transportation policy component to complement the greenhouse gas or ozone depletion policies? A partial answer may be found in proposed transportation. initiatives.

The Commoner perspective raises the issue of whether EPA 90 contains a sufficiently powerful mandate for the social governance or leadership needed for so drastic a policy shift. Should EPA 90 have created a stronger policy direction for alternative agriculture and nonpolluting technology projects? Perhaps the initiative should have delineated a specific policy agenda for the grant programs. For example, there are goals and timetables for pollution controls, but there are no concomitant goals and objectives for the research initiatives.

The other facet of the leadership mandate is the Environmental Advocate. Is this office the most effective way to ensure implementation of this program? Should this office have been given more specified powers *vis-a-vis* existing state agencies which will be implementing EPA 90? As currently structured, the Environmental Advocate is more of an intervenor than a leader.

In considering EPA 90, we must return to Commoner's problem of how Americans conceptualize the role of government. Perhaps EPA 90's most significant contribution will be to bring into public debate the necessity to recast the role of government policy toward the environment into a positive leadership role.

NOTES

1. Specifically, after January 1, 2000, the initiative would preclude publicly owned treatment works from discharging pollutants into marine waters without at least secondary treatment as defined in the Federal Clean Water Act. Currently, the Federal Clean Water Act allows publicly owned treatment works to apply for a waiver of the secondary treatment requirement with the concurrence of the state (33 U.S.C.A. § 1311(h) (West 1986 & Supp. 1989). The initiative would preclude the state of California from concurring in waivers to be in effect after the year 2000. This raises potential federal preemption issues.

2. Cal. Food & Agric. Code § 3 (West 1986) states that the provisions are enacted "...for the purposes of promoting and protecting the agricultural industry of the state and for the protection of the public health, safety, and welfare." The mandate of the Department of Health Services includes broad authority for "the detection and prevention of the adulteration of articles used for food and drink..." Cal. Health & Safety Code § 202 (West 1979). However, adulterated foods do not currently include pesticide residues which are regulated by the Department of Food and Agriculture.

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Proposition 65: An Initiative Poised to Fulfill its Promises?

by Andrew Sabey

INTRODUCTION

Proponents of Proposition 65 (Prop. 65) promised that if the initiative passed, it would effect real change in the area of toxics enforcement. The proponents promised safer drinking water, clear warnings of toxic exposure, effective enforcement, greater government disclosure regarding toxics, and a shift of hazardous waste clean-up costs from the taxpayers to the offenders. Cal. Health & Safety Code § 25249.6 (Deering 1988).

These promises carried some weight with California voters. The initiative garnered sixty-six percent

of the vote despite an expensive "No on 65" campaign which outspent proponents by a margin of almost four to one.[1] Prop. 65 passed in November, 1986 and took effect on January 1, 1987. Governor Deukmejian designated the Health and Welfare Agency (HWA) as the lead agency charged with promulgating regulations in furtherance of the new law. Christenson, *Interpreting the Purpose of Initiatives: Proposition 65*, 40 Hastings L.J. 1031,1053 (1989).

MECHANICS OF THE LAW

Prop. 65, also known as the Safe Drinking Water and Toxics Enforcement Act, has the dual purpose of protecting the public from, and informing the public about, exposure to carcinogens and reproductive toxins. *Id.* Prop. 65 requires the Governor to publish a list of chemicals known by the State to cause cancer or birth defects, specifically including those chemicals listed as human and animal carcinogens by the International Agency for Research on Cancer. Cal. Health & Safety Code § 25249.8 (Deering Supp. 1990). The law provides for a panel of State experts to add chemicals to the list as needed. It also prohibits businesses from discharging listed chemicals "into water or onto land where such chemical passes or probably will pass into any source of drinking water" unless the business can prove that the release is "insignificant." *Id.* at § 25249.6. Similarly, the law prohibits businesses from exposing people to listed chemicals unless they can prove such exposure poses "no significant risk." *Id.*

