

enviRONS

Volume 6, Number 2

May 1982

ENVIRONS, a non-partisan environmental law/natural resources newsletter published by King Hall School of Law, and edited by the Environmental Law Society, University of California, Davis

Designation of the employer or other affiliation of the author(s) of any article is given for purposes of identification of the author(s) only. The views expressed herein are those of the authors, and do not necessarily reflect the position of the University of California, School of Law, Environmental Law Society, or of any employer or organization with which an author is affiliated.

Submission of Comments, Letters to the Editor, and Articles is encouraged. We reserve the right to edit and/or print these materials.

Editor-in-Chief

Laura Kosloff

Senior Editor

Michael Endicott

Editors

Wally Burton

Gerry Hobrecht

Clancy Nixon

Mark Trexler

Production Manager

Geri Carr

Financial Managers

C.J. Golden

Gail Klein

Jim Laughlin

Art

D. Hanlon

Staff

John Adkisson

Hugh Barroll

Elliot Block

Billy Davies

Joel Davis

Jake Dear

Lynn Hutchins

Jamie Kerr

Joan Lukasik

Nancy Simel

Faculty Advisor

Harrison C. Dunning

copyright ©

May 1982, Environmental Law Society

enviRONS

THE BOTTLE BILL

NO DEPOSIT - NO RETURN. That phrase has caused a revolution in the beer and soft-drink industry. It is symbolic of the development of a throwaway economy in which Americans annually consume 74 million tons of packaging - 661 pounds per person. A quarter century ago, virtually all soda and most beer containers were returnable. Today, Americans throw away over 50 billion containers each year.

In November 1982, California voters will have the opportunity to vote on a Californians Against Waste (CAW) initiative patterned after Oregon's historic "bottle bill". CAW has already submitted more than 500,000 signatures, well over the requirement of 346,000 valid signatures. The initiative may well be the most controversial issue on the ballot, and will certainly draw nationwide attention.

Like the law in Oregon, the California initiative eliminates throwaway containers from the market. It has four major provisions:

- (1) After March 1, 1984, a minimum 5¢ deposit must be collected on each beverage container sold in the state. Each container must be marked with the name of the state and the amount of deposit.
- (2) Retailers and distributors are required to accept empty containers for refunds during normal business hours.
- (3) Retailers, recycling centers, and others are allowed to set up redemption centers where consumers can bring empty containers for refunds.
- (4) Distributors are required to pay a 20% handling fee on all deposits refunded to redemption centers and retailers in order to cover their redemption related costs.

CAW's decision to take the issue directly to the people was not made lightly. Buoyed by the passage and immediate success of the law in Oregon and other states, CAW decided to go the initiative route only after repeated legislative efforts failed. For the past eight years, California State Senator Omer Rains (D-Santa Barbara) has been sponsoring S.B. 4, which is virtually identical to the initiative. With the beverage industry and grocers' associations lobbying heavily against it, the bill has only once reached the Senate floor, where it was soundly defeated in January 1980. The current S.B. 4 failed by a vote of 3-5 in the Senate Natural Resources and Wildlife Committee on January 12 of this year.

Federal legislation, modeled closely after the Oregon act, is being sponsored by Republicans from the first two bottle bill states, Oregon and Vermont. Senators Robert Packwood and Mark Hatfield of Oregon are sponsoring S. 709, while Rep. James Jeffords of Vermont is carrying the House version, H. 2498. Like S.B. 4, these bills have remained mired in committee.

LETTER FROM THE EDITOR

Laura Kosloff

With this issue, an important era is coming to an end for *ENVIRONS*. One of our most dynamic individuals is leaving us for the "real world". Under the encouragement and leadership of Michael Endicott, *ENVIRONS* has improved immensely and is now a dependable publication which tries to come out on a regular basis three or four times a year. Michael also deserves credit for maintaining morale and keeping an organized and committed staff. We want to thank him for all his past effort and his efforts at making the editorial transition as smooth as possible. Our special thanks also go to all the other third year students who have been involved with *ENVIRONS* and the Environmental Law Society and who will also be leaving at the end of this year.

ENVIRONS and the Environmental Law Society are very fortunate in having an especially committed group in the first year students who entered this fall. The future looks bright,

finances aside, of course. With the next issue, we may try a different format to cut production costs, but this does not mean it will be "cheap", since we are dedicated to maintaining *ENVIRONS* quality. We appreciate the past support of our subscribers, and encourage you to subscribe at the highest level you can.

Notwithstanding our fairly optimistic outlook for *ENVIRONS*, the same cannot be said for the country as a whole. We strive in *ENVIRONS* to present different perspectives on a broad range of environmental issues, focusing on regional and state issues. But the national scene is also important. The past year has seen a virtual halt come to many of the environmental advances of the past decade. Administration proposals regarding wilderness areas alarm many conservationists, as do the proposals to amend the Clean Air Act and Endangered Species Act. The EPA's enforcement program is being severely curtailed, affecting its ability to monitor toxic waste disposal among other things. This shift in federal policy is predicated on economics, on an attempt to cut back on federal spending; while the goal may be worthwhile, we take issue with the means. Forfeiting the battle against toxic waste almost before it has started will not save the country. We encourage people to become involved in efforts such as letter-writing and donations to specific causes, if you have not already done so.

Off Road Vehicles in the National Forest

environmental effects and user conflicts

(NOTE: The views expressed in this article are those of the author and do not necessarily reflect the opinions of *ENVIRONS* or its staff. We would welcome articles submitted expressing alternative viewpoints.)

