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OPINION	:	No. 79-1010
	:	
of	:	<u>February 8, 1980</u>
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SUBJECT: INSTREAM FLOW REQUIREMENTS—Proposed regulations of the State Water Resources Control Board providing a procedure for the determination of instream flow requirements are not authorized under division 2 of the California Water Code.

The Honorable Eugene A. Chappie, Assemblyman, Third District, has requested and opinion on the following question:

Are the proposed regulations of the State Water Resources Control Board providing a procedure for the determination of instream flow requirements authorized under division 2 of the California Water Code?

CONCLUSION

The proposed regulations of the State Water Resources Control Board providing a procedure for the determination of instream flow requirements are not authorized under division 2 of the California Water Code.

ANALYSIS

California Constitution, article X, section 2 prescribes the fundamental public policy of this state with respect to the beneficial use of water:

“It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner’s land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.”

This fundamental law is essentially restated in sections 100 and 101 of the California Water Code.¹

Section 102 provides:

“All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law.”

Section 104 provides:

¹ Hereinafter, all section references, are to the California Water Code unless otherwise indicated.

“It is hereby declared that the people of the State have a paramount interest in the use of all the water of the State and that the State shall determine what water of the State, surface and underground, can be converted to public use or controlled for public protection.”

Section 105 provides:

“It is hereby declared that the protection of the public interest in the development of the water resources of the State is of vital concern to the people of the State and that the State shall determine in what way the water of the State, both surface and underground, should be developed for the greatest public benefit.”

In order to provide for the orderly and efficient administration of the water resources of the state, the State Water Resources Control Board was established. (§§ 174, 175.)²

Division 2, commencing with section 1000 of the California Water Code is declared to be in furtherance of the policy contained in section 2 of article X of the California Constitution and in all respects for the welfare and benefit of the people of the state, for the improvement of their prosperity and their living conditions. (§ 1050.)

Division 2 prescribes the exclusive method of appropriating water in California (§ 1225; *Fullerton v. State Water Resources Control Board* (1979) 90 Cal. App. 3d 590, 599–600; *California Trout Inc. v. State Water Resources Control Board* (1979) 90 Cal. App. 3d 816, 819–820) and charges the board with regulating the appropriation of the state’s water resources under terms and conditions as in its judgment will best develop, conserve and utilize them in the public interest. (§ 1253; *Fullerton v. State Water Resources Control Board*, *supra*, at p. 593.) Section 1201 provides:

“All water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is hereby declared to be public water of the State and subject to appropriation in accordance with the provisions of this code.”

Section 1252 provides:

² The term “board” as used in this text or in any statute herein cited refers to the State Water Resources Control Board. (*Cf.* § 25.)

“Any person may apply for and secure from the board, in conformity with this part and in conformity with reasonable rules and regulations adopted from time to time by it, a permit for any unappropriated water.”

The board is required to consider and act upon all applications for permits to appropriate water (§ 1250) and to reject an application when in its judgment the proposed appropriation would not best conserve the public interest. (§ 1255.)

Certain uses of water are expressly declared to constitute a “beneficial use.” Section 1243.5 provides in part that in determining the amount of water available for appropriation, the board shall take into account, whenever it is in the public interest, the amounts of water needed to remain in the source for protection of beneficial uses. Section 1243 provides:

“The use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water. In determining the amount of water available for appropriation for other beneficial uses, the board shall take into account, whenever it is in the public interest, the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources.

“The board shall notify the Department of Fish and Game of any application for a permit to appropriate water. The Department of Fish and Game shall recommend the amounts of water, if any, required for the preservation and enhancement of fish and wildlife resources and shall report its findings to the board.

“This section shall not be construed to affect riparian rights.”

Section 1254 provides:

“In acting upon applications to appropriate water the board shall be guided by the policy that domestic use is the highest use and irrigation is the next highest use of water.”

