regulations of the Special Water Management Areas and otherwise guiding the actions of the Areas.

The regulations adopted by an Area Water Board can include such specific management mechanisms as well spacing, water pricing, special water rights transfer programs, special water reporting and metering, rotation of allowed water use days, programs of river basin management, and so on. These regulations might be quite different in different Special Water Management Areas of the State, reflecting the different problems and different needs of the several Areas. These differences could be as basic as one Special Water Management Area stressing the privatization of water usage, with another, perhaps adjacent, Special Water Management Area stressing public decision making about water usage. The problems and questions to be resolved are simply too varied to be resolved in the abstract or by general prescription. Any regulations proposed or adopted under this section are subject to judicial review in the same manner as provided in section 5R-3-01 for regulations proposed or adopted by the State Agency. By also incorporating section 5R-3-03 into subsection (5) of this section, the section ensures not only that the Area Water Board shall conform its regulations to the orders and decisions of the Court, but also that a judgment for the expenses of another person's litigation will not be entered against the Area Water Board.

Some States, such as Florida, delegate the primary responsibility for issuing permits for water rights to the Special Water Management Areas. FLA. STAT. ANN. §§ 373.203-373.249. An optional subsection (4) is provided to cover this possibility. This Code, however, prefers to keep the permit-issuing function vested in the State Agency. As the Agency is necessarily charged with issuing permits both to obviate the need for an elaborate statewide permit process to deal with interbasin or trans-Area transfers and to ensure consistent application of the relevant criteria throughout the Area and the State, the keeping of the entire permitting process vested in the State Agency reduces the risks of conflicts over what is the proper source of a particular permit or the possibility of conflicting permits from different sources. If subsection (4) is omitted as recommended in this Code, subsection (5) will be renumbered as (4).

The Area Water Boards are to consider water quality concerns as well as water allocation in formulating their Area Water Management Plans and regulations. Still, as is generally true with this Code, the focus is primarily on water allocation rather than other issues. Therefore, this section speaks in terms of Drought Management Strategies and the obligation to coordinate with agencies responsible for water quality. If, as is currently true in several regulated riparian States, a single agency is responsible for water allocation, water quality, flood control, and other issues relating to water management, with the whole package being delegated to Special Water Management Areas, the language of this section would need to be revised. "Drought Management Strategies" would need to become "Water Shortage and Water Emergency Strategies." Subsection (2) on coordination with other agencies would simply be omitted.

Florida is unusual in mandating that Water Management Districts cooperate with each other. FLA. STAT. ANN. § 373.047. This legislative mandate goes so far as to direct two Districts to enter into a specific agreement allowing one District to issue permits for water withdrawals within a county in the other District. One naturally ponders why the Florida legislature did not just transfer the county to the other District. *Id.* § 373.046(2). *See also id.* § 373.0691 (transfer of areas). This Code does not directly address conflicts between Special Water Management Areas, in part because the permit-issuing authority remains with the State Agency. Should such a conflict arise, the duty to cooperate is found in the general administrative provisions of the Code. *See* sections 4R-3-01 to 4R-3-05. *Compare* FLA. STAT. ANN. § 373.103 (2) (Water Management Districts to cooperate with the federal government).

Often, existing Special Water Management Areas are charged with responsibility for constructing and managing water use facilities within the Area as well as (or in place of) regulatory authority. This Code does not provide for such responsibilities given the Code's focus on the regulation of water allocation rather than on other sorts of activities relevant to the development and preservation of water sources. Appropriate provision for such additional duties should be added if the State so desires.

The policies of the American Society of Civil Engineers support recognition of the local interest in water management. Special Water Management Areas with regulatory authority are one way to implement such policies. *ASCE Policy Statement* No. 243 on Ground Water Management. The Society's policy favoring watershed management comes closer to supporting the conferral of regulatory authority on Special Water Management Areas. *ASCE Policy Statement* No. 422 on Watershed Management.

Cross references: § 1R-1-01 (protecting the public interest in the waters of the State); § 1R-1-02 (ensuring efficient and productive use of water); § 1R-1-03 (conformity to the policies of the Code and to physical laws); § 1R-1-05 (efficient and equitable allocation during shortfalls in supply); § 1R-1-06 (legal security for water rights); § 1R-1-09 (coordination of water allocation and water quality regulation); § 1R-1-10 (water conservation); § 1R-1-11 (preservation of minimum flows and levels); § 1R-1-12 (recognizing local interests in the waters of the State); § 1R-1-13 (regulating interstate water transfers); § 1R-1-14 (regulating interbasin transfers); § 1R-1-15 (atmospheric water management); § 2R-2-02 (biological integrity); § 2R-2-03 (chemical integrity); § 2R-2-06 (consumptive use); § 2R-2-07 (cost); § 2R-2-13 (nonconsumptive use); § 2R-2-15 (person); § 2R-2-16 (physical integrity); § 2R-2-18 (the public interest); § 2R-2-21 (safe yield); § 2R-2-22 (Special Water Management Area); § 2R-2-23 (State Agency); § 2R-2-24 (sustainable development); § 2R-2-28 (water basin); § 2R-2-29 (water emergency); § 2R-2-30 (water right); § 2R-2-31 (water shortage); § 2R-2-33 (water source); § 2R-2-34 (withdrawal or to withdraw); § 4R-1-06 (regulatory authority of the State Agency); § 4R-3-02 (cooperation with other units of State and local government); § 4R-3-03 (duty to cooperate); § 4R-4-01 (purposes of Special Water Management Areas); § 4R-4-02 (Special Water Management Area studies); § 4R-4-04 (Area Water Boards); § 4R-4-05 (Area Water Management Plans); § 4R-4-07 (conflict resolution within Special Water Management Areas); § 4R-4-08 (funding Special Water Management Areas); §§ 6R-3-01 to 6R-3-06 (the basis of a water right); §§ 7R-1-01 to 7R-3-07 (the scope of the water right); §§ 8R-1-01 to 8R-1-07 (multijurisdictional transfers).

Comparable statutes: ALA. CODE § 9-10B-22 (regulations for capacity stress areas issued by statewide authority); FLA. STAT. ANN. §§ 373.0695(1)(d), (2)(e), 373.083(2), 373.103(1), (4), 373.106, 373.113, 373.146, 373.161; HAW. REV. STAT. § 174C-48; ILL. CON. STAT. ch. 525, § 45/5.1; IND. CODE ANN. § 13-2-2-5(a) (permits in restricted use areas issued by statewide authority); MASS. GEN. LAWS ANN. ch. 21G, § 4 (same); MISS. CODE ANN. §§ 51-3-15, 51-8-27; N.C. GEN. STAT. §§ 143-215.14 to 143-215.16 (permits for capacity use areas, issued by statewide authority); S.C. CODE ANN. § 49-5-50 (same, underground water); VA. CODE ANN. §§ 62.1-44.97, 62.1-44.100 (same, underground water), 62.1-247 to 62.1-249 (same, surface water sources).

