Decision **DRAFT DECISION OF COMMISSIONER DUQUE**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into whether existing standards 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, MTBE, and whether those Standards and policies are being Uniformly compiled with by Commission regulated utilities.	Investigation 98-03-013 (Filed March 12, 1998)

TABLE OF CONTENTS

Title **Page**

TABLE OF CONTENTS
(Cont'd)

Title **Page**

O P I N I O N

I. Summary

This proceeding was instituted after numerous civil lawsuits were filed in Los Angeles and Sacramento alleging drinking water delivered by water utilities caused death and personal injury to customers. Even though civil lawsuits naming certain regulated water utilities as defendants prompted the investigation in this proceeding, the Commission did not name as respondents just those entities.

The Order Instituting Investigation (OII) of March 12, 1998 instituting this proceeding directed all regulated Class A and B water utilities[1] (respondents) to file compliance reports comprised of water quality information including test results and any follow-up procedures performed over the past 25 years. The Commission ordered its Water Division (WD) to review the compliance filings, file a written report on their review and indicate whether additional compliance filings were warranted or additional issues, questions and recommendations should be considered in this proceeding. The Commission directed numerous questions to the Department of Health Services (DHS) and invited that agency to participate in this proceeding.

In addition, the Commission asked WD, the California Water Association (CWA), DHS and any other interested parties to address five issues regarding drinking water regulatory policy and the adequacy of remedies for noncompliance. Thus, this investigation is intended to provide an industry-wide status of drinking water quality regulation and compliance by all large and

[1] Class A water utilities serve over 10,000 customers; Class B serve from 2,001 to 10,000 customers.

medium-sized regulated water utilities. By ordering this investigation of the majority of regulated water utilities, the Commission sought to ascertain whether any potential physical or economic harm to regulated water utility customers and ratepayers exists and to minimize or avoid any such harm in the future.

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.

The moving parties alleged 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 requested that this investigation be abandoned in its entirety. Seven parties in this proceeding oppose the two motions.[2] They contended that the Commission has subject matter jurisdiction with DHS over the quality of drinking water provided by regulated utilities.

On June 10, 1999, the Commission adopted D.99-06-054 to resolve the allegations. This decision found that the Commission's cost setting and regulating role is inextricably bound to the quality of water provided by the

[2] 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.

regulated utilities. It discusses the authority and responsibilities of both this Commission and DHS, and demonstrates how the two are intertwined with and complementary to each other. The decision provides a full discussion of the history of this authority. Finally, it makes clear that this investigation is only a starting point, with possible consideration of enforcement actions or new standard setting being matters for the future.

EL&L filed a timely application for rehearing, alleging that specific findings of fact and conclusions of law relating to the finding of jurisdiction are in error. The California Water Association, a party in the OII, filed a response in opposition to this application for rehearing. On September 16, 1999 the Commission adopted Decision 99-09-073 denying rehearing, but adopted several clarifying modifications to D.99-06-054. It further noted that it "is essential that D.99-06-054 be read in conjunction with the OII in order to get the most complete and accurate view of the Commission's authority…" (D.99-06-054, *mimeo.*, at 5-6).

Returning now to the inquiry into water quality, in response to the order instituting this proceeding, respondents filed detailed compliance reports. CWA, interested parties, the Commission Ratepayer Representation Branch (RRB, staff) and DHS filed comments on the utility compliance reports and replies to each others' comments. In addition, the order asked all parties to specify the contaminants alleged to cause physical harm and directed specific questions to various parties in the Scoping Memo in an effort to narrow any dispute in this proceeding. As explained below, parties representing plaintiffs in pending civil lawsuits did not answer questions posed in the Scoping Memo. Staff, respondents, DHS, CWA and one party representing potentially responsible defendants in pending civil lawsuits filed responses to the questions.

The inquiry in this proceeding can be divided into two broad categories: (1) whether current water quality regulation adequately protects the public

health, and (2) whether respondent utilities are (and for the past 25 years have been) complying with existing drinking water quality regulation.

There is no dispute that existing water quality regulation by DHS adequately protects public health. However, numerous parties and DHS offer suggestions for improvement of existing Commission regulation of water quality which warrant workshops and, if necessary, a further rulemaking proceeding.

After review of regulated water utility compliance reports and the comments and replies of all parties, we conclude that the record of regulated water utility compliance with state and federal water quality regulation requires no further inquiry or evidentiary hearings, except for one utility, Alco Water Company. DHS and RRB have reviewed all other parties' objections to these reports and confirm respondents' representations that they have satisfactorily complied with applicable state and federal drinking water quality regulation, with the exception that a court matter involving DHS and Alco Water Company is pending. As to compliance with Commission decisions and orders regarding correction and prevention of water quality problems, several utilities provided vague and incomplete information regarding whether they have complied with all Commission orders during the past 25 years. Staff may pursue complete answers to this question separately as these companies request rate relief in the future.

In accordance with our findings and conclusions herein, we close this docket and continue to exercise our jurisdiction, we order preparation of a separate rulemaking proceeding to evaluate recommended changes and additions to Commission water quality regulatory policy and rules governing water quality customer complaints.

II. Procedural History

The OII in this proceeding was issued on March 12, 1998. This order required each Class A and Class B regulated utility to file by July 15, 1998 reports regarding compliance with safe drinking water regulation for the past 25 years. The Water Division was ordered to review and comment on these utility compliance reports by November 16, 1998. Upon the request of the utility respondents, these dates were extended. Utility compliance reports were filed on or before September 15, and staff's report was filed on December 4. In response to the Commission's invitation to answer specific questions, DHS filed its report on September 21, 1998.

Subsequently, two prehearing conferences (PHCs) were held. At the first PHC on November 12, 1998, the assigned ALJ granted petitions to intervene filed by certain law firms representing plaintiffs in the Superior Court actions. The law firms, which were permitted to intervene as one joint interested party, were as follows: Engstrom, Lipscomb & Lack; Girardi & Keese; and Dewitt, Algorri & Algorri (collectively the EL&L Group or EL&L). The EL&L Group represents over 500 plaintiffs in pending civil lawsuits alleging personal injury and death caused by drinking water. After the PHC, the presiding officer granted the Petition to Intervene filed by Rose, Klein & Marias (RK&M), a law firm which represents over 500 plaintiffs in other pending civil actions. Subsequently, the presiding officer also granted the Petitions to Intervene of the following companies named as potentially responsible parties (PRPs) in pending civil litigation (thereafter, they participated as one joint interested party): McDonnell Douglas Corporation, Aerojet-General Corporation, and Huffy Oil Company.

At the November 12, 1998 PHC, several other procedural issues were resolved. First, parties were directed to file any prehearing jurisdictional motions on or before December 4, 1998. EL&L and RK&M subsequently filed timely

motions challenging the Commission's jurisdiction to pursue this investigation. Eight parties opposed these motions. On June 10, 1999, we issued D.99-06-054, our interim decision denying the jurisdictional motions of RK&M and the EL&L Group. At the November 12 PHC, the respondent utilities were also instructed to provide supporting documents for their compliance reports to all parties, which they did. Staff's request for supplemental compliance reports disclosing all exceedances of DHS standards was also granted at the November 12 PHC.

At the second PHC held on January 26, 1999, more procedural matters were resolved. The parties agreed that although ex-parte contacts were generally allowed under Commission rules governing a quasi-legislative proceeding, any ex-parte contacts in this case should be reported under the requirements of Rule 7(d) because civil lawsuits were pending between the same parties in the proceeding. This ruling was later confirmed by the Commission in D.99-06-059.

After discussing the scope, issues, and schedule at the January 26 PHC, a status ruling with a partial schedule was issued on February 11, 1999. The assigned Commissioner asked parties to identify the specific contaminants alleged to have caused a health risk in the drinking water, and he indicated that further questions to refine the issues in the OII were forthcoming. Parties subsequently identified roughly 30 contaminants.

The presiding officer issued a scoping ruling on May 3, 1999. This ruling resolved motions by Citizens and California American Water Company (Cal-Am) to compel the EL&L Group to answer data requests. The ruling granted the motions and required compliance within 10 days. In addition, the May 3 scoping memo directed the parties to answer 25 supplemental questions, and DHS to answer 12 questions, for the purpose of narrowing the focus of the proceeding and clarifying the DHS report.

On May 10, 1999, Oral Argument before the Commission en banc was held pursuant to a request by RK&M and the EL&L Group. EL&L did not attend, and later notified the Commission of its intended absence. Opening briefs were filed on July 15 and reply briefs on July 20, 1999.

On December 4, 1998, EL&L filed an application for rehearing of D.99-06-073. On September 17, 1999, we issued D.99-09-054 modifying the Interim Opinion yet upholding its conclusion that the Commission has jurisdiction to resolve all issues outlined in this proceeding. No further appeals of the jurisdiction issue were filed.

III. Motions to Withdraw and Motions to Compel Discovery

After the close of the taking of evidence in this proceeding, four motions were filed which have not yet been resolved. The EL&L Group and RK&M filed pleadings that requested, in effect, that these law firms be allowed to withdraw as parties to this proceeding. Shortly after the EL&L and RK&M filings, California-American Water Company (Cal-Am) filed a motion to compel the EL&L Group to comply with that portion of the May 3 Scoping Memo which had ordered the EL&L Group to answer Cal-Am's data requests. Finally, Suburban filed a motion to compel RK&M to answer the additional questions set forth by the Assigned Commissioner in the May 3 Scoping Memo.

Parties opposing the requests to withdraw by the EL&L Group and RK&M indicated that one basis for their opposition was that none of the law firms had answered any of the data requests propounded by other parties (and similar questions posed by the Commission) seeking to determine the factual basis for the firms' allegations that the regulated utilities had violated safe drinking water regulations and caused injury to customers. Thus, in their responses to the firms'

motions to withdraw, many parties addressed both the discovery and withdrawal issues.

Since the alleged noncompliance with the discovery order occurred first, the discussion below addresses the motions to compel before considering the question of withdrawal. We have done this in the interest of providing a comprehensible discussion of the many arguments that the parties have made regarding both issues.

A. Motion of Cal-Am to Compel Compliance With Prior Discovery Ruling and to Award Sanctions

On June 14, 1999, Cal-Am filed a Motion to Compel Compliance With Discovery Order and to Award Sanctions. In its motion, Cal-Am seeks to compel the EL&L Group to answer Cal-Am's data requests, as the Assigned Commissioner had ordered in the May 3 Scoping Memo. Cal-Am contends that prior to filing its June 14 motion, it made reasonable efforts to meet and confer with the firms comprising the EL&L Group (pursuant to the requirements of Commission Resolution ALJ-164) for the purpose of resolving any differences regarding the mandated discovery, but that these efforts have failed. Cal-Am asserts that as of June 14, 1999, the EL&L Group had not answered any of Cal-Am's data requests (which were served on March 3, 1999). Instead of responding to the data requests, the EL&L Group simply notified the other parties on May 18, 1999, without seeking leave from the Commission, that the EL&L Group was withdrawing from these proceedings. Cal-Am asserts that this attempt to withdraw is compelling evidence of the EL&L Group's continued refusal and failure to comply with the discovery rulings in the May 3 Scoping Memo.

For the EL&L Group's failure to comply, Cal-Am requests both *evidentiary* and *monetary* sanctions. As evidentiary sanctions, Cal-Am seeks the following binding findings:

1. Drinking water served by Cal-Am at no time contained chemicals or contaminants that created a health risk to Cal-Am's customers;
2. The water quality standards applicable to Cal-Am were at all times adequate; and
3. Cal-Am was at all times in full compliance with such standards.

As *monetary* sanctions, Cal-Am seeks reimbursement in the amount of $15,000, or alternatively, an amount equal to the reasonable attorneys fees and costs expended by Cal-Am to file its two discovery motions.[3]

Cal-Am bases its request for evidentiary sanctions on the suggestion in the May 3 Scoping Memo that a request for such sanctions be renewed in the event the EL&L Group did not comply with the Scoping Memo's discovery rulings. (May 3 Scoping Memo, *mimeo.*, at 8.) Cal-Am also bases its request for monetary sanctions on D.98-03-073, *Pacific Enterprises, et al.*, 1998 Cal.PUC Lexis 1, 184 PUR4th 417, where we concluded that (1) imposing sanctions for recalcitrance in discovery is part and parcel of the power to control a proceeding, and (2) discovery sanctions in Commission proceedings include the power to order payment of reasonable attorneys fees and costs.

[3] These two motions are (1) the March 29, 1999 motion seeking to compel answers to the March 3, 1999 data requests, and (2) the June 14 motion seeking an order to compel EL&L to comply with the discovery rulings in the May 3 Scoping Memo.

Finally, Cal-Am urges that if any further violations of the Commission's orders occur, the Commission should issue an order to show cause why the EL&L Group should not be held in contempt.

1. Response of the EL&L Group

On June 23, 1999, the EL&L Group filed an opposition to Cal-Am's June 14 motion to compel. For several reasons, EL&L argues that the Commission should deny this motion, and should instead issue an order directing Cal-Am to withdraw its data requests.

First, the EL&L Group argues that the Commission has neither subject matter jurisdiction to address the issues in this proceeding, nor personal jurisdiction over any of the plaintiffs in the pending civil lawsuits.[4] EL&L begins by arguing that Cal-Am's data requests seek information regarding plaintiffs' allegations in the pending lawsuits, which are not the subject of this proceeding. EL&L also contends that Cal-Am misstates the purpose of the OII, which was not to investigate the accuracy or correctness of the EL&L Group's contentions, but to investigate whether the regulated utilities have complied with safe drinking water standards. Accordingly, EL&L contends that plaintiffs' allegations in the civil lawsuits are irrelevant to this investigation and should be addressed by the Superior Court rather than this Commission. The EL&L Group concludes by noting that the Commission cannot compel them or their clients to respond to Cal-Am's data requests, nor can the Commission make findings that preclude the assertion of any of their clients' contentions.

[4] The EL&L Group also made these arguments prior to the issuance of D.99-06-054, which denied EL&L's motion challenging Commission jurisdiction.

In the same vein, EL&L contends that Cal-Am is inappropriately attempting to litigate the civil cases before the Commission.[5] Cal-Am's data requests should be propounded in the Superior Court after the stay is lifted, according to EL&L. If this Commission were to grant the motion to compel, the Commission would effectively be lifting the stay and allowing litigation in this forum of the lawsuits. Such an act would not only be beyond the jurisdiction of the Commission, but would be a result that the regulated utilities have said they wish to avoid, according to EL&L.

The EL&L Group also argues that Cal-Am's data requests conflict with several well-established Commission policies regarding discovery. First, EL&L maintains that under the Commission's rules, the right to obtain discovery from nonparties such as EL&L clients is limited. To support this argument, EL&L relies upon D.94-08-028, *In Re Alternative Regulatory Frameworks for Local Exchange Carriers*, 55 CPUC2d 672 (1994), which holds that members of a trade association are not automatically subject to discovery merely because their association has intervened as an interested party in a Commission proceeding. Second, EL&L argues that Cal-Am's data requests are contention interrogatories, which cannot be propounded to nonparties under Public Utilities Code § 1794 and § 2020 of the Code of Civil Procedure (CCP). Third, the EL&L Group contends that evidence regarding the violations of drinking water quality standards and personal injury lies solely within the possession of Cal-Am.

---

[5] In particular, EL&L argues that Cal-Am's request for *binding* findings of fact is beyond the authority of the Commission, since the OII does not involve plaintiffs' contentions or their ability to recover for injuries allegedly suffered because of the acts of the regulated utilities. EL&L contends that Cal-Am is essentially requesting that the Commission make findings in the pending lawsuits without evidence or due process.

Accordingly, the burden of discovery should be placed upon EL&L clients only if Cal-Am can demonstrate that it does not have the requested materials, a showing Cal-Am has not made.

The EL&L Group reiterates that because discovery in the civil suits has been stayed, it does not have adequate information to answer the questions in the Scoping Memo, and should not be compelled to do so.[6] EL&L repeats that the focus of this investigation has been improperly shifted from the respondents to the injured plaintiffs represented by EL&L and RK&M. The EL&L Group asserts that apart from public information, the only information it has in this proceeding to answer the data requests at issue is the allegedly inadequate information that the regulated utilities have provided themselves.

2. Responses Supporting Cal-Am's Motion

Responses supporting Cal-Am's motion to compel were filed by Southern California Water Company (SoCal), San Gabriel, Citizens and CWA.