(See also § 106.) With respect to the various beneficial uses, section 1257 provides: as follows:

“In acting upon applications to appropriate water, the board shall consider the relative benefit to be derived from (1) all beneficial uses of the water concerned including, but not limited to, use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife,

recreational, mining and power purposes, and any uses specified to be protected in any relevant water quality control plan, and (2) the reuse or reclamation of the water sought to be appropriated, as proposed by the applicant. The board may subject such appropriations to such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest, the water sought to be appropriated.”

Finally, section 1350 provides that the board may grant, or refuse to grant a permit and may reject any application, after hearing. However, no hearing is required in order to issue a permit upon an unprotested application or in order to reject a defective application after notice (§ 1351) or upon failure of any party in interest to appear at a hearing (§ 1352).

With this background we proceed to the principal inquiry whether the proposed regulations of the board providing a procedure for the determination of instream flow requirements are authorized under division 2 of the California Water Code. The proposed regulations would add subchapter 2.1 to chapter 3 of title 23 of the California Administrative Code, as follows:

“Article 1. General Provisions

“820. *Purpose of This Subchapter.*

“The purpose of this subchapter is to ensure the protection of instream beneficial uses of water such as fish and wildlife and to simplify the procedure for such protection.

“821. *Authority.*

“Adoption of the procedure contained in this subchapter is authorized by Water Code Sections 185, 1058, and 1252. The procedure is intended to implement the board’s duties and authorities contained in Water Code Sections 1243 and 12435 (relating to the board’s duty to take into account the amounts of water required to serve specified instream beneficial uses); Water Code Section 1255 (requiring the board to reject an application when the proposed appropriation would not best conserve the public interest); Water Code Section 1257 (authorizing the board to impose public interest terms and conditions on appropriations); and Water Code Section 275 (requiring the board to take all actions necessary to prevent waste, unreasonable use, unreasonable method of use, and unreasonable method of diversion of water).

“822. *Definitions.*

“The following definitions are applicable to this subchapter:

“(a) ‘Stream system’ includes stream, lake, or other body of water, and tributaries and contributory sources, or a segment of any of these.

“(b) ‘Beneficial instream use’ means beneficial uses of water enjoyed by the public generally which are achieved by allowing water to remain in a stream and for which a diversion or some other form of control is not necessarily required. Beneficial instream uses include the uses identified in Water Code Section 1243 and 1243.5 and other instream uses found by the board to require preservation or enhancement in the public interest.

“(c) ‘Person’ means any person, firm, association, organization, partnership, business trust, corporation, company, the State of California and its agencies and departments, and political subdivisions of the State of California, and the United States of America and any of its agencies and departments.

“(d) ‘Instream flow requirement’ means an amount of water, expressed in terms of quantity per unit of time or of elevation that is determined to be necessary, at a specified location in a stream system during a specified season, to preserve or enhance beneficial instream uses.

“Article 2. Development of Instream Flow Requirements

“823. *Selection of Stream Systems.*

“The board will select stream systems within which to establish instream flow requirements.

“(a) In selecting stream systems the board shall give priority to systems where water is available for appropriation or where water appropriated by storage upstream is conveyed to points of redirection downstream.

“(b) In selecting stream systems the board shall consider the recommendations of all interested persons and, upon notice, may hold a public hearing on selection of stream systems.

“(c) Selected stream systems will be placed on a priority list for public review and information. The priority list will be updated or modified periodically as appropriate.

“524. *Face-Finding Hearing.*

“(a) Following selection of a stream system or systems within which to establish instream flow requirements, the board shall hold a public hearing for the purpose of obtaining information from interested persons. Issues upon which information shall be received shall include, but shall not be limited to, the following

“(1) Identification of beneficial instream uses and of the flows necessary to protect or enhance such uses;

“(2) Identification of the available water supply and existing demand thereon for offstream beneficial uses; and

“(3) Public interest considerations in establishing beneficial instream use requirements.

“(b) As a part of the notice of any hearing to be conducted pursuant to this section, the board may include a background staff report on the stream system or systems under consideration. Such report may include information on the issues identified in subsection (a) of this section. Any such report issued shall be a part of the hearing record.

