

# Legislative Update Spring/Summer 1991

by  
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## INTRODUCTION

The environmental community had looked forward to 1991 as a promising year for making great strides in environmental protection. Common wisdom held that the absence of Governor Deukmejian's all-too-familiar veto would allow the legislature to achieve great progress.

But 1991 has brought with it a new set of hurdles arguably higher than the Governor's veto. A \$12.6 billion deficit means that bills requiring a budgetary appropriation are all but certain to fail. The passage of Proposition 140, which limits legislator's terms and slashes the legislative budget, has left the lawmakers reeling from a loss of 650 staffers and great uncertainty about their own careers. Finally, Reapportionment looms large in the minds of legislators as they prepare to redraw the districts in light of the 1990 census.

For his part, Governor Wilson has been sending encouraging signals to the environmental community. Wilson has already announced his appointment of James Strock, former director of enforcement for the federal EPA as the Secretary of the yet-unformed California EPA. In addition, he appointed Doug Wheeler, former executive director of the Sierra Club as the Resources Agency Secretary. The environmental community is guardedly optimistic that Wilson's governorship will herald a new willingness to address the many environmental issues facing California.

Proposals addressing many of the problems will likely have to wait until next year. Despite the hurdles, some creative work will be accomplished this year. The following is a sample of the legislation currently wending its way through the labyrinth of the State Legislature.

## FORESTRY

Several bills are expected this session which will codify an agreement worked out between environmental organizations and the timber industry. In the wake of expensive, failed attempts at legislating through the initiative, both sides finally agreed to negotiate.

The agreement would require "sustained yield" plans from owners of 2,500 acres or more of timberland. Sustained yield plans limit cutting to an average equivalent of two percent of timber inventory per year. Clearcuts would be limited to a maximum of 20 acres. The current maximum is 120

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acres. In addition, a larger buffer zone would be required between clearcuts and neighboring lands. Clearcuts would be more strictly limited in watershed areas and stream protection zones and banned entirely in ancient forests. Finally, membership on the state Board of Forestry, which sets forest policies, would provide for greater representation of environmental organizations.

Four legislators have agreed to carry portions of the proposal. (Senators Dan McCorquodale (SB 310), Barry Keene (SB 854) and Assembly Members Dan Hauser (AB 641) and Byron Sher (AB 714.)) But the Sierra Club, among others, is concerned that out-of-state timber interests will battle these bills fiercely.

## **WATER**

Water issues promise to remain contentious during the current session, but the exigencies of a critical drought and the specter of severe rationing seem to have fostered more consensus than ever. Senator Roberti recently held a "water summit," which brought the major interested parties together, in anticipation of writing legislation to change fundamentally state water policies and programs. The bill is not expected to be fleshed out until next year's session.

### **SB 1224 (Killea, D-San Diego)**

This bill would require installation of ultra-low flush (ULF) toilets in residences whenever property is transferred. The average toilet uses 6 gallons of water per flush. ULF toilets use only 1.5 gallons. It is estimated that installation of such toilets could eventually save California 700,000 acre feet of water per year. In addition, ULF toilets would reduce the burden on overworked waste-water treatment plants.

## **GROWTH MANAGEMENT**

### **A. SB 929 (Presley, D-Riverside)**

SB 929 would create the California Conservation and Development Commission to oversee the Governor's Office of Planning and Research in its development of statewide growth management policies. The bill contains specific goals for the new commission including: preserving farmland, improving air, water, and land resources, protecting other natural resources, development of a diverse economy, decent, affordable housing, providing public services concurrent with new development, developing an efficient transportation system and involving citizens in all phases of planning.

This bill would require the Councils of Government, (e.g. Sacramento Area Council of Government, SACOG) to prepare a comprehensive plan consistent with the statewide plan. Conflicts would be mediated by the Commission.

**B. SB 434 (Bergeson, R-Newport Beach)**

SB 434 would maintain the Office of Planning and Research (OPR) as the lead agency and would create Regional Fiscal Authorities (RFA). Local agencies throughout the state would be encouraged to join together to form RFAs. RFAs would be given special revenue-generating mechanisms and revenue sharing authority. Thus, entire regions could benefit from development instead of each city or county vying for local development regardless of whether the development is well-conceived and well-suited to the area.