SoCal's vice president of water quality, Denise Kruger, filed a response indicating that on February 18, 1999, SoCal produced for EL&L all of the workpapers underlying SoCal's compliance report. Ms. Kruger seriously questions how, after seeking and receiving information from several respondents, reviewing the respondents' compliance filings and filing numerous lawsuits, the EL&L Group would still be unable to answer questions about the basis for these lawsuits. Ms. Kruger argues that EL&L should not be allowed to benefit from the Commission's rules and regulations when they favor EL&L, and not abide by them when they do not.

---

[6] The May 3 Scoping Memo asked parties to pinpoint the dates and locations of allegedly unhealthy drinking water, among other specific inquiries. (*Mimeo.*, at 8-10; Appendix A.) It also asked DHS to clarify and expand upon portions of its report.

San Gabriel contends that in compliance with the presiding officer's November 23, 1998 ruling, it contacted the EL&L Group to make available documents supporting the San Gabriel compliance report. Between February 2-5, 1999, San Gabriel allowed EL&L to inspect and copy these documents. San Gabriel states that EL&L made no objections to the documents produced, nor did EL&L propound additional data requests. Thus, San Gabriel argues, the EL&L Group has no basis for alleging that it has been denied access to data critical for answering the data requests. San Gabriel also challenges the EL&L Group's assertion that Question 16 in the May 3 Scoping Memo requires responses from experts in the civil lawsuits. San Gabriel argues that parties in this proceeding have prepared to offer expert testimony via a technical advisory panel, in which the EL&L Group is free to participate.

Citizens believes that the EL&L Group's contention that it does not have the information necessary to answer the questions in the Scoping Memo is false, since Citizens and other respondents have provided all of the information that EL&L requested in discovery. Citizens claims it has not denied access to anything relating to its compliance with water quality standards, and points out that EL&L has not specified with particularity any information to which access has allegedly been denied. Citizen continues that since a civil lawsuit cannot properly be filed unless the plaintiff has knowledge of facts supporting its claims of injury and alleged wrongdoing, the fact that EL&L is claiming to have no such information in this proceeding demonstrates that its lawsuits were filed without an adequate factual basis, and should be dismissed immediately. Citizens concludes that the Commission clearly has authority to order answers to its questions, and that the stays in the civil court actions apply only to discovery in those actions. Indeed, Citizens continues, the stays were granted specifically

because this Commission *does* have jurisdiction over drinking water quality and had opened this investigation.

CWA contends that under *Holocard v. PT&T Co.,* 86 CPUC 406 (1977), the Commission clearly has the authority to compel discovery from utilities or nonutilities, and from parties or nonparties. CWA argues that EL&L has information relevant to this proceeding, and that the Commission must require EL&L to respond to the outstanding discovery requests and to the questions in the Scoping Memo before permitting EL&L to withdraw.

Most dramatically, CWA contends that the EL&L Group has committed contempt under Public Utilities Code § 2113 through its nonresponsiveness to Commission orders, and that the sanctions for this behavior should include the payment of *all* parties' costs to file and pursue discovery motions and to respond to EL&L pleadings, including the motion to withdraw. CWA contends that under CCP § 2023(b)(1), this is a routine punishment in civil courts for noncompliance with discovery rulings, and that the Commission has authority to impose similar punishments in its own proceedings. Other civil sanctions that the Commission can impose, according to CWA, include a prohibition on participation in an action (or on the assertion of particular claims) until the contempt is cured, and making findings of fact in favor of parties who have been adversely affected by misuse of the discovery process. (*See, Hull v. Superior Court,* 54 Cal.2d 139, 146 (1960); CCP § 2023(b)(2).)

CWA requests the following sanctions in this proceeding: (1) that the EL&L Group be prohibited from commenting on the final order in this proceeding or from challenging its findings of fact or conclusions of law, (2) that the Commission adopt a finding of fact that there is no factual basis for EL&L's assertion that the regulated utilities have delivered contaminated water, (3) that the Commission report the EL&L Group's contempt to the trial and appellate

courts hearing the civil lawsuits filed by EL&L, and (4) that the Commission impose other appropriate sanctions for failure to comply with its orders.

3. Discussion

To the extent that the EL&L Group is continuing to challenge the discovery rulings in the May 3 Scoping Memo by arguing that the Commission lacks subject matter or personal jurisdiction, we once again reject those arguments as having no merit. D.99-06-054 resolved the EL&L Group's challenge to this Commission's subject matter jurisdiction to pursue this investigation; we concluded therein that we have such jurisdiction.

In the portion of the May 3 Scoping Memo devoted to Cal-Am's motion to compel answers to its data requests, we also rejected EL&L's argument that we lacked personal jurisdiction. We concluded that the EL&L Group received full-party status and has behaved as a full party throughout this proceeding, including propounding data requests to (and receiving responses from) numerous respondent utilities. The May 3 Scoping Memo determined that by these and other acts of participation, the EL&L Group had waived any of the protections from discovery that arise from a special appearance, or that a nonparty enjoys. We expressly noted in the May 3 Scoping Memo that the Commission has the power to subpoena information from nonparties. Therefore, we are obviously convinced that we have authority to compel the information that Cal-Am requests.

The May 3 Scoping Memo rejected as unconvincing EL&L's argument that Cal-Am's data requests are beyond the scope of the OII because they are directed to matters within the knowledge of EL&L clients. We stated in the Scoping Memo that this Commission is concerned about these claims and the policy issues they raise and that, without adjudicating the merits of the lawsuits, we have the authority to investigate these issues and to receive information from

anyone who has facts regarding these issues. Thus, the May 3 Scoping Memo concluded that Cal-Am's data requests were appropriate.

The Scoping Memo also rejected: (1) EL&L's arguments that Cal-Am's data requests are beyond the limits of discovery permitted by Public Utilities Code § 1794 and CCP § 2020; (2) the EL&L claim that their clients are members of an association, and so subject to the limitations on discovery from association members described in D.94-08-028; (3) the claim that Cal-Am's data requests are unlawful contention interrogatories under Public Utilities § 1794; and (4) the allegation that the information requested is under Cal-Am's control. In its response, EL&L has provided no reasons why we should revisit the conclusions in the May 3 Scoping Memo on these issues.

As to the EL&L Group's argument that granting Cal-Am's motion will effectively lift the Superior Court stay of discovery, the EL&L Group fails to mention that the stay was instituted to allow this Commission to complete its investigation in this proceeding. Thus, compelling answers to data requests propounded in this investigation would not interfere with the stay of discovery ordered by the Los Angeles County Superior Court in the damage actions before it.[7]

---

[7] We note that in *Hartwell Corp. v. Superior Court (Santamaria),* 74 Cal.App.4th 837 (1999), the First District Court of Appeal ruled that because of the preemptive effect of Pub. Util. Code § 1759 and provisions of the California Safe Drinking Water Act, the Los Angeles County Superior Court should have sustained the demurrers filed by the regulated water utilities, rather than staying the damage actions against them. (74 Cal.App.4th at 865-67.) However, on December 16, 1999, the California Supreme Court granted review of the *Hartwell* decision, so for purposes of discussion here, we have assumed that the discovery stay is valid and still in effect.

Regarding Cal-Am's request for evidentiary sanctions, we find merit in the EL&L argument that we should not attempt to make our findings binding on the Superior Court. However, our findings are binding upon the parties to this proceeding and in any future Commission proceedings. The specific findings that Cal-Am is requesting go to the heart of the issues being investigated here, but they also go beyond what the evidence before us justifies. We are unwilling to distort the evidentiary record before us merely for the purpose of attempting to control the behavior of the EL&L Group in discovery. Other adequate monetary sanctions for such behavior are available, as discussed below. However, in order to preserve an orderly process, we will impose a more appropriate evidentiary sanction. We will prohibit EL&L, in any future proceeding that is a continuation of or arises out of this investigation, the introduction of evidence that (1) directly contradicts the conclusions reached in this decision, and that (2) was available and could have been introduced by EL&L during the course of this proceeding.

We find unreasonable CWA's request that all parties should be reimbursed for the costs of responding to *any* of the EL&L Group's pleadings because the EL&L Group was authorized to participate as a full party in this proceeding and filed pleadings in accordance with that status. However, there is no question that the EL&L's refusal to answer Cal-Am's data requests has subjected Cal-Am to unnecessary litigation expense. As described above, Cal-Am incurred substantial expense in filing its March 29, 1999 motion to compel answers to its data requests, and then was forced to incur further costs in filing the June 15 motion seeking compliance with the discovery rulings in the May 3 Scoping Memo.

Under these circumstances, we conclude that the $15,000 sanction sought by Cal-Am from the EL&L Group is reasonable. For the reasons set forth

in *Pacific Enterprises* and discussed below, it is also reasonable to require that EL&L pay the Commission costs of $5,000 for having to resolve the same discovery dispute twice.[8] As described above, the EL&L Group has continued in its opposition to the June 15 motion to advance the same arguments that were rejected in D.99-06-054 and in the discovery portion of the May 3 Scoping Memo. Such behavior is unacceptable and makes the imposition of monetary sanctions appropriate.

In *Pacific Enterprises, et. al.* (1998) Cal.PUC LEXIS 1, 184 PUR4th 417, (D.98-03-073), we summarized our authority in discovery disputes and concluded that we have the power to impose discovery sanctions -- including the payment of attorneys fees and the Commission's costs -- where litigants violate the discovery procedures in CCP § 2023, which we have generally applied in Commission proceedings. Our rationale was as follows:

> "The presiding officer controls the day-to-day activity of a proceeding. . . The presiding officer, of necessity, must have the authority to pass on discovery motions and impose sanctions for discovery abuse. To hold otherwise would impose a burden on the Commission that Rules 62 and 63 were designed to avoid. Further, if sanctions could not be imposed by the presiding officer[,] material evidence would remain undisclosed or unconscionable delay incurred as parties seek relief from the Commission. . ."
>
> * * *
>
> "It seems to us incongruous to grant to a presiding officer the authority to control the course of a hearing, rule on all motions, and recommend a decision to the full

[8] Other parties did not pursue this issue by filing a second round of motions to compel, or by requesting monetary sanctions for the EL&L Group's behavior.

> Commission, and yet deny that officer authority to assure the soundness of the fact-finding process. Without an adequate evidentiary sanction, a party served with a discovery order in the course of a Commission hearing has no incentive to comply and often has every incentive to refuse to comply. Evidentiary sanctions for recalcitrance in discovery are part and parcel of the power to control a hearing and recommend a decision based on *all* relevant evidence." (184 PUR4th at 488-89.)

We conclude that the EL&L Group has willfully and without substantial justification refused to comply with our May 3 discovery order, and to answer crucial questions posed by the Commission for the purpose of narrowing the disputes in this proceeding. EL&L's refusal to answer Cal-Am's data requests without reasonable cause constitutes an intentional misuse of the Commission's discovery process (as defined in CCP § 2023(a)(5), (7), and (8)),[9] and sanctions similar to those imposed in *Pacific Enterprises, et al.* are therefore warranted.

We have considered the respondent utilities' argument that there will be inequity if the EL&L Group is not again compelled to answer Cal-Am's data requests, since the utilities have answered all of the RK&M and EL&L data requests. On balance, however, we do not believe that this inequity justifies yet another ruling directing the law firms to answer Cal-Am's data requests. We note that even if RK&M and the EL&L Group had not intervened in this proceeding, our OII demanded answers to questions very similar to those posed by the law firms, and the regulated utilities would have been required to answer

[9] These subsections of CCP § 2023 concern: "… (5) Making, without substantial justification, an unmeritor[i]ous objection to discovery…(7) Disobeying a court order to provide discovery… [or] (8) Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery…"

these questions even if EL&L and RK&M had not intervened in this proceeding. Further, we have minimized the adverse economic consequences of the EL&L Group's behavior by ordering EL&L to pay Cal-Am's costs for having to file the two motions to compel.

Rather than prolong this proceeding in order to afford the EL&L Group a second opportunity to answer Cal-Am's data requests where it is likely that EL&L will continue to be evasive in providing responses, we think it is a better use of the parties' and the Commission's resources to use the existing record in this 18-month proceeding to resolve the issues herein and move on to the next phase, if any, of this investigation.

Finally, we deny CWA's request to foreclose the rights of the EL&L Group to appeal from the final order in this proceeding. CWA's request for such relief raises many issues, and CWA has provided no analysis of how this request can be reconciled with Public Utilities Code § 1794, which allows applications for rehearing under specified circumstances by both parties and nonparties in Commission proceedings.[10]

B. Suburban's Motion to Compel Answers to Data Requests

On June 28, 1999, Suburban Water Systems (Suburban) filed a motion to compel that raises issues similar to those raised by Cal-Am's motion. Suburban's motion seeks to compel RK&M to answer 25 specific questions set forth in Appendix A to the May 3 Scoping Memo. In an effort to narrow disputes in this proceeding, these questions had asked all parties to provide specific facts (such

[10] We also decline to report EL&L's behavior to the Superior Court or other courts where its cases may still be pending. Our orders are public information, and constitute adequate notice to any court of the events that have occurred in this proceeding.

as the date and location of any water quality violations or personal injuries), as well as comments on existing water quality regulation and its enforcement.

In its motion, Suburban contends that this proceeding was instituted in response to a number of lawsuits, including the *Santamaria* and *Anderson* lawsuits,[11] which allege that the public utility defendants have provided contaminated water to the plaintiffs for many years.[12] Suburban argues that RK&M's petition to intervene was granted based on the representation that this proceeding would affect the outcome of these lawsuits, that RK&M has actively participated in this proceeding on behalf of over 500 plaintiff clients, and that in view of this participation, it would be "preposterous" – as the May 3 Scoping Memo concluded – "for law-firm intervenors to proclaim that now requiring them to provide the factual bases [for] their allegations would impose an undue burden [on them] or other unfairness." (Suburban Motion, pp. 6-7, *quoting* May 3 Scoping Memo at p. 7.) Suburban notes that all parties except the plaintiff intervenors have responded to the Commission's inquiries, and that RK&M should also be compelled to do so.

1. RK&M Response

On July 8, 1999, RK&M filed a response to Suburban's motion. RK&M contends that the sole purpose of its involvement in this proceeding has

---

[11] *Kristin Santamaria et al. v. Suburban Water Systems et al.*, Los Angeles County Superior Court No. KC025995, Complaint filed July 29, 1997; and, *Anthony Anderson et al. v. Suburban Water Systems et al.*, Los Angeles County Superior Court No. KC028524, First Amended Complaint filed October 13, 1998.

[12] In particular, the plaintiffs allege that Suburban knew or should have known that hazardous contaminants existed in its well water supply, that Suburban failed to used reasonable care to remediate the problem, and that this lack of care caused plaintiffs to be exposed to toxic chemicals including TCE, PCE, CTC and perchlorate.

been to address jurisdictional issues, and that its participation has been limited to those issues. Suggesting that it has made only a special appearance, RK&M argues that the Commission lacks personal jurisdiction to compel answers to the questions in the May 3 Scoping Memo.

2. Discussion

Although Suburban is seeking an order requiring answers to questions posed in a Commission scoping memo rather than the parties' data requests, its motion is otherwise quite similar to the motions to compel filed by CWA and Cal-Am, and similar reasoning applies.

Contrary to the suggestions in its July 8 response, RK&M – like the EL&L Group -- did *not* make a special appearance in this proceeding, but asked for and was granted intervention with the rights of a full party. It has participated fully in this proceeding and has received the same data responses and factual information made available to all other parties. RK&M has not disputed this information, nor has it contested the conclusions drawn from the information by staff, the regulated utilities and DHS. Moreover, RK&M has offered no contrary information of its own. Based on this silence, we have no choice but to conclude that RK&M neither disputes this data nor the conclusions drawn from it by other parties.

Rather than prolong this proceeding by issuing a second ruling that directs RK&M to answer questions that it has previously been ordered to answer, we believe it would be a better use of the parties' and the Commission's resources to deny Suburban's motion, resolve the issues in this proceeding based on the existing record, and move on to the next phase (if any) of this investigation. Further, since RK&M has had an opportunity to speak to the substantive issues in this proceeding and has chosen not to, we believe it would be unfair to permit RK&M to introduce evidence in any future proceeding that

directly contradicts the conclusions we reach herein. Accordingly, we will impose on RK&M an evidentiary sanction that prohibits the introduction, in any future proceeding that is a continuation of or arises out of this investigation, of evidence that (1) directly contradicts the conclusions reached in this decision, and (2) was available and could have been introduced by RK&M during the course of this proceeding.