“825. *Establishment of instream Flow Requirements.*

“(a) Following the close of any hearing conducted pursuant to Section 824, and prior to acting to establish instream flow requirements, the board shall give notice of the proposed requirements for a stream system or systems considered at the hearing. The notice shall have the effect of a ‘notice of proposed action,’ pursuant to the provisions of Government Code Section 11423. Thereafter, instream flow requirements may be established by rules set in accordance with the provisions of chapter 4.5 (commencing with Section 11371) of Part 1, Division 3, Title 2 of the Government Code.

“(b) In any hearing conducted pursuant to subsection (a) of this section, the board shall take official notice of the record of the hearing conducted pursuant to Section 824 and of the record of any hearing

conducted pursuant to subsection (c) of Section 823.

“Article 3. Implementation of Instream Flow Requirements

“826. *Official Notice and Evidence by Reference.*

“(a) In acting upon any application or petition, the board shall take official notice of any instream flow requirements established pursuant to this subchapter which it deems applicable to the water source.

“(b) In acting upon any application or petition the board shall include as evidence by reference the record of applicable proceedings under Sections 823, 824, and 825 of this subchapter.

“827. *Presumption of Instream Needs.*

“Applicable instream flow requirements established pursuant to this subchapter shall be presumed to define the amounts of water reasonably required in the public interest for protection of beneficial instream uses for the purposes of Water Code Sections 275, 1243, 1243.5, 1255, and 1257. Any action on an application or petition shall be consistent with such requirements unless their need or the public interest in maintaining them is successfully rebutted under Section 828.

“828. *Rebuttal of Presumption of Instream Needs.*

“(a) In any proceeding wherein the presumption identified in Section 827 is applicable evidence to rebut the presumption may be presented by any interested person. Such evidence may be proffered to show only that the applicable instream flow requirements define amounts of water which exceed the reasonable needs of the beneficial instream uses sought to be protected or that the public interest in allowing the proposed appropriation or in approving the requested change or extension of time outweighs the public interest in maintaining the requirements.

“(b) When acting upon an application or petition, the board shall not authorize reduction of any applicable instream flow requirements unless it determines that a requirement is excessive, or that the public interest is better served by reducing the requirement.

“829. *Mitigation of Impacts from Water Project Development.*

“Implementation of instream flow requirements pursuant to this subchapter does not relieve the obligation to fully compensate any adverse environmental impacts resulting from construction and operation of a water project.

“Article 4. Instream Flow Requirements for Stream Systems

“830. *General.*

“Specific instream flow requirements will be established pursuant to Article 2 of this subchapter, for implementation as provided in Article 3 of this subchapter, by adoption by the board of succeeding sections within this Article.”

The board is authorized to make such reasonable rules and regulations as it may from time to time deem advisable in carrying out its powers and duties under the California Water Code. (§§ 185, 1058, 1252.) Whenever a state agency is authorized by statute to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate its purpose. (Gov. Code, § 11374; *Morris v. Williams* (1967) 67 Cal. 2d 733, 748; 61 Ops. Cal. Atty. Gen. 424, 438 (1978).) An administrative agency may not, by means of a regulation or otherwise, alter, amend, enlarge, or impair the scope of the statute. (*Morris v. Williams, supra*; 61 Ops. Cal. Atty. Gen. 335, 339 (1978).) While the board, in the exercise of its statutory mandate, pursues at the same time those broad policy expressions and directives contained in article X, section 2 of the California Constitution (*Bank of America, etc., v. State Water Resources Control Board* (1974) 42 Cal. App. 3d 198), it is a creature of statute (§ 175) and possesses only such powers as are expressly granted or fairly implied from the law of its creation. (*Cal. Toll Bridge Authority v. Kuchel* (1952) 40 Cal. 2d 43, 53; 62 Ops. Cal. Atty. Gen. 467, 472 (1979); 61 Ops. Cal. Atty. Gen. 335, 338 (1978).)

