CALIFORNIA

Environmental Law Reporter

Current Issues in Environmental & Land Use Law

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Editor's Note: Matthew Bender & Co, Inc. is pleased to welcome attendees to this year's California State Bar Annual Meeting in San Diego, and the Environmental Law Section's Second Annual Environmental Law Institute at Yosemite. In conjunction with these events, the Reporter proudly presents two special features in this issue. First, the following article on environmental prosecutions written by Jan Chatten-Brown, a speaker at this year's Environmental Law Institute. Second, a Special Topics Column co-authored by Terry Bird and Stan Spracker on insurance coverage for environmental claims [see p. 359]. Mr. Bird will be a speaker on this subject at the State Bar Annual Meeting.

The Evolution of Environmental Prosecutions and the Role of the Private Practitioner

*By Jan Chatten-Brown**

The probability of a business or governmental agency being criminally or civilly prosecuted for a violation of environmental laws has increased dramatically in the past decade. As a consequence, the value of assisting a client in conducting an environmental audit as a method to eliminate violations also has increased. This article provides an overview of environmental prosecutions, including on recent statistics on the number of such prosecutions; discusses some of the benefits of practicing preventive law in the context of environmental problems; and explores a number of issues which arise when violations do occur.

An Overview of Prosecutions of Environmental Crimes

A Brief History of Environmental Prosecutions

Twenty years ago, no one prosecuted "environmental crimes." Despite the fact that penalty provisions existed for illegal disposal of oil and other hazardous materials as early as 1889, when the Rivers and Harbors Act became law, cases were rarely prosecuted. When a violation was found and the relevant regulatory agency despaired of achieving "compliance," charges were generally filed against the corporation responsible for the violation. On the rare occasion that individuals were charged, they were dismissed in exchange for pleas from the corporations. Dramatic change in prosecution practices began in the early 1970s, as organizers of the first Earth Day used the event to press enactment of a series of tough criminal sanctions in the new environmental laws.

In 1974, the first environmental prosecution program was established in a local prosecutor's office. The new Los

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Angeles City Attorney was elected with a campaign pledge to do something about air pollution in the city with the worst air pollution in the nation. The City Attorney's Office, and later the Los Angeles District Attorney's Office, established a presence at the cutting edge of environmental prosecutions, forming the first multi-agency task forces to facilitate investigations and effective prosecutions, and obtaining the first jail sentences for corporate officers and managers.

Even with the engagement of prosecutors who saw prosecutions as a key deterrent to environmental degradation, criminal prosecutions came slowly. In the early 1970's, regulatory agencies such as the then Los Angeles Air Pollution Control District were more interested in working with industry than the prosecution, and actually protested the concept of seeking maximum penalties or charging individuals. In contrast, today there is a strong commitment by most regulatory agencies to use criminal or civil prosecutions as one in a panoply of tools used to protect the environment.

A Growing Commitment of Resources

Special divisions for the investigation and prosecution of environmental crimes have been created in the United States Department of Justice, the Federal Bureau of Investigations, and Environmental Protection Agency. According to the head of EPA's Office of Criminal Enforcement, 110 special criminal agents are now employed, and EPA has a goal of deploying 200 by 1995. In California, local involvement in environmental prosecutions is extensive. For example, the Los Angeles District Attorney commits nine attorneys, and seven criminal investigators, to environmental cases. Almost every county in the State, and most major city prosecutors, have some commitment to these cases. When local resources are thin, the enforcement arm of Cal/EPA, headed by former Los Angeles District Attorney environmental crimes prosecutor Bill Carter, is there to provide technical and legal assistance.

For years, the California District Attorney's Association has conducted an annual two day conference on advanced criminal prosecutions, as well as a similar program on introduction to environmental violations. In addition to a forum for keeping up on the latest developments in statutory and case law, the seminars provide panels on such topics as chemistry for lawyers and the use of highly technical expert witness testimony. The California District Attorney's Association also has a standing Committee on the Environment, which meets several times a year, in both the north and the south, and provides a valuable opportunity for the exchange of ideas on investigations and prosecutions. In the Spring of 1992, the Committee even initiated an environmental prosecutor's advisory hotline.