C. The Motions to Withdraw by the EL&L Group and RK&M

As noted above, the May 3 Scoping Memo included (in Appendix A) a series of questions that all parties were directed to answer and that were designed to narrow the issues in this proceeding. On June 23, 1999, the EL&L Group filed a pleading that objected not only to these questions, but generally to the resolution of issues in the Scoping Memo. As in many of its prior pleadings, the EL&L Group contended that it was not the subject of this investigation and was not subject to the jurisdiction of the Commission. What was new, however, was that for the first time EL&L contended that because of this status, it was entitled to withdraw as a party to the proceeding and to participate without intervention in accordance with Rule 54. [13]

[13] Rule 54, Participation Without Intervention, provides: "In an investigation or application proceeding, or in such a proceeding when heard on a consolidated record with a complaint proceeding, an appearance may be entered at the hearing without filing a pleading, if no affirmative relief is sought, if there is full disclosure of the persons or entities in whose behalf the appearance is to be entered, if the interest of such persons or entities in the proceeding and the position intended to be taken are stated fairly, and if the contentions will be reasonably pertinent to the issues already presented and any right to broaden them unduly is disclaimed. A person or entity in whose behalf an appearance is entered in this manner becomes a party to and may participate in the proceeding to the degree indicated by the presiding officer."

Consistent with the position that it was entitled to withdraw, EL&L stated that its pleading constituted a notice of withdrawal from the proceeding. However, EL&L asked to remain on the mailing list for informational purposes.

Shortly after the EL&L pleading was received, RK&M also filed what it claimed was a notice of withdrawal. In its pleading, RK&M alleged that it had no further need to participate in this proceeding, because the Commission had ruled on the jurisdictional motion that RK&M had entered a special appearance to make. At the request of the other parties, RK&M's notice was interpreted by the assigned ALJ as a motion to withdraw, to which other parties were allowed to respond.

1. Opposition to the Purported Withdrawal of EL&L

Oppositions to the purported withdrawal of the EL&L Group were filed by Cal-Am, Citizens, CWA and SoCal.

In its opposition, Cal-Am contends that the Commission cannot properly grant leave to withdraw while the EL&L Group is subject to and in violation of Commission discovery orders. Cal-Am points out that EL&L (as well as RK&M) is the source of allegations that influenced the initiation of this investigation, that EL&L presumably has relevant information, and that it has actively asserted rights as a party without performing its obligations to provide relevant information. Cal-Am contends that other parties will be harmed by the EL&L Group's attempted withdrawal under these circumstances, and that the Commission should retain personal jurisdiction over EL&L until it has satisfied its obligations as a party. Cal-Am therefore urges that EL&L's *de facto* motion to withdraw should be denied without prejudice.

Cal-Am also contends that the Commission has used the test developed in C*hadbourne v. Superior Court* 60 Cal.2d 723, 731 (1964) and *Liberty Mutual Insurance Co. v. Fales* 8 Cal.3d 712, 716 (1973) for evaluating withdrawal

motions. Under this test, a court determines whether a party should be allowed to withdraw by balancing the litigant's right to control its interaction with government against the government's duty to resolve matters of important public interest. Cal-Am asserts that this proceeding is clearly addressing issues of continuing public importance, a situation that justifies denial of leave to withdraw. Cal-Am also points out that the assigned Commissioner has already rejected the argument that the Commission has no personal jurisdiction over the EL&L Group.

In its opposition to the purported notice of withdrawal, Citizens begins by comparing the questions in Appendix A of the May 3 Scoping Memo with the discussion in the March 12, 1998 OII. Based on this comparison, Citizens argues that the questions in the Scoping Memo clearly do not exceed the boundaries of this proceeding, and that answers to these questions are central to resolving the issues outlined in the OII. Consistent with this position, Citizens vigorously opposes EL&L's attempt to withdraw. After noting that EL&L has filed lengthy comments on other parties' compliance reports and on the DHS report, has participated in PHCs, has received answers to data requests and has obtained a substantial amount of back-up material for the compliance reports, Citizens argues that it would be unjust to allow the EL&L Group to obtain these benefits of participation without subjecting it to a corresponding obligation to answer the respondents' data requests. The EL&L Group should also be obliged, Citizens continues, to provide the Commission with the factual basis for the EL&L contention that drinking water furnished by the respondents has injured the health of EL&L clients.

Citizens also raises three other points in opposing the attempted withdrawal: (1) there is no unilateral right to withdraw from Commission proceedings, any more than there is from civil proceedings, (2) the EL&L Group's

argument that the Commission cannot award damages is irrelevant, because the Commission has already ruled that it has jurisdiction over the subject matter of this proceeding, and (3) the expert testimony that EL&L asserts can only be presented in civil court could easily be presented in this forum.

CWA opposes EL&L's attempted withdrawal for the same reasons as Cal-Am and Citizens. CWA urges the Commission not to allow withdrawal while the discovery rulings in the May 3 Scoping Memo remain outstanding and unsatisfied. CWA contends that the EL&L Group is seeking to withdraw because it disagrees with the discovery rulings in the May 3 Scoping Memo. CWA concludes that a withdrawal under these circumstances would be unfair to all parties and would set a dangerous precedent for practice before the Commission.

In its opposition to the purported withdrawal, SoCal advances many of the same arguments as Citizens and CWA. SoCal also argues, however, that in the event the Commission decides to permit withdrawal, it should require that the following conditions be met:

1. The EL&L Group must provide responses to the questions in the Scoping Memo along with supporting documents;
2. Alternatively, if EL&L continues to refuse to provide responses, the Commission should prohibit EL&L from presenting any evidence in this proceeding regarding allegations against utilities;
3. The Commission should find that the EL&L Group has willfully and without lawful justification refused to comply with a lawful order of the Commission (*i.e.*, the May 3 Scoping Memo); and
4. The Commission should find that EL&L has presented no substantial evidence that any regulated utility has delivered water to any plaintiff that failed to comply with applicable state and federal water

> quality standards, or contained a substance which caused injury to any plaintiff.

2. Opposition to the Purported Withdrawal of RK&M

Oppositions to the purported withdrawal of RK&M were filed by San Gabriel and by McDonnell Douglas Corporation (McDonnell Douglas).

In its opposition, San Gabriel argues that RK&M's contention that it has made only a special appearance in this proceeding is belied by the record and by the extent of RK&M's participation. RK&M's petition to intervene (from which San Gabriel quotes) makes no mention of a special appearance, and RK&M's service upon the respondents of data requests seeking background materials for the utilities' compliance filings is obviously inconsistent with a special appearance, according to San Gabriel.[14]

In its opposition, McDonnell Douglas argues that RK&M has mischaracterized D.99-06-054, the interim decision in this docket. Contrary to RK&M's assertions, that decision did not state or suggest that this investigation will have no impact on the lawsuits filed by RK&M and the EL&L Group; rather, McDonnell Douglas states, the Commission in D.99-06-054 simply confined its discussion to whether it has jurisdiction to conduct this investigation.

3. Discussion

In Re Application of Southern California Gas Company, 43 CPUC2d 639 (1992), holds that withdrawal from a proceeding in which the Commission has invested substantial time and resources is not a matter of right, but an action that requires Commission approval.

---

[14] RK&M served data requests seeking the back-up materials on December 23, 1998. On February 2, 1999, RK&M began making copies of San Gabriel's back-up materials.

In *SoCal Gas*, we concluded that the standards for evaluating requests to withdraw from proceedings that have resulted in a significant record should be analogous to those used by the California Supreme Court in the *Chadbourne* and *Liberty Mutual* cases cited above. We said:

> "The issue [of withdrawal] requires a balancing of a general disposition to permit litigants to control their interaction with governmental bodies with the necessity that entities such as courts and this Commission advance the public business while disposing of private claims and petitions. While earlier California cases suggested that litigants had [an unlimited] right [to withdraw], those cases were arrested by the decision of the Supreme Court in *Chadbourne v. Superior Court*, 60 Cal.2d 723, 731 n.5 (1964) . . .
>
> * * *
>
> "We need not speculate on the possible circumstances which would cause us to regard dismissal or withdrawal as no longer a matter of right. It is sufficient that we indicate that submission of a matter upon an evidentiary record and obtaining a proposed decision within the meaning of Section 311(d) involve steps which clearly make termination a matter of the Commission's discretion." (43 CPUC2d at 640-41.)

In *SoCal Gas*, the issue was whether the utility should be allowed to withdraw its application for pre-approval of gas purchase contracts even though the Commission had invested considerable resources by holding hearings on the application and having the ALJ prepare a proposed decision. Because we agreed that the applicant would be "adversely affected" if it were required to perform under the gas contracts, we permitted withdrawal of the application. (43 CPUC2d at 641.)

In this case, the issue is whether the law firm intervenors should be allowed to withdraw even though they have subjected the other parties to

significant discovery burdens and have refused to answer reasonable discovery requests. The reasons for not allowing withdrawal under such circumstances were well summarized by Commissioner Fessler in his concurring opinion in *SoCal Gas*. In agreeing that withdrawal under the circumstances of that case should require the Commission's consent, he said:

> "In the absence of such a policy all manner of mischief may go unchecked. Parties would be free to engage our resources and put opponents or intervenors to considerable expense and no little risk only to moot the controversy in the event of an adverse proposed decision. Further, our ability to discharge our own public responsibilities could be thwarted . . . by the sudden removal of a vehicle which presents the occasion to answer certain vital questions of general interest." (*Id.*; emphasis supplied.)

The concerns expressed by Commissioner Fessler clearly militate against permitting withdrawal from this proceeding by the law firm intervenors. It seems clear that the EL&L Group's principal justification for withdrawing is that it continues to believe that (1) the Commission has no personal jurisdiction over its members, and (2) EL&L has made only a special appearance in this proceeding for the purpose of challenging jurisdiction. As noted above, both of these claims were firmly rejected in the May 3 Scoping Memo. As one opposing party has suggested, it appears that after incurring adverse legal rulings from the Commission and receiving discovery responses that are inconsistent with its allegations of wrongdoing, the EL&L Group believes it may simply "pick up its marbles and go home."

On the other hand, the consequences for the Commission of withdrawal in this case would be quite different from those in *SoCal Gas.* Here, allowing the EL&L Group (and RK&M) to withdraw will not require that this proceeding be dismissed, nor will it prevent the Commission from reaching a

final determination on the merits. Instead, it will simply mean that we will not have the benefit of input from parties who raised similar issues in the civil lawsuits that initially attracted the Commission's attention. However, because the respondent utilities and DHS *have* assisted in our investigation of these issues, we have an adequate record and do not need to rely on the law firm intervenors as a significant source of information on the water quality and other issues before us. Instead, we can base our final decision on the evidence offered by DHS staff and the utilities.

In addition, we believe that our analysis should take into account the possible advantages that might accrue from permitting withdrawal. In view of the EL&L Group's behavior in connection with the recent discovery motions, it seems clear that their further participation in this docket (or other proceedings that arise out of this docket) will be neither beneficial nor desirable. In addition, EL&L wasted significant time and resources by requesting an oral argument before the full Commission on jurisdictional issues, and then not bothering to notify the ALJ on a timely basis that EL&L attorneys would not attend the argument.[15] Given the fullness of the record before us, the only reason for retaining jurisdiction over the EL&L Group is to ensure payment of the monetary sanctions we are imposing for EL&L's noncompliance with our prior discovery ruling.

After weighing these factors, we have decided to grant conditionally the EL&L Group's request to withdraw. We will make the withdrawal effective after EL&L has paid the sanctions we are imposing for noncompliance with the

[15] As noted elsewhere in this decision, the notice that EL&L sent to the assigned ALJ stating that its attorneys would not be attending the oral argument did not reach the ALJ until after the oral argument had already been held.

discovery rulings in the May 3 Scoping Memo. We will retain jurisdiction over EL&L until that time

The same reasoning applies to RK&M's request to withdraw. Like EL&L, RK&M has provided no relevant facts to support its contentions that the regulated utilities have violated drinking water regulations or caused personal injury by delivering contaminated drinking water. Under these circumstances, it is obvious that RK&M does not intend to participate in this proceeding in any meaningful way. It is therefore in the best interests of the Commission and the other parties to grant RK&M's motion to withdraw (subject to the evidentiary sanctions described above) and to resolve the issues in this proceeding on the ample record that other parties have provided.

We decline to grant RK&M's request that it be permitted to reassert party status in this proceeding in the event it later concludes that this proceeding will impact the pending civil lawsuits. We agree with McDonnell-Douglas that it is obvious now, and that no additional time is needed to confirm that a final order in this proceeding may impact these lawsuits. Thus, we hereby state that our granting of RK&M's request to withdraw from this proceeding will terminate RK&M's present participation in this docket.

D. Conclusions

Based upon the discussion above, we conclude that Cal-Am's motion to compel the EL&L Group to comply with the discovery ruling in the May 3, 1999 Scoping Memo should be granted in part and denied in part. Because it is unlikely that EL&L will provide any meaningful answers to Cal-Am's data requests, we will not order EL&L to answer these data requests. However, for making it necessary for Cal-Am to file (and the Commission to decide) two unnecessary discovery motions, we order EL&L to pay $15,000 as attorneys fees and costs to Cal-Am, and $5,000 to the Commission. We condition EL&L's

withdrawal from this proceeding on paying these sums. We also impose on EL&L an evidentiary sanction that prohibits in any future proceeding that is a continuation of or arises out of this investigation, the introduction of evidence that (1) directly contradicts the conclusions reached in this decision, and that (2) was available and could have been introduced by EL&L during the course of this proceeding.

RK&M's motion to withdraw from this proceeding is granted, effective immediately. RK&M's request for permission to "reappear" as a party in the event that RK&M eventually concludes that such an action is appropriate, is denied. However, both EL&L and RK&M will remain on the mailing list for this proceeding.

Suburban's motion to compel with respect to the questions in Appendix A of the May 3 the Scoping Memo is granted in part. Although we will not order RK&M to respond to these questions in view of its withdrawal from the proceeding, we will also impose on RK&M an evidentiary sanction that prohibits, in any future proceeding that is a continuation of or arises out of this investigation, the introduction of evidence that (1) directly contradicts the conclusions reached in this decision, and that (2) was available and could have been introduced by RK&M during the course of this proceeding.

IV. Motion to Retroactively File Water Division Reports

The Ratepayer Representation Branch of the Water Division (staff) inadvertently failed to file its reports in this proceeding and requests leave to file them late. Since these reports were timely served to all parties and no party objected to staff's motion, it is granted. The following reports will be

retroactively filed on the respective dates below that they were mailed to parties in this proceeding:

1. December 4, 1998 Report on Responses of Class A and Class B Water Utilities to Investigation 98-03-013;
2. January 22, 1999 Modified Summary and Recommendations and Table 2-M;
3. March 12, 1999 Data Request for Perchlorate and MTBE tests;

4. May 17, 1999 Response to Questions 28-30 in May 3 Ruling; and
5. June 4, 1999 Follow-Up to Report Dated December 1998.

V. Applicable Drinking Water Quality Regulation

As discussed in D.99-06-054, the Public Utilities Commission has jurisdiction to regulate the service of water utilities with respect to the health and safety of that service (D.99-06-054, *mimeo.*, p. 50). 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 compliance standard to which the Commission holds utilities because it aptly encompasses SDWA laws and regulations developed by DHS as well as Commission orders. Moreover, it explicitly recognizes that this Commission has concurrent jurisdiction with the State Department of Health Services over the quality of drinking water provided by regulated water utilities.

A jurisdictional structure that preserves the authority if both DHS and the Commission over the quality of water provided by residents and businesses by private water companies is consistent with the original intent of the 1911 Act giving the Commission authority over water issues. It remains crucial to the effective regulation of public utilities. The expertise of the Commission, however, 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 continue to marshal the expertise the Commission

as well as the health-science expertise of DHS to support a public interest as critical of the quality of drinking water.

We, therefore, concluded in the Interim Opinion, D.99-06-054, as modified by D.99-09-073, that we have independent and concurrent jurisdiction to pursue all issues outlined in this proceeding based upon an analysis of the California Constitution, Article XII, §§ 2, 3 and 5 and Pub. Util. Code §§ 451, 454, 701, 761, 768 and 770. In addition, we concluded that under § 1759, the existence of pending civil suits on subjects related to matters being considered herein does not prevent us from exercising our jurisdiction to pursue this investigation.