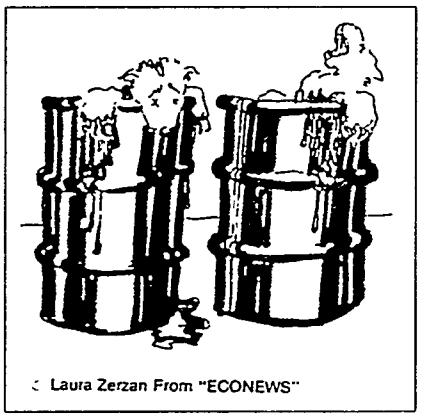
If a business with more than ten employees (small businesses and government agencies are exempt) exposes the public to a listed chemical they must give the public a "clear and reasonable warning." *Id.* at § 25249.8. Failure to adhere to the warning standard exposes the company to civil and criminal liability. The law allows private citizens to bring civil suits against suspected violators and, if successful, to collect 25 percent of the total fines levied against the violator. These so-called "bounty hunter suits" provide incentives for private enforcement of the law. A plaintiff must give the State sixty days notice of his intent to sue during which time the State may intervene, thereby nullifying any private plaintiff's claim to a share in the penalties. *Id.* at § 25249.7.

In Prop. 65 cases, unlike traditional tort law or regulatory enforcement, the burden of proof is shifted from the plaintiff to the defendant. If the plaintiff can prove that there was a chemical release into potential drinking water or an exposure without the proper warning, the defendant must show that the exposure or release of the listed chemical was *de minimis,* that is, posed no significant risk. The plaintiff does not need to show damages, they merely need to make a *prima facie* case that a release or exposure occurred. Critics of the law suggest that the reversal of traditional burden of proof requirements combined with "bounty-hunter" incentives will cause an explosion of irresponsible suits by the public. However, Prop. 65's language regarding shifting the burden of proof was modeled after six federal environmental laws, each of which provide for citizen-initiated suits. From 1978 through 1984, only 189 suits were filed nationwide under all six federal laws. Simple arithmetic suggests that California, with about ten percent of the country's population, will generate a fraction of that number. Letter *To Those Interested in Prop. 65* from David Roe, EDF July, 17, 1986.

ADMINISTRATIVE CHALLENGES

The initiative process typically yields ambitious laws that require extensive interpretation. Prop. 65 began as a broad law full of promise. The law has required extensive clarification through regulations and litigation. Defranco, *California's Toxics Initiative: Making It Work,* 39 Hastings L.J. 1196 (1988). In the beginning, Prop. 65 was tied up in lawsuits so long that its only impact seemed to be providing more fodder for the litigious. Christenson, *Interpreting the Purpose of Initiatives: Proposition 65*, 40 Hastings L.J. 1031,1037 (1989). Exacerbating this situation was Governor Deukmejian's opposition to the law and his lack of diligence in executing its provisions. As one commentator noted, Deukmejian attempted to "accomplish administratively what opponents [of the law] could not do by election." *LA TIMES*, March 3, 1987.

Environmental groups attacked some of the early regulations promulgated by Deukmejian's HWA, as subverting the purpose of the law. Most notably, the Governor's first list of dangerous chemicals contained only twenty-nine entries, far below the over 200 chemicals contemplated by the initiative. In 1987, an amalgam of environmental and labor groups successfully sued to compel the Governor to expand his list of dangerous chemicals. This favorable judgment was sustained on appeal in 1989. *AFL-CIO v.*



Laura Zerzan From "ECONEWS"

Deukmejian, 212 Cal. App. 3d 425 (1989). Since then, the list has grown to include over 300 chemicals. *Regulation Economics and Law, Daily Report for Executives*, Bureau of National Affairs, Inc., Aug. 25, 1989.

LEGAL CHALLENGES

In many instances, litigation over the meaning of an initiative has defeated the law after its adoption by the voters. A recent example is the plight of Proposition 103. The promise of twenty percent rate rollbacks in auto insurance never took effect. Opponents of Prop. 103 were able to convince the Supreme Court that twenty percent was an arbitrary figure, as opposed to one based on a study of insurance company profit margins. It may be many years, if ever, before the supporters of Prop. 103 see a dime's worth of benefits. *Davis Enterprise*, March 15, 1990, at A8.