The National District Attorney's Association and the National Association of Attorneys General have their own environmental committees and regional programs, such as the Western States Hazardous Waste Project. Less than two years ago, the American Prosecutors Research Institute established the National Environmental Crime Prosecution Center.

Greater Involvement in Investigations

Today, prosecutors no longer are dependent almost entirely on agency referrals. Many tips of criminal activities come from current or former employees of suspects, or from competitors who resent the unfair economic advantage another business may enjoy from shortcutting environmental compliance. The public frequently reports suspected illegal activity. Environmental Crimes Task Forces operate at the local, state, and federal levels. California has even statutorily created a Strike Force [Health & Safety Code § 25197.2]. Sophisticated undercover or sting operations are

not uncommon, and agencies and prosecutors use scientific monitoring equipment. Since business documents provide evidence of the elements of many environmental crimes, use of search warrants and subpoena are routine. Increasingly, prosecutors make use of grand juries to obtain testimony from the reluctant witnesses who may be employed by a company under investigation.[1] For some types of cases, it is almost essential to retain an expert in the investigatory stage. For example, for an air exposure Prop 65 case for civil penalties and injunctive relief, an expert is normally required to assess or conduct dispersion modeling.

Recent Statistics on Environmental Prosecutions

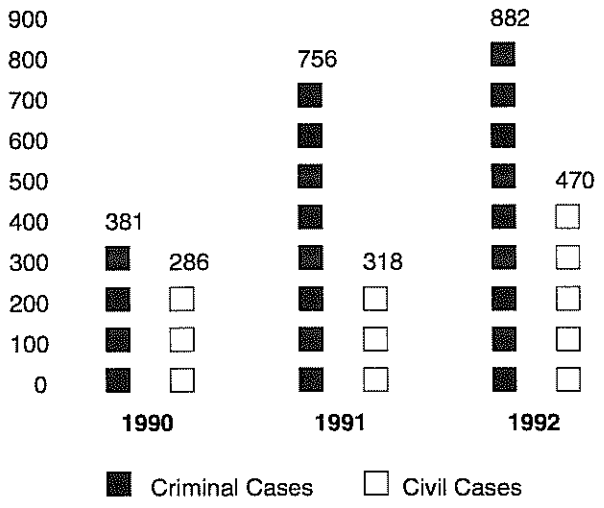
What has been the result of this commitment of resources? At the federal level, there has been a slow but steady increase in the number of prosecutions. On the other hand, local prosecutions in large cities throughout the country have increased dramatically. The following charts, obtained from the National Environmental Crime Prosecution Center, report on Department of Justice prosecutions, and prosecutions by a group of urban area local prosecutors.

UNITED STATES DEPARTMENT OF JUSTICE DATA ON ENVIRONMENTAL PROSECUTIONS

	INDICTMENTS	PLEAS/CONVICTIONS
Fiscal Year '83	40	40
Fiscal Year '84	43	32
Fiscal Year '85	40	37
Fiscal Year '86	94	67
Fiscal Year '87	127	86
Fiscal Year '88	124	63
Fiscal Year '89	107	101
Fiscal Year '90	134	85
Fiscal Year '91	125	96
TOTAL	834	607

ENVIRONMENTAL OFFENSE CASES PROSECUTED at Local Level in Jurisdictions Exceeding 250,000

(1990, 1991, Jan-June 1992): Total Cases Prosecuted by Year



Perhaps more significant than the number of prosecutions is the increase in sentences, both in terms of monetary penalties imposed and periods of incarceration. EPA's *1991 Enforcement Accomplishments Report*, issued in May of 1992, reported that in 1991, 48 criminal cases were completed, 82 defendants were convicted, and 28 of those defendants were sentenced to jail. Los Angeles County's data is perhaps the most impressive local prosecution program. The following chart shows prosecutions between 1987 and mid-year 1992:

LOS ANGELES COUNTY DISTRICT ATTORNEY
Environmental Crimes/OSHA Division

Year	Criminal Cases Filed	Defendants W/Jail Sentence	Total Days Jail Time	Average Sentence	Total Fines
1987	53	5	357	71 Days	$1,200,000
1988	45	6	630	105 Days	1,400,000
1989	50	7	1,170	169 Days	1,500,000
1990	72	5	690	139 Days	3,916,000
1991	46	13	3,043	234 Days	3,508,250
1992	32	5	1,940	388 Days	2,193,585

(through 6/24)

According to Michael Delaney, the Head Deputy for the Los Angeles District Attorney's Environmental Crimes Division, penalties for fiscal year 1992-93 were $4,300,00. This figure includes fines and restitution totalling $2.5 million in a joint prosecution with Cal/EPA, in a case involving the illegal transportation and disposal of waste in Mexico. In addition to the penalties obtained by the Los Angeles District Attorney, thirty defendants were sentenced to a total of 3,550 days in custody, with several sentences of one year in jail for smog check fraud, and two years in a conviction involving the illegal handling of asbestos.

Types of Prosecutions

A constantly widening array of laws is being prosecuted. In the 1980s, almost all criminal prosecutions were for the disposal of hazardous wastes. Although there were prosecutions for air pollution violations, they almost never resulted in jail time. Although most prosecutions still involve hazardous wastes, and other hazardous materials, there is an increasing number of prosecutions for destruction of natural resources and endangered species. For example, in 1991, the Los Angeles District Attorney obtained an eighteen month jail sentence against a developer who filled a streambed in the Santa Monica Mountains. While there has been relatively little use of California's criminal nuisance law, or the California Corporate Criminal Liability Act, which makes it a felony to fail to report a serious concealed danger, those laws remain in the prosecutors arsenal.

At the federal level, there has been considerable interest in the use of the Racketeer Influenced and Corrupt Organizations Act (RICO), although the penalties already are quite substantial under various federal laws, including the Clean Air Act; the Clean Water Act; the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); the Resource Conservation and Recovery Act (RCRA); and the Toxic Substances Control Act.

This year the California legislature focused attention on creating a favorable climate for business, with a major effort in revising the California Environmental Quality Act. Although there was a significant focus on regulatory reform, there was no weakening of the penalty provisions of California's environmental laws, which have become increasingly stringent in terms of the penalties imposed, the limitation, and sometimes elimination, of the scienter required, and the scope of individual liability.

Standards of Liability

The erosion of the traditional requirement of scienter for environmental and other public welfare prosecutions has been well documented.[2] In short, the courts have repeatedly affirmed the concept that criminal sanctions in public welfare, or malum prohibitum crimes, including environmental crimes, may be based upon simple as opposed to criminal negligence, or even strict liability. Two significant California cases deal with liability under California's Hazardous Waste Control Act.

In 1989, the power of the Legislature to base liability for disposal of hazardous wastes on a "should have known" standard was upheld. The court stated:

> Lawmakers have wide latitude to declare an offense and to exclude, or include, elements of knowledge and diligence.

[People v. Martin, (1989) 211 Cal. App. 3d 699.] A further extension of criminal liability for "responsible corporate officers" is discussed in *People v. Matthews* [(1992) 7 Cal. App. 4th 1052], where the court held:

> [P]ersons holding significant shares of corporate responsibility and power are subject to prosecution and conviction for strict liability crimes unless they have exercised their responsibility and power so as to have undertaken all objectively possible means to discover, prevent and remedy any and all violations of such law.

The fact that courts have acknowledged the authority to impose such strict liability based upon an officer's or manager's position or authority only in misdemeanors in-

volving "light penalties and no moral obloquy or damage to reputation. . ." [People v. Matthews, *above*] is no doubt of little comfort to those corporate managers contemplating up to one year in County jail.