We also described in great detail the history of this Commission's policies and our implementation of rules, requirements and guidelines governing drinking water quality, such as General Orders 96 and 103 and individual case law. We described our active partnership with DHS in assessing the public health risk in contaminated or polluted water, providing detailed memoranda of understandings, specific mandated guidelines and case-by-case decision-making. (D.99-06-054, at pp. 12-35.) As stated in the OII:

> "In furtherance of the Commission's policies and requirements embodied in General Order 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."

As mentioned above, a central feature of General Order 103 is its incorporation of the water quality standards developed by DHS.

Thus, this final opinion focuses on resolving the two broad issues of adequacy of drinking water quality standards and compliance by regulated utilities with these standards by answering the specific questions asked throughout this proceeding regarding these issues.

As invited, DHS provided an overview of existing state and federal water quality regulation, including procedures for setting standards, testing requirements, follow-up procedures for tests exceeding standards, citation criteria and enforcement mechanisms. The following DHS summary is undisputed.

A. Agency Responsibilities

Under the Federal Safe Drinking Water Act (SDWA) enacted by Congress in 1974 and amended in 1986 and 1996, the federal government has preempted states in the regulation of public water systems. Pursuant to the federal SDWA, the U. S. Environmental Protection Agency (EPA) is mandated to adopt national drinking water regulations to ensure that public drinking water supplies are potable. In 1975, EPA adopted the National Interim Primary Drinking Water Regulations to replace the then-existing Public Health Service Drinking Water Standards of 1962. Since 1975, EPA has adopted a broad range of drinking water standards, monitoring regulations, and reporting requirements to protect the quality of drinking water. Current regulations govern: contaminants to be monitored by utilities; sample frequency, collection and analytical methods; standards to define "safe" levels; treatment requirements if "safe" levels are exceeded; and requirements for utilities reporting to the state and notifying customers of detected contaminants.

The federal SDWA permits states to assume the responsibility to implement the provisions of the SDWA. This authority, known as "primacy," requires that states enact laws consistent with the federal SDWA and adopt regulations that are at least as stringent as those adopted by EPA. EPA is responsible for ensuring that each state meets the primacy requirements mandated in the SDWA.

The California Legislature has the responsibility to incorporate required mandates from the federal SDWA into California's Safe Drinking Water statutes. In addition, the Legislature addresses public concerns on specific water quality issues in California by passing legislation establishing requirements extending beyond the federal SDWA, such as public health goal requirements and the mandate for primary and secondary maximum contaminant levels (MCLs) for specific chemical contaminants such as Methyl Tertiary Butyl Ether (MTBE).[16]

DHS has the responsibility to adopt and enforce regulations to implement the mandates in the California SDWA. Under this mandate, DHS has regulatory oversight in this area of approximately 8,600 water systems, including those investor-owned water systems regulated by this Commission. This oversight responsibility includes issuing operating permits, conducting inspections, carrying out general monitoring and surveillance activities, and conducting water quality evaluations. DHS may take enforcement action, including imposing fines against a water system for noncompliance with drinking water regulations. The California SDWA authorizes DHS to delegate the responsibility for regulating water systems with less than 200 service

[16] MTBE is an oxygenate that is added to gasoline to reduce the amount of contaminants released into the air by the operation of motor vehicles. MTBE was used in limited quantities in gasoline sold in California starting in the 1970s. In approximately 1992, MTBE became the oxygenate of choice for gasoline because of its availability and favorable blending characteristics. The use of MTBE became more widespread in 1995 when stricter air pollution standards went into effect that required cleaner burning fuels. DHS established a secondary MCL for MTBE of 5 parts per billion (ppb) effective January 7, 1999. DHS set an advisory level of 13 ppb for MTBE effective March 9, 1999. Testing for this contaminant was begun by many regulated utilities prior to any DHS requirement.

connections to local county health officers by means of local primacy delegation agreements. There are 34 such agreements in place at this time.

The county health agencies (also known as Local Primacy Agencies, LPAs) have the same administrative authority as DHS to cite and fine noncomplying water systems. LPAs may conduct office hearings where they hear the testimony of an alleged noncomplying company. The LPAs have an advantage over DHS when dealing with some noncommunity water systems, such as restaurants, because they also issue permits to such facilities for other purposes, such as to serve food. If such a facilities is noncooperative regarding water system problems, the LPA has the authority to close down the facility. As a last resort, the LPAs may utilize the County District Attorney to initiate court actions against recalcitrant water systems.

B. Setting Maximum Contaminant Levels

Regarding water sources that have "no contaminants," the definition of "contaminants" is important. There are many drinking water sources that meet drinking water standards and need no treatment before delivery to the public. However, no drinking water source could meet the definition of "pure" water, that is a collection of molecules each of which has two hydrogen and one oxygen atoms. In fact, there could be a health risk associated with drinking "pure" water. Its ingestion could disrupt the normal physiologic (homeostatic) mechanisms that keep the body's electrolytes in balance. However, like other substances, this would depend on the quantity ingested.

The protection of public health by establishing water quality criteria and monitoring to ensure those criteria are met is actually a matter of minimizing health risks rather than eliminating risk entirely, because it is not possible to totally eliminate risk due to practical, technical, and financial constraints.

DHS performs several steps in order to set MCLs. First, DHS conducts a risk assessment to evaluate the human health risks associated with exposure to the contaminant in drinking water. Health risks are determined by evaluating epidemiologic studies of people exposed to high levels of a particular chemical (such data are rarely available except in an occupational setting) or by evaluating the results of toxicological studies on laboratory animals. The results of these studies are used to describe the dose-effect relationship, which can be represented graphically by dose-effect curves. For carcinogenic effects, the experimental dose-effect curve is usually sigmoidal, or S-shaped. As a matter of health protective prudence and convention, DHS assumes the dose-effect curve to be linear from high to low doses, with zero risk at zero exposure. This assumption tends to overestimate the risks at low doses, affording additional health protection when risk management decisions are made based on carcinogenic risk assessments.

For noncarcinogenic chemicals, levels are established that are expected to pose no health risk. Usually there is a large margin of safety that is incorporated, although there are exceptions, such as with nitrate and lead. Nitrate essentially has no safety factor because the MCL is set at zero risk due to the health effects for infant exposure and the risk of methemoglobinemia. Lead is treated likewise since it may pose neurological risks at very low exposure levels.

For carcinogenic chemicals, since any exposure is assumed to pose a calculable risk, DHS sets a level that poses an insignificant cancer risk. By convention, this is a level that corresponds to a lifetime cancer risk of up to *one excess case of cancer per million people exposed by drinking two liters of water per day for 70 years.* The excess cancer risks from a lifetime exposure that is up to one excess case per million people exposed per 70-year lifetime, are in excess of the cancers that would normally occur (250,000 to 300,000 per million people per lifetime).

This perception of risk has been used by DHS since the mid-1980s. At that time DHS began adopting MCLs for a number of chemical contaminants related to pollution from industrial and agricultural activities. DHS formalized this process to establish Public Health Goals (PHGs) which the Office of Environmental Health Hazard Assessment (OEHHA) in the California Environmental Protection Agency adopts. PHGs denote contaminant levels that are considered to pose an insignificant health risk in drinking water.

Even though MCLs for chemical contaminants are established at levels that are not expected to pose a danger to the public, there may be theoretical, calculable risks due to ingestion of water with contaminants at or below the MCL. For carcinogens, for example, the general methodology of risk assessment assumes that there is risk associated with any exposure, with zero risk expected to occur at zero exposure. So in some cases, a chemical might be at a level corresponding to a theoretical cancer risk of up to one excess case per 10 million or 100 million people per lifetime, lower than the de minimis level, but calculable nonetheless. Thus, even though the theoretical carcinogenic risk estimates are "up to" one excess case of cancer per a given population, the risk may be zero when contaminant levels are below the MCL.

After obtaining the risk assessment, DHS determines whether commercially available laboratories can detect the contaminant and at what levels, evaluates the treatment options available to public water systems affected by a contaminant, if any, and estimates treatment costs. DHS also reviews available occurrence and exposure data related to the number of systems and drinking water sources affected. If treatment is feasible to meet the PHG in terms of technology and costs, then DHS proposes the PHG as the MCL. If a contaminant cannot be detected in drinking water at the level of the PHG or its equivalent risk assessment, then the detectable level would be proposed as the

MCL. If treatment is not feasible, particularly for smaller systems, after considering the predicted theoretical illnesses that would be prevented, a less stringent MCL might be proposed.

The proposal for an MCL and background documentation undergo the standard rulemaking procedure required by the Administrative Procedure Act which governs many state agency proceedings. Public input is actively sought via the solicitation of public comment during rulemaking, as required by state and federal law. The public, on its own, can provide input through the initiative process, as it did with the Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65"). The public also has input via its elected officials.

DHS provided the regulatory package for perchloroethylene (tetrachloroethylene), one of the chemicals identified by parties in this proceeding as named in pending lawsuits, as an example of the documentation of the administrative process of setting a standard. The federal process for establishing MCLs is similar to that of DHS, according to DHS, and the verified statement of Dr. Elizabeth L. Anderson, former director of EPA risk assessment.

Federal law requires the federal EPA to review MCLs at least every three years. (42 USCA 300 g-l (3A) and (a).)

C. Action Levels

Action Levels (ALs) are nonenforceable health guidance levels for chemicals lacking MCLs. Contaminants are identified and ALs are derived in the following manner. A contaminant may be detected as a result of a utility's analytical method run for other chemicals, such as a volatile organic scan, and, pursuant to DHS policy, the utility reports the finding to DHS. A contaminant may be found in a drinking water source because of some indication that it may

be present. For example, perchlorate[17] was found in drinking water wells because of sampling that resulted from learning about the movement of perchlorate in ground water from a Superfund site nearby. Other contaminants needing ALs may result from hazardous waste cleanup activities, industrial contamination, pesticide use, fuel spills or other activities that might contaminate drinking water supplies. The use of an AL ends if a MCL is adopted for that contaminant.

Generally, there are health risks associated with any chemical, whether or not an AL or MCL has been established. Risk is determined by the chemical toxicity and exposure. It is the quantity of contaminant to which someone has been exposed and the period of time during which exposure has occurred that determines the extent of risk. Thus, a low enough level of a contaminant is not necessarily poisonous. It is because of concerns about health risks that ALs are established in order to identify a level that is considered to pose an insignificant risk. ALs allow DHS to advise drinking water systems and the public about the significance of contaminant exposures in drinking water far in advance of the development of MCLs, which take considerable time to promulgate. The lengthy process for MCLs results from the need to address aspects other than the risk assessment for a particular chemical (such as treatment technologies), and the requirements for agency review and public input associated with regulation development.

[17] Perchlorate was not recognized as a potentially harmful chemical until the early 1990s. It is currently an unregulated chemical with no MCL. In 1997, DHS set an advisory level for perchlorate of 18 ppb.

When DHS (or EPA) is developing new standards (MCLs), water utilities can utilize the ALs for planning purposes. Generally, ALs are precursors to the MCLs.

D. Public Health Goals

OEHHA is mandated by statute (Health and Safety Code Section 116365) to adopt PHGs for each contaminant for which an MCL is established. PHGs may be the same as MCLs, or they may be more or less restrictive than MCLs, depending upon the outcome of OEHHA's review of available scientific information.

For acutely toxic substances (noncarcinogenic effects), PHGs are at a level at which no known or anticipated adverse effects on health will occur, with an adequate margin of safety. This would usually correspond to the "no observable adverse effect level" (NOAEL) divided by what are called Uncertainty Factors to take into account the quality of the data and its applicability to humans. For example, each component that supplies data to the risk assessment provides uncertainty. Hence, uncertainties are associated with extrapolating from high dose, short-term exposures to low dose, long-term environmental exposures, extrapolating from laboratory animals to humans, taking into account more sensitive members of the population, such as children, and taking into account the quality of available data.

For carcinogens or other substances that can cause chronic disease, PHGs are set at a level that OEHHA has determined does not pose any significant risk to health. For noncancer effects, this would be done as described above for other toxic substances. For cancer, this corresponds to a risk of up to one excess case of cancer per million people per 70-year lifetime, the so-called "de minimis" level. To date, approximately 50 contaminants have been reviewed and PHGs adopted.

DHS has identified several contaminants for review to determine whether or not the MCLs should be revised in response to the PHG. Two of those chemicals, chromium (total and the contribution of chromium IV) and trichloroethylene, are among the contaminants listed as allegedly causing a health hazard in pending litigation.

As to the federal MCLs, EPA is reviewing arsenic and radionuclides (including radon), so these federal MCLs may change within the next few years.

E. Testing for Known Contaminants

There is no requirement that utilities test for contaminants with ALs unless the contaminants are on the list of "unregulated contaminants" for which DSH requires monitoring because often the contamination is site-specific. However, when a contaminant is associated with certain industrial activities, widespread sampling may be advised, as with perchlorate, when public water systems were advised in 1997 of findings around aerospace facilities. Often, when it needs to obtain information on the occurrence of a particular contaminant, DHS will add the contaminant by the regulatory adoption process to the list of unregulated chemicals for which monitoring is required.

DHS requires water utilities to test for any contaminant for which it has established a drinking water standard and any contaminant that is on the list of "unregulated" chemicals. Testing for certain contaminants may not be required if DHS determines that a utility's drinking water source is not "vulnerable" to a specific contaminant.[18]

---

[18] A source is "vulnerable to contamination" if the physical barriers to contamination are not adequately effective to prevent it. These physical barriers include geological and hydrogeological conditions that influence the movement of water and contaminants through ground water recharge areas and through aquifers. Vulnerability also reflects the presence of contaminants in the surface and subsurface

Footnote continued on next page

After a regulation containing new standards or monitoring requirements is adopted, DHS provides written notice to the utilities informing them of the new requirements and what they must do to comply. DHS frequently conducts training for utilities to assist them in meeting new requirements, especially if the requirements are complex. DHS also makes special presentations at water industry conferences and meetings, such as conferences held by the California-Nevada Section of the American Water Works Association, Association of California Water Agencies and CWA.

DHS maintains a water quality monitoring database for all community water systems under its direct authority that can be compiled in a number of different report formats. In the 34 counties where DHS has delegated the authority to regulate, the county oversees the regulation of water utilities serving less than 200 service connections and maintains the water quality monitoring data. DHS recently compiled a report on the most recent sampling results from the water sources of regulated water utilities. In this proceeding, DHS used that report to verify the number of sources within each system that had a positive

---

area that contribute to the source, as well as the presence of possible contaminating activities. If potentially contaminating chemicals have been or are present in certain locations under certain circumstances, the water sources may be subject to contamination. Regardless of the proceeding, a source is considered vulnerable if contamination of the source has already occurred. A "vulnerable system" is defined in Title 22, California Code of Regulations (CCR) Section 64402, as "a water system which has any water source which in the judgment of the Department, has a risk of containing an organic contaminant, based on an assessment as set forth in Section 64445(d)(1)." This latter section refers to a source that may be eligible for a waiver from monitoring one or more organic chemicals for which MCLs are established "if it can be documented that the chemical has not been previously used, manufactured, transported, stored, or disposed of within the watershed or zone of influence and therefore, that the source can be designated nonvulnerable."

finding based upon testing for all inorganic and organic chemicals, radionuclides with MCLs and other chemical constituents.

A large percentage of water utilities, roughly 75%, have their chemical and radionuclide data reported electronically to DHS by the laboratory conducting the analyses. The remaining water utilities report water quality data to DHS by hard copy. Depending on the arrangements made, the utility receives a copy of the monitoring data from the laboratory. DHS expects utilities to review their data and make arrangements with their contract laboratories to be notified immediately if any sample finding exceeds a standard. Depending on the standard or the follow-up monitoring required, different timeframes are specified to contact DHS.

Regulations adopted by DHS specify how utilities are to proceed when contaminants are found, the requirements differing based upon the level of detection. All regulated utilities are expected to be familiar with the regulations. DHS also certifies water treatment operators pursuant to state law.[19] Depending on the level of certification, operators are required to know applicable drinking water law, including the responsibility of a regulated water utility when contaminants are discovered. DHS requires that each operator pass a test for his or her specific grade level before a certification may be granted.