§ 4R-4-07 Conflict Resolution within Special Water Management Areas

(1) Each Area Water Board shall provide, by specific regulation, for the resolution of conflict among water users within the boundaries of the Special Water Management Area.

(2) The State Agency may refer proceedings under administrative dispute resolution to an appropriate Area Water Board when the State Agency determines that appropriate procedures exist in that Special Water Management Area and that the Area Water Board provides an appropriate forum for resolving the dispute.

(3) Nothing in this Part shall impair any remedy provided to any person under the provisions of this Code or under any applicable general rule of law, except to the extent that a regulation creates an administrative procedure that must be exhausted before a person is entitled to resort to a court.

Commentary: As the resolution of conflicts that are more intense in some part of the State than in others will often be the primary reason for creating Special Water Management Areas, the Area Water Boards are required to devise special procedures for dealing with those conflicts. This section makes clear that any such procedure does not preempt the legal rights of any person, although the regulation can enforce reasonable delays necessary to give the prescribed procedure an opportunity to work before a person can disregard the procedure and resort to some other remedy. The State Agency is authorized, in appropriate cases, to refer a proceeding brought under section 5R-2-03 (administrative resolution) to a proceeding under the appropriate Area Water Board's procedure. This section is supplemented by, but not preempted by, the provisions on dispute resolution found elsewhere in this Code.

Persons involved in the dispute could bring it to the Area Water Board. Or those persons might initiate a proceeding before the State Agency or in a court. Either the State Agency, under subsection (2), or the court, under subsection (3), would refer the decision to the Area Water Board whenever that would be the best method for making an initial attempt to resolve the dispute. As a result, each Area Water Board could be said to exercise primary jurisdiction over disputes relating to water within its Special Water Management Area. Vesting primary jurisdiction in the Area Water Board is appropriate because the members are likely to be more familiar with local conditions and needs than the State Agency with its broader focus and limited resources. Having primary jurisdiction in the Area Water Board might be even more appropriate if the governor's appointment power under section 4R-4-04 is exercised to make the Board broadly representative of the different major interests in the use and protection of water in the Special Water Management Area. If the dispute is transferred from the State Agency, the Area Water Board can exercise functions equivalent to an administrative hearing under the State Agency. The Area Water Board is not authorized to function as the equivalent of a court, and if a dispute is transferred from a court to the Board, the Board will function more akin to mediation and conciliation than to a formal administrative adjudicatory hearing. The State Agency could also refer a dispute to an Area Water Board as a step in alternative dispute resolution, when the Board could function as a mediation or conciliation service or (as provided in section 5R-2-03) as an arbitral proceeding. In any event, the Area Water Board's responsibility is to pursue the public interest in its dispute resolution processes. The problem is to reconcile individual water rights and other legally protected interests with the preeminent goal of sustainable development.

If a conflict resolution proceeding before an Area Water Board produces, or is expected to produce, a binding order or decision, any resulting order or decision is reviewable in the manner provided in section 5R-3-02 for an order or decision of the State Agency. That section provides for review under the State's Administrative Procedure Act for final orders or decisions, and also for preliminary, procedural, and intermediate orders or decisions when awaiting a final order or decision before review is allowed would not afford an aggrieved party an adequate remedy. By also incorporating section 5R-3-03 into subsection (5) of this section, the section ensures not only that the Area Water Board shall conform its orders and decisions to the orders and decisions of the Court, but also that a judgment for the expenses of another person's litigation will not be entered against the Area Water Board.

This section is consistent the policy of the American Society of Civil Engineers supporting alternative dispute resolution. *ASCE Policy Statement* No. 256 on Alternative Dispute Resolution.

Cross references: § 1R-1-05 (efficient and equitable allocation during shortfalls in water supply); § 1R-1-06 (legal security for water rights); § 1R-1-08 (procedural protections); § 2R-1-04 (protection of property rights); § 2R-2-15 (person); § 2R-2-18 (the public interest); § 2R-2-23 (State Agency); § 2R-2-24 (sustainable development); § 4R-3-02 (cooperation with other units of State and local government); § 4R-3-03 (duty to cooperate); § 4R-4-01 (purposes of Special Water Management Areas); § 4R-4-04 (Area Water Boards); § 4R-4-06 (regulatory authority of Special Water Management Areas); §§ 5R-2-01 to § 5R-2-03 (dispute resolution); § 6R-4-05 (preservation of private rights of action).

Comparable statute: FLA. STAT. ANN. § 373.119; ILL. CON. STAT. ch. 525, § 45/5.

§ 4R-4-08 Funding Special Water Management Areas

The activities of Special Water Management Areas through their Area Water Boards shall be funded by a special surcharge on the fees paid for permits to withdraw water from water sources within the Area.

Commentary: All Special Water Management Areas require some level of operational funding to support administrative and other expenses necessary to fulfill their water planning and management activities. *See generally* Dellapenna, § 9.03(a)(5)(A). In most states with existing Special Water Management Area programs, this funding comes from a combination of sources such as general state revenues, locally levied property taxes, special resource management funds, and general water use fees. *Id.* § 9.03(a)(5)(C). A State might well consider whether to substitute such a source for the surcharge on permit fees indicated here. One reason for again burdening the permit fees is that Special Water Management Areas, almost by definition, are areas of sustained overuse and conflict over water. Reliance on additional revenues to be generated by surcharges on the permit fees will provide an incentive for those water users who are making low-valued uses to curtail use or to stop using the water altogether, thereby reducing the stress on water sources within the Area.

Permit procedures are designed, in part, to prevent the issuance of permits for water use with the intention of creating water shortages or conflicts among permit holders. If those procedures are followed correctly by the State Agency, or enforced properly by the courts, the various incentives for low-valued users to

discontinue use will come into play solely in times of true shortfalls in water supply, and not as a back-door way of compelling the shift of water to higher-valued uses. The promotion of such shifts is provided for elsewhere in the Regulated Riparian Model Water Code through provisions regarding the duration and modification of permits.

Cross references: § 4R-1-07 (application fees); § 4R-4-01 (purposes for Special Water Management Areas); § 4R-4-03 (creation of Special Water Management Area); § 4R-4-04 (Area Water Boards); § 4R-4-05 (Area Water Management Plans); § 4R-4-06 (regulatory authority of Special Water Management Areas); § 4R-4-07 (conflict resolution within Special Water Management Areas); §§ 6R-3-01 to 6R-3-06 (the basis of a water right); § 7R-1-02 (duration of permits); § 7R-1-03 (forfeiture of permits); §§ 7R-2-01 to 7R-2-04 (modification of water rights); §§ 7R-3-01 to 7R-3-07 (restrictions during water shortages or water emergencies).

Comparable statutes: FLA. STAT. ANN. §§ 373.0695(1)(c), 373.0697, 373.088 to 373.93, 373.109; MISS. CODE ANN. §§ 51-8-35 to 51-8-49.