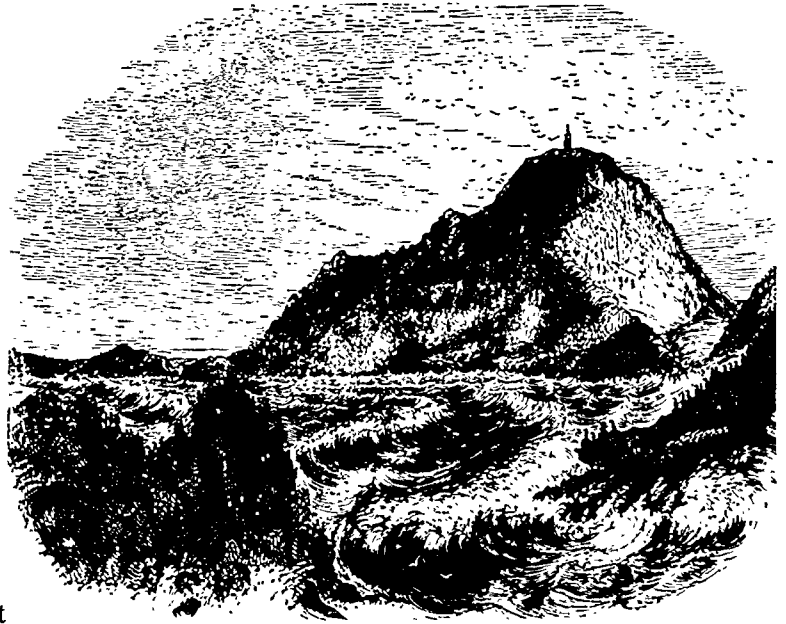
Many of us desire to visit the wilderness and to experience its freedom. Yet unrestrained exercise of this desire may degrade the environment as well as dilute the recreational experiences of others. Off-road vehicles (ORVs) present both of these dangers. Thus, the allocation of public land to ORV use is one of the most controversial issues faced by modern forest planners.



This article addresses this issue by analyzing the treatment of ORVs in the El Dorado National Forest (EDNF). After a brief background on the EDNF and its ORV policies, the article discusses the environmental effects of ORV use and the conflicts this creates with other recreational uses of the forest. Finally, the article

(See **VEHICLES**, page 9)

Environmentalists VERSUS THE Pentagon: NEPA exemptions for the military



On December 1, 1981, the U.S. Supreme Court issued a decision that may be viewed as a judicial retreat from broad application of the National Environmental Policy (NEPA) Act of 1969. In Weinberger v. Catholic Action of Hawaii/ Peace Education Project --- U.S.---, 70 L.Ed.2d 298, 102 S.Ct. 197 (1981), the Court unanimously held that the Navy is not required to prepare or release an Environmental Impact Statement (EIS) detailing the effects of storing, handling, and transporting nuclear weapons at a Hawaiian military base. Any discussion of the possible hazards of storing nuclear weapons might reveal military secrets, the Court claimed, so the public's interest in ensuring that the Navy comply with NEPA must give way to national security considerations. Since the existence of a proposal to store nuclear weapons must itself remain secret, the Court said, not even the judiciary can ultimately determine whether the requirements of NEPA have been fully met.

The case arose in 1978 when several environmental groups filed suit to obtain an injunction against the construction of weapons storage facilities at the West Loch branch of Lualualei Naval Magazine at Pearl Harbor. They claimed that the Navy's failure to prepare an EIS for the project violated NEPA, which states that all federal agencies shall, "to the fullest extent possible", file a detailed statement for any proposed project significantly affecting the quality of the environment. Such a statement must discuss all possible environmental impacts, unavoidable adverse consequences, and alternatives to the proposed action. (42 U.S.C. § 4332).

To determine if an EIS is required for a proposed project, an Environmental Impact Assessment (EIA) is prepared to determine whether there will be any significant environmental impacts from the project. The Navy filed an EIA for West Loch in 1975. It concluded that the probable environmental impacts of the weapons storage facility would not be significant enough to necessitate a full EIS. A Candidate Environmental

Impact Statement (CEIS)* filed in 1978 discussed the general dangers associated with storing nuclear weapons; it also concluded that the handling, storage, and transportation of nuclear weapons presented no environmental hazards.

The plaintiffs challenged the sufficiency of both the EIA and the CEIS. They contended the EIA dealt only with the possible effects of storing conventional weapons, such as had previously been stored at West Loch; it did not consider that nuclear weapons might also be stored there. The plaintiffs charged four important factors were ignored: (1) The risk of nuclear accidents; (2) The enhancement of that risk by the proximity of three nearby airports (one of which, the Honolulu International Airport, has a final approach to a main runway only one mile from West Loch); (3) The effects of a nuclear accident on the surrounding population and environment of Hawaii; and (4) The effects of continual low-level radiation from the storage of nuclear weapons.

The plaintiffs claimed that the CEIS did not adequately address these factors either. The CEIS only discussed nuclear weapons storage in the abstract; it did not address the site-specific dangers of storing nuclear weapons at West Loch. These dangers would have to be considered in an EIS, they charged, for the requirements of NEPA to be met.