When "knowledge" is statutorily required, the courts have interpreted the term restrictively. For example, under RCRA, early cases held that the law required knowledge both that the waste was hazardous and that the regulation had been violated, but held that knowledge "may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant." [U.S. v. Johnson & Towers, Inc. (3d Cir. 1984) 741 F.2d 662.] Subsequent cases limited the requirement for showing knowledge. In *U.S. v. Hayes* [(11th Cir. 1986) 786 F.2d.149], the court held that RCRA did not require proof that individuals transporting wastes knew that the wastes were hazardous under the regulations, saying "it is completely fair and reasonable to charge those who choose to operate in such areas with knowledge of the regulatory provisions." Subsequently, the Ninth Circuit held that in RCRA prosecutions for illegal disposal of hazardous waste it was not necessary to show that defendants knew or should have known that a waste facility lacked proper permits, but it was only necessary to show knowledge that the waste was hazardous. U.S. v. Hoflin [(9th Cir. 1989) 880 F.2d 1033, cert. denied, 110 S. Ct. 1143].

Filing Decisions

Once prosecutors determine that the elements of a crime are present, a number of filing decisions must be made. Some prosecution offices routinely elect to proceed to prosecute civilly for illegal business practices under Bus. & Prof. Code § 17200, based upon a violation of a criminal law. Stated rationale for such an election include the lower burden of proof, and the authorization for injunctive relief, but for many jurisdictions, a major factor in the decision is the greater flexibility the law allows in recovering costs of investigation and prosecuting the violation, and in the distribution of penalties. This is somewhat less of an issue under the Hazardous Waste Control Act, which specifies a distribution of the penalties that includes apportionment to the prosecuting and investigating agencies [Health & Safety Code § 25192].

Other significant decisions, which are made on a case by case basis, are which individuals should be charged, and whether felony or misdemeanor charges are more appropriate. Perceptions of culpability, the seriousness of the violation, goals of deterrence, and regulatory history, are the primary factors that come into play.

The Role of the Private Practitioner

The Practice of Preventive Law and the Environmental Audit

Corporate counsels for large and small companies involved in the transportation, production, or use of chemicals and other hazardous substances, the combustion of fossil fuels, or other activities triggering the application of environmental law already may spend a large portion of their time practicing preventive law with regard to preventing or remedying environmental violations. Commercial real estate attorneys focus on potential liability of sellers and buyers of property. Government attorneys, in addition to regulating, may look at the consequences of operations of public works departments, airports, municipal utilities, and ports. Today, it is incumbent on all who are advising potential polluters not just to identify potential liability, but to assist the business or government in reducing or eliminating liability in the most cost-effective method possible. Encouraging the client to conduct an environmental audit is one of the most effective methods of achieving environmental compliance.[3] It also may save the client money by reducing or eliminating wasteful practices which result in pollution.

An environmental audit requires managers and their counsel to work closely with environmental professionals in a systematic identification of potential sources of pollution and applicable law; an assessment of the adequacy of methods of compliance in use at the time of the audit; and development of a plan for better environmental or risk management. Even when there is substantial in-house environmental expertise, it is usually desirable to bring in an outside professional on a periodic basis, or at least once, in order to provide a fresh perspective. Someone with knowledge of the particular type of industry is preferred. Ideally the person also either can personally assess, or will know when to identify the need for a related safety and health professional. When there is an environmental problem, occupational safety and health issues often exist.

After evaluation of all sources of pollution, the management team, with the help of the environmental professional, will focus on a plan for assuring compliance. Industries are increasingly finding that pollution prevention, including elimination of unnecessary chemicals, or substitution of less toxic alternatives, is more cost-effective than post-use pollution control. The process of developing and implementing an environmental or risk management plan includes institutionalizing and documenting routine procedures for assuring on-going compliance; documenting timely corrective action, and the resources committed to achieving environmental compliance; and establishing a clear chain of

command for these purposes. A system to encourage employee participation in the identification and elimination of environmental problems can be an important part of such a plan.