F. Detection of New Contaminants

DHS learns of water contamination in several ways. The regulated utility is required to notify DHS within 48 hours after a contaminant in excess of an MCL is detected and within 24 hours when the level of contamination is 10

[19] H&S §§ 106875-106910.

times greater than the MCL.[20] DHS requires utilities to submit certain monitoring data monthly. DHS field engineers routinely review these reports to determine if changes have occurred in water quality. Utilities are also advised to report to DHS when a contaminant is found for which there is no drinking water standard. DHS reports that utilities have been very responsive to this advisory. DHS may then determine if appropriate and adequate action was taken when contamination was discovered.

In many cases, a laboratory or utility may not "know" that there is a new contaminant in drinking water if it cannot detect it. DHS reports that the one overriding impediment limiting utility actions in addressing various contaminants has been the lack of knowledge as to the chemical contaminants that could be affecting their water sources.

In other cases, a utility might analyze a sample for a contaminant to verify its absence, but may detect it anyway, such as occurred with perchlorate in Colorado River water. Or a utility might monitor for a chemical based on information that is becoming available, as was the recent experience with the gasoline additive MTBE and its contamination of ground water and surface water sources. In many cases, a new contaminant is found when a utility is conducting routine monitoring for regulated contaminants. The analytical methods used to monitor for regulated contaminants are generally broad spectrum methods that can detect a large number of chemicals.

A utility would not likely know that a contaminant is present if its concentration is lower than the detection level. However, a laboratory may be able to detect a chemical lower than the detection level for purposes of reporting

[20] H&S § 64445.1.

(DLR), which is the level at which findings are required to be reported to DHS. This would require further investigation by the utility or laboratory to determine whether the contaminant was actually present in the sample. In any case, if a contaminant cannot be detected by the analytical equipment, its presence in a sample would not be known.

With regard to perchlorate, the initial method that was developed by a private laboratory had a detection level of 35 parts per billion (ppb). DHS chose not to use this method because it was not sensitive enough, and it was a proprietary method. DHS developed a new method with a detection level of 4 ppb. DHS does not know if perchlorate could have previously been seen below 35 ppb using the private laboratory's method.

There may be clues to suggest the presence of contamination for some chemicals. For example, solid rocket propellant testing or ammonium perchlorate manufacture can suggest the presence of perchlorate in ground water. Similarly, leaking underground fuel tanks suggest the presence of components of gasoline, dry cleaners suggest perchloroethylene, and Air Force bases suggest trichloroethylene. To the extent that possible contaminating activities are present, certain potential contaminants may also be present.

Aerojet, in its comments on the draft decision, points out that there are several federally sponsored studies and state laws that provide for increased security in public drinking water systems from unregulated or previously unidentified agents that also provide the basis for identifying new contaminants that require regulation. This can help provide notice to utilities of what monitoring is required of systems vulnerable to contaminants identified by federal and state agencies.

Aerojet points out that the Anderson Report chronicles various EPA-conducted nation-wide surveys of public water supplies, beginning with the

Community Water Supply Survey (1969 USPHS) and the Safe Drinking Water Act of 1974 (SDWA). These surveys were initiated in anticipation of the need to identify previous unknown agents that might pose public health risks.[21] The data in these surveys have contributed to the determination of which contaminants should be regulated by federal agencies, as well as by state agencies that are statutorily required to act in concert with federal requirements. In addition, California has its own list of unregulated contaminants that must be monitored in drinking water every 5 years, as well as other chemicals that must be monitored if the system is vulnerable to contamination.

Despite the many sources of information, however, it is unlikely that a utility would know that a new chemical was present, unless the utility had reason to suspect that contamination occurred based on local information or general scientific information. It is also unlikely that commercial analytical laboratories would develop new tests for chemicals that are not known to be of concern to drinking water utilities or to be present in drinking water. In particular, there would be no market for such analyses since no utilities would be requesting them.

G. Follow-Up After Detection of Contamination

When the level of an organic chemical exceeds 10 times the MCL and this is confirmed by a sample taken within 48 hours of receiving the results from the initial sample, the source is taken out of service, with customer notification. An exceedance less than 10 times the MCL requires customer notification and increased frequency of sampling. The 10-times-the-MCL threshold follows the convention in risk assessment for noncarcinogens that includes uncertainty

[21] Anderson Report at 15-19.

factors that are in units of 10, and for carcinogens that includes 10-fold expressions of risk, such as one excess case of cancer per million, one per hundred thousand, or one per ten thousand. This threshold provides a second tier to the MCL to address contamination that significantly exceeds the MCL and which could potentially reduce the "safety cushion" built in by the risk assessment.

If contamination of the water exceeds the MCL but is less than 10-fold, the water continues to be served while the utility conducts customer notification and increased monitoring, attempts to identify the source of contamination, takes corrective action, and installs treatment to come into compliance with the MCL. At a 10-fold exceedance, taking the source out of service while corrective action proceeds serves to protect the public against relatively high levels of exposure.

In the opinion of DHS, it is highly unlikely that any member of the public would become ill or physically injured by ingesting water contaminated at 10 times the MCL. The concern for noncarcinogens is that the margin of safety provided by the MCL would be eroded, something that is important even for short-term exposures. For carcinogens, the theoretical cancer risk over a lifetime would be increased, but this increase would require long-term exposures. For short-term exposures, even the theoretical risk would not be significant. The exception to this discussion is the MCL for nitrate. At levels lower than 10 times the MCL for nitrate, infants are at risk of methemoglobinemia, and the required public notification when the MCL is exceeded includes information specific for exposure to infants.

H. Customer Notification

For ground water sources, whenever an MCL or an AL is exceeded, DHS requires the utility to notify local government officials (city council, county board of supervisors), whether or not a well is taken out of service.

DHS requires customer notification when an MCL is exceeded and strongly recommends such notice when an AL is exceeded.

If exceedances are temporary, the notification may indicate the temporary nature of the exposure, particularly if corrective actions are being taken and are anticipated to be completed by a certain date. Such notification would be followed by a subsequent notice when corrective actions have been completed, or one that indicates they have not been completed and exceedances are continuing as before. DHS requires that public notification be continued on a quarterly basis for any MCL violation as long as the water being served exceeds the MCL.

The existing guidelines and regulations adequately protect the public by minimizing exposures to drinking water contaminants, either by limiting exposure or by providing notification when water continues to be served so that an informed public can decide whether or not it wants to use or ingest the water during the time the exceedance occurs. The required notification to local government agencies also allows for other forums and means of addressing local concerns.

There is no 10-fold rule for exceeding ALs, although DHS recommends public notification when the AL is exceeded. The recommendation for public notification and the fact that DHS will provide public notification if needed usually prompt utilities to seek alternative sources or treat the water, if treatment options are available.

I. Temporary Excursions Above Standards

Temporary excursions above the MCL do not necessarily constitute noncompliance with the MCL for a contaminant set by DHS. Each class of chemicals has its own compliance determination. Temporary excursions

generally trigger confirmation, follow-up, and notification if a violation is determined to have occurred.

Also, in DHS' opinion, all excursions or exceedances of the MCL or AL do not constitute a danger to the public health. In most cases, an exceedance of an MCL or AL would constitute a theoretical diminution of the protection of the public health that is provided by the MCL or AL. In particular, the safety factor would have been reduced. The reason such exceedances are considered not to pose a danger is that the risk assessments used to evaluate the human health risks associated with exposure to contaminants in drinking water are very conservative or health protective, as explained above. Risk assessments establish levels for noncarcinogenic contaminants that are expected to pose no health risk. Included in these established levels are considerations to take into account uncertainties up to a factor of 10,000. As a result exceeding such a level, does not pose a health risk, but rather, a diminution of the margin of safety that the risk assessment and standard setting practice affords.

Even though risk management adjustments occur in the development of MCLs for chemical contaminants, DHS nonetheless generally establishes MCLs at levels that do not pose a danger to the public. For example, OEHHA's PHG for trichloroethylene is 0.0008 mg/L, which corresponds to a risk of up to one excess case of cancer per million people per lifetime, or from zero to one case of cancer, in addition to the 250,000-300,000 that might be expected to occur in the million people exposed for a 70-year lifetime. The MCL for trichloroethylene is 0.005 mg/L, six times higher than the PHG. This means that for exposures at the MCL, there would be from zero to 6 additional cases among the 250,000-300,000 cancer cases expected to occur in the million people over a lifetime. At 10 times the MCL, this would be from zero to 60 cases among the 250,000-300,000 cases expected. This is still a relatively small, and theoretical, number.

J. Enforcement of Standards

In the case of a MCL, violations are determined differently for different chemicals. For radionuclides, it is on the basis of an average of four quarterly samples; for inorganic chemicals, except nitrate, it is on the basis of a single sample or the average of a single and its confirmation sample collected within 14 days; for nitrate, it is on the basis of the average of the initial sample and a confirmation collected within 48 hours; for organic chemicals, it is on the basis of the average of the initial sample, confirmation samples if collected (within seven days), and either five additional samples collected monthly for larger systems or three additional samples collected quarterly for smaller systems.

DHS considers water systems to be in noncompliance with standards, rules, regulations or orders when they either do not conduct some action in the timeframe provided by law, or they do not meet timelines established in DHS citations or orders for taking some specific action. For example, when a new rule such as the Surface Water Treatment Rule became effective, water systems were given a period of time to come into compliance. Most water systems were issued a Compliance Order that established specific dates by which they were to meet certain goals. If a water system does not meet those goals, DHS issues a citation with or without fines. If a water system does not sample its supply according to the regulations, DHS issues a citation specifying when it must complete such sampling. The district offices of DHS and the LPAs track the monitoring requirements for their water systems to try and assure that samples are taken as mandated by law.

If a regulated utility does not comply with water quality requirements, DHS may take the following enforcement action based upon the severity of the circumstances: an informal letter regarding the violation, a formal citation, a compliance order or compliance agreement, permit revocation, service

connection moratorium, public hearing, public notification or litigation in Superior Court.

When noticed by DHS of noncompliance, most water systems, especially large water systems, are generally responsive to initiating corrective measures. At times, it may be necessary for DHS to impose a fine on a water system to get its cooperation. This is more of a problem with smaller water systems with fewer than 1,000 service connections due to their limited resources. Only rarely is it necessary to take a water system to court to get its cooperation.

K. Discussion

We asked the parties to address policy and compliance issues in this proceeding: whether existing drinking water standards adequately protect public health, whether exceedances above maximum contaminant levels protect public health, what remedies for noncompliance are appropriate and whether regulated utilities comply with existing standards. No party commenting on the DHS representation of existing regulation disputed it. DHS provided the national and statewide framework of drinking water quality regulation. This framework includes federal, state and local agencies authorized to monitor and correct drinking water quality. Minimal standards for specific contaminants determined to be dangerous to public health are set by the federal government. DHS sets more stringent standards for our state in most cases and further individualizes regulation per regulated water utility based upon the component of its water sources and location of its facilities. DHS and numerous other state, federal and local agencies continually and regularly monitor the quality of drinking water to assure that it meets mandated requirements.

DHS sets mandatory drinking water standards by assessing the risk of human consumption of any given contaminant based upon the testimony and research of toxicology experts and an analysis of the cost and feasibility of

current treatment methods. The process and procedure for setting standards is judicial in nature with the opportunity for any interested party and the public to participate. The decision rendered by DHS discusses and considers each party's recommendations and all input into the standard- setting process. This process, the caliber of experts and ability of the public to participate is similar to the proceedings conducted by this Commission. The consideration of the feasibility and cost of treatment are matters of foremost importance should we engage in this process.

The basis of selecting the actual maximum level of health risk (such as one excess case of cancer based upon a seventy-year exposure in one million) is also a reasonable one, balancing all interests involved, the public at large, the ratepayer and the company. Thus, while minds may differ somewhat on the outcome of this process, we find little reason to believe the outcome of a Commission standard-setting process would yield substantially different results than those of DHS. In fact, no party requests that the Commission engage in such a process for the standards that currently exist. All parties commenting on this issue agree that the current mandatory standards, testing, reporting follow-up for temporary exceedances and enforcement requirements protect the public health, and they offer no changes or additions to this body of regulation.

The potentially responsible parties participating as Aerojet–General offer a witness to confirm the DHS representations. However, in the existing record Dr. Anderson, former director of EPA Risk Assessments, substantiates the margins of safety surrounding each contaminant and the function of this safety cushion during periods of temporary exceedances.

While no party disputed the adequacy of existing DHS regulation, Aerojet-General recommends that regulated utilities should be under a Commission obligation to monitor and maintain "unregulated" chemicals in

drinking water at or below levels that present "unacceptable" public health risks. We decline to institute a mandate to maintain unregulated chemicals below "unacceptable" levels. To do so, the Commission would need to perform the identical steps DHS performs to set this level of "unacceptable public health risk" at a time when DHS would also be in the process of performing the same task. DHS has indicated that setting advisory levels for unregulated chemicals is the precursor to setting a mandatory maximum contamination level and that advisory levels are set based upon the same one in a million risk level as MCLs. It would be a waste of state resources for this Commission to perform the same tasks, and DHS would likely be further toward completion of the MCL process at the time the Commission began its process.

DHS also reports that it has begun assessing the risk of the two new contaminants we targeted in this proceeding, MTBE and perchlorate. Since the institution of this proceeding these contaminants have attracted nationwide and statewide concern. DHS has begun the process of establishing mandatory regulation by setting "voluntary" advisory levels for these contaminants. It would be futile to duplicate this process.

Aerojet-General argues that water utilities can be held liable for serving water that meets all standards, regulations or other requirements imposed by DHS. Citizens and SoCal disagree. Whether regulated utilities may incur such civil liability is not germane to this proceeding. Whether a public utility incurs civil liability for alleged harms caused by the drinking water it delivers is

currently an issue pending before the California Supreme Court in *Hartwell Corporation v. Superior Court* (Santa Maria).[22]

DHS requirements are geared to provoke correction of any water quality exceedance of contaminants known to be hazardous to public health rather than automatically punish for the occurrence of any such incident. This approach is reasonable since it recognizes that all contaminants that pose a health risk are not always known, technology is not always capable of detecting their presence in drinking water or eradicating them, and their presence in drinking water is not always within the control of the distributor. While on the other hand, limits of contamination are set that virtually assure no health risk should they be exceeded.

Since there is no dispute over the adequacy of existing regulation including temporary exceedances of standards, there is no need for evidentiary hearings on these issues. Nor do we believe a special panel of experts to advise this Commission on contaminants or their health effects is needed at this time, given the state and nationwide processes, procedures and advisory groups that exist. Instead, we prefer to rely on our staff to explore ways to become more involved in these forums and address in workshops or a future rulemaking proceeding the possibility of requiring that our regulated utilities do likewise.

VI. Further Rulemaking Proceeding

Even though we decline to adopt Aerojet-General's suggestion to determine what levels of contaminants are unacceptable, the suggestion that

---

[22] Petitions for review was granted December 15, 1999, No. 9815, on the following issue: Does the Public Utility Commission's jurisdiction pre-empt private actions against regulated water utilities for harms allegedly caused by the utilities' provision of contaminated water?

regulated utilities monitor unregulated chemicals for advisory levels already set by DHS where there is vulnerability of the water source to a specific contaminant is a good one. We notice that the majority of respondents agree; however, several disagree with this proposition. Thus, it warrants further consideration in a rulemaking proceeding where the feasibility and costs to do so may be explored.

All of the utilities believe that the existing trigger mechanism for secondary drinking water standards is sufficient, and that any additional trigger mechanisms for drinking primary water standards are unnecessary. These mechanisms are the requirement that a regulated utility immediately notify DHS when a contaminant level is detected at above the MCL or AL and in turn, DHS may, in certain circumstances, require the utility to distribute a public notice as well. In addition, for primary drinking water, consumers are notified of all the contaminants found in the water during a given year in the Annual Water Quality Report. Utilities commenting on additional trigger mechanisms suggest an additional measure of informing the Commission as well as the DHS of any detection of contamination.

DHS comments that the Commission may wish to establish mandatory public notice requirements for chemicals for which ALs exist where the AL is exceeded. DHS suggests that regulated utilities could be required to provide customer notification when ALs are exceeded, and to cease serving water when contamination exceeds an AL by a factor of 10, paralleling the approach DHS uses for MCLs. The Commission could also remind utilities of its obligations to notify customers and local government officials when an AL is exceeded, and consider imposing its own penalties on utilities if notification does not occur.

DHS indicates there are times when the Commission could provide valuable assistance when DHS is taking enforcement action against a regulated

water system. DHS recommends that a closer working relationship would be beneficial to both agencies.

DHS recommends that water utilities work with communities to develop programs that will help prevent or minimize contamination of drinking water sources by possible contaminating activities. This approach enables the possible contaminating activity to be the focus of attention rather than a particular chemical.