It is beyond the realm of dispute that the use of water for recreation and for the preservation and enhancement of fish and wildlife resources is a beneficial use of water. (§ 1243.) For this reason, section 1243 provides that in determining the amount of water available for appropriation for other beneficial uses, the board shall take into account, whenever it is in the public interest, the amounts of water required for recreation and for the preservation and enhancement of fish and wildlife resources. Thus, it is clear that such instream beneficial uses must be considered in the context of all other beneficial uses. In this regard, section 1257 provides: that in acting upon applications to appropriate water, the board shall consider the relative benefit to be derived from all beneficial uses of the water concerned, including domestic, irrigation, municipal, industrial, recreational,

preservation of fish and wildlife, mining and power, and other purposes.

In connection with its duty to consider instream and other beneficial uses, the board is authorized to make such investigations of the water resources of the state as may be necessary *for the purpose of securing information* needed in connection with applications for appropriations of water. (§ 1251; and Cf. §§ 1051, 183.) With regard to the use of water for the preservation of wildlife resources specifically, section 1243 further provides that the board shall notify the Department of Fish and Game of any application to appropriate water, and that the Department of Fish and Game shall recommend the amounts of water, if any, required for such use and report its findings to the board.

Under the proposed regulations, the board would conduct public fact-finding hearings for the purpose of identifying beneficial instream uses and required flows to protect or enhance such uses of selected streams, the available water supply and existing demand for beneficial offstream uses, and the public interest considerations in establishing beneficial instream use requirements. Upon the conclusion of such a hearing and the issuance of notice of proposed action, the board may establish instream flow requirements by rule. Such applicable instream flow requirements shall be presumed to define the amounts of water reasonably required in the public interest for protection of beneficial instream uses, and any action on an application for appropriation of water shall be consistent with such requirements unless the applicant successfully rebuts the presumption by showing that such requirements exceed the reasonable needs of the beneficial instream uses or that the public interest in allowing the proposed appropriation outweighs the public interest in maintaining the requirements.

It is clear that (1) the use of water for recreation and for the preservation and enhancement of fish and wildlife resources is a beneficial use of water (§§ 1243, 1257), (2) the board is required to take into account, in determining the amount of water available for other beneficial uses, the amount required for such beneficial instream uses (§§ 1243, 1243.5), and (3) the board may conduct investigations for the purpose of securing information needed in connection with application for appropriation of water. (§ 1251.) The issue presented, however, is whether the board is authorized under these statutes to (1) determine, without regard to any application for appropriation of water for beneficial offstream uses, the required flow for beneficial instream uses, (2) establish, in advance of a hearing on any such application, the required flow for beneficial instream uses by rule, and (3) create, without considering the relative benefits of all beneficial uses, a presumption as to the validity of the rule. Are the proposed regulations providing for such a procedure consistent with, and reasonably necessary to effectuate the purposes of the statutory mandate to hold a hearing in connection with each application for the appropriation of water (§ 1350), to consider the relative benefits of all beneficial uses (§ 1257), and to be guided by the policy that domestic use is the highest use and irrigation is the next highest

use of water (§§ 1254, 106)? We examine first the nature and effect of the presumption.

A presumption is an assumption of fact that is required to be made from mother fact or facts otherwise established. (Evid. Code, § 600.) Every rebuttable presumption is either a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof. (Evid. Code, § 601.) A presumption affecting the burden of producing evidence is established to implement no public policy other than to facilitate the determination of the particular action, and requires the trier of fact to assume the existence of the presumed fact until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence without regard to the presumption. (Evid. Code, §§ 603, 604.) A presumption affecting the burden of proof is established to implement some public policy other than to facilitate the determination of the particular action, and imposes upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact. (Evid. Code, §§ 605, 606.)