The Navy argued that it had complied with NEPA to the fullest extent possible because the Atomic Energy Act and its own regulations prohibit it from dis-

*The CEIS used to be prepared for proposed military projects after an EIA was filed, and like the EIA, it was a preliminary study to determine whether environmental impacts of a project would be significant enough to warrant a more detailed EIS. The CEIS was discontinued when Defense Department regulations were revised in 1978, and now only the EIA is used to determine whether an EIS is necessary.

closing any information relating to the presence of nuclear weapons on military bases. The Navy said a detailed EIS would have to discuss the numbers, types, locations, and capabilities of nuclear weapons; since such a document would compromise national security, it should not be required. The U.S. District Court agreed and denied the plaintiffs' request for an injunction. 468 F.Supp. 190 (1979).

By the time the Ninth Circuit Court of Appeals heard the case, 643 F.2d 369 (1981), the facilities had already been constructed. Nevertheless, the appellate court ruled that an EIS would be required to assess the environmental impacts of operating the facilities. In preparing an EIS, the Navy would not have to reveal whether a decision had actually been made about the storage of nuclear weapons, so there need not be any disclosure of confidential information. Since the Navy had conceded that the facilities were capable of storing nuclear weapons and the public was presumably aware of this capacity, the court reasoned, "...the public must receive some assurance, particularly in a situation as potentially catastrophic as this one, that when the decision is made, the decisionmaker will have been adequately informed as to the environmental consequences of each alternative, here including the potential consequences of the storage of nuclear weapons at this particular site." 643 F.2d at 571 (1981).

The appellate court quoted from the Defense Department's own regulations regarding the dissemination of classified information in support of its holding: "The fact that a proposed action is of a classified nature does not relieve the proponent of the action from complying with the requirements of NEPA...When feasible these [environmental impact] statements shall be organized in such a manner that classified portions can be included as annexes, so that the unclassified portions can be made available to the public." 32 C.F.R. §214.8(i) (1978) (repealed); 32 C.F.R. §214.6 (1980). The court concluded that although specific information about the number and type of nuclear weapons to be stored at the facility cannot be revealed to the public, an EIS generally assessing the impact of such storage can be publicly released.

To avoid disclosing the Navy's decision whether or not to store nuclear weapons at West Loch, the court said, the EIS could be based on a series of hypotheses covering the entire range of possible uses for the storage facilities. Thus, the public would know the environmental effects of how the facilities could be used, not how they would be used. A hypothetical EIS would not only protect classified information, but would also satisfy the twin aims of NEPA: (1) to force decisionmakers to consider environmental impacts of a proposed action; and (2) to inform the public as to what the impacts would be and that they had been considered by the decisionmaker. The court reasoned that if the Navy was allowed to conceal from the public the

possibility that nuclear weapons might be stored at West Loch, it would be able to avoid the political consequences of an unpopular decision.

The U.S. Supreme Court rejected this analysis. It held that the Navy was not required by NEPA to disclose to the public a "Hypothetical" EIS. Justice Rehnquist, writing for the Court, said that public disclosure of an EIS is expressly governed by the Freedom of Information Act (FOIA). The FOIA specifically exempts from disclosure material exempted by statute or Executive order. He stated that although national security information of the type involved in this case is arguably exempt from disclosure under the Atomic Energy Act, it is unnecessary to reach that question. Executive Order 12065, 43 Fed. Reg. 28949 (1978), which allows information relating to the storage of nuclear weapons to be classified, exempts public disclosure of such information under both FOIA and NEPA.

The Court also held that the Navy is not required to prepare a confidential EIS for internal decisionmaking purposes. Citing Kleppe v. Sierra Club, 427 U.S. 390 (1976), it said an EIS need not be prepared when a project is contemplated but only when it is proposed. Since the Navy, for national security reasons, can neither admit nor deny whether it proposes to store nuclear weapons at its new facilities "...it has not been and cannot be established that the Navy has proposed the only action that would require the preparation of an EIS dealing with the environmental consequences of nuclear storage at West Loch. Ultimately, whether or not the Navy has complied with NEPA 'to the fullest extent possible' is beyond judicial scrutiny in this case. Narrowly construed, Catholic Action may stand for no more than a rejection of the appellate court's "hypothetical" EIS as "a creature of judicial cloth, not legislative cloth." Critics of this decision say that even though the specific term "Hypothetical Environmental Impact Statement" is not mentioned in the statutory language of NEPA, there is little difference between a "hypothetical" EIS and a "standard" EIS. They claim that any EIS is by definition hypothetical, as it examines the possible and future environmental impacts of proposed and alternative actions before a decision is actually made to proceed with it or not.

Viewed more broadly, this case suggests a willingness by the Court to sidestep the EIS requirement whenever the military claims an overriding national security interest. Some environmentalists claim the Court has blurred the distinction between the impact consideration and public disclosures functions of NEPA. They agree there may be times when the public should not have access to classified information; but argue it is hard to reconcile the Court's statement that the Navy must consider environmental consequences in its internal decisionmaking process with the Court's holding that the Navy is not required to prepare any

(See PENTAGON, page 11)

national forest wilderness since

RARE II

When the U.S. Forest Service completed its second Roadless Area Review and Evaluation (RARE II) in 1979, it hoped that the process of determining which National Forest lands would be included in the National Wilderness Preservation System would also be completed. That hope was quickly dashed in 1980 when the State of California successfully challenged the legal sufficiency of the RARE II Environmental Impact Statement in *California v. Bergland*, 483 F. Supp. 465 (E.D. Cal. 1980). (See July 1980 edition of *ENVIRONS* for a complete discussion of RARE II and the *Bergland* case.)

