

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

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

Investigation 98-03-013  
(Filed March 12, 1998)

**ASSIGNED COMMISSIONER'S SCOPING MEMO AND  
RULING ON MOTIONS TO COMPEL**

Pursuant to Rule 6.2 of the Commission's Rules of Practice and Procedure, this scoping memo identifies the issues and schedule in this proceeding and rules on matters which have occurred since the Second Prehearing Conference (PHC) on January 26, 1999.

**CWA's Scoping Memo Concepts**

At the prehearing conference on January 26<sup>th</sup>, California Water Association (CWA) filed and distributed a memo of concepts recommended for the scoping memo. Numerous parties protested the consideration of this document at the PHC and later in noticed letters to me. Since this "memo" was not requested or scheduled and other parties had inadequate opportunity to respond to it, we have not considered it in finalizing this scoping memo. In the future, parties will abide by Rule 45 when requesting that we take any specific action in this proceeding or if they wish to oppose any action taken by another party.

## **Role of DHS**

The Department of Health Services (DHS) is the state agency primarily responsible for the administration of federal and state safe drinking water laws and attendant regulations. This Commission has previously relied on the vast experience and responsibility of DHS in the promotion of safe drinking water and DHS has agreed to assist us in this proceeding. General Order 103 sets the compliance standard for regulated utilities which is to be applied in this proceeding. General Order 103 provides in relevant part:

“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)

By General Order 103, DHS determines, “except as otherwise ordered by the Commission,” whether a regulated utility has failed to comply with safe drinking water laws. Accordingly, to the extent that clarification is needed on questions of a utility’s compliance or general compliance standards, DHS will be consulted.

DHS has not expressed a wish to become a party in this proceeding and we do not intend to make the agency a party. As a sister agency and partner in the effort to insure that the water provided by regulated water utilities is healthy and safe, we intend to continue to solicit information and reports from DHS. We will ask them to publicly respond to our inquiries and parties will have an opportunity to comment on their response. Attached as Appendix B is a list of questions for DHS. These questions are intended, for the most part as “follow up” inquiries to some responses in DHS’ response to OII questions filed earlier in this proceeding.

## **Motions to Compel**

On March 29, 1999, California-American Water Company (Cal-Am) moved to compel answers to certain data requests from three law firms (Engstrom, Lipscomb & Lack, Girardi & Keese, and DeWitt, Algorri & Algorri) and certain clients of these law firms participating as a joint-party (collectively referred to as "law-firm intervenors"). They refused to answer the data requests asserting that the Commission has no personal jurisdiction over the firms or its clients.

On April 15, 1999, Citizens Utilities Company of California (Citizens) filed a similar motion to compel directed against the same law-firm intervenors. Citizens' data requests were more limited than Cal-Am's, but of the same tenor. Responses were due April 26, 1999, pursuant to the Law and Motion Resolution, ALJ164, none were filed. However, law-firm intervenors filed a response on April 28, 1999, which was virtually identical to its response to Cal-Am's motion. Since this response is the same as the one previously filed, the arguments are considered in this ruling.

In all material respects, the issues raised and the reliefs sought in the two motions to compel are identical, and our decision today will dispose of both motions.

## **Background**

The intervenors from whom Cal-Am seeks to compel responses are, according to Cal-Am, the law firms representing either already-named plaintiffs in various superior court law suits in which Cal-Am is named as a defendant, or individuals who expect to become plaintiffs in these law suits or similar litigation against Cal-Am.

Cal-Am served a set of 14 data requests on these law firms. The requests, in essence, ask about the basis of law-firm intervenors' contentions regarding Cal-Am allegedly delivering contaminated water, including such things as: the

identity and source of the contaminants; the time, place, and duration of contaminated deliveries; any inadequacy of past and current state and federal water quality standards; and, any instances where Cal-Am failed to comply with decisions of this Commission.

Law-firm intervenors objected to all 14 data requests “on the grounds that the PUC has no jurisdiction or authority over the plaintiffs which [law-firm intervenors] represent in the underlying litigation. Plaintiffs are not the subjects of the OII. Thus, plaintiffs are not subject to the discovery requests.”

Cal-Am urges that we order law-firm intervenors to “file responsive answers” to these data requests. Cal-Am further asks that if law-firm intervenors do not file “full, responsive, and timely answers,” we thereafter bar law-firm intervenors from contending that Cal-Am delivered contaminated water, that the water quality standards applicable to such delivery were inadequate, or that Cal-Am at any time failed to comply fully with such standards.