Both local agencies and RFAs would submit planning documents to the OPR for approval. If the OPR approved the plan, it would be insulated from attack by groups opposed to the proposed development.

(For a discussion of two other growth management bills currently in the legislature, AB 3, and AB 76, see *Environs*, vol. 14, number 2, Jan. 1991, p.53).

**AIR QUALITY**

**A. AB 157 (Roybal-Allard, D-Los Angeles)**

AB 157 represents the rebirth of a bill vetoed by Deukmejian last year. This bill would broaden the authority of air quality districts to consider the permit applicant's compliance history in other permit situations. The district would have the power to deny a permit to an applicant based on that applicant's poor record of compliance.

**COASTAL PROTECTION**

**A. AB 854 (Lempert, D-San Mateo)**

Assembly Member Ted Lempert co-authored the landmark Oil Spill Prevention and Response Act (see *Environs*, vol. 14, no.2, January, 1991 at 45). AB 854 would further protect California's coastline by creating a Marine Resources Sanctuary, a three mile band of protected waters. Oil drilling would be banned within the sanctuary unless a national emergency is declared.

The bill would also bar municipalities from discharging untreated sewage or wastewater into the ocean. The federal Clean Water Act already bans such discharges but provides for waivers for some communities, including the city of San Francisco.

AB 854 would also strengthen the authority of California's state agencies charged with protecting the coast. The Coastal Commission and the State Lands Commission would both be granted authority to issue "cease and desist" orders to halt coastal development not in compliance with conditions of the building permits.

#### **B. SB 283 (Rosenthal D-LA)**

SB 283 would enhance the Coastal Commission's enforcement powers by granting the Commission the authority to levy administrative fines for violations of the Coastal Act. In addition, it would grant the Commission the power to impose civil fines of up to \$50,000 per day for violations. Senator Rosenthal has introduced a companion bill that would provide a funding system that will make the enforcement program self-sustaining.

### **TRANSPORTATION**

#### **SB 431 (Hart, D-Santa Barbara)**

This bill represents the rebirth of Senator Hart's "DRIVE Plus" program which fell victim to Governor Deukmejian's veto last year. The bill's acronym stands for Demand-based Reductions in Vehicle Emissions, plus reductions in carbon dioxide emissions. DRIVE-Plus would increase the sales tax on new vehicles which pollute more than average, and decrease the sales tax on vehicles that are cleaner than average. This creative use of market incentives would be essentially revenue-neutral because people who pay surcharges would be subsidizing those who receive rebates.

Carbon dioxide is expressly included as a pollutant targeted for reduction because the only way to reduce carbon dioxide emissions from automobiles is to increase fuel efficiency. Thus, manufacturers and consumers will have dual incentives to choose the most efficient, least polluting vehicles.

### **ENERGY POLICY**

The lack of leadership on energy issues at the federal level has left California to formulate its own plans to combat an ever-growing energy crisis.

**A. AB 1064 (Sher, D-Palo Alto)**

According to the California Energy Commission, Californians burn 150 million tons of fossil fuels every year. This bill would establish an official state energy efficiency goal aimed at reducing per capita consumption by 50% by the year 2005. The California Energy Resources Conservation and Development Commission, the Public Utilities Commission (PUC), and the Air Resources Board would be directed to identify how and where the transportation, industrial, commercial and residential sectors of society could increase efficiency.

The Energy Commission would be required to submit biennial reports which address emerging conservation trends and which forecast California's energy efficiency for specified planning periods. The PUC would be required to direct major utilities to develop "energy efficiency assistance and incentive programs" designed to meet specified targets. In addition, the PUC and utilities would have to establish a comprehensive demand-side data monitoring and evaluation system to provide detailed and reliable statistics on actual energy savings from all classes of demand-side management programs.