According to DHS, regulated utilities in proximity to federal Superfund sites or other hazardous waste sites could, as an interim safety practice, evaluate the list of Chemicals of Potential Concern and Chemicals of Concern from those sites, especially those that have been detected in soil and shallow ground water and in monitoring wells associated with the sites. Screening of drinking water samples for those chemicals might enable utilities to determine whether cleanup activities are being carried out in a timely and appropriate manner. At a minimum, utilities should take part in the public participation activities associated with any neighboring hazardous waste facilities.

DHS recommends that regulated utilities review the list of chemicals for which ALs have been established and determine if their sources may be vulnerable. In addition, they should review the list of unregulated chemicals for which monitoring is required and make sure their sampling is in compliance. They could also review the findings of neighboring water systems' monitoring programs to identify any chemical contamination that might be occurring nearby.

DHS suggests that the Commission consider directing the utilities to conduct source water assessments and to require utilities to implement source water protection programs (SWPPs). SWPPs are voluntary programs, but they offer an opportunity for utilities to take actions that may help reduce their potential for contamination by focusing on possible contaminating activities that

might affect their drinking water sources, including watersheds and recharge areas. A requirement by the Commission may help utilities protect themselves against allegations such as those that the Commission is investigating. DHS has developed guidance for source water assessment and protection programs. However, there is no assessment of the costs to do so in this proceeding. Therefore, this issue warrants further consideration in a rulemaking proceeding.

Although the water companies as a whole are responsive to the directions from DHS, from time to time the attitude of the management of a company may be less cooperative than other times. DHS recommends that representatives of the Commission Water Division and DHS meet on a regular basis to facilitate the coordination of the efforts of both agencies in achieving the delivery of water that meets the quality and quantity standards of both agencies. In the course of such meetings, the two agencies may decide that meeting jointly with a company may promote prompt resolution of problems. Staff should assess the feasibility of implementing this suggestion.

Staff recommends that each utility be required to provide quarterly data on:

> Wells shut down due to contamination, name of contaminant(s), reason for contamination, mitigation;
>
> Wells under continuous monitoring for contamination and name of the contaminant(s); and,
>
> Each instance of noncompliance with DHS and EPA rules, regulations, and requirements.

Staff recommends that each utility provide in every application for a general increase in rates a section on water quality, addressing improvements or deterioration, since its last application. Although no party opposes this suggestion, other items could be included in this water quality report, such as

whether the utility has complied with past Commission or DHS decisions and orders and information regarding the utility's efforts to keep abreast of any contamination issues affecting its service territory. Therefore, this issue should be defined further.

Staff suggests that the Commission develop a systematic repository for storing information on water quality by company and district. However, staff does not develop a system to collect this information in this proceeding or indicate how it would be used.

Staff suggests that the Commission develop a systematic program to monitor water quality on a continuing basis. However, no details of such a program are provided.

In addition, the implication of customer complaints regarding water quality, the nonexistence of requirements to record and maintain these complaints and whether these complaints are related to previously unknown contamination has not been explored in this proceeding and should be in further proceedings.

A. Discussion

We will consider these new recommendations in the context of the rulemaking and investigation to revise General Order 103, the regulatory instrument used to codify water quality standards. In the interval leading to the start of the rulemaking, it may prove more practical and may preserve Commission and the parties' resources if staff conducts a workshop to explore the matters of agreement and disagreement and the feasibility of alternate details involved in the party's and DHS' suggested additional measures involving water quality. The result of such workshops will prove critical input to a formal rulemaking proceeding.

Staff should immediately explore the DHS recommendations of a closer working relationship.

VII. Regulated Utility Compliance With Applicable Water Quality Regulation

General Order 103 and numerous Commission decisions cited in the order instituting this proceeding require that regulated water utilities comply with DHS regulation, decisions and orders. We ordered all Class A and B regulated utilities to answer 12 specific questions in the form of a compliance report in this proceeding. In response, respondents' compliance reports listed the date, location, test results and then-applicable standards for each contaminant detected based upon records retained for the past 25 years, as well as any follow-up efforts and citation history. Overall, respondents reported numerous incidences of tests exceeding maximum contaminant levels. However, they also reported that in each case of testing where a contaminant exceeded then-existing standards, the DHS-mandated follow-up procedures were conducted, resulting in few citations from DHS for noncompliance. When citations have occurred, respondents reported that the offenses have been timely corrected under then-existing DHS requirements and orders, such as frequent monitoring and removal of a well from the distribution system. DHS confirmed that respondents' past and present compliance with applicable water quality regulation and DHS orders for correction and improvement is satisfactory, with the exception, that a court matter is pending involving DHS and Alco Water Company, discussed below.

As instructed, RRB verified respondents' compliance reports using random sampling techniques and comparison with DHS records. RRB agreed with the DHS' comments that respondents' compliance with past and present state and federal water quality regulation is satisfactory, with the one exception, even though tests exceeding maximum contaminant levels have occurred.

A. Staff Analysis of Respondents' Compliance Reports

Staff reviewed each compliance report and commented on its content. Staff summarized the water utility responses to the 12 questions in the order instituting this proceeding posed by the Commission. Table 1 of the staff report filed December 4, 1998 lists each Class A and Class B utility that filed a compliance report.[23] Table 2-M1 in staff's supplemental report filed May 17, 1999 (modified to include all supplemental water utility responses to staff follow-up data requests) indicates that each respondent adequately answered each of the 12 questions.

1. What Contaminants Did You Test for and When?

DHS is empowered to oversee compliance with both federal and state water quality regulation. Title 22 of the CCR contains DHS' requirements for water quality testing and requires that each utility retain the results of chemical analysis for ten years and bacteriological analysis for five years. Class B utilities are allowed to test for fewer contaminants than Class A utilities. Generally contaminants fall into the following nine categories of contaminants:

---

[23] Class A: Apple Valley Ranchos Water Company, California-American Water Company (Cal-Am), California Water Service Company, Citizens Utilities Company of California (Citizens), Dominguez Water Company (Dominguez), Great Oaks Water Company, Park Water Company, San Gabriel Valley Water Company, San Jose Water Company (SJWC), Santa Clarita Water Company, Southern California Water Company (SoCal), Suburban Water Systems (Suburban) and Valencia Water Company.

Class B: AWC, County Water Company, Del Oro Water Company, East Pasadena Water Company, Elk Grove Water Company, Fruitridge Vista Water Company and Hillcrest Water Company.

TABLE 3
Major Categories

CATEGORY	EXAMPLES
Bacteriological	Total Coliform, Fecal Coliform
General Physical	Turbidity, Taste, Odor, Color
Non-Volatile Organic Chemicals	Dibromochloropropane (DBCP), Polychlorinated Biphenyls (PCBs), Phenol, Formaldehyde
Volatile Organic Chemicals	Trichloethelene (TCE), 1,1, Dichloroethylene (1,1, DCE), Perchloroethylene (PCE), Methyl tertiary Butyl Ether (MTBE),
Inorganic chemicals	Nitrate (as NO3), Arsenic, Fluoride, Mercury, Nickel, Selenium, Cyanide, Ammonium Perchlorate (Perchlorate)
General Mineral	Total Dissolved Solids (TDS)
Lead and Copper	Lead, Copper
Metals	Iron, Manganese
Radionuclides	Uranium, Tritium, Gross Alpha Particle Activity

DHS prescribes the various contaminants within the above categories for which a regulated water utility must test and specifies the maximum amount of each contaminant that may lawfully be present in drinking water. In reviewing water utility compliance reports, staff compared respondents' test results with the applicable primary drinking water MCLs for

each contaminant regulated under the above categories,[24] secondary MCLs,[25] unregulated chemicals requiring monitoring, and DHS' suggested ALs.

MCLs are monitored for compliance with the Safe Drinking Water Act, and must be met by each public drinking water system to which they apply. Primary MCLs are established for organic and inorganic chemicals and radioactive contaminants. Lead and copper have specific regulations and are considered primary MCLs. Secondary MCLs are established for taste, color, and appearance. In addition, unregulated chemicals may be required to be monitored depending on vulnerability of the drinking water system to specific contaminants, as determined by DHS. ALs are DHS advisory levels for unregulated chemicals which are nonenforceable standards. If an AL is exceeded, DHS recommends, but does not require, notification to the public. An exception is the case of lead and copper. If an AL is reached for lead or copper, DHS may require the utility to conduct corrosion studies and install corrosion control. Many contaminants with ALs are unregulated. In an appendix to its first report, staff provided the entire lists of regulated and unregulated contaminants. Wholesale suppliers are required to conduct testing on the water they sell, relieving utilities of the requirement to conduct testing on purchased water.

Numerous state agencies are authorized to monitor testing, generally under statutes regulating specific contaminants. Table 4 in staff's first report summarizes the various state statutes which govern water quality monitoring, in addition to those of DHS, and the establishment dates.

---

[24] 22 CCR § 64449.

[25] 22 CCR § 64450.

TABLE 4
AUTHORITIES ESTABLISHING DETAILS OF TESTING

YEAR	AUTHORITY
1972	Domestic Water Supplies, Quality and Monitoring
1977	Domestic Water Quality Monitoring Regulations
1983	One time screening for organic chemicals for all companies with more than 200 customers required by AB 1803
1986	California Safe Drinking Water Act, Laws and Standards Relating to Domestic water Supply
1989	Safe Drinking Water Act
1991	Lead and Copper Rule
1992	EPA Phase II and V Rules
1992	Domestic Water Quality Monitoring Regulations
1994	Domestic Water Quality Monitoring Regulations
1995	California Safe Drinking Water Act and Related Laws
1998	California Safe Drinking Water Act and Related Laws

In its capacity to oversee compliance with both federal and state drinking water quality regulation, DHS has authority to approve unique proposals to meet these requirements that reduce utility testing costs. For instance, for a time three utilities participated in a program in which tests on representative wells in an aquifer were substituted for testing of each well in that

aquifer. DHS may also issue waivers for utilities after review of their water sources to forego the monitoring of certain contaminants. For instance, groundwater sources may not need to be tested for bacteriological contaminants.

Each utility that responded indicated that it conducts tests in accordance with EPA and DHS requirements, including annual oversight requirements by DHS. Some utilities indicated that they adhere to a self-imposed policy of testing for contaminants that were not yet required by EPA or DHS. Among the reasons cited were the EPA's Contaminant Candidate List, anticipation of possible future regulation, and research on water sources.

2. How Did You Know What to Test for?

Most utilities stated that they rely on the regulations listed in Table 4. DHS and EPA also specify testing requirements for each utility through additional regulations, rules, directives, and permits. Utilities are able to keep abreast of new and revised regulations through information available from the American Water Works Association and the Federal Register. Some southern California utilities also rely on the Metropolitan Water District for this information. From 1979 to 1998 the Sacramento Area Water Works Association sponsored a committee charged with keeping members abreast of new and updated regulations. DHS also individually notifies regulated utilities of new or revised DHS regulations. DHS may review a utility's specific circumstances, such as location and water sources, and provide waivers for testing of certain contaminants. Finally, some utilities test for certain contaminants for reasons other than required regulation.

3. What were the Standards (MCLs) for Each Contaminant?

Water quality standards are set separately by EPA and DHS. Usually the federal government is the first to set minimal standards. DHS may legally and often does adopt more stringent requirements than the EPA.

Any drinking water sample that tests below the MCL for a certain contaminant is deemed in compliance with state law. Tests that exceed these standards require follow-up testing and often public notice to the customers. For inorganic chemicals, standards are not exceeded unless an average of an initial sample above the MCL and a follow-up sample is above the MCL. For inorganic chemicals, an initial sample which is above the MCL, must be confirmed by a follow-up sample and test. If the average of the tests is above the MCL, the source is placed on a six-month monitoring program. If the average of the initial, confirmation, and six-month monitoring is above the MCL, the source is considered to be out of compliance. For radionuclides, standards are not exceeded unless an average of four consecutive quarterly samples is above the MCL.

If an AL is exceeded, DHS recommends but does not require, notice to the public. An exception is the case of lead and copper. If an AL is reached for lead or copper, the utility may be required to conduct corrosion studies and install corrosion control.

Staff attached to its first report the current MCL for each contaminant. All Class A and B utilities provided in their compliance reports detailed tables with applicable MCLs or MCLs and ALs with corresponding test results for the period 1973-1998, except in several cases where these records were not available. However, DHS only requires that regulated utilities retain the

results of chemical analysis for ten years and bacteriological analysis for five years.

4. What Entity/Company Performs Sample Taking?

Sampling can be divided into three areas: sampling at the water source (source sampling), sampling at various locations in the distribution system (distribution system sampling), and sampling at the customer's tap pursuant to the Lead and Copper Rule. A particular utility may use a different agent to conduct each kind of sampling. Sample takers include company personnel, consultants under contract, local agencies, DHS, and EPA. Wholesale sellers of water are required to perform testing on their product, and utilities that purchase water are not required to test purchased water. Every utility that specifically addressed Lead and Copper sampling indicated that customers draw their own samples. In these cases, the utility provides specific customers with sampling vessels and sampling instructions developed by DHS for this purpose. In some instances, sampling by DHS and local authorities may be performed.

Title 22, Chapter 15, Section 64415(b) addresses requirements for personnel who conduct water quality testing. The water quality sample-taking must be conducted by a water treatment operator certified by DHS, by personnel trained by DHS to collect samples, a certified laboratory, or a state-certified operator. Every regulated utility that responded indicated that sample collectors were certified or had received some kind of training on sampling procedures. In some instances, the responses were not specific as to whether the training met Title 22's requirements.

5. What Entity/Company Performs Your Required Testing?

Laboratories certified by the State of California to perform water testing undergo a mandated certification process and receive continued oversight

by DHS, pursuant to CCR Title 22, Chapter 15, Section 64415(a). These laboratories must use EPA's methods of analysis. In cases where EPA and DHS have not approved any method of testing, the laboratories use the industry's standard methods published in the "Standard Methods for the Examination of Water and Wastewater."

Two respondents maintain their own state-certified laboratories for testing. These companies conduct the bulk of the necessary testing in-house, but still contract with other certified labs for some types of testing. The rest of the respondents use certified independent labs to conduct testing under contract. Many respondents have programs under which personnel use portable equipment to conduct additional testing for water quality or to confirm the adequacy of the treatment process at various locations.

6. How Did You Test for Each of These Contaminants?

EPA sets methods of analysis for each contaminant or group of contaminants that are published in the Federal Code of Regulations. Testing methods have continuously improved throughout the years, resulting in increased levels of detection of potentially harmful contaminants.

Testing and monitoring are based upon the three types of procedures, source monitoring, distribution system monitoring and "information collection rule" monitoring. The purpose of source monitoring is to ensure that safe water enters the distribution system. Water samples taken from the source of drinking water are tested for general minerals, volatile organic compounds, inorganic chemicals, bacteriological, synthetic organic chemicals, herbicides, pesticides and radioactivity. If drinking water has been treated or blended, the testing takes place after these processes but before it enters the distribution system. DHS approves locations where samples are drawn for testing. The kind of testing required of each utility may vary depending on the water source. For

instance, surface water is subject to unique testing regulations under the Surface Water Treatment Rule.

Distribution system monitoring is intended to ensure that any change to water caused by the distribution system does not create drinking water which violates state or federal standards. Samples taken in a distribution system are tested for bacteriological contaminants, general physical characteristics, lead and copper levels, and residual disinfectants.

The specific rules applied to the testing of water in the distribution system are as follows: "Total Coliform Rule," "Total Trihalomethanes Rule" and "Lead and Copper Rule." Under the Total Coliform Rule, DHS approves locations, frequency of sampling, follow-up protocols, laboratories, and sampler qualifications. Monitoring samples for compliance with the Total Triholomethane Rule are also collected at locations approved by DHS. The monitoring for lead and copper occurs at the taps of the most "vulnerable" customer. All initial lead and copper monitoring was conducted by EPA. However, most recent monitoring was conducted and approved by DHS.

Water quality monitoring in accordance with the "Information Collection Rule" is conducted to compile information required by the "Federal Information Collection Rule" (ICR). Information gathered for the ICR is used to develop a nationwide water quality database, including source and distribution system testing. The ICR applies only to utilities serving more than 100,000 people.

Every respondent indicated that testing was conducted in compliance with then- and currently existing regulations. Nearly all respondents indicated a presumption that testing had been conducted properly because it was performed by state-accredited labs. Some respondents supplemented the required testing with volunteer testing.