### **Discussion**

The Constitution of California authorizes this Commission, subject to statute and due process, to establish its own procedures (Article XII, Section 2) and to examine records, issue subpoenas, administer oaths, take testimony, and punish for contempt (*Id.*, Section 6). In furtherance of this Constitutional authority, the Legislature has empowered the Commission to adopt rules of practice and procedure, Pub. Util. Code Section 1701; “to cause the deposition of witnesses... to be taken in the manner prescribed by law for like depositions in civil actions in the superior courts,” Pub. Util. Code Section 1794; and to “compel... the production of books, waybills, documents, papers, and accounts.” (*Id.*) In the exercise of its power and jurisdiction over public utilities, the

Commission “may do all things, whether specifically designated in [the Public Utilities Act] or in addition thereto, which are necessary and convenient” to such exercise. (Pub. Util. Code Section 701.) This Constitutional and statutory authority easily encompasses the power to compel the production of the documents that Cal-Am seeks.

Law-firm intervenors make three arguments in their opposition to Cal-Am’s motion. The first argument repeats the objection that the Commission has no authority or jurisdiction over law-firm intervenors or their clients. In light of the Constitutional and statutory authorities just cited, and the many Commission precedents relying on those authorities, law-firm intervenors are mistaken. Furthermore, law-firm intervenors have asked for and received full-party status in this proceeding for themselves and their clients, and in that capacity they have propounded, and have received responses to, data requests of their own. Any protection that law-firm intervenors might have had by remaining non-parties, or by making a limited appearance to dispute personal jurisdiction, they have long since waived. Finally, the Commission has the power to subpoena information even from nonparties.

We note Cal-Am’s statement, in its motion, that law-firm intervenors have objected to its data requests only on the single ground, just discussed, of the Commission’s purported lack of “jurisdiction or authority.” Cal-Am asserts that law-firm intervenors’ failure to object on other grounds waives all such objections. Cal-Am is correct; however, as we explain below, even if law-firm intervenors’ vague objection were sufficiently explicit to preserve their other two arguments, neither of those arguments has merit.

Law-firm intervenors' second argument is that Cal-Am's data requests are beyond the scope of the order instituting this investigation.<sup>1</sup> Law-firm intervenors reason that the investigation directs specific questions to the water utilities and to the Department of Health Services, not to the clients on whose behalf the law firms have brought suit against certain water utilities. This reasoning is, to put it mildly, unconvincing. The law suits concern delivery of allegedly contaminated water. Presumably, law-firm intervenors believe they have some factual basis for these law suits. Without intending in any way to adjudicate the merits of these law suits, this Commission is and ought to be concerned about the claims that have been made, and how the utilities have responded to complaints from their customers about water quality.<sup>2</sup> Cal-Am's data requests are reasonably related to these and similar matters that go to the heart of this investigation, and the requests are addressed to people who purport to have directly relevant information on these matters. Thus, Cal-Am's data requests are appropriate discovery for this forum.

Law-firm intervenors' third argument is that Cal-Am's data requests go beyond the limits of discovery permitted pursuant to Pub. Util. Code Section

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<sup>1</sup> Law-firm intervenors make this argument without prejudice to their more fundamental objection that this Commission does not have jurisdiction to investigate even those matters that are within the scope of the order instituting this investigation. We address this fundamental objection in the interim decision.

<sup>2</sup> Law-firm intervenors are under the impression that the Commission is concerned solely with the setting of rates. In fact, the Commission's regulatory duties under the Public Utilities Code go much further. Among many other things, the Commission must ensure that water utilities maintain such service and facilities as are necessary for the safety and health of their customers, employees, and the general public. See, e.g., Pub. Util. Code Sections 451, 761, 762, 768, 770, and 8201.

1794 and Code of Civil Procedure Section 2020. This argument contains three further points: the law firms and their clients are an association whose individual members should not be subject to discovery merely by virtue of such association (citing Decision (D.) 94-08-028); Cal-Am's data requests are "contention interrogatories" that (under the cited statutes) are not permitted as to nonparties; and, finally, the data requests involve information under Cal-Am's control. These points have no merit.

As noted earlier, law-firm intervenors have been made parties to this proceeding at their request and have conducted themselves as parties, participating in every aspect of the investigation since their request to intervene. Moreover, by their own account, law-firm intervenors have filed suit on behalf of more than 500 individuals "alleging delivery of contaminated well and ground water." It is preposterous for law-firm intervenors to proclaim that now requiring them to provide the factual bases to their allegations would impose an undue burden or other unfairness. To the contrary, allowing law-firm intervenors to freely conduct discovery in this investigation without themselves having to respond to proper data requests would amount to an abuse of our process.