**B. SB 1214 (Killea, D-San Diego, & Rosenthal, D-LA)**

This bill would direct the Air Resource Board to achieve, to the maximum extent feasible, the goal of petroleum displacement to reduce vehicle emissions and diversify the available fuel sources. Thus, the Air Resources Board is directed to pursue regulations that will mandate the use of "clean fuels" and low-emission vehicles. Current law already requires a program to reduce emissions of certain gases by 55% by the year 2000. (Cal. Health & Safety Code §43018(b)).

**C. SB 103, (Morgan, R-Los Altos)**

Tax incentives for solar energy systems in residences expired at the beginning of this year. This bill would continue the incentives. Solar tax incentives were first introduced in 1980 and over the past ten years have resulted in greater production efficiency and dramatic cost reductions for solar power. With further research and development, the solar industry believes it can make solar-generated power competitive with electricity produced by fossil fuels. The bill should benefit from a renewed interest in energy independence in the wake of the Gulf War.

**RECYCLING**

Several bills are pending which are aimed at refining and furthering provisions of the Integrated Waste Management Act of 1989.

**A. AB 1423 (Gotch, D-San Diego) and  
SB 235 (Hart, D Santa Barbara)**

Both of these bills require that packaging and containers be made of recycled material. AB 1423's requirements apply to glass (replacing the weaker requirements passed last year), aluminum, bi-metal and steel containers. SB 235's requirements apply to rigid plastic and paper containers, such as microwave food trays.

**B. AB 2213 (Sher, D-Palo Alto)**

AB 2213, by the author of the Integrated Waste Management Act, would create a system of economic incentives to encourage companies to produce more recyclable products. The bill would impose a fee on all products which will end up in landfills. The fee will be based on the product's weight and the cost of recycling it. Manufacturers who persist in using non-recyclable materials would be assessed an additional surcharge. Thus, manufacturers who use less packaging and make their products more easily recyclable would pay less.

**HAZARDOUS WASTE**

**A. SB 1143 (Killea, D-San Diego & Torres, D-LA)**

Over the last several years, significant state and local government efforts to combat the problem of household hazardous waste disposal have resulted in the establishment of waste collection programs. These programs prevent pollution by providing a comparatively safer option of disposing of the products in a hazardous waste facility, rather than in a regular landfill or by simply being flushed down the drain.

Unfortunately, these collection programs face two major obstacles: they are extremely expensive for local governments to operate and; since consumers do not know which products are hazardous, consumers do not know which products to save for the collection program. To help inform consumers, SB 1143 requires manufacturers of hazardous products to provide warning labels on those products not to be thrown in the garbage or down the sink. Its small fee assessment on these products would fund state and household hazardous-pollution prevention, including local collection programs.

**B. SB 611 (Calderon, D-Whittier)**

California regulates over twice as many hazardous wastes as the EPA and most other states. For these wastes, called "California-only" wastes, the state imposes special storage, handling, treatment and disposal require-

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ments. Examples of California-only waste include industrial solvents, metal and organic sludges, surplus chemicals and oil-based wastes.

The estimated costs of meeting California's treatment standards for these wastes is \$100-850 per ton, depending on the waste product. These high costs create a strong economic incentive for companies which generate these California-only wastes to avoid state regulations by shipping their wastes to other states, like Utah, which allow the disposal of untreated California only wastes in landfills designed for non-hazardous waste only.

In 1990, 19% of California's waste was shipped out of state to facilities requiring less stringent standards. This figure was eight times higher than the amount shipped out of state just four years earlier.

SB 611 is an attempt to stop the mass evasion of California law. This bill would require all California companies which ship California-only wastes out of state to certify that their waste is treated in conformance with California's strict standards before being exported. Companies would be given the option of paying a fee equivalent to the cost of treating their wastes for the right to ship untreated waste out of state.