The *Bergland* case is currently on appeal. No other state has challenged RARE II in court, despite California's success so far in delaying the implementation of RARE II. Individual states and wilderness advocates have instead focused their attention on Congress and have attempted to fashion a legislative solution to the final disposition of National Forest lands under the Wilderness Preservation System.

Congress was content in its 1980 session to address the issue on a state-by-state basis. Rather than determine on a national scale which remaining roadless areas would be designated as wilderness, Congress began to consider separate bills for each state containing roadless areas. Wilderness advocates and the timber industry both agreed that this was the best approach.

In 1980, Congress passed comprehensive state bills for the states of Colorado and New Mexico. Representative Phillip Burton (D-Cal.) introduced a comprehensive bill for California during the same Congressional session. The House of Representatives approved Burton's bill, but the Senate did not.

The state RARE II bills that have been approved or proposed all contain "release" language. This term means that in exchange for including certain roadless areas in the Wilderness Preservation System, all remaining areas which were recommended for nonwilderness in RARE II are "released" from further consideration for possible wilderness designation. This release is not permanent. The Forest Service is not allowed to consider the wilderness option only for the first round of ten-year management plans it has to prepare under the National Forest Management Act. After that, the Forest Service may reconsider the wilderness designation for any remaining roadless areas that have not yet been devoted to non-wilderness uses.



The release language is a compromise. This compromise is intended to satisfy the timber industry, which desires greater certainty for planning purposes for the harvesting of National Forest lands. The industry argues that without such language the spectre of possible wilderness designation would always hover over the roadless areas. The industry feels this would cause an unstable economic situation. In exchange for having certain areas designated as wilderness, wilderness advocates have generally been willing to accept a compromise in the release language; they feel a ten-year release is preferable to a permanent one.

The climate for compromise between wilderness and industry interests worsened when the Reagan administration took office in 1981. The timber industry perceived that the new administration favored development interests and pressed for national legislation that would contain permanent release language. Republican Senator Hayakawa of California responded to this and introduced S. 842 in April, 1981. The stated purpose of Hayakawa's bill is "to provide for stability and certainty in planning and management of certain National Forest lands." Although S. 842 would stabilize the timber industry's planning process, the bill would also have several effects that alarm wilderness advocates.

First, all areas that were recommended for nonwilderness by the Forest Service in RARE II would be opened up for immediate development. The Forest Service would be prohibited from recommending wilderness status for these areas in any future review of forest plans.

Second, S. 842 would severely curtail the time period in which Congress could add remaining roadless areas to the Wilderness Preservation System. In western National Forests, Congress would have until January 1, 1985, to designate as wilderness the areas that were recommended for wilderness status in RARE II. All areas not designated by then would be released for multiple-use development and could never be considered for wilderness status again. In addition, the Forest Service would have until September 30, 1985, to complete the planning process for the areas which were placed into the "further planning" category in RARE II. Any of these areas that have not been recommended for wilderness by then would be permanently released from wilderness consideration. Moreover, if Congress does not actually add the recommended areas to the Wilderness Preservation System by January 1, 1988, they would be released from wilderness consideration.

In eastern National Forests, all roadless areas recommended for wilderness would be protected until January 1, 1988. Any area that Congress has not actually designated as wilderness by that date would be permanently released.

Third, S.842 would deny jurisdiction to the federal courts regarding any legal challenge to the RARE II Environmental Impact Statement. The bill would also overturn the injunction presently in effect under Bergland.

S. 842 has received the support of the Reagan administration. The bill, however, is currently under review by the Senate Energy and Natural Resources Committee where it faces strong opposition from Senate Democrats and many moderate Republicans. Even if the bill does emerge from the committee, the full Congress is unlikely to pass it in its present form.

Meanwhile, wilderness advocates continue to pursue the state-by-state approach, though Congress did not pass any comprehensive state bills in 1981. Representative Burton re-introduced legislation for California very similar to that which passed the House in 1980. The 1981 legislation was originally introduced as two separate bills, H.R. 856 and H.R. 859. H.R. 856 would designate 1.4 million acres as wilderness in Yosemite, Sequoia, and King's Canyon National Parks. H.R. 859 would designate an additional 2.1 million acres in California National Forests. H.R. 859 would also open up for multiple-use development the remaining areas recommended for nonwilderness under RARE II. Development in these areas is presently prohibited as a result of Bergland.

Representative Burton's bills were eventually consolidated into a single bill, H.R. 4083. This bill passed the House late last summer and is presently in the Senate Energy and Natural Resources Committee. It is being considered together with Senator Hayakawa's bill, S. 842, and a companion bill introduced by Senator Alan Cranston of California, S. 1584, which has essentially the same provisions as H.R.856 and H.R. 859.



Further legal challenges to Rare II are unlikely at this time since some progress is being made toward a legislative solution to the issue of National Forest wilderness. But Bergland is on appeal before the Ninth Circuit Court of Appeals. The legal status of RARE II could change considerably depending on the outcome of this case. As of now, however, the state-by-state approach is likely to prevail.

In light of all this controversy, one might conclude that the entire RARE II program has been a waste of time, since the Forest Service has not developed a "final" and "peaceful" solution to the issue of National Forest wilderness. Congress, however, has the ultimate authority for creating wilderness areas; any "final" solution rests with that body.

