

ENVIRONMENTAL LAW

CALIFORNIA
LAWYERS
ASSOCIATION

2022 Environmental Law Conference at Yosemite

Saturday General Session: Clean Water Act at 50

Speakers: Honorable Ronald B. Robie, E. Joaquin Esquivel,
Felicia Marcus

Conference Reference Materials

Points of view or opinions expressed in these pages are those of the speaker(s) and/or author(s). They have not been adopted or endorsed by the California Lawyers Association and do not constitute the official position or policy of the California Lawyers Association. Nothing contained herein is intended to address any specific legal inquiry, nor is it a substitute for independent legal research to original sources or obtaining separate legal advice regarding specific legal situations.

© 2022 California Lawyers Association
All Rights Reserved

The California Lawyers Association is an approved State Bar of California MCLE provider.

2022 Environmental Law Conference at Yosemite

Clean Water Act at 50

Moderator:

Ronald B. Robie, Justice of the Third District Court of Appeal

Panelists:

E. Joaquin Esquivel, Chair, State Water Resources Control Board;

Felicia Marcus, Landreth Visiting Fellow, Stanford University's Water in the West Program

I. Background on California pre-1972 Law and the enactment of the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act)

A. California's pre Clean Water Act Approach.

1. Dickey Water Pollution Act (Stats.1949, ch. 1549, p. 2782, § 1) emphasis on using waters' assimilative capacity.
2. Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.; Stats. 1969, ch. 482, p. 1051, § 18) emphasis on adopting and implementing receiving water standards.

B. Federal Clean Water Act emphasis on technology based standards for point source discharges, implemented through a National Discharge Elimination System (NPDES) permit program. (See 33 U.S.C. §§ 1311, 1312. But see *id.* § 1311(b)(1)(C) [requiring many more stringent requirements to meet water quality standards].)

B. State Water Resources Control Board Water Board involvement in development of the Clean Water Act.

1. Conflict of interest. (See 33 U.S.C. § 1314(i)(2)(D), Wat. Code, § 13388.)
2. Federal facility compliance (See 33 U.S.C. § 1323.)

C. Cooperative Federalism under the Clean Water Act

1. Clean Water Act respect for state authority
 - a. Continuation of state certification authority, originally enacted in Water Quality Act of 1970. (See 33 U.S.C. § 1341.)[Clean Water Act Section 401 water quality certification]
 - b. Authorization of state programs to implement the National Pollutant Discharge Elimination System (NPDES) permit program if state programs are adequate. (See 33 U.S.C. § 1342(b)&(c).)

- c. Provision for state adoption of water quality standards, with United States Environmental Protection Agency (USEPA) review and adoption standards where state standards are inadequate. (33 U.S.C. § 1313.)

2. California's Response

- a. To ensure that California's waste discharge requirement program would be adequate to obtain USEPA approval of a state NPDES program, the Legislature amended the Porter-Cologne Act in 1972. (Wat. Code, § 13370 et seq.; Cal. Stats. 1972, ch. 1256, §, p. 2485.)
- b. On May 14, 1973, California became the first State to be approved by EPA to administer the NPDES permit program. (*Environmental Protection Agency v. California ex rel. State Water Resources Control Bd.* (1976) 426 U.S. 200, 209.)
- c. Immediate effects on California's programs, including requirements to achieve levels of treatment (cf. Wat. Code, §§ 13360, 13377 [Porter-Cologne Act restriction on specifying the manner of compliance does not apply to the extent necessary to achieve NPDES requirements]) and requirements for protection of Waters of the United States previously treated as discharge conveyance channels.

II. Financial Assistance

- A. Construction Grant Program for Publicly Owned Treatment Works
 1. Originally 75% federal grant. (33 U.S.C. § 1282.)
 2. Policy favoring state implementation. (33 U.S.C. § 1251(b))
 3. The State Water Resources Control Board implemented the program in California, and the state provided an additional 12.5 %.
- B. Federal funding has for clean water infrastructure declined after the 1970's. (See [Congressional Research Service, Funding for EPA Water Infrastructure: A Fact Sheet.](#))
- D. Shift in 1987 to federal capitalization grants for State Revolving Funds to provide low interest loans. (33 U.S.C. § 1381 et seq.; Wat. Code, § 13475 et seq., Stats 1987, ch. 1313, § 1, p. 4804; [State Water Resources Control Board, Financial Assistance Funding - Grants and Loans - CWSRF .](#))
- E. Emphasis in California, and more recently at the federal level, in wastewater recycled water. (See [USEPA Water Reuse Infrastructure Funding Programs](#); [State Water Resources Control Board Water Recycling Program Guidelines.](#))

- F. Needs for additional funding
 - 1. Upgrades and replacements for publicly owned treatment works infrastructure
 - 2. Municipal Separate Storm Sewer Systems
 - 3. Unsewered communities
 - 4. Disadvantaged Communities. (See, e.g., Wat. Code, § 79723.)