CHAPTER 5
ENFORCEMENT AND DISPUTE RESOLUTION

Inevitably, there will be disputes between the State Agency and those subject to its regulatory authority, as well as disputes between holders of water rights. The Regulated Riparian Model Water Code seeks to provide a complete and effective range of remedies for these several kinds of disputes. The Code relies on general law for most of the details of these remedies but does spell out the essential terms of the rights of persons and of the Agency to basic remedies and some of the means of proving their claims.

This Code does not automatically require a hearing before any order or decision by the State Agency but does provide full opportunity for a contested hearing by any person affected by an order or decision. These provisions apply both to specific decisions such as the issuance or denial of a permit or a decision to undertake a Special Water Management Area study and also to decisions of a more general nature, such as the adoption of a regulation. These same provisions generally apply to Area Water Boards and Special Water Management Areas in comparable circumstances. *See* Part 4 of Chapter 4. The provisions in the first Part of this chapter spell out the most central features of the right to a hearing. These provisions will apply to any hearing held pursuant to the Code, whether under this chapter or otherwise.

Consistent with the policy of the American Society of Civil Engineers, the Code emphasizes alternate dispute resolution, both between the State Agency and the persons it regulates and between water right holders. *See ASCE Policy Statement* No. 256 on Alternative Dispute Resolution. This can include recourse to the dispute resolution facilities of the Area Water Board of the appropriate Special Water Management Area. In the event that such devices fail, this chapter also provides a full panoply of formal dispute resolution methods, including administrative hearings to resolve disputes between holders of water rights. The Code also provides enforcement measures for the Agency of both a civil and criminal nature. For a general discussion on the enforcement of permits, *see* Dellapenna, § 9.03(a)(5)(B).

PART 1 HEARINGS

The essence of due process of law is fair procedures to ensure that any person affected by a government decision has an appropriate opportunity to be heard in the matter during the decision-making process. This Part provides for hearing generally and provides the State Agency with authority to compel the production of necessary evidence. The Agency is also empowered to decline to provide a hearing if there is no material question in dispute.

§ 5R-1-01 Right to a Hearing

(1) Any person aggrieved by an order or decision of the State Agency, or whose interests in fact are likely to be affected adversely by a regulation proposed or adopted by the State Agency, must submit a written request for a hearing within 30 days of that person's receipt of notice of the order or decision or within 60 days of the publication of the proposed or adopted regulation.

(2) The State Agency shall provide a hearing within 30 days of the receipt of a written request for a hearing pursuant to subsection (1), unless the requesting person has been heard previously on the same matter.

(3) The person requesting a hearing must indicate in the written request the reasons why that person believes the order or decision in question should be changed.

Commentary: This section provides for an administrative hearing before the State Agency at the request of any person aggrieved by an order or decision of the Agency or likely to be adversely affect by a regulation adopted by the State Agency. The Regulated Riparian Model Water Code rejects always requiring a mandatory hearing (whether informational or adjudicatory) before the Agency acts. Such a requirement is found in the law of some regulated riparian States. Still, the Code recognizes that fundamental fairness requires that any person aggrieved by an order or decision or likely to be affected by a proposed or adopted regulation should be heard if that person deems it worth the effort to request the hearing and to undertake to make a presentation, whether in person or through counsel.

The requirements to qualify to request a hearing are that the person be "aggrieved" by a decision focusing on specific interests or rights or "interested in fact" in a regulation cast in general terms. These are the usual requirements for "standing" before federal courts and are often the law in the states as well. A person is "aggrieved" by an order or decision if her, his, or its legal rights actually are affected by the order or decision. *Sierra Club v. Morton*, 405 U.S. 727 (1972). A person has an "interest in fact" if their property or activities are likely to be affected adversely by the regulation in question even if no specific legal right is involved. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc*., 528 U.S. 167 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The person requesting the hearing must indicate the grounds for the requested hearing in the request for the hearing and shall have the right, so long as the grounds alleged are not frivolous (according to the next section).

Hawaii provides a considerably more restrictive model. Hawaii limits the right to a hearing to persons who own land within the water basin in which the withdrawal is to occur or who will be "directly and immediately affected" by the proposed water use. Haw. Rev. Stat. § 174C-53(b). This Code is more forthcoming regarding the right to request a hearing but requires the adversely affected person to act promptly in order to obtain the hearing within 30 days of receiving written notice of an Agency order or decision. A longer period of 60 days is allowed for persons seeking a hearing after the Agency publishes a

regulation as the regulation might not come to the attention of adversely affected persons as quickly as an order or decision communicated directly to those affected by the order or decision. If the right to a hearing is invoked by a non-frivolous written request, the hearing must be held within 30 days. Such relatively short time limits ensure both fairness to the affected individuals and ensures that the State Agency will be able to implement its orders, decisions, and regulations promptly. A State legislature may choose some other time limit for the holding of the hearing, depending on local traditions, anticipated demand for hearings, or other relevant considerations.

Cross references: § 1R-1-08 (procedural protections); § 2R-2-15 (person); § 2R-2-23 (State Agency); § 5R-1-02 (a hearing not required for a frivolous claim); § 5R-1-03 (hearing participation); § 5R-1-04 (authority to compel evidence); § 5R-1-05 (hearings not to delay the effectiveness of a permit); §§ 5R-2-01 to 5R-2-03 (dispute resolution); §§ 5R-3-01 to 5R-3-03 (judicial review); § 6R-2-02 (notice and opportunity to be heard); § 6R-2-04 (contesting an application); § 6R-2-05 (public right of comment); § 7R-2-02 (approval of modifications); § 7R-3-02 (declaration of a water shortage); § 7R-3-03 (declaration of a water emergency).

Comparable statutes: ALA. CODE §§ 9-10B-5(9), 9-10B-30; ARK. CODE ANN. § 15-22-206(a), (b) (mandatory hearing); CONN. GEN. STAT. ANN. §§ 22a-371, 22a-372; DEL. CODE ANN. tit. 7, § 6004, 6006; FLA. STAT. ANN. § 373.229(3) (hearings required if the withdrawal is over 100,000 gallons per day); GA. CODE ANN. §§ 12-5-31(o), 12-5-43, 12-5-95(b), 12-5-96(g), 12-5-99(2), 12-5-106(b); HAW. REV. STAT. §§ 174C-11, 174C-13, 174C-27(b), 174C-31(m), 174C-42, 174C-50(b), 174C-53, 174C-71(1)(F); KY. REV. STAT. ANN. § 151.184; MD. CODE ANN., NAT. RES. § 8-806(f), (i) to (k); MASS. GEN. LAWS ANN. ch. 21G, § 12; MINN. STAT. ANN. § 105.44(3)-(6); N.Y. ENVTL. CONSERV. LAW § 15-0903(1); S.C. CODE ANN. § 49-5-60(D), (E).