7. What Reports Did You (or a Contractor) Create and to Whom Were They Sent?

The written reports discussed by respondents may be divided into four categories: Overall Summary Reports, Water Source Reports, Distribution System Reports, and Treatment Plant Reports. Tables 5 and 6 attached to the first staff report summarize each report discussed by each respondent. Staff determined that the failure of a respondent to discuss a particular report does not necessarily mean that it does not file the report or comply with the requirements by another method. Many respondents indicated that the contracting laboratories that conduct testing electronically transfer the results to DHS, which constitutes compliance with reporting requirements even if the respondent did not indicate that a particular written report is filed. Other utilities explained that they were exempt from filing certain reports, failed to list all of its reports, or that a misunderstanding may exist as to what to call a particular report.

The Overall Summary Reports which many respondents indicate they file based upon their location and reporting requirements include: Annual Reports to DHS, Annual Water Quality Reports to Customers, Area Agency Water Quality Monitoring for the Main San Gabriel Basin, Public Health Goal Reports (every three years), and monthly Water Quality Monitoring Data Report. Every Class A water utility files an Annual Water Quality Report to Customers listing each contaminant, its MCL, and the highest and lowest levels present during the year.

Respondents are required to file either monthly or quarterly reports under the various rules listed above that are applicable based upon their individual circumstances and location. Occasionally, DHS requires special reports from water utilities depending on the specific water quality issues of an individual system.

8. List Each Failure by Type of Test, Date of Test, District and Location. 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 Tests, and Corrective Action Taken.

Table 7-0.M2 in staff's supplemental report dated June 4, 1999 shows a summary of respondents reported failures of water quality tests by regulated contaminant and respondent water utility, not including testing for MTBE and perchlorate, two unregulated contaminants.[26] In total during the 25-year period, respondents together reported 96 failures or tests which exceeded applicable contaminant levels, 83 by Class A and 9 by Class B water utilities. Tables 7-1M-1 through 7-6 show a summary of reported failures by contaminant (not including perchlorate and MTBE), year, and company or district. Utilities reported failures in 46 companies or districts. Several respondents did not have data for the entire 25-year period.

The largest number of failures (61), excluding MTBE and perchlorate, are regarding bacteriological standards established by the Total Coliform Rules and occurred in 1978 and between 1990-1995. The next largest number of failures over the 25-year period reported are as follows: nitrate (13), lead and copper (8), turbidity (8), TCE (3), 1,1-DCE (1), arsenic (1), cyanide (1) and flouride (1).

[26] Perchlorate, a recently discovered potentially harmful contaminant, is listed in an unregulated category and inadvertently under organic chemicals instead of inorganic chemicals. MTBE, a second recently discovered potentially harmful contaminant, is listed under organic chemicals.

The corrective actions respondents indicated were taken regarding specific failures are categorized as follows:

a. Coliform Level - sanitary surveys of water storage and pumping facilities were conducted, along with intensive microbiological testing, and the public was notified. In some cases, the level of disinfectant applied in the surface water treatment process was adjusted. And, in the cases where the source was groundwater, wells were taken out of service and the system was flushed with chlorine.

b. Nitrate Level - wells were taken out service and the public was notified. In some cases, after DHS' approval, well water exceeding the nitrate standard was blended with water of lower levels of nitrate. Blending requires DHS' approval and extensive monitoring of the distribution system at different locations.

c. MCLs for VOCs - wells were taken out of service. Depending on the situation, corrective actions were categorized as: (1) investigation was conducted to determine the source of the contamination; (2) water exceeding the VOC standard was blended with water of better quality from other wells; (3) treatment facilities, such as granular activated carbon (GAC) filters and air stripping plant, were constructed to remove the VOC; and, (4) the well was abandoned. The more frequent failures were for TCE, PCE and "1,1, DCE."

d. Lead and Copper - corrosion control treatment facilities were installed at affected wells and monitoring was increased.

Staff requested respondents to supplement their compliance reports with information regarding any MTBE and perchlorate detection by type of test, date of test, district and location, applicable standards, if any, result of the test,

and action taken, if any. The OII in this proceeding expressly requested information regarding MTBE[27] and perchlorate.[28]

RRB reviewed the responses and found that a substantial majority of respondents provided adequate information. Table 9-0M of staff's June 4, 1999 supplemental report summarizes reported detection by contaminant and utility. Tables 9-1 through 9-5M summarize reported detection by contaminant and district. Five Class As and one Class B reported MTBE detection. Two Class As reported detection higher than the standard for MTBE at the time tests were performed. The substantial majority of MTBE tests were performed in the years 1996 through 1998.

In addition, eight Class As reported perchlorate detection. Two reported higher than the standard at the time tests were performed. The substantial majority of these perchlorate tests were performed in 1997 and 1998. Depending on each case, the action taken by utilities included: (1) continued monitoring of wells and (2) removal of wells from service. In one case, well water exceeding the standard was blended with water having a lower level of perchlorate. Two Class Bs reported that no MTBE or perchlorate test was required by DHS since they purchase water.

Table 9-4M shows that SoCal reported perchlorate detection in its Arden Cordova District's Cordova System. Arden Cordova District has two separate water systems, Arden and Cordova. A closer look at the data submitted indicates that SoCal reported 13 wells with perchlorate detection in the Cordova System. Four of the Cordova System's wells, all removed from service, produced

[27] See Footnote 2, supra.

[28] See Footnote 3, supra.

water with perchlorate concentration higher than the standard in effect at the time tests were performed. According to the 1998 Annual Report for the Arden Cordova District, 17 wells were active and four were inactive.

Class B utilities reported no detection of either MTBE or perchlorate.

Staff followed up on this supplemental data with additional data requests to explain discrepancies between numerous respondents' reports and DHS records. RRB does not identify any specific instance of noncompliance that warrants further scrutiny.

9. What Reports (if any) Indicating You Did Not Meet Standards Were Not Filed Correctly or in a Timely Manner (List Reports)?

Table 8-0M in staff's May 17, 1999 supplemental report shows a summary of reported citations for filing incorrect or untimely reports. Six respondents reported a total of 19 citations from EPA and DHS. The majority of citations reported were issued by the EPA under the Lead and Copper Rule for failing to begin required monitoring on time. Twelve respondents, including seven Class A and five Class B water utilities, received no citations. Tables 8-1, 8-2, and 8-3 show a summary of reported citations by water utility district.

10. What Did You Do if the Levels Exceeded Standards?

The respondents interpreted this question two ways. One group, mainly Class A water utilities, responded that the actions taken were in response to cases when MCLs were temporarily exceeded. The second group responded that the actions taken were in cases of temporary excursions and failures. Actions taken regarding specific situations are summarized as follows:

a. Coliform Level - Sanitary surveys of water storage and pumping facilities were conducted, along with intensive microbiological testing, and the public was notified. In some cases, the level of disinfectant

applied in the surface water treatment process was adjusted. And, in the cases where the source was groundwater, wells were taken out of service and the system was flushed with chlorine.

b. Nitrate Level - wells were taken out service and the public was notified. In some cases, after DHS' approval, well water exceeding the nitrate standard was blended with water of lower levels of nitrate. Blending requires DHS' approval and extensive monitoring of distribution system at different locations.

c. Temporary Excursion Above MCLs for VOCs - wells were taken out of service, confirmation samples were taken and the water was tested for six months to determine whether excursion was a one-time occurrence. Depending on the situation, the actions taken are categorized as (1) investigation was conducted to determine the source of the contamination; (2) the water exceeding the VOC standard was blended with water of better quality from other wells; (3) treatment facilities, such as GAC filters and air stripping plant, were constructed to remove the VOC; and (4) and the well was put out of service permanently. The more frequently detected VOCs were TCE, PCE and "1,1, DCE."

d. Lead and Copper - corrosion control treatment facilities were installed at affected wells and monitoring was increased.

11. What Information Did You Provide the Customers and When?

The information provided customers was generally in connection with violations of bacteriological, nitrate, and lead and copper levels. One utility reported that it notified the public following the violation of the turbidity performance standard. Another indicated that it issued a Boil Water Order after a severe earthquake. In addition, the majority of respondents reported that they

provided customers the Annual Water Quality Report, including a list of each contaminant, its MCL, and the highest and lowest levels present during the year. Also, some respondents reported that they made the Public Health Goals Report available at public meetings. Nearly all respondents indicated that they followed DHS regulations and sent the required information by direct mail or published it in a local newspaper. One respondent reported that it "provided its customers with a letter explaining its dispute with the DHS and stating its own position." Almost all respondents reported the date that information was provided to customers or indicated that they followed the DHS' time requirements.

12. Did You Take any Actions that Were Not Specifically Required by DHS in Testing or Treating the Water or Notifying the Public?

All Class A water utilities explained actions taken which were not required by DHS. Among Class B water utilities, three responded that they took some additional actions, three did not take any actions. The responses are categorized as follows:

a. Monitored sources of water by anticipating new regulations and emerging issues and contaminants, such as perchlorate, MTBE, arsenic, radon, boron, and viruses.

b. Adopted policies that exceeded the monitoring and testing requirements established by DHS.

c. Participated in activities related to areas of customer communication, such as providing conservation material and handouts by mail and at community functions.

d. Participated in evolution of statewide monitoring programs, including cross-connection control and electronic data transmittal to DHS.

e. Implemented treatment technologies such as air stripping VOCs from groundwater and removal of VOCs by carbon adsorption.

f. Provided water quality reports to customers prior to state law mandating such information and provided information to customers about water quality subjects and monitoring results.

g. Encouraged professional staff to participate in the AWWA's activities and provided expertise on advisory committees of the American Water Works Research Foundation and as board members addressing drinking water research.

h. Implemented Water Treatment Operators Certification Programs to further educate field staff.

i. Participated in monitoring chemicals such as VOCs, arsenic, perchlorate, and MTBE in advance of regulations.

B. Additional Scoping Memo Inquiries

After the parties in this proceeding narrowed the alleged harmful contaminants to roughly 30, the Scoping Memo ordered respondents to answer additional questions regarding the specified contaminants and all parties were asked to specify any alleged violations or other alleged problems regarding drinking water quality. CWA and 10 respondents filed responses. Parties representing plaintiffs in pending lawsuits filed no responses to these questions.

In summary, all of the water utilities contend that the water supplied in the last 20 years has been healthy or had no other problems. Six out of the ten utilities responded that they are aware of allegations that water delivered by the utilities is alleged to be unhealthy, unsafe or had other problems. Such allegations have been made in numerous pending lawsuits, this proceeding, DHS citations, Quality Assurance Customer Inquiries and customer complaints. The

additional information elicited from parties' responses to the additional questions related to customer complaints of water quality during the past 20 years.

Citizens reports that concerns regarding the healthfulness of the water are raised in customer inquiries and are relatively infrequent. The majority of the time, Citizens resolves the concerns to the customer's satisfaction. Since Citizens has not made a written log specifically dedicated to recording customer complaints until recently, it could not provide specific information regarding these allegations by the requested date. However, Citizens did provide such information after a search of its full customer service log. SoCal provided a chart detailing the allegations made by customer inquiry and a pending lawsuit for the period May 1987 to April 1999. The chart includes the occurrence, the location, the contaminant alleged and the action taken in each allegation. SJWC indicates that the customer inquiries about water quality since June 1995 have been compiled in a computer database. It comments that the number of inquiries is miniscule compared to the total number of water customers.

Suburban responds that it has been named in eight civil lawsuits, the details of which have previously been supplied to the Commission in its compliance report, but did not indicate the number and basis of Quality Assurance Customer Inquiries. Dominguez responds that it is only aware of two DHS citations and customer inquiries which were not disclosed. Citizens responds that the allegations in civil suits are not specific enough to ascertain a basis for the plaintiffs' claim. In addition, they state that the problem with discovery issues in its litigation prevents them from providing specificity in the alleged occurrences, their location and the contaminants involved. San Gabriel is named in eight lawsuits not specific as to the location of the alleged occurrences, which water utility provided the water, or the period of time over which it occurred. SoCal's chart indicated that between early May 1987 to late April 1999

there was one lawsuit and 114 customer calls alleging of poor water quality. Of these customer complaints; 39 were health concerns, 71 cited a variety of unsafe conditions (odor / smell, taste, and appearance), and 5 other customer inquiries. The specific location was not indicated, nor whether they had supplied the water. SJWC reports one occurrence where an overdose of caustic soda on April 12-13, 1995 led to approximately 250 customer calls.

The customer complaints discussed by respondents, by and large, are complaints not filed with the Commission. Of the six utilities that have received allegations of unsafe drinking water, the earliest time that a utility learned of the allegations is 1980, and the latest was 1997. Outside of the lawsuits, all the utilities that have received complaints believe their actions were in compliance with instruction or orders from the DHS.

Of the six utilities that have allegations that water delivered by the utilities is unhealthy, unsafe or had other problems, four of the utilities also have allegations that the water delivered did not meet the state or federal drinking water requirements and regulations and orders of the Commission.

All respondents replied that they are in compliance with existing state or federal drinking water standards and Commission regulation and orders, and that there is no evidence that these standards are being violated. Likewise, all utilities replied that they are in compliance with existing state or federal primary drinking water quality procedures and Commission-required procedures, and that there is no evidence that these procedures are being violated. All the utilities responded that they have no allegations that they have failed to comply with DHS testing requirements.

DHS responds that the regulated utilities have not "unreasonably failed to comply" with DHS regulation or orders, and that Alco Water Company has

challenged the propriety of DHS actions regarding a citation in 1993. This matter is currently pending in federal court.

Six of the utilities responded that they are aware of Commission decisions or orders that relate to correction or prevention of safe drinking water with which they all indicate they have complied. Three of these respondents attach the Commission orders in question. Three other respondents were unaware of any such Commission decision or orders for its companies.

C. Discussion

Initially, numerous parties posed numerous objections to the respondent utilities' compliance reports. However, each objection was rectified. Respondents were ordered to provide to all parties supporting documents relied upon to file the compliance reports. Staff timely requested that respondents supplement their compliance reports with statistics regarding secondary MCLs and MTBE and perchlorate test results. Staff verified the compliance filings by randomly sampling 35% of the reported data and followed-up on answers given by respondents that conflicted with DHS records. This follow-up substantiated either the company or DHS records. Several respondents who did not report the entire 25-year period were not required by law to maintain records for this length of time.

After review and follow-up of all compliance reports including verifying 35% of responses, staff indicates that respondents have satisfactorily answered the 12 questions posed by the Commission in the compliance reports. Staff and DHS agree with each respondent's representation, except the currently disputed citation of Alco Water Company, that each Class A and B utility has and is satisfactorily complying with DHS standards and orders. Staff concludes that no further inquiry into compliance is needed. Based upon this informed opinion

and verification of satisfactory compliance by DHS, we agree, except for Alco Water Company, discussed below.

In staff's comments filed on June 21, 1999, staff concludes that answers to Question 26 in the Scoping Memo were vague and incomplete and that analysis of these answers was meaningless.[29] Some respondents misconstrued this question to report Commission orders or decisions during the past 25 years related to correction of water quality problems, without also reporting those related to prevention, as requested. The number of such orders that were reported ranged from 1 or 2 to 214.

We believe that further analysis of customer complaints to determine whether these complaints may be a precursor to significant water quality problems and whether rules regarding the reporting to this Commission the number and type of customer complaints is warranted. Therefore, we recommend that this review be accomplished in a separate rulemaking following the conclusion of this proceeding. The focus of this long-planned proceeding should be to consider revisions of GO 103 regarding operating standards, plant facilities water quality, other 103 subjects, new water treatment technologies, procedures for managing extremely impaired sources of supply, and the relevant costs for increasing levels of treatment technologies. As a prelude to formal Commission review in the G.O. 103 rulemaking/investigation, utilities should meet with staff to ensure that the answers to Question 26 are neither vague or incomplete before resubmission,.

[29] Question 26 asked utilities to provide each Commission order within the past 25 years to correct or prevent a violation of a water quality requirement.

Additional staff investigation of past compliance with Commission orders may be accomplished without special orders in any rate proceeding of these individual utilities. Such investigations of past compliance and general issues of water quality are always appropriate parts of any general rate case proceeding.