Law-firm intervenors point to D.94-08-028 as insulating members of an "association" from having to respond to data requests directed to the association. That decision does not support law-firm intervenors' position. The decision dealt with a trade association, and we concluded that "the Commission cannot compel an association to require its individual members to answer data requests." (55 CPUC2d 672, 678.) In this proceeding, law-firm intervenors are not a trade or other association but (1) individuals claiming individual causes of action against water utilities, and (2) the law firms that are representing those

individuals before the courts and this Commission. None of the reasoning we applied to deny a motion to compel in D.94-08-028 applies to the case at bar.<sup>3</sup>

However, while granting the request to compel production, we will deny without prejudice Cal-Am's request for imposition of sanctions at this time. The requested sanctions, in the form of a ruling that would bar law-firm intervenors from contesting certain facts regarding the adequacy of water quality standards and Cal-Am's compliance with those standards, should be reconsidered, along with other potential sanctions, should law-firm intervenors fail to produce the information as we require.

### Issues

Let me now turn to the scope of this proceeding. Clearly, our starting point remains the following questions which were posed in the Order Instituting this Investigation(O II):

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

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

“Are water quality standards adequate and safe, including, without limitation, whether the maximum contaminant levels (MCLs),

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<sup>3</sup> Even if we were to apply the holding in D.94-08-028 to the present case, we would not thereby preclude Cal-Am from pursuing discovery against the individual plaintiffs among law-firm intervenors. As we there noted, “[I]f [the utility] wants to obtain information from the individual members of [the association], [Pub. Util.] Code Section 1794 permits discovery by way of deposition of non-party witnesses.” (55 CPUC2d 678.)



Action Levels, and other Safe Drinking Water Act requirements relating to substances such as VOCs and Perchlorate and any other contaminants, such that these standards adequately protect the public health and safety?

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

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

These questions set the parameters of this investigation and serve as the umbrella inquiries. They do not tell us, however, how to proceed. They require both application and refinement. With that in mind, we have posed additional questions for the parties in this proceeding which should assist us in focusing and amplifying points of discussion for this investigation (See Appendix A). These questions are organized under the general concepts: (1) compliance with safe drinking water requirements; and (2) adequacy of safe drinking water requirements and should be answered within the Limitations Focusing Proceeding Issues discussed below. Appendix A questions are designed to answer some of the questions that my review of those posed in the OII brought to mind, such as:

- Is there a problem with the water provided by private water companies?
- If so, what is it?
- How were the standards for contaminant levels in water set for private water companies?
- If standards are alleged to be problematic, then we might ask, How were the standards for contaminant levels in water set for private water companies?

- What procedures are followed to ensure that water served to customers meets these standards?
- What are the testing protocols followed in California pursuant to DHS?
- What has staff found concerning the practices of California companies concerning testing and compliance with standards?
- What evidence has our staff found concerning whether safety procedures and reports are followed by each water utility? Should changes in reporting or Commission practices follow?
- Is there any evidence of violations of standards and procedures that warrants an adjudicatory investigation? Should an individual utility's compliance be further examined?
- Are the procedures by which drinking water standards are administered problematic? If so, then which ones?
- In particular, what procedures are in place to deal with water that fails to meet Minimum Contaminant Levels? How are "temporary excursions" handled?
- How and when are wells shut down? How were these procedures developed? Are these procedures adequate?
- Are the procedures by which the standards are administered problematic? If so, then which ones?

### **Final Decision/Proceeding Continuation**

Upon receipt of the responses and replies to the questions in Appendix A, we shall determine which disputed facts require hearings. It is clear that the task of this proceeding cannot be completed in the 18 month time allotted and that this matter will have to be continued in what effectively will be a continuation docket. We desire to complete in this docket those disputed issues, if any, that may be expeditiously heard, briefed and resolved. In the final order in this proceeding, we will place issues that remain unresolved into a new docket for completion. At that time, depending on what we learn from parties' responses to Appendix A questions, we may or may not be ready to ask the Commission to institute separate rulemaking and/or individual utility compliance proceedings.

In the meantime, we shall discuss below the limitations which we recommend be considered as we pursue this investigation.