§ 5R-1-02 A Hearing Not Required for a Frivolous Claim

The State Agency may disallow a hearing if the State Agency determines that the proposed grounds for questioning the State Agency's action are frivolous, serving notice of that determination on the person requesting the hearing and allowing that person a reasonable opportunity to demonstrate a non-frivolous basis for convening a hearing.

Commentary: Recognizing that some requests for hearings under section 5R-1-01 are made for purposes of delay rather than because of any actual belief that the order or decision is wrong, the Regulated Riparian Model Water Code authorizes the State Agency, upon proper notice and an opportunity to contest the Agency's conclusion, to disallow the hearing when the Agency determines that the hearing request is based upon frivolous grounds or otherwise fails to present a material issue. In addition, at least under the general administrative procedure law of some states, the party responsible for presenting the frivolous claim is subject to the sanction of being ordered to pay the other party's expenses for answering the frivolous claim. *See, e.g., Friends of Nassau Cnty., Inc. v. Nassau Cnty.*, 752 So. 2d 42 (Fla. App. 2000). This provision provides content to a policy of the American Society of Civil Engineers. *See ASCE Policy Statement* No. 364 on Prevention of Frivolous Lawsuits.

Cross reference: § 5R-1-01 (right to a hearing).

Comparable statute: MD. CODE ANN., NAT. RES. § 8-806(k).

§ 5R-1-03 Hearing Participation

(1) Any hearing shall be held in any county in which the withdrawal or use in question is or would be made and shall, except when required to protect confidential business information as provided in § 4R-1-09, be open to the public.

(2) Any person shall be allowed to participate in any hearing in which that person has an interest in fact.

(3) Any person participating in a hearing pursuant to this Code may be represented by counsel, make written or oral arguments, introduce any relevant testimony or evidence, cross-examine witnesses, or take any combination of such actions.

Commentary: This section sets forth certain limited procedures to be followed in holding a hearing under the Regulated Riparian Model Water Code. The State Agency has the authority to adopt regulations to define in more detail the procedures pertaining to hearings.

Subsection (1) provides that hearings are to be held in any county in which the withdrawal or use is to be made and are to be open to the public. If withdrawals or uses are to occur in several counties, the State Agency has discretion to select the county in which the hearing is to be held. If only one person is to be heard, the hearing normally would be held in the county that is the most convenient for that person. When numerous people are to be heard, the State Agency would schedule the hearing to optimize the convenience of all concerned and might even hold the hearing in a number of sessions in several authorized counties.

The major limitation on the openness requirement is the preservation of confidential business information. That protection is not absolute. Confidential business information shall be made public when relevant to an administrative process. This clause merely provides that no such disclosure shall occur without notice to the person entitled to the confidentiality provided in section 4R-1-09, and then only after a hearing to determine its relevancy to the proceeding.

Subsection (2) allows any person to participate in the hearings (i.e., to be heard), so long as that person is "interested in fact." *See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). This is a broader right to be heard than is necessary to qualify to request a hearing under section 5R-1-01 (1). To request a hearing, one's interests must be adversely affected in some fashion. To be heard at a hearing, one need only have an interest in fact, even if that interest would not be adversely affected by the order, decision, or regulation that is the subject matter of the hearing.

Subsection (3) provides that any participant in a hearing has a legal right to be represented by counsel, to present evidence or witnesses, and to cross-examine adverse witnesses.

Cross references: § 1R-1-08 (procedural protections); § 2R-2-15 (person); § 2R-2-23 (State Agency); § 4R-1-06 (regulatory authority of the State Agency); § 5R-1-01 (right to a hearing); § 5R-1-02 (hearing not required for a frivolous claim); § 5R-1-04 (authority to compel evidence); § 5R-1-05 (hearings not to delay effectiveness of permit); §§ 5R-2-01 to 5R-2-03 (dispute resolution); §§ 5R-3-01 to 5R-3-03 (judicial review); § 6R-2-02 (notice and opportunity to be heard); § 6R-2-04 (contesting an application); § 6R-2-05 (public right of comment); § 7R-2-02 (approval of modifications); § 7R-3-02 (declaration of a water shortage); § 7R-3-03 (declaration of a water emergency).

Comparable statutes: ARK. CODE ANN. § 15-22-206(a); CONN. GEN. STAT. ANN. §§ 22a-371(c), (d), (g), 22a-372; DEL. CODE ANN. tit. 7, § 6004, 6006; GA. CODE ANN. §§ 12-5-43, 12-5-96(h)(2); HAW. REV. STAT. §§ 174C-11, 174C-13, 174C-27(b), 174C-31(m), 174C-42, 174C-50(b), 174C-53, 174C-71(1)(F);

KY. REV. STAT. ANN. § 151.184; MD. CODE ANN., NAT. RES. § 8-806(f), (i), (j); MASS. GEN. LAWS ANN. ch. 21G, § 12; MINN. STAT. ANN. § 105.44(3)-(5); N.Y. ENVTL. CONSERV. LAW § 15-0903; S.C. CODE ANN. § 49-5-60(D) to (F).

§ 5R-1-04 Authority to Compel Evidence

(1) The State Agency is authorized for all purposes falling within the State Agency's jurisdiction to administer oaths, issue subpoenas, and to compel the attendance of witnesses and the production of necessary or relevant data, including witnesses or evidence that appear necessary to evaluate the arguments of any party.

(2) Any person who defies a proper subpoena or other order to attend a proceeding or to produce evidence without lawful excuse is guilty of criminal contempt and may be prosecuted in any court of competent jurisdiction.

Commentary: The Regulated Riparian Model Water Code provides full authority to the State Agency to compel the attendance of relevant witnesses and the production of any relevant evidence at any hearing. Evidence is relevant whether it is necessary to evaluate the Agency's position or is necessary to evaluate any other person's position at the hearing. This power, then, is to be exercised to compel the attendance of witnesses and the production of evidence on behalf of someone challenging the Agency's orders or decisions as well as in support of those orders or decisions. Failure to obey an order to attend or produce evidence without lawful excuse, or providing false witness or evidence, is treated as a contempt of court upon conviction before any competent court. Although the authority to order the appearance or the production of evidence applies to any party, it is defeated by a valid claim of privilege (such as the attorney-client privilege or as otherwise provided by the applicable general law of evidence) or a valid claim of immunity (as of the federal government or its agencies or instrumentalities to immunity from state process).

Cross references: § 2R-2-15 (person); § 2R-2-23 (State Agency); § 5R-1-01 (right to a hearing); § 5R-1-03 (hearing participation).

Comparable statutes: ARK. CODE ANN. §§ 15-22-207, 15-22-208; DEL. CODE ANN. tit. 7, § 6006(3); KY. REV. STAT. ANN. § 151.184(3); MINN. STAT. ANN. § 105.44(7); N.J. STAT. ANN. § 58:1A-15(d); N.Y. ENVTL. CONSERV. LAW § 15-0903(3)(c).