When a problem is identified, it is imperative to carefully evaluate the alternative methods of abatement. Too often one problem is solved by creating a new one. For example, it is not in the long-term interest of the client to eliminate use of a Prop 65 carcinogen or reproductive toxin by substituting a chemical which may soon be on the list, or a chemical that will create other worker exposure problems.

When an environmental audit is completed, and the recommendations of the auditor or auditing committee implemented, counsel should discuss with management a schedule for periodic reassessment, which at the very least should include a procedure for reviewing the impact of introduction of any new or expanded use of chemicals or hazardous substances or processes, and an annual review of new environmental laws and regulations.

One of the legitimate concerns of managers and their counsel is whether the results of an environmental audit can be kept confidential in case of a governmental investigation. Although the subject of the confidentiality of environmental audit supervised by counsel has been much debated, the consensus seems to be that there is a very high likelihood of its disclosure if there is a criminal investigation. As a result, most counsel urge their clients to conduct the audits only when there is a serious commitment to implement all reasonable recommendations necessary to eliminate any violations or potential violations which are identified.

Clearly, despite the risks inherent in conducting an audit without a good faith commitment to implementation, there are substantial benefits to an audit even when violations occur notwithstanding the audit. Under the U.S. Sentencing Guidelines, fines for violation of federal law may be reduced from the base fine when the company has an effective program to prevent and detect violations of law [18 U.S.C. Appendix 4, § 8C2.4]. Although the specific Sentencing Guidelines for environmental crimes have not yet been issued in final, an effective program requires the exercise of due diligence in seeking to prevent and detect criminal conduct by the organizations's employees and agent. According to the commentary to the Sentencing Guideline, such due diligence must include:

(1) Compliance standards and procedures;

(2) Specific high level personnel assigned responsibility for compliance;

(3) Exercise of due care not to delegate to those with a propensity for violations;

(4) An effective communication program regarding standards and procedures;

(5) Use of monitoring and auditing systemsreasonably designed to detect criminal conduct, including a system for employees and agents to report such conduct without fear of retribution;

(6) Consistent enforcement of standards; and

(7) Implementation of all reasonable steps to respond appropriately to an offense which is detected, and prevent further similar offenses.

Determination of the precise actions necessary for an effective program depends upon factors including the size of the corporation, the likelihood of offenses based upon the nature of the business, and the organization's prior history.

Voluntary compliance efforts also are considered by the Department of Justice in their filing decisions. On July 1, 1991, the Justice Department issued a policy statement entitled FACTORS IN DECISIONS ON CRIMINAL PROSECUTIONS FOR ENVIRONMENTAL VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR. The stated purpose of the document is to "describe the factors that the Department of Justice considers in deciding whether to bring a criminal prosecution for a violation of an environmental statute, so that such prosecutions do not create a disincentive to or undermine the goal of encouraging critical self-auditing, self-policing, and voluntary disclosure."

Cal/EPA also has issued enforcement guidelines to encourage environmental audits, a subject discussed at 1993 CELR 193.

In addition to the view of the prosecutor, regulatory agencies routinely consider compliance efforts, and cooperation once a violation is identified, when assessing administrative penalties and deciding whether to make a referral for civil or criminal prosecution.

When A Violation Occurs

Even when an audit is undertaken, violations can occur. Counsel should work with managers in advance to establish procedures to be followed when either a routine inspection or a criminal investigation occur. Procedures for the prompt abatement of violations are necessary, but if hazardous materials are involved, agency approval for remedial action

may be necessary. Before action is taken, the issue should be discussed with counsel, unless delay would jeopardize public health, employee safety, or the environment.

When a violation is uncovered without regulatory agency involvement, the issue of voluntary disclosure must be carefully considered. Disclosure sometimes is required by a specific law (e.g., oil spill laws). Even when disclosure is not compelled, it may be desirable as evidence cooperation and of a good faith effort to avoid repeat violations. In any case, abatement should be carefully documented.