The lack of a clear legislative purpose and legislative history often impedes a court's ability to interpret initiative-based law in the face of challenges to the law's legitimacy. A court analyzes an initiative-based law by looking to the plain language of the proposition. If the meaning is not clear from the written words, a court may look to the interpretation of the executive agency charged with administering the law, any legislative responses subsequent to the law's passage, or the advertisements used to sell the law to the voters. Christenson, *Interpreting the Purpose of Initiatives: Proposition 65*, 40 Hastings L.J. 1031,1046 (1989).

However, judicial interpretation of a law based on anything beyond the plain meaning of the proposition is a risky venture. The interpretation of the executive agency charged with administering the law may be prejudiced by the Governor's own predispositions; Prop. 65 is a good example of this. Likewise, a legislator's response to the law may be based on agendas inconsistent with the purpose of the law; this is why the initiative process exists--to bypass recalcitrant or self-interested legislators. Finally, judicial deference to the political advertisements is fraught with uncertainty. As one justice faced with that task noted, any effort to determine the motivation behind each favorable vote "would be folly." *Id.* at 1047.

That Prop. 65 withstood its first legal attacks bodes well for the law's effectiveness. For example, in November of 1989, Prop. 65 faced its first federal preemption suit on its warning requirements. *d-Con* a pesticide manufacturer, filed suit asserting that the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) preempted Prop. 65's warning requirements. In other words, *d-Con* claimed that FIFRA's labelling requirements took precedence over Prop. 65's warning provisions. The federal district court held that the plain language of FIFRA's labelling requirements did not preempt Prop. 65's warning requirements. The court noted that not all of the various consumer warning methods condoned by Prop. 65 could be considered "labelling" under FIFRA. *Regulation Economics and Law, Daily Report for Executives*, Bureau of National Affairs, Inc., Nov. 16, 1989, at A4. A State Deputy Attorney General suggested that shelf labels or signs posted nearby could be used to satisfy Prop. 65, but not warnings directly on the product label. *Id.*

This was only the first of several preemption challenges to Prop. 65 currently pending in federal court; others assert that Occupational Safety and Health Act and the Pure Foods Act preempt its warning requirement. *Id.* This first ruling on *d-Con*'s challenge suggests that Prop. 65's broad warning requirements may weather all the Federal preemption suits and emerge unscathed.

Prop. 65 won another major victory when a State superior court invalidated the toll-free phone system set up to provide warnings to consumers who feared exposure to chemicals listed under Prop. 65. The Ingredient Communication Council (ICC), a coalition of consumer product manufacturers and retailers established the phone program that was pejoratively tagged, "1-800 Baloney" by environmental groups. In September of 1988 the ICC requested a declaratory judgment that their phone warning system was adequate under Prop. 65's "clear and reasonable warning requirement." The state court ruled that the ICC's system did not warn the consumer prior to exposure. "No actual warning

occurs until the consumer dials the toll-free number and makes inquiries. . . consumers are not likely to call and inquire about relatively inexpensive, routinely purchased items." *Regulation Economics and Law, Daily Report for Executives*, Bureau of National Affairs, Inc., Aug. 25, 1989. Despite promises from the ICC that they would appeal, the Environmental Defense Fund hailed the decision as a victory.

In Prop. 65's most recent legal victory, a State court overturned the HWA's exemption of foods, drugs, cosmetics, and medical devices from Prop. 65's warning provisions. The same group that in 1987 compelled Governor Deukmejian to expand his short list of dangerous chemicals,(discussed above) filed this suit in 1988. They claimed that Prop. 65's consumer warning provisions apply to HWA's exemptions of food, drugs, cosmetics, and medical devices. HWA had exempted these items because it was convinced, by the manufacturers' lobbyists, that the federal Food and Drug Administration preempted Prop. 65. The HWA had reasoned that products complying with FDA regulations automatically "pose no significant risk" and, therefore, are not subject to Prop. 65. This ruling means that thousands of products ranging from fresh foods and over-the-counter drugs to deodorant and hair spray could be subject to Prop. 65's warning requirements if they contain significant levels of any of the 300 recognized carcinogens or reproductive toxins. *Regulation Economics and Law, Daily Report for Executives*, Bureau of National Affairs, Inc., Mar. 9, 1990.