- G. Funding for State Programs
 - 1. Clean Water Act policy for provide funding for state programs. (33 U.S.C. §§ 1251(b), 106.)
 - 2. Need for states to have additional sources of funding to adequately implement Clean Water Act programs. (See Wat. Code, § 13260, subds. (d)-(h) [waste discharge fee system to support state program].)

- IV. Gaps and Adjustments in the Clean Water Act
 - A. Different perspectives from public agency dischargers.
 - B. Inapplicability to Groundwater
 - C. Agricultural and other non-point source pollution
 - 1. Water quality standards and Total Maximum Daily Loads apply to all sources affecting Waters of the United States. (33 U.S.C. § 1313.)
 - 2. USEPA has limited authority to implement these requirements as applied to non-point sources.
 - D. Wetlands
 - 1. Few states have taken over the dredge and fill permitting program (404 permit program) implemented by the United States Army Corps of Engineers. (See 33 U.S.C. § 1344.)
 - 2. California has relied on its water quality certification authority (33 U.S.C. § 1251; Wat. Code, § 13160) to condition federal permits, including 404 permits to protect wetlands and implement water quality standards. This include use of water quality certification authority to condition hydropower licenses issued by the Federal Energy Regulatory Commission, and field where state regulatory authority is otherwise subject to broad preemption. (See generally *PUD No. 1 of Jefferson County v. Washington Department of Ecology* (1994) 511 U.S. 700.)
 - 3. Supreme Court opinions narrowing the interpretation of what constitute Waters of the United States has removed Clean Water Act protection of isolated waters, including isolated wetlands (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (2001) 531 U.S. 159) and other waters not considered to have a significant nexus to waters that are navigable in fact. (*Rapanos v. U.S.* (2006) 547 U.S. 715.) The Supreme Court may further narrow the applicability of the Clean Water Act. (See *Sackett v. Environmental Protection Agency* (2022) 142 S.Ct. 896 [granting certiorari on issue of “the proper test for determining whether wetlands is ‘waters of the United States’ under the Clean Water Act.”].)
 - E. Tribal Authority (33 U.S.C. § 1377.)
 - F. Enforcement
 - 1. USEPA Enforcement. (33 U.S.C. § 1319.)

2. State Enforcement. (33 U.S.C. § 1342 (b)(7); 40 C.F.R. § 123.27; see Wat. Code, §§ 13300 et seq., 13385-8.)

3. Citizen Suits (33 U.S.C. § 1365.)

G. How EPA/states/stakeholders have chosen to apply, or not apply, tools

1. TMDL trajectory—how implemented vs. potential

2. Lack of uptake of delegation noted above

3. Challenges to state certification in practice: *Hoopa Valley Tribe v. Federal Energy Regulatory Comm’n*, 913 F.3d 1099, 49 ELR 20015 (D.C. Cir. 2019); USEPA reconsideration of waiver rule (June 2022 recommendations summarized in *National Law Review* at <https://www.natlawreview.com/article/epa-proposes-changes-again-to-cwa-water-quality-certification-rule>); Inflation Reduction Act “deal” explicitly limiting scope and timing.

III. The Future

Recommended Reading:

Environmental Law Institute and George Washington University School of Law (2021). “Reimagining Environmental and Natural Resources Law: A Synthesis Report Exploring the Next 50 Years of Environmental Law (December 2021) (Available at https://www.eli.org/sites/default/files/files-pdf/Reimagining%20Environmental%20Law_2021_1.pdf)

USEPA (website), History of the Clean Water Act (with summary link)(Available at <https://www.epa.gov/laws-regulations/history-clean-water-act>)

Sean G. Herman, *A CLEAN WATER ACT, IF YOU CAN KEEP IT*, 13 Golden Gate U. Env'tl. L.J. 63 (2021). (Available at <https://digitalcommons.law.ggu.edu/gguelj/vol13/iss1/4>) (positing that CWA should be amended to not be limited to WOTUS jurisdiction)

Cliff Rechtschaffen, *Enforcing the Clean Water Act in the Twenty-First Century: Harnessing the Power of the Public Spotlight*, 55 Ala. L. Rev. 775 (2004) (Available at <https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1200&context=pubs>) (critiquing level of enforcement and suggested ways of bringing attention to it to get more)

Jan G. Laitos & Heidi Ruckriegel, *The Clean Water Act and the Challenge of Agricultural Pollution*, Vermont Law School Law Review, 2013 (Available at <https://lawreview.vermontlaw.edu/wp-content/uploads/2013/08/14-Laitos-Ruckriegle.pdf>)