If a violation is not identified and abated by the client, but is instead discovered by the regulatory agency or prosecutor, then the counsel's role changes dramatically. Today, if the prosecutor is involved, or the violation particularly serious, most companies will retain, or corporate counsel associate, an experienced white collar criminal defense attorney. This should be done promptly, since such action may assist in putting the violation in perspective, and in developing facts that will reduce the likelihood of a filing, or reduce its seriousness. It also may help assure that any information or evidence necessary for a defense is preserved.

The first order of business must always be finding out what actually happened, by a systematic, thorough internal investigation. Witness interviews should be conducted, with counsel bearing in mind that they do not have the right to be present during investigatory interviews conducted by prosecutors or their agents [75 Ops. Cal. Atty. Gen. 223 (1992)]. If hazardous materials are involved, samples should be obtained.

Finally, if a criminal or civil case is filed, counsel may find it beneficial to initiate early discussions with the prosecutor, and the regulatory agency or agencies, on ways to prevent further violations. If multiple agencies are involved, or may become involved, it may be possible to enlist the prosecutor in fashioning a remedy that will meet the concern of all the agencies. Finally, creative counsel may wish to explore with the client their willingness to contribute to the greater resolution of environmental problems within the community or industry through creative sentencing such as contributing funds for educational programs or environmental enhancement or clean-up programs. Many prosecutors are extremely responsive to such suggestions.

By becoming fully engaged in the identification and elimination of environmental violations, and potential violations, counsel may find themselves serving the interests of their community at the same time that they protect the interests of their client.

ENDNOTES

[1] For a detailed discussion of investigatory and prosecutorial policies of specific District Attorneys for violations of the Hazardous Waste Control Act, see *Enforcement in Your Backyard: Implementation of California's Hazardous Waste Control Act by Local Prosecutors*, Ecology Law Quarterly, Vol. 17:803, 1990.

[2] Articles on the subject include *The Park Doctrine — Application of Strict Criminal Liability to Corporate Individuals for Violation of Environmental Crimes*, Journal of Environmental Law, Vol. 10:112, 1991; *Perils of the Profession: Responsible Corporate Officer Doctrine May Facilitate a Dramatic Increase in Criminal Prosecutions of Environmental Offenders*, Southwestern Law Journal, Vol. 45:1199, 1991; *A Little Knowledge May Be Dangerous, But Absence of Knowledge May Lead To Criminal Penalties: United States v. Hoflin*, Journal of Urban and Contemporary Law, Vol. 40:191, 1991; and *Corporate Officer Liability for Federal Environmental State Violations*, Environmental Affairs, Vol. 18:357, 1991.

[3] The Environmental Protection Agency's policy favoring environmental audits, including an appendix describing the elements of an effective environmental auditing program, may be found at 51 Fed. Reg. (No. 131) 25002 25010. For a description of the evolution of environmental audits and EPA's policies with regard to their use, see *Environmental Auditing: Developing a "Preventive Medicine" Approach to Environmental Compliance*, Loyola of Los Angeles Law Review, Vol. 19:1171, 1986.

COMMON LAW AND ENVIRONMENTAL PROTECTION

Cases

BRIEFLY NOTED: Plaintiffs Failed to Show Sufficient Exposure to Toxic Chemicals to Support Claims for Increased Risk of Illness and Medical Monitoring

Abuan v. General Electric Co.
No. 92-15476, 9th Cir.
8/27/93 Daily J. D.A.R. 10953
Aug. 26, 1993

Plaintiff workers at a U.S. Naval Base on Guam brought this class action against the manufacturers of an electrical transformer and chemicals used in the transformer, alleging they were injured by exposure to PCBs and other toxic chemicals when the transformer ruptured. The district court ordered each claimant to file and serve expert opinions supporting the claims that he or she was exposed to a sufficient level of PCBs or other toxic chemicals as a result

of the incident to require future medical monitoring, and that the exposure placed the claimant at increased risk of future injury, illness, or disease. The district court subsequently granted defendants' motions for summary judgment on the ground plaintiffs failed to submit expert opinions that they had been exposed to a sufficient level of toxic substances to succeed on their claims. The Ninth Circuit affirmed.