At the very least, it may be said that RARE II has provided a clearer path towards a solution. Prior to RARE II, wilderness decisions were primarily made on an area-by-area basis. Many wilderness advocates prefer this approach because it enables planners to give greater attention to the unique characteristics of each area. But this slow process is unacceptable to the timber industry. The industry feels it has a legitimate interest in a speedy and final determination of which lands will be open to harvesting. RARE II has focused attention on all the remaining National Forest roadless areas and has forced Congress to face the issue. It will be much simpler for Congress to fashion legislation now that all National Forest roadless areas have been inventoried.

Everyone involved in the wilderness controversy is interested in a solution to the issue of National Forest wilderness. RARE II has at least contributed to the achievement of this goal.

Wally Burton



The Bottle Bill

(continued from front page)

Although progress has been slow in Washington and Sacramento, the campaign against throw away containers has met with success in other states. Oregon became the first state to prohibit all non-returnable beverage containers in 1972. Vermont followed suit less than a year later. Since then, similar measures have become law in Maine (1978), Michigan (1978), Connecticut (1980), Iowa (1980), Delaware (1981), and on November 16, 1981, Massachusetts passed a bottle bill over Governor Edward King's veto.

The California initiative is essentially the same as the statutes in most of the other states, although differences do exist. Some states have a two-tiered deposit structure which lowers deposit fees for standardized containers refillable by more than one manufacturer. CAW rejected this approach. It felt that such a provision would put cans at a competitive disadvantage to bottles.

The California proposal, like laws in most deposit states, provides for handling fees. Distributors would recoup part of this fee from deposits forfeited on unreturned containers. The larger share of the handling fee would be made up by savings from recycling. Thus, deposit laws encourage use of refillable containers.

Environmental Arguments

The arguments for eliminating non-returnable beverage containers center on three considerations: litter control, solid waste reduction, and resource and energy conservation.

Non-returnable beer and soft drink containers constitute 40-60% of all roadside litter volume, according to the Environmental Protection Agency (EPA). Uncollected containers have a definite environmental impact, for unlike biodegradable paper waste, metals, glass, and plastic containers remain in the environment for decades, even centuries. The strong disincentive to consumer littering provided by a deposit system represents one of the most immediately measurable benefits of a bottle bill.

Even opponents of deposit legislation have conceded that it has been successful in litter control. Studies in Oregon, Vermont, Michigan, and Maine reflect a 77-86% reduction in container litter. In total litter volume, this represents a decrease of 35-45%. [Source: CalPIRG-Stanford Environmental Law Society Study Group Report on Can & Bottle Bills (1981)]

Solid waste control is more difficult to measure. Beverage containers comprise about 7% of all municipal solid waste, and container waste volume is increasing by 8% each year. Nationwide, solid waste disposal costs

are approaching \$10 billion per year. In Michigan and Connecticut, state officials attribute a 4-6% reduction in solid waste to the deposit law.

Deposit legislation also promises to save energy and to conserve natural resources. In 1977, Americans threw away 5.2 million tons of glass and 2 million tons of metal in the form of beverage containers. Although the supply of silica (which is used to produce glass) is nearly inexhaustible, other ingredients such as potash are becoming increasingly scarce.

Furthermore, the energy saved by recycling is striking. For example, a no-refill bottle or can uses the energy equivalent of about 4 ounces of oil; a refillable bottle uses about 1.3 ounces. Container manufacturers themselves have reported that making cans from recycled aluminum requires only a fraction of the energy needed to manufacture cans from virgin ore; the estimates range from 67-69% less to as much as 95% less. CalPIRG estimates that a California deposit law would cause total system use to be reduced about 40%. This would save the equivalent of 110 million gallons of gasoline each year.

Opposition Arguments

The opponents of deposit legislation include brewers' and soft drink manufacturers' associations, container manufacturers, grocers' associations, and the AFL-CIO. Several of these groups have moderated or dropped their opposition in states where deposit laws have been implemented.

While the financial interests of container manufacturers are understandable, the opposition of labor is more complex. The United Steelworkers and Glassblowers Unions remain convinced that the recycling of beverage containers will reduce employment in their industries. Job opportunities for glassblowers have in fact declined in states where use of refillable bottles has increased. Deposit laws should not affect steelworker employment since cans cannot be refilled but must instead be melted down and remanufactured. However, in Oregon and Michigan the industry has attributed a decline in can manufacturing employment to the bottle bill.

Statistics from the bottle bill states show an overall increase in beverage related employment, ranging from a net increase of 200 jobs in Oregon to more than 4000 in Michigan. The sorting, transporting, and storing of returnable containers produces large numbers of jobs for store clerks, truck drivers, and warehousemen. Several unions, particularly the Retail Clerks and Teamsters, have been active proponents of the California bottle bill despite official AFL-CIO opposition.

The strongest argument used by the industry, particularly in recent initiative campaigns, relates to consumer prices. The industry claims that the storage, shipping, and handling costs of returnable containers will

exceed any cost savings from recycling. Opponents of deposit legislation are fond of pointing to Michigan, where soft drink and beer prices rose 6-10% above inflation in the first 11 months of the bottle bill. It is not clear, however, whether the bottle bill was responsible, and the state Attorney General is currently conducting a general investigation. In other deposit states, soft drink prices are actually lower than in adjacent states, while beer prices are higher only in Maine and Connecticut. Brewers attribute this difference to the bottle bills, but supporters point to the continued reluctance of brewers to switch to refillable containers. With or without state deposit legislation, beverages are almost uniformly less expensive in refillable containers.