### **Limitations Focusing Proceeding Issues**

In the course of this proceeding we have obtained information which causes us to narrow our focus with respect to target contaminants and drinking water standards. Because this investigation is concerned with water quality problems dangerous to public health and safety, we have announced our lack of interest in a contaminant's secondary drinking water standard which addresses aesthetic issues such as taste and odor. However, we are interested in the secondary drinking water standard of a given contaminant to the extent that said standard can be tied to public health and safety (e.g. contaminant being considered for development of a primary drinking water standard (Maximum Contaminant Level [MCL]) which presently has only an established secondary drinking water standard.)

Information provided by parties indicate that parties are primarily concerned about the presence of the following contaminants in drinking water provided by regulated utilities: 1,1,1-trichloroethane, 1,1-dichloroethene, 1,4-dioxane, acetone, arsenic, Benzene, carbon tetrachloride, chloroform, chromium VI, freon-113, hexavalent VI, hexavalent chromium, hydrazine, isopropanol, lead, methylene chloride, nitrates, nitrosodimethylamine, perchlorate, ammonium perchlorate, perchloroethene, potassium, sodium, tetrachloroethylene, trichloroethylene, trichloroethane, vinyl chloride, xylene. Therefore, unless parties have reason to believe that regulated utilities have committed serious violations of drinking water requirements with respect to contaminants not listed above, or that a utility's delivery of water containing contaminants, not identified above,

has been harmful to the public health, we shall focus our inquiries in this proceeding on this list of contaminants.

There has been some discussion of ground water and its relevance to this proceeding. Please note that our concern about the delivery of safe and healthy drinking water by regulated utilities includes interest in ground water to the extent that such water is a water source for utility drinking water. We are concerned about all utility drinking water sources where there is identifiable contamination which, if untreated, could endanger health. Beyond that issue, we are not concerned with ground water per se.

### **Schedule**

The following schedule is set for this proceeding:

May 10	Oral Argument on Jurisdiction Motions
May 14	Written Responses to Additional Questions
May 28	Written Replies to Additional Questions
June 15	Briefs, if requested <b>[Target Submission Date]</b>
June 30	Proposed Final Decision filed
July 20	Comments on Proposed Final Decision
July 25	Replies to Comments on Proposed Decision
Aug. 5 or Sept. 2	Sign Final Decision
<b>Sept. 12</b>	<b>Statutory Deadline</b>

### **IT IS RULED** that:

1. The motions to compel answers to data requests of California American and Citizens Utilities are granted in part and denied in part. The law-firm intervenors will answer all previously served data requests within 7 days after the date of this ruling. However, no sanctions are imposed. The requests for

sanctions may be renewed should law-firm intervenors fail to comply with this ruling.

2. The issues in this proceeding are those outlined by the Commission in the order instituting the investigation in this proceeding on pages 10-11, as restated in questions contained in Appendix A, attached to this ruling.

3. On or before May 14, 1999, parties will file and serve a written Response answering the questions contained in Appendix A and DHS is requested to answer follow-up questions to its report in Appendix B, unless other dates are specified in Appendix A or B. The Response will include the verification and qualifications of any witness(es) who will adopt the Response as their testimony in any hearing held in this proceeding. Responding parties will simultaneously make available all documents and other information upon which the Response is based.

4. On or before May 28, 1999, parties may file and serve a written Reply to other parties Responses and to DHS' answers to follow-up questions contained in Appendix B. The Reply will include the verification and qualifications of witness(es) who will adopt the Reply as their testimony in any hearing held in this proceeding. Parties filing a Reply will simultaneously make available all documents and other information upon which the Reply is based.

5. The Responses and Replies will be in the format contained in Appendix C, if possible. In addition to the required hard copy of any Responses and Replies that are sent to the assigned ALJ parties will also send a copy to her by e-mail in the designated format in Appendix C to the following internet address:

pab@cpuc.ca.gov

6. The schedule above is set for this proceeding.

7. Service throughout the remainder of this proceeding will include sending a copy to parties of any pleading by expedited process, such as facsimile, express mail, or personal delivery.

Dated May 3, 1999, at San Francisco, California.

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Henry M. Duque  
Assigned Commissioner

**CERTIFICATE OF SERVICE**

I certify that I have by mail this day served a true copy of the original attached Assigned Commissioner's Scoping Memo and Ruling on Motions to Compel on all parties of record in this proceeding or their attorneys of record.

Dated May 3, 1999 at San Francisco, California.

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Shirley Mak

**NOTICE**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