The presumption established by the proposed regulations is not merely a presumption affecting the burden of producing evidence. In this regard, the Law Revision Commission's comments to Evidence Code section 603 are particularly instructive:

“ . . . Section 603 describes those presumptions that are not based on any public policy extrinsic to the action in which they are invoked. These presumptions are designed to dispense with unnecessary proof of facts that are likely to be true if not disputed. Typically, such presumptions are based on an underlying logical inference. In some cases, the presumed fact is so likely to be true and so little likely to be disputed that the law requires it to be assumed in the absence of contrary evidence. In other cases, evidence of the nonexistence of the presumed fact, if there is any, is so much more readily available to the party against whom the presumption operates that he is not permitted to argue that the presumed fact does not exist unless he is willing to produce such evidence. In still other cases, there may be no direct evidence of the existence or nonexistence of the presumed fact, but because the case must be decided, the law requires a determination that the presumed fact exists in light of common experience indicating that it usually exists in such cases Cf. Bohlen, *Studies in the Law of Torts* 644 (1926). Typical of such presumptions are the presumption that a mailed letter was received (Section 641) and presumptions relating to the authenticity of documents (Sections 643–645).

“The presumptions described in Section 603 are not expressions of policy; they are expressions of experience. They are intended solely to

eliminate the need for the trier of fact to reason from the proven or established fact to the presumed fact and to forestall argument over the existence of the presumed fact when there is no evidence tending to prove the nonexistence of the presumed fact.”

Under paragraph 827 of the proposed regulations, the presumption applies to the predetermined “amounts of water reasonably required in the public interest for protection of beneficial instream uses.” Under paragraph 828, the presumption may be rebutted by a showing either that the designated requirements exceed the reasonable needs of beneficial instream uses or that the public interest in allowing the proposed appropriation outweighs the public interest in maintaining the requirements. Clearly, this presumption which favors the board’s predeterminations both as to the requirements for instream uses and as to the public interest in maintaining them is not designed to dispense with unnecessary proof of facts that are likely to be true if not disputed. On the contrary, the needs in question, the requirements to meet those needs, and the public interest in such needs and requirements are usually highly controversial issues. Moreover, evidence of the nonexistence of the presumed fact is not “much more readily available” to the applicant, nor is there any lack of evidence on the question. Consequently, the presumption in question does not affect merely the burden of producing evidence, but the burden of proof.

Thus, under the proposed regulations, the applicant must carry the burden of proof as to the nonexistence of presumed facts respecting the needs, requirements, and public interest in beneficial instream uses of water. Upon the failure of the applicant to meet this burden, his application, to the extent inconsistent with designated instream uses, must fail. To the extent of any such inconsistency, the board would be relieved of its statutory obligation to consider the relative benefit to be derived from all beneficial uses of the water. In such a case, the board would have effectively ordained in the absence of legislative authorization, that the beneficial instream uses shall prevail against other beneficial uses, thus precluding the application of the policy that domestic use is the highest use and irrigation is the next highest use of water.

In *Interstate Commerce Commission v. J-T Transport Co., Inc.* (1961) 368 U.S. 81, the commission denied applications for operating permits filed by contract motor carriers, supported by shippers and opposed by common carriers. Title 49, United States Code, section 309 (b) sets forth five factors to be considered by the commission in determining whether the permit should issue:

“In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared to this Act, the Commission shall consider (1) the number of shippers to be served by the applicant, (2) the nature of the service proposed, (3) the effect which granting

the permit would have upon the services of the protesting carriers and (4) the effect which denying the permit would have upon the applicant and or its shipper and (5) the changing character of that shipper's requirements." (Numerals added.)

The commission indulged in a presumption that the services of existing carriers would be adversely affected by a loss of potential traffic and assigned to the applicants the burden of proving the inadequacy of existing services. The Supreme Court held that while the adequacy of existing services is, under the statute, a criterion to be considered by the commission, it is not a determinative factor, and that the presumption which imposed upon the applicants the burden of proving the nonexistence of the presumed fact was not countenanced by the congressional delegation of authority. (*Id.*, at pp. 88–90.) Similarly, while beneficial instream uses are to be considered by the board, such uses are not determinative, and the presumption which would impose upon applicants for appropriation of water for beneficial offstream uses the burden of proof as to the nonexistence of presumed facts is not countenanced by the statutes in question. In carrying out its statutory duty, the board exercises a broad discretion in determining whether the issuance of a permit will best serve the public interest; that determination requires an administrative adjudication. (Cf. *Temescal Water Co. v. Department of Public Works* (1955) 44 Cal. 2d 90, 100.) The board "may not by the adoption of any rule of policy or procedure so circumscribe or curtail the exercise of [its] discretion under the statute as to prevent the free and untrammelled exercise thereof in every case, for an attempt to do so would be for [it] to arrogate to [itself] a legislative function." (Cf., *Bank of Italy v. Johnson* (1926) 200 Cal. 1, 15.)