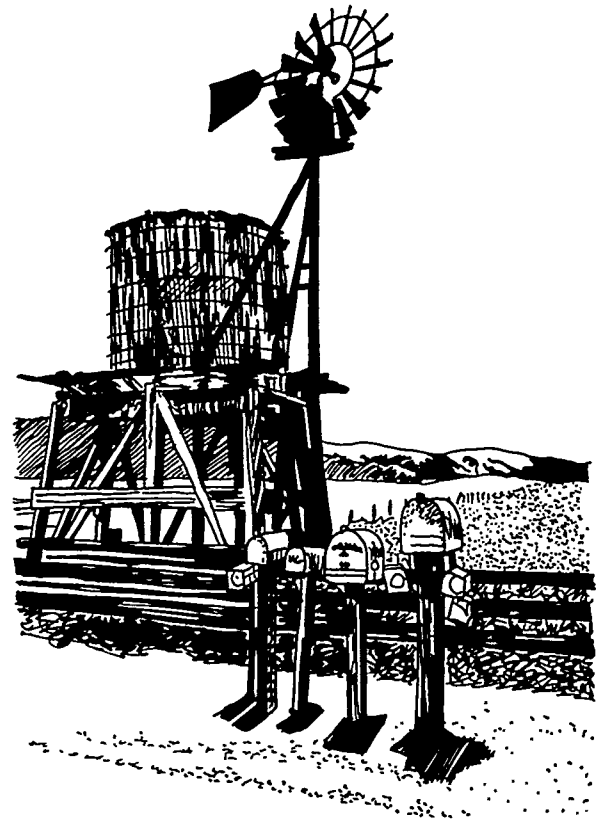
In Oregon, grocers receive no additional compensation for their handling of empty containers. It has been argued that this imposes a hardship on retailers. The California initiative deals with this objection, and provides reasonable handling fees to retailers. Even in Oregon, polls indicate that grocers no longer support repeal of the bottle bill.

Opponents argue that the states should deal with the problems these containers create by encouraging recycling and imposing "litter taxes" rather than restrict consumer choice by banning non-returnable containers. In 1977, California implemented just such a program at the urging of lobbyists eager to avoid deposit legislation. Basically, the law funded litter control and education, imposing a tax of \$10-\$2,000 on large retailers, bottlers, and distributors. The anti-litter program did not provide any disincentive to littering and did little to promote recycling. After the legislation was swamped with protests over the size of the assessments, the "litter tax" was repealed and substituted with general revenue funds. Similar laws have been tried and later repealed in Colorado, Kentucky, Arkansas, and Connecticut.

Constitutional Issues

Considering the strength of industry opposition to bottle bills, the relative lack of litigation on the issue is surprising. Some commentators have argued that a ban on non-returnable containers is a subject that requires a uniform nationwide rule, and that state laws should be preempted under the commerce clause. (See Greef and Martin, Beverage Container Legislation 52 Texas Law Rev. 351.) But in American Can Company v. Oregon Liquor Control Commission, 517 P.2d 691 (1974), the Oregon Court of Appeals rejected plaintiffs' equal protection and commerce clause claims. The court held that the act did not discriminate against interstate commerce, although it did impose some economic burdens on plaintiffs, and was a legitimate exercise of the state police power. The Oregon Supreme Court denied review, and the industry did not appeal to the U.S. Supreme Court.

A 1981 Supreme Court case gives the beverage



industry even less reason to hope that federal courts will strike down deposit legislation. The Court sustained a Minnesota statute banning the sale of milk in non-refillable plastic containers over equal protection and commerce clause challenges. Although the statute stated that waste control was its primary purpose, it did not ban other kinds of non-returnable containers. Nevertheless, the Court reiterated its frequently stated position that states are free to handle related problems one at a time. Minnesota v. Clover Leaf Creamery Co., --- U.S. ---, 101 S.Ct. 715 (1981).

One reason that state bottle bills have not been challenged in federal courts is that the Federal Government itself has expressly endorsed deposit legislation. Under authority of the Solid Waste Disposal Act (42 U.S.C.A. 3245) and the Conservation Recovery Act (42 U.S.C.A. 6964) the Environmental Protection Agency has promulgated regulations requiring most federal facilities to require a 5¢ deposit on all beverage containers. (40 CFR 244). The regulations provide that the agency or facility may not deal with distributors who refuse to accept all returnable containers. The regulation does not require agency compliance if it is impractical, but the result has been a marked decline in litter and solid waste disposal costs in many national parks. The regulation specifically recommends this approach to all state and local governments.

Initiatives: Mixed Record

Bottle bill initiatives have had a mixed record. Laws in Maine and Michigan were passed by voters, but initiatives have been defeated in five other states.

Washington voters twice rejected initiative moves, in 1970 and 1979.

The political scenario in such defeats is familiar. The initiative is qualified for the ballot by grassroots organizations with large numbers of volunteers but little financial backing. Polls initially show widespread public support, but saturation by industry political action committees often turns the tide in the final weeks and days.

In Massachusetts, for example, the 1976 initiative campaign began as a class project in a college political science course. The proponents spent a total of \$40,000; the opposition raised more than \$2,000,000. Nevertheless, the measure lost by only 7/10 of 1% of the vote. This strong showing gave the bottle bill proponents credibility which they used in their successful lobbying of the state legislature five years later.