VIII. Further Reporting By Alco Water Company

DHS has reviewed its files and found that all but one of the water companies have satisfactorily complied with DHS orders and citations. The exception is Alco Water Company. DHS cited Alco Water Company for a bacteriological failure in the Fall of 1993. The citation required Alco Water Company to notify its customers. Alco Water Company sought judicial review of this and other DHS citations. The lawsuits were eventually dismissed. However, Alco Water Company has never provided the required notification. Alco Water Company was charged an enforcement fee, related to the 1993 citation and other matters arising during the same time period. Alco Water Company has not paid this fee. The DHS referred these events to the federal government for investigation. Litigation resulting from that investigation is still in progress. The parties reported that a trial may take place in the latter part of 1999.

A. Discussion

Staff does not request any investigation or specific orders to Alco Water Company at this time. However, we will order Alco Water Company to report the results of the circumstances DHS describes in this proceeding in its next rate proceeding, as well as whether the fines DHS assessed have been paid. Upon receipt of this report, we expect staff to evaluate whether an investigation into these circumstances is warranted, including whether a fine should be assessed for any nonpayment of DHS fines.

IX. Comments on Draft Decision

The draft decision of the Principal Hearing Officer in this matter was mailed to the parties in accordance with Public Utilities Code § 311(g) of the Rules of Practice and Procedure. The draft decision of the Principal Hearing Officer in this matter was mailed to the parties in accordance with Public Utilities Code § 311 (g) of the Rules of Practice and Procedure. The following comments and one reply were timely filed and we have made the following revisions to the draft decision as discussed below.

CWA requests that the draft include more expansive statements regarding our conclusions regarding jurisdiction and drinking water policies as described in the Interim Opinion in this proceeding. CWA requests that staff's recommended topics for a future OIR be included in the order to open an OIR. We have added language regarding jurisdiction and clarified that topics suggested by staff for a future OIR are acceptable. Moreover, the future OIR / OII will include additional topics specified in the past as those of concern to the Commission and will also undertake the currently planned revision of GO 103.

The water utilities filing joint comments request that we delete entirely the discussion of Aerojet's position that regulated utilities can be held liable despite any compliance, especially since the opinion releasing them from liability is now under review by the California Supreme Court. We agree that this language may be removed.

Aerojet, Huffy and McDonnell Douglas Corporations and Wynn Oil Company (Aerojet) filed joint comments requesting that we take the following action in this proceeding:

1. Analyze the potential health risk associated with the limited exceedances summarized in the record for periods during which existing DHS maximum contaminant levels and other regulatory standards were in place;

2. Analyze monitoring data available to the Commission for those periods during which there were no standards

governing particular contaminants, using existing DHS standards to assess the potential health risk associated with those data;

3. Consider what conclusions, if any, can be drawn regarding the health risk associated with water served by the regulated utilities during periods for which monitoring data may not be available; and,

4. Institute sanctions against EL&L and RK&M for not responding to discovery requests, but do not bar them from participating in the proceeding.

Aerojet et al. desire further hearings to receive testimony from expert witnesses on the issue of whether a health risk to the public existed prior to the establishment of DHS standards and to more fully discuss the health impact of the exceedances, an area in which it contends DHS is not fully informed.

The water companies, filing jointly, reply to these requests, contending that to do so changes the focus and purpose of this investigation. The water companies contend the draft decision makes adequate and appropriate findings regarding health risks. They contend to speculate about the health risk during periods when no standards applied is an unwarranted expansion of this proceeding and erroneously implies that there were periods when the regulated utilities were under no standards, ignoring GO 103. The water companies assert that the findings and conclusions in the draft decision reasonably and correctly lead to the conclusion that the minimal exceedances did not constitute a danger to public health.

We conclude that an investigation into whether a health risk to the public existed prior to the establishment of DHS standards in not warranted at this time. The Commission's major focus must remain on assuring the healthfulness of

water, and we do not at this time see the relevance of further investigations into events distant in time.

In addition, Aerojet made critical comments to clarify the discussion of the science of public health at various points in the draft decision. We now reflect and incorporate many of the suggested changes and adopt their recommendation not to bar EL&L from further participation in this or any continuation proceeding.

Citizens and Alisal, in separately filed comments, request correction of factual errors which have been made. Since we clarify or correct the errors alleged by Alisal, its motion to receive the basis upon which certain facts are made is denied.

Lastly, the corrections indicated by RK&M have been made.

Findings of Fact

1. On December 4, 1998, EL&L and RK&M filed motions challenging the Commission's jurisdiction to conduct this proceeding, alleging, among other things, that DHS and EPA are responsible for setting water quality standards and the enforcement of laws related to the Safe Drinking Water Acts.

2. In D.99-06-054 (as later corrected by D.99-07-004), the Commission denied EL&L's and RK&M's motions challenging the Commission's jurisdiction, holding that the jurisdictional challenges are without merit and that the Commission's and DHS's authority and responsibilities are intertwined and complementary to each other.

3. EL&L and RK&M timely filed applications for rehearing of D.99-06-054, alleging various legal errors.

4. In D.99-09-073, the Commission modified D.99-06-054 and denied EL&L's and RK&M's applications for rehearing of D.99-06-054, again affirming its

jurisdiction with DHS on issues relating to the enforcement of water quality standards.

5. The Commission adopted General Order 103 in 1856, has maintained it as its basic policy on water supply and water quality issues, and implemented that policy by rules, regulations, and decision orders.

6. The Commission and DHS signed Memorandums of Understanding in 1986 and 1006 identifying the roles of each party and their mutual, cooperative relationship in addressing water quality issues that involve the delivery of drinking water by public water utilities.

7. On July 28, the Ratepayer Representation Branch of the Water Division filed a motion for leave to file its numerous reports and data requests in this proceeding since they inadvertently were not filed. These reports were timely mailed to parties on the various dates completed. No party opposes this motion.

8. On May 3, 1999, the presiding officer granted Citizens and Cal-Am's motions to compel EL&L to answer their data requests, denying Cal-Am's request for sanctions. The presiding officer ordered EL&L to provide this information within ten days. EL&L violated this order by failing to do so.

9. Because EL&L did not answer Cal-Am's data requests, Cal-Am subsequently filed a second motion to compel EL&L to answer the same data requests, requesting evidentiary and monetary sanctions.

10. In the Scoping Memo issued on May 3, 1999, the presiding officer ordered parties and DHS to address additional questions in an effort to narrow the dispute in this proceeding. EL&L and RK&M did not answer the Scoping Memo questions.

11. EL&L has caused unnecessary litigation costs of $15,000 to Cal-Am and excessive costs of $5,000 to the Commission by failing to comply with Cal-Am's data requests.

12. EL&L has received answers to all questions and information requested during discovery in this proceeding.

13. EL&L provided no justifiable reason for not answering respondents' data requests or the questions in the Scoping Memo and instead seeks to withdraw from the proceeding without answering these questions. EL&L unjustifiably contends it intervened to monitor this proceeding, took affirmative positions at the direction of the Commission and in the public interest to complete the record in this investigation. EL&L denies that it has any information critical to the outcome of this investigation. EL&L contends it is not a party to this proceeding and cannot be compelled to respond to data requests which are beyond the scope of this investigation and the limits of discovery.

14. RK&M received all information requested during discovery from respondents regarding their compliance reports in this proceeding, yet failed to answer the questions in the Scoping Memo seeking to narrow the dispute in this proceeding.

15. Suburban subsequently filed a motion to compel RK&M to answer the Commission's questions in the Scoping Memo.

16. RK&M provided no justifiable reason for not answering the questions in the Scoping Memo and instead sought to withdraw from the proceeding without answering these questions. RK&M simply alleges, unjustifiably, that it has no further need to participate since the dispute over jurisdiction was resolved in the Interim Order and in that order the Commission indicated it would not address any impact the investigation in this proceeding may have on civil lawsuits.

17. EL&L and RK&M did not request to limit their appearance or make a special appearance to challenge jurisdiction in this proceeding. Both parties filed Petitions to Intervene as full parties which were granted and participated as full

parties by engaging in discovery and recommending the scope, schedule, and issues of this and any subsequent proceedings.

18. EL&L admits they have received all information requested from respondents in discovery in this proceeding, yet they did not answer any data requests or the questions in the Scoping Memo and contend that it has no meaningful information to do so.

19. EL&L did not appear at the Oral Argument scheduled at its request and notification of its intended absence reached the Assigned Administrative Law Judge after the argument was held.

20. Neither EL&L nor RK&M have provided any factual basis in this proceeding for allegations that respondents have at any time delivered drinking water that is harmful to the public or violated applicable drinking water standards for the past 25 years.

21. EL&L and RK&M's intentional disregard of its discovery obligations has irreparably harmed Citizens, Cal-Am and Suburban's due process rights to conduct full and fair discovery in this proceeding.

22. The presentation of evidence by EL&L or RK&M in this or future proceedings investigating issues not completed in this proceeding to show that respondents have delivered drinking water during the past 25 years that poses a health hazard to the public will violate the respondents, parties herein and DHS' right to due process.

23. The Commission's personal jurisdiction over EL&L should be retained until EL&L complies with all orders in this final decision.

24. General Order 103, P.U. Code 770(b), and a multitude of individual Commission decisions establish overall Commission policy and also require that all regulated water utilities comply with DHS rules, regulations, and orders.

25. DHS is the primacy state agency authorized to implement statewide water quality requirements under federal guidelines and to monitor and enforce state and federal requirements.

26. DHS has set primary and secondary MCLs for numerous known contaminants which are published in the CCR. DHS has also set ALs of specified contaminants and requires monitoring of unregulated contaminants on this list. DHS has also set testing, sample-taker, follow-up after contamination detection and monitoring requirements applicable to regulated water utilities.

27. DHS sets MCLs and ALs under procedures prescribed by the Administrative Procedures Act.

28. DHS sets MCLs and ALs based upon a health risk analysis including a threshold level of one excess case of cancer per one million people exposed by drinking two liters of water per day for 70 years, special impacts of contaminants on infants, and the increased effect of certain contaminants on humans. This threshold level for each contaminant with special considerations is reasonable.

29. When the level of an organic chemical exceeds 10 times the MCL and this is confirmed by a sample taken within 48 hours of receiving the results from the initial sample, the source is taken out of service, with customer notification. An exceedance less than 10 times the MCL requires customer notification and increased frequency of sampling. The 10-times-the-MCL criterion follows the convention in risk assessment for noncarcinogens that includes uncertainty factors that are in units of 10, and for carcinogens that includes 10-fold expressions of risk, such as one excess case of cancer per million, one per hundred thousand, or one per ten thousand. This criterion provides a second tier to the MCL to address contamination that significantly exceeds the MCL and could potentially reduce the “safety cushion” built in by the risk assessment.

30. Because the threshold level for an MCL or AL is set near zero contamination, where levels of contamination are below an MCL or AL or temporarily exceed these levels, no health hazard is reasonably expected to occur.

31. Parties commenting on existing water quality regulation make no recommendations for additional MCLs, ALs or unregulated chemicals.

32. DHS' existing requirements for drinking water quality adequately protect the public and no additional MCLs, ALs or unregulated contaminants are warranted. However, the detection of new contaminants and procedures to monitor newly discovered contaminants that have no DHS requirements warrant additional consideration in workshops or a new rulemaking proceeding.

33. Respondents adequately reported results of contamination testing during the past 25 years. Numerous respondents have detected numerous levels of contaminants exceeding DHS requirements without committing violations of those requirements. Numerous respondents have incurred citations from DHS. However, these results do not show a pattern of unreasonable violations of DHS water quality regulation.

34. Based upon the information provided by respondents and verification by staff and DHS, all Class A and Class B regulated water utilities, except Alco Water Company, have satisfactorily complied with DHS regulation and requirements. Alco Water Company has challenged the propriety of DHS actions regarding a 1993 citation. This matter is currently pending in federal court. Alco Water Company should report in its next rate proceeding before this Commission on this federal litigation and any DHS citations regarding public notice for the alleged 1993 past contamination as described in this proceeding. Staff should recommend further investigation of this matter should DHS fines be

warranted, enforceable not paid or otherwise resolved at the time of Alco Water Company's next rate case filing.

35. The recommendations of parties and DHS for supplementing existing procedures and to follow-up for detection of new contaminants and for possible new rules governing customer complaints regarding water quality, plus possible new rules or policies on the blending of supply courses, balancing the costs of best available treatment technology (BATT) against increased rates for ratepayers, revising GO 103, and other water quality issues not specifically addressed in this proceeding warrant further exploration and investigation in a new a rulemaking proceeding.

Conclusions of Law

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

2. The Commission has exercised concurrent jurisdiction with DHS over the quality of drinking water provided by regulated water utilities.

3. The motion by the Ratepayer Representation Branch of the Water Division for leave to retroactively file its reports should be granted.

4. EL&L has intentionally misused the discovery process as defined by Section 2023(a)(5), (7) and (8)[30] of the Code of Civil Procedure by willfully and without substantial justification refusing to comply with a lawful discovery order

[30] CCP § 2023 states: "… (5) Making, without substantial justification, an unmeritorous (Footnote: So in enrolled bill.) objection to discovery… (7) Disobeying a court order to provide discovery… (8) Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery…"

and to answer crucial questions posed by the Commission to narrow any dispute in this proceeding.

5. RK&M has intentionally misused the discovery process as defined by Section 2023(b)(5) and(8) of the Code of Civil Procedure by willfully and without substantial justification refusing to answer crucial questions posed by this Commission to narrow any dispute in this proceeding.

6. There is no "substantial justification" that make the imposition of sanctions against EL&L and RK&M "unjust," as defined under CCP § 2023(b)(1).

7. Because of their unlawful refusal to answer data requests or questions posed by the Commission in this proceeding, relevant evidentiary and monetary sanctions should be imposed against EL&L under the authority of CCP § 2023(b)(1).

8. Because of their unlawful refusal to answer questions posed by the Commission in this proceeding, relevant evidentiary sanctions should be imposed against RK&M under the authority of CCP § 2023 (b)(1).

9. Commission jurisdiction over EL&L continues until they have paid sanctions imposed and complied with all orders issued in this decision.

10. Commission jurisdiction over RK&M continues until they have complied with all orders in this decision.

11. DHS requirements governing drinking water quality adequately protect the public health and safety.

12. Regulated water utilities except Alco Water Company have satisfactorily complied with past and present drinking water quality requirements.

13. Staff should pursue Alco Water Company's compliance with DHS orders in its next rate proceeding or a future separate investigation.

14. The Commission should explore the recommendations made by parties in this proceeding and other water quality issues not addressed by the Commission in this Decision in a new rulemaking proceeding.

15. This proceeding should be closed.

O R D E R

IT IS ORDERED that:

1. The motion by the Ratepayer Representation Branch of the Water Division for leave to retroactively file its reports is granted.

2. California-American Water Company's (Cal-Am) motion to compel Algorri & Algorri (EL&L) to comply with the May 3 discovery ruling is denied in part and granted in part.

3. Suburban Water Systems' (Suburban) motion to compel answers to questions in the May 3 Scoping Memo is granted in part.

4. EL&L's motion to withdraw as a party in this proceeding is granted upon the condition that sanctions below are paid. The effective date of withdrawal is the date of total compliance with sanctions.

5. Rose, Klein & Marias's (RK&M) motion to withdraw as a party in this proceeding is granted effective on the date of this order.

6. EL&L and RK&M are prohibited from presenting in this proceeding, or any further Commission proceeding to continue the investigation of issues addressed in the final order herein, any evidence that contradicts the decision in this proceeding that was available and could have been introduced by EL&L during the course of this proceeding.

7. Within 90 days after the effective date of this decision, EL&L shall provide restitution to the State of California for the Commission's expenses associated with resolving the willful violation of a lawful discovery order, $5,000.

8. Within 120 days after the effective date of this decision, EL&L shall pay to Cal-Am $15,000 as reimbursement for unnecessary attorney's fees and costs to pursue compliance with lawful data requests and a lawful discovery order in this proceeding.

9. Within six months after the effective date of this order, the Commission Water Division (staff) will present to the Commission a draft Order Instituting Investigation and / or Rulemaking that addresses the recommendations for follow-up on water quality regulation and monitoring made in this proceeding and other water quality issues of concern not addressed by the Commission in this Decision. In preparation for drafting such a proposed order, staff will timely provide notice to the service list in this proceeding and other known interested parties and convene a workshop.

10. In its next rate case proceeding, Alco Water Company will report on the status of pending federal litigation involving the 1993 Department of Health Services (DHS) citation discussed in this proceeding and any resolution of this matter, including whether any fines assessed by DHS are warranted and have been paid or otherwise resolved and the date of any payment.

11. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.