§ 5R-1-05 Hearings Not to Delay the Effectiveness of a Permit

Pending the outcome of a hearing or ensuing litigation concerning the terms and conditions of a permit, the person holding the permit must comply with the contested terms or conditions.

Commentary: A request for a hearing is not allowed to delay the implementation of the State Agency's decisions regarding the terms and conditions of permits. Persons contesting the terms or conditions of a permit must abide by the contested terms or conditions pending the outcome of the hearing or subsequent litigation. This is necessary in order to prevent a person from using the hearing process and judicial review to delay necessary steps to manage, conserve, and develop the waters of the State.

Cross references: § 1R-1-08 (procedural protections); § 2R-2-15 (person); § 2R-2-23 (State Agency); § 5R-1-01 (right to a hearing); § 5R-1-02 (a hearing not required for a frivolous claim); § 5R-1-03 (hearing participation); § 5R-1-04 (authority to compel evidence); §§ 5R-2-01 to 5R-2-03 (dispute resolution); §§ 5R-3-01 to 5R-3-03 (judicial review); § 6R-2-04 (contesting an application for a permit); § 6R-2-05 (public right of comment); § 7R-1-01 (permit terms and conditions).

PART 2 DISPUTE RESOLUTION

Disputes over the allocation of water or the modification of water rights should be resolved as expeditiously, inexpensively, and fairly as possible. *See ASCE Resolution* No. 256 on Alternative Dispute Resolution (1999) (endorsing recourse to dispute avoidance, arbitration, mediation, dispute review, and mini-trials). Once a dispute arises, the persons involved generally discuss their differences and try to settle the misunderstanding or disagreement through the informal process of negotiation. Negotiation offers the advantage of allowing the persons themselves to control the process and the solution and, thus, offers the greatest assurance of achieving a mutually satisfactory outcome that they will honor rather than seek to evade. As a result, the majority of disputes will never enter any formal dispute resolution process; most will be settled through negotiation. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981).

If direct negotiations between the parties to a dispute fail, various forms of alternate dispute resolution have been developed to combine the advantages of greater party control than is possible for litigation and third-party intervention designed to facilitate (mediation) or mildly compel a resolution to the dispute (arbitration). The four goals of alternative dispute resolution are to

(1) relieve more formal dispute resolution mechanisms of congestion and the parties to the dispute of undue cost and delay;
(2) enhance community involvement in the dispute resolution process;
(3) facilitate access to justice; and
(4) provide more effective dispute resolution.

Most regulated riparian statutes already in place say little or nothing about resolving disputes between holders of water rights. *See* Dellapenna, § 9.03(c). This silence relegates the parties to any such dispute, once they have exhausted their own efforts to negotiate their differences, to the law courts. This Part of the Regulated Riparian Model Water Code encourages a wider range of informal dispute resolution for all disputes involving the waters of the State and requires arbitration for disputes between permit holders. The American Society of Civil Engineers strongly supports alternative dispute resolution. *See ASCE Policy Statement* No. 256 on Alternative Dispute Resolution.

§ 5R-2-01 Support for Informal Dispute Resolution

When the State Agency determines that an agreement, executed in writing by all persons having an interest in a dispute regarding the waters of the State and filed with the State Agency, is consistent with the policies and requirements of this Code, the State Agency shall approve the agreement, and the agreement shall thereafter control in place of a formal order or regulation of the State Agency until terminated by agreement of the persons bound by the agreement or terminated by the State Agency because the agreement or its effects have become inconsistent with the policies or requirements of this Code.

Commentary: The Regulated Riparian Model Water Code facilitates the settlement of disputes by negotiation between the parties, whether through mediation or otherwise, by providing

that the State Agency will be bound by the terms of the resulting agreement once it is filed by the Agency, unless the Agency determines that the agreement or its effects are inconsistent with the policies or requirements of the Code. Any person aggrieved by the Agency's determination to recognize such an agreement is entitled to judicial review on the same terms as any person aggrieved by any final order or decision by the Agency. *See* § 5R-3-02. No existing water allocation law includes such a provision. The Agency itself has the authority to resolve its disputes through negotiations with the parties rather than solely through formal proceedings. *See* section 5R-2-02. *See also ASCE Policy Statement* No. 256 on Alternative Dispute Resolution.

Cross references: § 2R-2-15 (person); § 2R-2-23 (State Agency); § 5R-2-02 (conciliation or mediation); § 5R-2-03 (administrative resolution of disputes among holders of permits to withdraw water); § 5R-3-02 (judicial review of orders or decisions of the State Agency); § 5R-4-07 (civil charges).

Comparable statutes: GA. CODE ANN. § 12-5-23 (b)(3); OR. REV. STAT. § 537.745.

§ 5R-2-02 Conciliation or Mediation

(1) With the consent of persons involved in disputes over water or the allocation thereof, the State Agency may conduct informal negotiations to encourage and assist the conciliation, mediation, or other informal resolutions of the dispute.

(2) The State Agency shall recover from the parties the expenses of its activities in encouraging and assisting the conciliation or mediation of disputes, allocating the expenses to the parties in the same proportions as their water use fees bear to each other.

Commentary: If negotiations directly between the parties fail, this section authorizes the State Agency to facilitate the negotiations in an effort to achieve the sort of informal outcome that offers the best chance of long-term success. This approach is consistent with the policies of the American Society of Civil Engineers. *ASCE Policy Statement* No. 256 on Alternative Dispute Resolution.

Two techniques are available for this intervention, and both are authorized. The least intrusive role possible for a representative of the State in helping to resolve a dispute not involving the State is conciliation in which the State Agency merely functions as a conduit for information and encourages the parties to devise their own solutions. The State Agency takes on a slightly greater role in the process of mediation; in that process, the mediator suggests solutions to the dispute, although the Agency refrains from attempting to impose any solution it suggests to the parties. This express recognition is not to foreclose other modes of intervention that could also facilitate the informal resolution of a dispute. Illinois, for example, prescribes a somewhat different role for its administering agency, that of "fact finder." This section authorizes any informal techniques that are mutually agreeable to the parties to the dispute if the Agency finds it can usefully perform a function under the technique.

Some will consider this to be the most important function of the State Agency. Still, the Agency cannot undertake to conciliate or mediate every dispute between water right holders if only because of budget limitations, for conciliation and mediation can become a time-consuming and expensive process. Therefore, the section merely authorizes the Agency to become involved. The Agency retains discretion on how often and how extensively it will become involved in conciliation or mediation. The exercise of this discretion will necessarily be strongly influenced by the appropriations by the State legislature authorized for this purpose or for the State Agency generally. In a proper case, the State Agency can refer the interested persons to an Area Water Board for conciliation or mediation, which could somewhat ameliorate the burdens of conciliating or mediating a large number of disputes.