The events in Maine may be the most significant in the long run. In 1979, a little more than a year after the bottle bill was passed, beverage distributors and retailers organized a repeal effort. Labor organizations and several prominent businesses, which had originally opposed the law, refused to support the repeal. Although repeal sponsors had a large financial advantage, voters decided to keep the deposit law by a 226,076 to 41,802 margin. Maine citizens were apparently pleased with the reduction in litter and ease of recycling under the law, and as a result the claims of the repeal sponsors rang hollow.

While the industry continues to have success in defeating bottle bill initiatives, it may be powerless to repeal those that do pass. Once deposit legislation is enacted, its popular acceptance grows as consumers learn they can live without "no-deposit, no-return." Nationwide, polls show 73% support for a federal deposit law. In Oregon and Vermont, where laws have been in effect the longest, public support is over 90%.

Conclusions

If the bottle bill is approved by California voters in November, deposit legislation will be put to the test in the nation's most populated state. California is often looked to as a legislative pioneer; the success of deposit legislation here would almost certainly spur similar initiatives in other states. Favorable results in California would not be lost upon Congress or the industry.

California alone accounts for approximately 10% of the national beverage market. A bottle bill victory here could persuade the beverage industry that a majority of the U.S. market will eventually be closed to non-returnable containers by deposit legislation. The industry itself might concede the inevitable and expedite conversion to returnable containers by asking Congress to enact a uniform, national bottle bill.



Off Road Vehicles

(continued from page 2)

proposes an alternative ORV scheme and invites interested persons to express their views to the officials currently devising the forest plan.

The El Dorado National Forest and its Current Plan

The EDNF borders the southwestern shore of Lake Tahoe. It receives more than three million days of visitor use per year, mostly from the Sacramento, Stockton, and San Francisco Bay areas. The Forest Service estimates that in 1980 approximately 122,000 visitor days were spent using motorized recreation such as dirt bikes, four-wheeled vehicles, and snowmobiles in forest areas not designated as wilderness. More than one million visitor days were spent in non-motorized recreation such as hiking, cross-country skiing, backpacking, and horseback riding.

ORV use on all federal lands is subject to regulation under Executive Orders 11644 and 11989. The Forest Service is authorized under these orders to minimize user conflicts and environmental effects and to close all National Forest lands to ORVs except those areas with trails suitable and specifically designated for ORV use. This scheme favors non-ORV use, ORV use being "closed subject to open". Yet the Forest Service has taken the opposite approach. It has authorized its managers to keep the entire forest open to ORV use, with use in certain areas subject to closure. While forest administrators note that this simply reflects administrative practicality, critics assert that the presumption in favor of ORV use cannot be reconciled with the presidential orders.

EDNF officials developed an ORV plan in 1976 pursuant to the Executive Orders and other self-imposed Forest Service regulations. Excluding the two wilderness areas (which comprise 83,000 acres and are by federal law off-limits to motorized use), one-half million acres of the EDNF are generally available for recreational use. It is important to note that in much of the area open to ORVs, actual use may be constrained by terrain or fire-season closure; thus, while areas may be officially "open", they may not be actually accessible for ORV use. On approximately 90,000 acres, dirt bikes and four-wheeled vehicles are allowed only on trails; on the remaining 410,000 acres, such vehicles are usually allowed to travel cross-country and to use most hiking trails. These vehicles are allowed unrestricted use of accessible lands during the dry season, but the forest is closed to them during the wet season. Snowmobiles are allowed throughout the entire forest, except on 27,000 acres where they are restricted to trails and on another 600 acres where they are prohibited. Thus, most of the half million acres of the EDNF non-wilderness land is open to ORV use.

Environmental Effects of ORVs in the EDNF

EDNF officials chose the present plan in 1976 from three viable alternatives. The forest administration rejected a plan which would have restricted ORV use mainly to designated trails. It also rejected a plan which would have allowed ORV trail and cross-country use only with permits. Instead it chose a plan which, according to the Forest Service's own standards, was the least protective of the environment among the three alternatives. This plan, which is described above, allows for a combination of open and regulated ORV use of essentially the entire half million non-wilderness acres of the forest.

Perhaps the most significant aspect of the current plan is that it allows ORVs to use trails and travel cross-country on more than 410,000 acres of land during the dry season. During this time, ORV use is restricted only by accessibility and fire closure. A Forest Service soil scientist says this policy of open use during the dry season results in "significant damage" due to soil displacement caused by dirtbikes and four-wheeled vehicles, especially harms meadows, riparian zones, and shallow soil areas.

The Forest Service has classified more than 300,000 acres of land subject to dry season use under the current plan as having heavy erosion potential. After some study, which included radio-tagging of deer to observe the effects of snowmobiles on animals, the Forest Service determined that the negative effects on animals would be limited.

User Conflicts Caused by ORVs in the EDNF

As noted above, the second major goal of the executive orders is to minimize recreational user conflicts. The orders recognize that motorized and non-motorized recreation are socially incompatible. Those who venture into the forest to find solitude and to escape the trappings of the internal combustion world may find their recreational enjoyment severely curtailed when they are passed on the trail or in the woods by exhaust-emitting, loud, and environmentally destructive dirt bikes or four-wheeled vehicles. While ORV enthusiasts do not seem to resent the presence of others in "their" domain, they, too, would prefer to roam the open without worrying about the occasional hiker or skier who trudges slowly along blocking the way.