One of the better known, and perhaps the most encouraging, victories for Prop. 65 is the recent settlement between the State Attorney General, joined by several environmental groups, and the Gillette Company. Gillette is the maker of *Liquid Paper* brand correction fluid, popularly known as "white-out." There are several chemical formulations of *Liquid Paper*, the most common of which contains lead, a known teratogen, and trichloroethylene (TCE), a known carcinogen. As one Sierra Club attorney noted, Gillette's use of TCE was a "particularly egregious example" of manufacturers' tendency to use toxics where they are not necessary. *Regulation Economics and Law, Daily Report for Executives*, Bureau of National Affairs, Inc., Sept. 8 1989, at A2. Although Gillette has *Liquid Paper* formulations without TCE and lead, Gillette maintained that TCE, a solvent, helps *Liquid Paper* dry faster and spread more evenly on the paper than similar water-based products. *LA Times*, Sept. 29, 1989, at A1.

In September of 1989, three environmental organizations, Environmental Defense Fund, Sierra Club and Campaign California, gave the requisite 60 day notice to the State that they intended to sue Gillette for its failure to warn consumers of the presence of TCE and lead in *Liquid Paper*. *Food Chemical News*, Sept. 11, 1989, at 33. Gillette had previously attempted to comply with the warning requirement by joining the ICC toll-free phone warning system. The environmentalists intended their suit to be a test case in the wake of the invalidation of the toll-free telephone warning system. They focused on *Liquid Paper* as a test case because (1) TCE and lead were not necessary chemicals in *Liquid Paper*, and (2) the label, after warning that intentional inhalation of the

Proposition 65 Notice

TCE Based

Liquid Paper Correction Fluid Bond White (black label) contains trichloroethylene (TCE). Pen and Ink (green label) and Thinner (clear bottle, white label) contain 1,4 dioxane. These chemicals are known to the State of California to cause cancer. Some Liquid Paper Stock Colors (pastel bottles of various colors) contain TCE and lead, which is known to the State of California to cause birth defects and other reproductive harm.

Liquid Paper is reformulating these products so that they no longer will contain these chemicals. The reformulated products soon will be available to consumers.

Water Based

Liquid Paper Mistake Out (light blue label) and Just for Copies Opaquing Fluid (red label) are water-based products that do not contain TCE, 1,4 dioxane or lead. These products are alternatives to Bond White and Pen and Ink.

Exchange Program

If you have a bottle of any one of these Liquid Paper products, you may exchange it at no charge for a bottle of Mistake Out or Just for Copies at the following toll-free number: 1-800-752-2231.

product is dangerous, states that the product is "non-hazardous when used as directed." The environmentalists felt that this label was not only inadequate for purposes of Prop. 65, but that it "actively misled" the consumer. *Id.*

After the environmental groups notified the state that they intended to sue Gillette, the State Attorney General opted to pursue the case. Consequently, any penalties awarded in the case would be paid to the State as opposed to the environmental groups. However, the environmental groups would be allowed to recover their attorney's fees. Gillette, concerned that litigation would be costly and would generate adverse publicity, quickly decided to settle the case. *People et. al. v. The Gillette Company,* Consolidated Consent Judgment, at 4.

While Gillette did not admit to guilt in the Consent Judgment entered into by the parties, the company did agree to pay $275,000 in fines and $25,000 in attorney's fees. *Id.* Most importantly, Gillette also agreed to reformulate the offending versions of *Liquid Paper* to eliminate the use of both TCE and lead. Gillette had until February 1, 1990, to reformulate the various versions of *Liquid Paper* not complying with Prop. 65. Additionally, Gillette agreed not to ship any of the old formula *Liquid Paper* into California after March 1, 1990, under penalty of $50,000 per month up to a ceiling of $1 million.

Finally, Gillette agreed to finance an advertising program in 10 large California newspapers alerting consumers that old formula *Liquid Paper* contained lead and TCE. Specific provisions in the Consent Judgment ensured that the ads would (1) appear in prominent locations in the newspapers and (2) inform consumers both of the current *Liquid Paper* products' chemical formulation and of the opportunity to trade in old *Liquid Paper* for the reformulated version. Under the Consent Judgment, Gillette could avoid the reformulation requirement if the Company included an adequate and reasonable warning of the contents of *Liquid Paper* on the product itself. *Id.* at 10.