## Notes & References

### *Mattas, Occupational Safety*

(continued from p. 28)

29. Id. at 311.
30. Id.
31. Id. at 308.
32. Id. at 309.
33. Navarro, *supra* note 19, at 150.
34. Fleischauer, *supra* note 23, at 292.
35. Navarro, *supra* note 19, at 150.
36. Id.
37. Id.
38. Fleischauer, *supra* note 23, at 292.
39. Navarro, *supra* note 19, at 151.
40. Id.
41. Fleischauer, *supra* note 23, at 319.
42. Id. at 320.
43. Id. at 329.
44. Navarro, *supra* note 19, at 153.
45. Id.
46. Fleischauer, *supra* note 23, at 304.
47. Navarro, *supra* note 19, at 153.
48. Bacow, *supra* note 1, at 103.

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### *Gustafson, Transnational Waterbasin Pollution*

#### References

J.G. Lammers, *Pollution of International Watercourses* (Boston: Martinus Nijhoff, 1984).

L.A. Teclaff and E. Teclaff, *Transboundary Toxic Pollution and the Drainage Basin Concept* 25 *Natural Resources Journal*, No. 3 (July 1985).

F.J. Berber, *Rivers in International Law*, R.K. Batstone, trans. (New York: Oceana, 1959).

*Plata Basin Treaty*, April 23, 1969, 875 *U.N.T.S.* 11.

J. Trevin and J. Day, *Risk Perception in International River Basin Management: The Plata Basin Example* 30 *Natural Resources Journal* 87.



A. Kiss, *The Protection of the Rhine Against Pollution* 25 *Natural Resources Journal*, No. 3 (July 1985), at 613.

L.A. Teclaff, *The River Basin in History and Law* (The Hague: Martinus Nijhoff, 1967).

Note, *Killing the Rhine: Immoral, But is it Illegal?* 29 *Virginia Journal of International Law*, No. 2 (Winter 1989), at 440.

D. Kennedy, *The Sources of International Law*, 2 *American University Journal of International Law and Policy*, No. 1 (Spring 1987), at 94-96.

### Notes

<sup>1</sup>These factors include pH factor, ambient temperature, dissolved oxygen content, fecal coliform count, radioactivity, turbidity, color, taste and odor, amount of carried solids, and type and quantity of toxic substances present. R. Aukerman and G. Chesley, *Classifying Water Bodies, Feasibility and Recommendations for Classifying Water*, Department of Recreational Resources, Colorado State University, Fort Collins, CO; Report to the National Water Commission, Report No. VWC-EES-72-040, July 1971 (Springfield, VA: National Technical Information Service), at 86-105.

<sup>2</sup>General water use type pairings include instream/withdrawn and consumptive/non-consumptive. Sorts or use include irrigation, fish and wildlife, industrial supply, and navigation. Conditions of use include seasonal, non-conflicting and critical.

<sup>3</sup>R. Johnson and G. Brown, Jr., *Cleaning up Europe's Rivers* (New York: Praeger Publishers, 1976), at 296-298.

<sup>4</sup>C. Okidi, *The State and Management of International Drainage Basins in Africa*, 28 *Natural Resources Journal*, No. 4 (Fall 1988), at 660-661.

<sup>5</sup>Teclaff (Note 1), at 50-52.

<sup>6</sup>A. Schwabach, *The Sandoz Spill: The Failure of International Law to Protect the Rhine from Pollution*, 16 *Ecology Law Quarterly* at 452, 462-464 and 471.

<sup>7</sup>Okidi (Note 21), at 661-662; and, locally, *Defending Mother Earth*, *California Lawyer*, June 1990, at 18.

<sup>8</sup>G. Handl, *Environmental Protection and Development in Third World Countries: Common Destiny--Common Responsibility*, 20 *New York University Journal of International Law and Politics*, No. 3, at 608-609.

<sup>9</sup>Johnson and Brown (Note 20), at 128-133.

<sup>10</sup>Okidi (Note ), at 659,663.

<sup>11</sup>B.R. Chauhan, Settlement of International Disputes in International Drainage Basins, *Wasserrecht und Wasserwirtschaft*, Band 19 (Berlin: E. Schmidt, 1981), p. 46.

<sup>12</sup>op cit., Lammers, pp. 124-147.

<sup>13</sup>ibid

<sup>14</sup>op cit., Schwabach, pp. 466-471.