The EDNF opted for a scheme in its 1976 plan which according to its own estimations would not minimize user conflicts, but which compared to alternative plans would allow greater ORV use. Only about five percent of the half million non-wilderness acres of the EDNF are off limits to all ORV use. (The amount of land open to ORV use fluctuates between summer and winter.) Although 91 miles of the forest's trails

are closed to ORVs (even in the area open to general ORV use), the accessible adjacent land is open to cross-country use and to all-season road travel. The result is that there are very few places in the half million acre non-wilderness portion of the EDNF where hikers, equestrians, or backpackers can go and not be confronted directly by ORVs or their noise. One might question this allocation of recreational resources, especially in light of the EDNF's own estimates that non-motorized recreational users currently outnumber ORV users by more than eight to one, and will continue to outnumber ORV users through the next four decades.

A Proposal

The EDNF is currently reconsidering its ORV policy. Others have questioned whether the Forest Service should sanction ORV use at all in light of the environmental degradation it may cause. However, the Forest Service has decided that ORV use is a legitimate recreational pursuit. In addition, although non-motorized recreationists greatly outnumber ORV users, the ORV lobby in Congress and at the state and local levels has made it politically unfeasible to exclude ORVs from public lands. Finally, according to the Forest Service's calculations, ORV use is more compatible with timber sales than is non-motorized recreation. The issue, then, is not whether to exclude ORVs from all National Forest lands, but is instead what is to be the appropriate extent of regulation. The problems of environmental effects and user conflicts must be addressed in any reassessment of ORV regulation.

Regulating the Environmental Effects of ORVs

The current policy allowing liberal ORV use during the dry season should be discarded as environmentally unsound and contrary to the EDNF's acknowledgement that such use may cause significant resource damage. Any ORV proposal should prohibit or strictly regulate ORV use on or near all meadows, streams, and shallow soil areas. In addition, ORV use should be prohibited in those areas that contain endangered vegetation or cultural resources. ORV use should be limited to designated trails except in areas particularly suited to cross-country use in order to minimize adverse effects on wildlife, forest vegetation, and soils.

Regulating User Conflicts

The current policy of allowing ORV use throughout most of the half million non-wilderness acres of the EDNF does not minimize user conflicts. In addition the present allocation of recreational resources cannot be justified on the basis of use, since non-ORV users overwhelmingly outnumber ORV users. A realistic recreational use policy should recognize that the two types of use are incompatible and should

accordingly segregate them. In some areas ORVs should be prohibited. These areas might include lands adjacent to existing wilderness areas and existing roadless areas that have been allocated to further planning under RARE II. In other areas ORVs should be allowed but their use should be restricted according to the environmental considerations set out above. Finally, allocation of land to ORV and non-ORV use should reflect more accurately the demand for those recreational uses.

Public Response

The EDNF personnel are competent and concerned professionals who welcome public suggestions about the ORV issue. All interested persons should address letters expressing their views to: Phil Corson, Recreation Officer, El Dorado National Forest, 100 Forni Road, Placerville, CA 95667.

Jake Dear



Environmentalists versus the Pentagon

(continued from page 4)

EIS at all. Presumably, the Navy knows whether the weapons storage facilities at West Loch will be used to store weapons, although it is prohibited by law from disclosing its intentions. Critics contend that the judiciary and the public must remain ignorant of the Navy's plans for West Loch, allowing the Navy to be exempt from preparing a classified EIS for purely internal use is a violation of the spirit of NEPA, if not its substance.

While agreeing with the ruling of the Court, Justice Blackmun wrote a concurring opinion to emphasize the fact that NEPA makes no exceptions for confidential or classified proposals. One of NEPA's main purposes, he said, is to guarantee that environmental concerns are considered by federal officials in planning actions and making decisions. "This is no less true when the public is unaware of the agency's proposals. Indeed, the public's inability to participate in military decisionmaking makes it particularly important that in cases such as the one before us, the EIS 'serve practically as an important contribution to the decisionmaking process'." If the public cannot insure that environmental impacts are properly considered in the planning of military projects, and if the judiciary declares itself unable or unwilling to force the military to consider them, how will anyone ever know if environmental considerations are taken into account in projects involving national security? To this fundamental question, the Court gives no answers and leaves no clues.

Jamie Kerr



our **MONEYTREE**

is part of an extinct species... in spite of our environmental efforts...so we turn to you, our readers, with this plea for support...

PLEASE SUBSCRIBE TO ENVIRONS AND ASSIST OUR CONTINUING EFFORT FOR SUSTENANCE

Please fill out the form below and mail to:

Environmental Law Society
UC Davis School of Law
Davis, California 95616

Yes, I would like to continue receiving Environs at the following subscription rate:

- \$ 5.00—Bread & Water (Basic Subscription)
- \$10.00—Soup & Sandwiches
- \$15.00—Three meals a day
- \$20.00—Gourmet Delight
- _____—Friend of Environs

NAME: _____

ADDRESS: _____

Please make checks payable to: ELS/Environs.

Is there someone/organization that might benefit from receiving Environs? Please send us their name/address too.

NAME: _____

ADDRESS: _____



inside:

The Bottle Bill/ONE
Letter from the Editor/TWO
**Off Road Vehicles in the
National Forest/TWO**
**Environmentalists versus the
Pentagon/THREE**
**National Forest Wilderness
Since RARE II/FIVE**

ENVIRONS
Environmental Law Society
King Hall
University of California
Davis, CA 95616

NONPROFIT ORG.
U.S. POSTAGE
PAID
Davis, Calif.
Permit No. 3

Design and job coordination by Robert Maddock, UC Davis Publications.
Layout and some typesetting by UC Davis Repro Graphics.