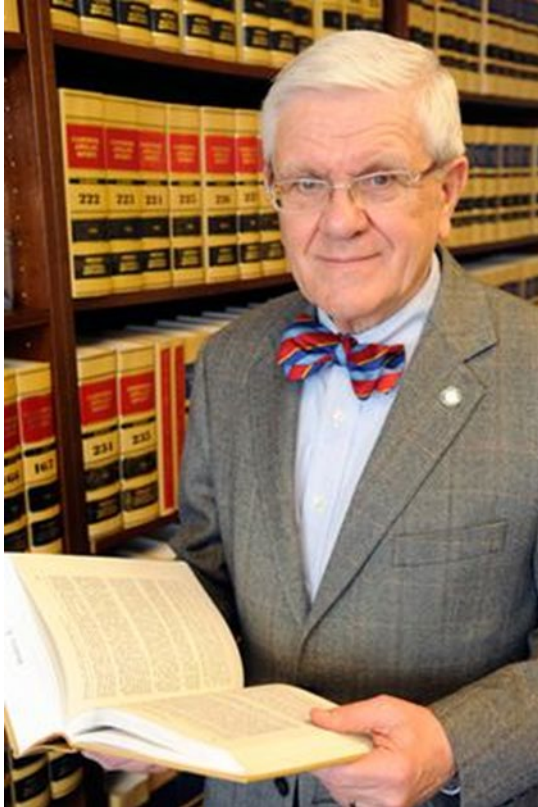
R. V. Percival, *Symposium - Environmental Federalism: Historical Roots and Contemporary Models*, 54 Md. L. Rev. 1141 (1995) (Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol54/iss4/3>)

Anna Todd, *Sackett v. EPA and the Definition of Waters of the United States*, Environmental and Energy Law Program, Harvard Law School (2022)(Available at <https://eelp.law.harvard.edu/2022/06/sackett-v-epa-and-the-definition-of-waters-of-the-united-states/>) (very short summary of case and EPA rulemaking)

Clean Water Act at 50 Speaker Biography's

Moderator:

Ronald B. Robie, Justice of the Third District Court of Appeal



Judge of the Superior Court of California, County of Sacramento, 1986-2002; Presiding Judge, 1994-1995; Judge of the Municipal Court, Sacramento Judicial District, 1983-1986; Co-Convener, "Dividing the Waters," a project for water judges, masters and referees 2004-present; Member, Board of Directors, Water Education Foundation, 2006-present; Adjunct Professor, (Water Law, Environmental Law) Pacific/McGeorge School of Law, Sacramento, 1970-2013; Chair, Environmental Law Section, Sacramento County Bar, 2001-2002; Co-author, California Civil Practice, Environmental Litigation (Thomson West) 1993-2023; Director, California Department of Water Resources, 1975-1983; Member and Vice Chair, State Water Resources Control Board, 1969-1975; Committee Consultant, Assembly Water Committee, California Legislature, 1960-1969; Member, California Commission on Access to Justice, 2005-2014, Chair 2010-2014; Member, Board of Directors, National Center for State Courts, 2005-2011; Chair, Supreme Court Committee on Judicial Ethics Opinions, 2010-present; Graduate,

University of California, Berkeley, AB, 1958; MJ, 1960; University of the Pacific, McGeorge School of Law, JD, 1967. Member of American Bar Association.

Speakers:

E. Joaquin Esquivel, Chair, State Water Resources Control Board



E. Joaquin Esquivel was appointed to the State Water Resources Control Board by Governor Jerry Brown in March 2017, designated by Governor Gavin Newsom as Chair in February 2019, and reappointed to the board by Governor Newsom in 2021. Previously, he served as Assistant Secretary for federal water policy at the California Natural Resources Agency in the Governor's Washington, D.C. office.

For more than eight years prior to that, Joaquin worked for U.S. Senator Barbara Boxer of California, most recently as her legislative assistant covering the agriculture, native american, water, oceans, and nutrition portfolios, in addition to being the director of Information and Technology.

He was born and raised in California's Coachella Valley. He holds a BA from the University of California, Santa Barbara in English.

Felicia Marcus, Landreth Visiting Fellow, Stanford University's Water in the West Program



Felicia Marcus is an attorney who has served in leadership and management positions in the government and non-profit sectors. She is currently the Landreth Visiting Fellow at Stanford University's Water in the West Program and is an elected Fellow of the National Academy of Public Administration. Felicia was most recently Chair of the California State Water Resources Control Board after having served as Regional Administrator of the U.S. EPA Region IX and as head of the Los Angeles Department of Public Works in addition to senior leadership in national non-governmental organizations (NRDC and TPL). She has experience as a private and public interest sector attorney and has worked on issues across the West spanning water supply, water rights, and water quality in addition to experience in other sectors like energy, toxics, and land use. She is also a member of the Water Policy Group, an international network of former and current high level water officials dedicated to assisting developing nations and is also one of the three US members of the Joint Public Advisory Committee of the North American Commission on Environmental Cooperation in addition to serving of many boards and advisory committees.