Subsection (2) requires the State Agency to recover the costs of its services from the parties. As the process is non-adversarial, there is not, strictly speaking, a "winner" or a "loser" when the process is concluded. Therefore, one cannot allocate the costs to the loser, as might be done after litigation. To allocate the costs equally between the parties would often impose an impossible financial burden on the smaller participants in the process. The Regulated Riparian Model Water Code allocates the costs in proportion to the water use fees paid by the participants. Such an approach is consistent with the non-adversarial nature of the process and, generally, will be consistent with the ability of the participants to pay for the process. In short, the formula will usually be fair or equitable.

Cross references: § 2R-2-15 (person); § 2R-2-23 (State Agency); § 4R-4-04 (Area Water Boards); § 4R-4-06 (conflict resolution within Special Water Management Areas); § 5R-2-01 (support for informal dispute resolution); § 5R-2-03 (administrative resolution of disputes among holders of permits to withdraw water).

Comparable statute: GA. CODE ANN. § 12-5-99(1).

§ 5R-2-03 Administrative Resolution of Disputes among Holders of Permits to Withdraw Water

(1) If the State Agency determines that the more informal procedures contained in sections 5R-2-01 and 5R-2-02 will not succeed in resolving a dispute among holders of water rights evidenced by a permit or upon the request of any person interested in such a dispute, the State Agency shall convene a hearing to arbitrate the dispute administratively.

(2) The State Agency shall provide at least 21 days' notice of the proposed hearing to any holder of a water right involved in the dispute prior to convening the arbitral hearing, sending the notice by any form of mail requiring return receipt to the last address reported to the State Agency for any reason by the holder in question.

(3) Upon the conclusion of the arbitral hearing, the State Agency shall issue an order determining whether there has been an unreasonable injury to any holder of a water right invited to participate in the arbitral hearing or to the public interest, and ordering as appropriate:

(a) steps to be taken by those parties best able to avoid or abate the injury at the least cost,

(b) compensation to the injured person by the person responsible, and

(c) modification or revocation of the permit of the offending person as necessary to prevent the unreasonable injury.

(4) The only recourse for any party to the arbitral hearing who is aggrieved by the result shall be judicial review of the State Agency's decision pursuant to section 5R-3-02.

(5) If the State Agency fails within six (6) months to conclude the proceedings under this section, or fails with reasonable diligence to effectuate or enforce the decision rendered through the hearing, any aggrieved

party to the arbitral hearing may initiate a proceeding in any court of competent jurisdiction to resolve the dispute according to the provisions of this Code and other relevant laws.

Commentary: The Regulated Riparian Model Water Code preempts most litigation between holders of water rights held pursuant to a permit by providing a formal administrative process before the State Agency to resolve the dispute. Although the compulsory aspects of this administrative process make it resemble full-blown litigation, the Code intends that the process generally remain more informal, less costly, and faster than litigation. *See* Herbert Kritzer and Jill Anderson, *The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the American Arbitration Association and the Courts*, 8 JUS. SYS. J. 6 (1983). *See also ASCE Policy Statement* No. 256 on Alternative Dispute Resolution.

The United States Supreme Court long ago upheld the constitutionality of removing disputes over water from courts to an administrative proceeding, so long as there is judicial review of the outcome of the administrative proceeding. *Pacific Live Stock Co. v. Oregon Water Board*, 241 U.S. 440 (1916). *See also United States v. Idaho*, 508 U.S. 1 (1993). This Code provides for judicial review, so there seems to be no credible basis for challenging this provision as a denial of due process.

While certain features of this administrative process are found in some of the existing regulated riparian statutes, none of them contains a provision as extensive or complete as the one set out in this Code. This procedure is designed to enable the Agency to retain its managerial control of the waters of the State without fear of confronting, for example, inconsistent judicial decrees entered in several separate private proceedings or that would somehow give third persons veto power over particular water sources or uses. The process is not available for all disputes because it does not reach disputes regarding water rights for which a permit is not required or disputes involving nonconsumptive uses.

The State Agency and the participants in the dispute remain bound to attempt informal dispute resolution before resorting to the arbitration hearing. In keeping with this Code's approach of maximum openness to all persons with an interest in an issue before the State Agency, once the Agency or any interested person determines that such informal steps will not succeed, the Agency is to convene a formal hearing, giving written notice to the interested parties. *See* section 5R-1-01. A State might narrow the range of persons who can request a hearing. Hawaii, for example, limits the right to a hearing to persons who own land within the water basin in which the withdrawal is to occur or who will be "directly and immediately affected" by the proposed water use. HAW. REV. STAT. § 174C-53(b). This Code addresses concerns about requests for a hearing by persons whose interest is too remote by authorizing the State Agency to dismiss frivolous claims without a hearing. *See* section 5R-1-02.

The Agency will conduct the hearing under the general rules in this Code supplemented by the State's Administrative Procedure Act. The only recourse for someone disappointed in the outcome to the hearing is through judicial review under section 5R-3-02—an approach that makes the Agency a party to any litigation and gives a strong presumption of validity to its decision in the hearing.

The Agency is to order a remedy only against a person found to have unreasonably injured another permit holder or the public interest. The remedies are to be sculpted by the Agency to provide the least cost avoidance or abatement of the injury, and can include physical solutions, compensation, and even modification or cancellation of the permit of the offending holder. In determining whether an injury is unreasonable, the Agency may consider the age and condition of the facilities of the several parties and the consequent reasonableness of continuing to insist on relying on each system without interference from the activities of another holder of a water right. The Agency might also require the parties to submit estimates of their costs to take various remedial steps, such as repairs or improvements in one party's water delivery system. If the remedy ordered requires the construction or reconstruction of a water withdrawal or use facility, the Agency shall supervise the design, construction, and testing of the resulting facility to ensure that it meets any general standards for such a facility adopted by regulation by the Agency and the particular standards set by the Agency in this proceeding as necessary to prevent further unreasonable injury.

Once the Agency renders its decision, the Agency is free to invoke any relevant civil enforcement measure to compel compliance with the decision. If noncompliance involves the knowing reporting of false information or the like, criminal sanctions become a possibility as well. The Agency might also refer a particular dispute in a proper case to an Area Water Board for arbitration pursuant to this section.

This section provides a rather lengthy maximum period for the proceedings to be concluded in an effort to ensure that the Agency has adequate time to complete the proceedings. If the Agency fails to render a decision within the period indicated or fails to effectuate or enforce its decision with reasonable dispatch, an aggrieved party is then free to go to court and seek any appropriate relief in any court of competent jurisdiction. A State would want to consider whether, given budgetary and other constraints, this period should be longer or shorter than the period provided in this section.