Because Gillette agreed to settle this case as opposed to litigating it, this case has no value as binding legal precedent. However, the settlement suggests that Prop. 65's language is clear enough to convince offenders not to contest their liability. Thus, the Gillette settlement serves to prompt other offending companies to settle Prop. 65 warning violation cases out of court, and as mentioned, to eliminate the dangerous chemicals from the product to avoid the need for future warnings.

CONCLUSION

Prop. 65 may force companies to halt or reduce their use of toxic chemicals and seek non-toxic alternatives for their products. In that way, Prop. 65 creates a natural incentive for manufacturers to seek clean formulas for their products. For example, assume that Brand X and Brand Y are similar in both quality and price. However, Brand X has a toxics warning prominently displayed on its label or on its display shelf, and Brand Y has none. Brand Y may gain a significant advantage in the marketplace. Without some glaring benefit, why would consumers buy Brand X and be unnecessarily exposed to carcinogens or reproductive toxins? The manufacturers of Brand X have an obvious incentive in Prop. 65 to reformulate their product to eliminate the chemicals that trigger the labelling requirement.

Does the Gillette settlement foreshadow that many companies will choose to reformulate their products to avoid the Prop. 65 warning requirements? If so, Prop. 65 may actually accomplish much of what its proponents promised: reduced consumer exposure to toxics, and adequate warnings before any possible exposure occurs. Similarly, by providing the manufacturers with an incentive to reformulate products to avoid using toxics, less toxics would be released into our drinking water sources.

It is still too soon to pronounce Prop. 65 an unqualified success or a glittering example of the initiative process at work. But Prop. 65's recent slew of legal victories regarding its meaning and effect suggests it may have a significant impact on curbing the use of

toxics. In fact, application of the law is proceeding with much less mayhem than predicted. As David Roe, an Environmental Defense Fund attorney and one of the initiative's authors, said of the three-year-old law, "you had the year of denial, the year of panic, and now the year of acceptance." *Chemical Week,* Chemical Week Associates, July 12, 1989, at 5. California will be better off if this is the decade of acceptance.

Notes

1. The "No on 65" campaign was financed largely by the following corporations: Chevron: $237,000; Arco: $70,000, and Dow Chemical: $50,000. *L.A. Examiner*, Oct. 27, 1986 at A3.

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Nature and the Rights of Animals

by Walter E. Howard

The intent of this article is not to debate animals' legal rights to humane treatment. All I can do with legal jargon is eavesdrop, as I am not competent to judge the conclusions. My goal is to present some laws of nature, which any jurisprudent scholar or animal rightist should consider in an objective debate about animal rights.

At the outset I confess, however, that I do not agree with the notion that animals are inherently entitled to the same constitutionally afforded rights as human beings, with access to the same legal venues, any more than I think people have the right to mistreat other animals, as commonly occurs in nature. My objective is to bring nature back into the deliberations of what has become the highly emotional and polarized topic of Animal Rights.

A positive value of the Animal Rights movement has been the increased consciousness regarding the welfare of pets, livestock, laboratory and wild animals. Most people now recognize that nature's animals, wild or domesticated, have legitimacy, a moral value, and deserve humane treatment. Unnecessary pain and suffering should be prohibited. But who defines "unnecessary?" What is right or wrong concerning the treatment of animals is often in the eye of the beholder; it is determined by one's personal ethics, not any particular broad moral or ethical standard.

Nature creates balanced communities where various animal species sustain themselves--by producing surplus offspring so they can eat each other. The balance of nature lies in the complex interplay of the birth and death of all organisms; i.e., it is the web of relationships among the population diversities of the diverse species that make up each ecological community. Included in this balance is the dynamic struggle for existence, the survival of the fittest, where it is the natural right of the largest and strongest (or smallest and quickest) to feed upon or displace the loser, even if it is the same species.

Nature demands a high premature death rate to maintain animal populations in a healthy state. For most species, the quality of life depends upon fairly high mortality rates from predation or other factors. If not, an overpopulation of the species will result in

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