As noted in *Fullerton v. State Water Resources Control Board*, *supra*, 90 Cal. App. 3d at pages 603–604:

"In summary, to carry out the necessary balancing process, the statutes have provided the Board with maximum flexibility to consider the competing demands of flows for piscatorial purposes and diversions for agricultural, domestic, municipal or other uses. Pursuant to Water Code section 1243, the Board gives notice to the Department [of Fish and Game] each time a diversion application is filed and the Department informs the board as to the minimum flows which it believes are required for fish. In addition, Water Code section 1330 allows any other person or group to protest the granting of an application to appropriate water for reasons which may include adverse environmental impacts, such as reduction of flows below the minimum required for fish and wildlife preservation. Further, pursuant to Water Code sections 1243.5, 1253, 1255 and 1257, the Board examines the use to which the applicant would place the water, the public

interest of that use, the necessity of the proposed minimum fish flows, and the public interest in maintaining such flows, and finally it makes a decision, if there is a conflict among various uses, as to what the public interest requires in that particular situation.”

Finally, in a related context the court, in *California Trout, Inc. v. State Water Resource Control Board*, *supra*, 90 Cal. App. 3d at pages 820–822, observed:

“Since it may be thought by some that the statutory and case law appropriation of waters in this state have somehow callously overlooked the interests of fish and fisheries in the watercourses of the state, we deem it appropriate to point out that there are protections afforded to such interests by existing law, working in conjunction with the law of appropriation of water. Thus, the Legislature has provided in sections 1243 and 1243.5 [fn. omitted] of the Water Code that (a) the board must notify the Department of Fish and Game of all applications to appropriate water; (b) the department must recommend the amounts of water required for preservation of fish and wildlife resources; (c) the board must take into account such amounts. Moreover, in Water Code section 1257 the board is directed to consider the preservation and enhancement of fish and wildlife in acting upon any application to appropriate water.

“The Legislature has enacted other specific statutes which establish the method to be followed to protect and enhance fish and wildlife species. Chapter 4 of division 2 of the California Fish and Game Code (§ 1300 *et seq.*) establishes a Wildlife Conservation Board with broad powers to investigate which streams and lakes are suitable for or can be made suitable for fishing (§ 1345) and authorizes it to purchase and acquire lands and water rights when necessary to carry out its purposes, including maximum revival of wildlife. (§§ 1347, 1348.) Fish and Game Code section 1501 authorizes the Department of Fish and Game to expend funds as may be necessary for the improvement of lakes and streams for fish. There are procedures which are to be followed by governmental agencies and the Department of Fish and Game when diversions of water are proposed in projects which could impact existing fish or wildlife resources, and Fish and Game Code section 1601 sets forth detailed guidelines to assist in assuring that fishery resources are considered during the planning of such projects.³ In conjunction with all this, the provisions of the Water Code to which we have previously adverted establish the manner by which the board and the Department of Fish and Game, with the assistance of private organizations which may desire to be heard, ascertain, on a case-by-case basis, what levels of instream flows

should remain in a watercourse when competing appropriation rights are sought.”

The court’s footnote provides:

“3. Of less direct effect but incidental to the clear statutory scheme for protection of fish and wildlife is the California Wild and Scenic Rivers Act (Pub. Resources Code, § 5093.50 *et seq.*) which is designed to preserve certain rivers in their natural state for fish and wildlife values, among other things. Also, the California Environmental Quality Act (Pub. Resources Code, § 21000 *et seq.*) declares the policy of the Legislature to prevent the elimination of fish and wildlife species, among other things.”

It is concluded that the proposed regulations of the State Water Resources Control Board are not authorized under division 2 of the California Water Code.