Cross references: § 1R-1-01 (protecting the public interest in the waters of the State); § 1R-1-06 (legal security for water rights); § 1R-1-08 (procedural protections); § 2R-1-01 (the obligation to make only reasonable use of water); § 2R-1-03 (no unreasonable injury to other water rights); § 2R-1-04 (protection of property rights); § 2R-2-07 (cost); § 2R-2-15 (person); § 2R-2-18 (the public interest); § 2R-2-20 (reasonable use); § 2R-2-23 (State Agency); § 2R-2-26 (unreasonable injury); § 2R-2-30 (water right); § 4R-4-04 (Area Water Boards); § 4R-4-07 (conflict resolution within Special Water Management Areas); § 5R-1-01 (right to a hearing); § 5R-1-02 (a hearing not required for a frivolous claims); § 5R-1-03 (hearing participation); § 5R-1-04 (authority to compel evidence); § 5R-2-01 (support for informal dispute resolution); § 5R-2-02 (conciliation or mediation); § 5R-3-02 (judicial review of orders or decisions of the State Agency); §§ 5R-4-01 to 5R-4-09 (civil enforcement); § 5R-5-01 (crimes); § 5R-5-02 (revocation of permits); § 6R-3-02 (determining whether a use is reasonable); §§ 7R-2-01 to 7R-2-04 (modification of water rights).

Comparable statutes: DEL. CODE ANN. tit. 7, § 6031; HAW. REV. STAT. § 174C-10; ILL. CONS. STAT. ANN. ch. 525, § 45/5; IND. CODE ANN. § 13-2-1-6(2); IOWA CODE ANN. §§ 455B.271(2)(d), 455B.281; VA. CODE ANN. § 62.1-44.37.

PART 3 JUDICIAL REVIEW

Judicial review of regulations and decisions or orders is an essential element of due process. This Part provides for generous review of either sort of action by the State Agency but leaves to the general administrative law of the State questions of standards of review and of the procedural details of such judicial review.

§ 5R-3-01 Judicial Review of Regulations

Any person likely to be affected by a regulation adopted or proposed by the State Agency may obtain a judicial declaration of the validity, meaning, or application of the regulation by bringing an action for a declaratory judgment in a court of competent jurisdiction in the county in which the executive offices of the State Agency are maintained.

Commentary: This section provides for definitive judicial review and interpretation of the regulations made by the State Agency under this Code by means of a declaratory judgment. The section removes any limitations to such review that might be found in the State's Administrative Procedure Act and provides the exclusive basis for challenging a regulation before the regulation is applied individually through an order or decision of the Agency. This section precludes a proceeding (such as for the extraordinary writs of mandamus or prohibition) under the general provisions of the State's Administrative Procedure Act as such, but the general legal standards of the Administrative Procedure Act (such as the legal bases for review and the standards that determine whether the Agency's action is valid) apply, as those questions are neither addressed nor displaced by this section. *See generally* MALONEY, AUSNESS, & MORRIS, at 115, 116; WILLIAM WALKER & PHYLLIS BRIDGEMAN, A WATER CODE FOR VIRGINIA 75 (Va. Polytech.. Inst., Va. Water Resources Res. Center Bull. No. 147, 1985).

An alternative model would be to establish a mechanism for appeal and review within the administrative structure. Thus, for example, Florida vests "exclusive" authority to review the validity of regulations in the Land and Water Adjudicatory Commission, composed of the governor and the cabinet. FLA. STAT. ANN. § 373.114. Delaware has an Environmental Appeals Board with primary authority to review both regulations and final decisions by the Secretary of Natural Resources and Environmental Control, the officer vested with permit-issuing authority. Appeal from these boards then brings the issues before the courts. The Regulated Riparian Model Water Code expedites this process by taking appeals directly from the State Agency to the courts.

Cross references: § 4R-1-05 (application of general laws to meetings, procedures, and records); § 4R-1-06 (regulatory authority of the State Agency); § 4R-4-02 (Special Water Management Area studies); § 4R-4-07 (conflict resolution within Special Water Management Areas); § 5R-1-01 (right to a hearing); § 5R-3-02 (judicial review of orders or decisions of the State Agency); § 5R-3-03 (compliance with competent judicial orders or judgments); § 5R-4-09 (citizen suits).

Comparable statutes: ARK. CODE ANN. § 15-22-209; DEL. CODE ANN. tit. 7, § 6006(2); GA. CODE ANN. § 12-5-95(c); HAW. REV. STAT. § 174C-12; MINN. STAT. ANN. § 105.471.

§ 5R-3-02 Judicial Review of Orders or Decisions of the State Agency

(1) Any person who has exhausted all administrative remedies available within the State Agency and who is aggrieved by any final order or decision of the Agency is entitled to judicial review of the order or decision under the State's Administrative Procedure Act.

(2) A preliminary, procedural, or intermediate decision is reviewable only if review of the final decision would not afford an adequate remedy.

Commentary: This section allows any person aggrieved by any final order or decision of the State Agency to appeal the Agency's order or decision to a court of competent jurisdiction. No special provisions are provided for the judicial review of other orders or decisions except to indicate that non-final orders are reviewable if awaiting a final order or decision would not afford the aggrieved party an adequate remedy. *See Hermiston Irrig. Dist. v. Water Resources Dep't*, 886 P.2d 1093 (Or. 1994). As noted in the introduction to this Part, the standards of review are left to the general administrative law of the State. An alternative model is found in Delaware, which makes review by an independent Environmental Appeals Board a precondition to judicial review of agency decisions. DEL. CODE ANN. tit. 7, §§ 6007-9.

Subsections 5R-2-03(4) and 5R-2-03(5) together provide a limit on this possibility of interlocutory judicial review. They provide that recourse through judicial review is available only after the entry of a final decision by the hearing officer or board. The failure of the Agency to render a decision within a reasonable period releases the aggrieved person to litigate the dispute in ordinary courts, but not as a form of interlocutory review. Instead, the Agency, by its failure to act within the specified time limits, loses its rather large control over the dispute resolution process to a competent court that shall proceed to provide a proper remedy on the merits of the dispute.

Cross references: § 4R-1-05 (application of general laws to meetings, procedures, and records); § 5R-1-01 (right to a hearing); § 4R-4-02 (Special Water Management Area studies); § 4R-4-06 (regulatory authority of Special Water Management Areas); § 5R-3-01 (judicial review of regulations); § 5R-3-03 (compliance with competent judicial orders or judgments); § 5R-4-09 (citizen suits).

Comparable statutes: ARK. CODE ANN. § 15-22-209; CONN. GEN. STAT. ANN. § 22a-374; DEL. CODE ANN. tit. 7, § 6006(1); GA. CODE ANN. §§ 12-5-44, 12-5-96(h)(1), 12-5-99(c), 12-5-106(b); HAW. REV. STAT. § 174C-12; KY. REV. STAT. ANN. § 151.186; MASS. GEN. LAWS ANN. ch. 21G, § 12; MISS. CODE ANN. §§ 51-3-49, 51-3-55(4); N.Y. ENVTL. CONSERV. LAW § 15-0905; WIS. STAT. ANN. § 30.18(9).

§ 5R-3-03 Compliance with Competent Judicial Orders or Judgments

(1) The State Agency shall comply with all orders or judgments of a court of competent jurisdiction relating to the waters of the State, conforming its regulations, orders, and decisions to the directions of the reviewing court.