The court noted that the plaintiff in an action for personal injury from exposure to toxic chemicals must demonstrate exposure to harmful levels of the substances, citing *Maddy v. Vulcan Materials Co.* [(D. Kan. 1990) 737 F. Supp. 1528]. Plaintiffs here had relied primarily on the reports of a professor of biochemistry and molecular biology, and a toxicologist. Both experts concluded that the plaintiffs had been exposed to PCBs and other toxic chemicals as a result of the accident, had an increased risk of future injury or illness, and required medical monitoring, but neither addressed the relative exposures of the different members of the class. In addition, plaintiffs submitted a report from the General Accounting Office ("GAO") that concluded that 29 employees were directly exposed to the PCB-contaminated oil at the time of the accident, and that other employees were also contaminated with PCBs and other chemicals. Plaintiffs contended that their experts and the GAO report established sufficient exposure to preclude summary judgment. The court disagreed.

The court stated that with respect to the cause of action for increased risk of future injury, plaintiffs had to show that the toxic exposure more probably than not would lead to the malady, citing *Hagerty v. L&L Marine Services, Inc.* [(5th Cir. 1986) 788 F.2d 315, modif. on other grounds, 797 F.2d 256]. None of the reports here contained such a conclusion, and plaintiffs did not claim to have presented evidence on this element.

The court further stated that to recover costs of medical monitoring, each plaintiff had to prove that as a proximate result of exposure to a proven hazardous substance, he or she suffered a *significantly increased risk* of contracting a serious latent disease, citing *Brown v. Monsanto Co. (In re Paoli R.R. Yard PCB Litigation)* [(3d Cir. 1990) 916 F.2d 829, *cert. denied*, 111 S.Ct. 1584 (1991)]. It observed that neither of plaintiffs' experts had attempted to state how "significant" or relative the increased risk was for any individual, either in the abstract or as compared to other members of the class. Thus, the court concluded that their evidence failed to meet the *Paoli* significance standard. In addition, the court noted that in depositions, both experts had testified that any exposure to a toxic substance justified medical monitoring. It stated that given these "amorphous views" and the dearth of conclusions regarding quantitative or even qualitative increased risk to individuals, plaintiffs failed to create a genuine factual issue on exposure and summary judgment was appropriate.

Commentary

By James R. Arnold

PCBs are practically indestructible carcinogenic substances. One would ordinarily assume that proof of injury from exposure would be relatively easy before a jury. But here the "failure of proof" occurred at the outset of the case, and resulted in loss of the claims. The Federal Rules of Civil Procedure, even if they do not parallel the Northern District's pilot program under the Justice Reform Act (*i.e.*, "early disclosure of all facts supporting both sides of a case"), federal courts have significant residual power under Rule 16, F.R.Civ.P. Here it was exercised to reject plaintiffs' claims, despite the funding on the litigation by local government.

▲ **References:** 3 Cooke, THE LAW OF HAZARDOUS WASTE, § 17.04[3][c] (Environmental Tort Liability — Increased Risk of Future Illness), [d] (Medical Surveillance Damages).

THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

Cases

Revised Responses to Public Comments in Reply to Writ of Mandate Comply With CEQA

Christward Ministry v. County of San Diego
No. D017589, 4th App. Dist., Div. 1
8/13/93 Daily J. D.A.R. 10337
July 16, 1993

The county's revision of its responses to comments in a supplemental EIR complied with a writ of mandate commanding it to adequately evaluate the potential adverse effects of a mitigation measure for a proposed landfill expansion.