<sup>15</sup>These liability doctrines are 1) absolute (causation or correspondence as basis, no excuse); 2) strict (causation as basis, limited excuses); 3) conditional (express provision or immunity waiver as basis, contractual excuses); 4) negligence (breach of duty as basis, immunity or general excuses); and 5) prevention (potential injury risk as basis, immunity or general excuses). To date, the preventative liability doctrine has yet to be applied in punitive actions, though it has been a bargaining tool in recent "debt-for-conservation" agreements. Constance O'Keefe, "Transboundary Pollution and the Strict Liability Issue: The Work of the International Law Commission on the Topic of International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law," 18 Denver Journal of International Law and Policy 207-208 (Winter 1990).

<sup>16</sup>op cit., Kiss, p. 633.

<sup>17</sup>Yearbook of the International Law Commission, 1987, Vol II, Part Two, United Nations Doc. No. A/CN.4/SER.A/1987/Add.1 (Part 2), pp. 39-49.

<sup>18</sup>op cit., Handl, p. 624; and N. Glover, "The New River: The Possibility of Criminal Liability for Transnational Pollution," 10 Criminal Justice Journal 112-113 (Fall 1987).

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### Racobs and Winn, *Feasibility Consideration and the Clean Air Act*

1. 42 U.S.C. §§ 7401-7642.
2. 42 U.S.C. § 7409.
3. 42 U.S.C. § 7410(a).
4. 42 U.S.C. § 7607(b)(1).
5. 42 U.S.C. § 7413(b) and § 7604.
6. *Union Electric Co. v. EPA*, 427 U.S. 246 (1976).
7. 42 U.S.C. § 7413(a).
8. 42 U.S.C. § 7413(b)(1).
9. Id.
10. 42 U.S.C. § 7413(b).
11. Id.
12. Id.
13. See II.E. below.
14. 42 U.S.C. § 7607(b)(1).
15. 42 U.S.C. § 7607(b)(2).
16. *Union Electric*, 427 U.S. at 268, n. 18 (1976). See II.C. below.

17. Note, A Limited Audience for Protestations of Impossibility: Proposed Procedures for Raising Infeasibility Claims Under the Federal Clean Air Amendments of 1970, 61 Iowa L. Rev. 723, 770 (1976).

18. 42 U.S.C. § 7409. Note, supra note 17.
19. S. Rep. No. 1214, 91st Cong., 2d Sess. 2-3 (1970).
20. Union Electric, 427 U.S. at 257.
21. Kramer, The 1977 Clean Air Act Amendments: A Tactical Retreat from the Technology-Forcing Strategy?, 15 Urb. L. Ann. 103, 108-09 (1978).
22. Id.
23. Union Electric, 427 U.S. at 265-66.
24. Id.
25. Id. at 266-68.
26. Id. at 168, n.18.
27. Id. at 269.
28. Bleicher, Economic and Technical Feasibility in Clean Air Act Enforcement Against Stationary Sources, 316, 352-53 (1975).
29. See supra note 25 and accompanying text.
30. United States v. Ford Motor Co., 814 F.2d 1099, 1103-04 (6th Cir. 1987).
31. Navistar Int'l Transp. Corp. v. EPA, 858 F.2d 282, 289 (6th Cir. 1988).
32. See e.g. United States v. Town of North Hempstead, 610 F.2d 1025, 1027 (2d. Cir 1979) (dictum).
33. Farber, Equitable Discretion, Legal Duties, & Environmental Injunctions, 45 U. Pitt. L. Rev. 513, 513-15 (1984).
34. 437 U.S. 153, 193-95 (1978).
35. Id. at 187-88.
36. 456 U.S. 305, 307-16 (1982).
37. Id. at 314.
38. Id. at 316.
39. Farber, supra note 33, at 524-27.
40. Cf. Union Electric Co. v. EPA, 427 U.S. 246, 268 (1976).
41. Cf. e.g. U.S. v. Wheeling-Pittsburgh Steel Corp., 818 F.2d 1077 (3d. Cir. 1987).
42. See supra notes 19 and 20 and accompanying text.