(2) If a reviewing court finds that an order or decision under review is unlawful or constitutes a taking without just compensation, the court shall remand the matter to the State Agency which shall, within a reasonable time, as appropriate:
- **(a) issue any necessary permit**,
- **(b) pay just compensation, or**
- **(c) modify its order or decision to remedy the unlawful aspects of its prior decision**.

(3) No judgment for the expenses of any litigation may be entered against the State Agency.

Commentary: Because of the nature of the activities and functions of the State Agency, the Agency will often find its orders, permits, and regulations challenged in litigation. The Regulated Riparian Model Water Code not only requires the Agency to comply with any valid judgment of a competent court, but it also authorizes the Agency to take any necessary steps to comply. This authorization eliminates as a defense any claim that the Agency is not authorized to undertake the action required by the

court. The only proper response of the Agency to a judicial order that allegedly violates the provisions of this Code is to appeal to a higher court, or to the legislature should the objectionable order issue from the State's highest court.

The State Agency must then, as appropriate, issue any necessary permit, pay just compensation, or modify its order or decision, or some combination of the above actions, although the Agency is not made liable for any expenses of litigation other than its own. In general, the court should allow the Agency to select the mode of compliance, so long as the mode chosen by the Agency will in fact remedy the illegality the court has found. If the court directs a particular response, however, the Agency must comply unless it can obtain a reversal of the order on appeal.

Cross references: § 4R-4-02 (Special Water Management Area studies); § 4R-4-06 (regulatory authority of Special Water Management Areas); § 4R-4-07 (conflict resolution within Special Water Management Areas); § 5R-1-01 (right to a hearing); § 5R-3-01 (judicial review of regulations); § 5R-3-02 (judicial review of orders or decisions of the State Agency); § 5R-4-09 (citizen suits); § 7R-1-01 (permit terms and conditions).

Comparable statute: MISS. CODE ANN. § 51-3-47.

PART 4 CIVIL ENFORCEMENT

Achieving the purposes and requirements of the Regulated Riparian Model Water Code are impossible without effective enforcement. The Code includes a detailed plan for the State Agency to enforce the provisions of the Code. The following measures should be read as a series of discrete steps following, when necessary, in succession until compliance is achieved. In a particular case, however, the sequence might be inverted or abbreviated.

The measures set forth in this Part would be available to enforce the outcome of an arbitration proceeding as well as the requirements of this Code and regulations, orders, or decisions of the State Agency. Each of these measures includes some degree of actual or threatened punishment as well as (often) means for compensating the State Agency or others for the effects of the violation. The more strictly punitive sanctions are set off in a separate Part of this chapter, denominated "criminal enforcement." For a summary of the various enforcement measures found in existing regulated riparian statutes, *see* Dellapenna, § 9.03(a)(5)(B).

§ 5R-4-01 Inspections and Other Investigations

(1) Any duly authorized employee of the State Agency may, pursuant to a valid administrative inspection warrant, enter at reasonable times upon any property, other than a building used as a dwelling place, in which that employee reasonably believes that water is withdrawn from the waters of the State, to inspect, investigate, study, or enforce this Code, or any order, term or condition of a permit, or regulation made pursuant to this Code.

(2) An employee acting pursuant to subsection (1) of this section remains liable for any actual damage caused in the course of an inspection by unlawful conduct.

(3) Duly authorized employees are authorized to undertake, with reasonable frequency, any investigations reasonably pertinent to any matter relevant to the administration or enforcement of this Code, including making tests, reviews, studies, monitorings, or samplings, or examining books, papers, and records, as the responsible employee present at the scene deems necessary.

Commentary: The first step of effective enforcement is the power to inspect or otherwise investigate whether users of water are complying with the provisions of the Regulated Riparian Model Water Code. The Code empowers duly authorized employees of the State Agency to carry out administrative inspections as necessary to enforce the Code. *See* Dellapenna, § 9.03(a)(5)(B); *V-1 Oil Company v. State of Wyoming, Dep't. of Envtl. Quality* 696 F. Supp. 578 (D. Wyo, 1988). Several policies of the American Society of Civil Engineers support the power to inspect facilities. Although no single policy is as broad and comprehensive as the provision included in the Code, collectively they reach a similar result. *See ASCE Policy Statements* No. 243 on Groundwater Management, No. 283 on Periodic Inspection of Existing Facilities, No. 356 on Voluntary Environmental Auditing for Regulatory Compliance, and No. 437 on Risk Management.

The power to conduct an administrative inspection is defined quite broadly in the Code and does not require a criminal search warrant. The constitution of the United States allows a State to conduct administrative inspections without any warrant at all for highly regulated industries, or under certain exigent circumstances, or subject to an administrative search warrant for other inspections. *Michigan v. Clifford*, 464 U.S. 287 (1984); *Michigan v. Tyler*, 436 U.S. 499 (1978); *Marshall v. Barlow's, Inc*. 436 U.S. 307 (1978). Administrative searches or inspections and administrative inspection warrants do not require a showing of probable cause in the technical legal sense, but only reasonable grounds—grounds that can include a regular pattern of inspections as well as some particularized reason for a given inspection. *New York v. Burger*, 482 U.S. 691 (1987); *Camara v. Municipal Court*, 387 U.S. 523 (1967). The power to inspect and investigate under this Code is so broad that administrative inspection warrants are required to avoid successful challenges under the U.S. Constitution. This Code does not spell out in detail the requirements for such administrative inspection warrants, leaving that to the general laws of the State and to regulations adopted under the Code. If the State does not have a statute regulating administrative search warrants, it might consider adopting one rather than leaving the question entirely to the regulations to be developed by the State Agency. Any evidence found through an administrative inspection can be used even in the criminal proceeding as long as the inspection was not merely a subterfuge for an unwarranted criminal search. *Michigan v. Clifford*, *supra*; *Michigan v. Tyler, supra; Abel v. United States*, 362 U.S. 217 (1960).

One concern with inspections and investigations is that the State Agency, or one of its duly authorized employees, shall exploit the authority to harass a particular water user or class of users. The Code seeks to prevent this by limiting inspections to "reasonable times," and by limiting investigations to "reasonable frequency." Hearings and judicial review are available to redress violations of these limits. Furthermore, although poking around in the yard is clearly authorized by this section, it specifically excludes actual dwelling places (as opposed to the yard, garage, and other outbuildings) from the searches and inspections authorized by this section. Furthermore, subsection (2) makes the employee personally liable for unlawful conduct in carrying out a search or inspection under this section.

Subsection (3) makes explicit that the search or inspection includes the records of the permit holder, including the records of any self-monitoring required by the terms and conditions of a relevant permit. Such searching or inspection of records are subject to the obligation to protect confidential business information from unauthorized disclosure. The search or inspection also includes the power to conduct such tests and similar