Facts and Procedure. Christward, which owned property near a county landfill, filed a writ petition challenging the certification of an EIR for a proposed landfill expansion. The trial court granted the petition in part [*see* 13 Cal. App. 4th 31, 16 Cal. Rptr. 2d 435], 1993 CELR 136, (*Christward I*). It ordered the county to revise the EIR with respect to

potential adverse effects on water quality. The county complied. Christward filed a writ petition challenging the county's certification of the supplemental EIR. The trial court granted the petition. It ordered the county to prepare an adequate evaluation of potential adverse impacts of the clay cap and liner system proposed as a mitigation measure, to prepare adequate responses to public comments, and to recirculate any future EIR to all who had received the original EIR.

The county prepared revised responses that addressed the impact of trucks bringing clay to the landfill site. It gave copies of the revised responses to persons who had previously submitted comments, and notified them that a hearing would be held on the certification of the SEIR. After a hearing, the county adopted a resolution restricting trucking of both wastes and clay to the trucking levels analyzed without challenge in the original EIR, recertified the original EIR and the SEIR with the revised responses, and readopted the mitigation measures and monitoring plan. The county then filed a return to the writ of mandate asserting that it had limited its activities with respect to the mitigation measure so that there would be no significant adverse environmental impacts beyond those already analyzed.

Christward opposed the return to the writ. The trial court found the return adequately addressed the potential impacts of the mitigation measure. It concluded that since the resolution dealt with information that had already been analyzed and commented on, it did not constitute "significant, new information" that would necessitate a recirculation of the SEIR to other public agencies for comment. The court also denied Christward's motion for attorneys' fees under Code Civ. Proc. § 1021.5. Christward appealed, and the court of appeal affirmed.

Revised Responses Complied With CEQA. Christward contended that the trial court should have found the return substantively inadequate because the revised responses did not discuss such matters as the proposed routes for hauling clay, the hauling distance, or the effect on traffic, air pollution, energy, noise, or cost. It argued that the county sought to substitute a limit on the number of trucks entering the landfill for the CEQA-required analysis of potential environmental impacts of the clay cap and liner mitigation measure.

The court of appeal disagreed. It stated that preparation and recirculation of another EIR on the impacts of trucking clay would have simply repeated the unchallenged trucking analysis in the original EIR. It noted that CEQA does not require the impacts of mitigation measures to receive the same level of analysis as the impacts of the project itself, citing 14 Cal. Code Reg. § 15126(c). The court further noted that it is doubtful whether there can be an effective appeal from a trial court's determination that a peremptory writ of mandate has been complied with, citing *Cosgrove v. County of Sacramento* [(1967) 252 Cal. App. 2d 45, 59 Cal. Rptr. 919]. Finally, it found that the record supported the trial court's determination that the truck trip limit and the revised responses complied with CEQA. It stated that by limiting the number of truck trips to the landfill, the county ensured that there were no environmental impacts beyond those analyzed in the original EIR. The court stated that the original EIR analyzed levels of trucking that were sufficient to subsume the additional trucks trips necessary to import the clay, and that the qualitative analysis of the impact of trucking waste also applied to trucks carrying clay.

Recirculation of Comments Not Required. The court rejected Christward's contention that the SEIR should have been circulated for public and agency comment on the information contained in the revised responses. The court noted that CEQA required recirculation of an EIR only if "significant" new information is added after public review and before final certification, citing Pub. Res. Code § 21092.1. It stated that recirculation is not required when the new information merely clarifies, amplifies, or makes insignificant modifications to the EIR. It stated that the revised responses merely clarified the nature of the mitigation measure and indicated that the project would be operated within the level of truck traffic projected and analyzed in the original EIR. The court stated that nothing in CEQA required the county to recirculate responses to public comments on a previously circulated environmental analysis. It noted that the comments and responses became part of the final environmental impact document [14 Cal. Code Reg. § 15132], and the county was not required to provide an opportunity for review and comment on the final document before approving the project [14 Cal. Code Reg. § 15089(b)]. Finally, the court held that the county was not required to comply with the writ's command that the county recirculate "any future environmental impact report," because the county had not prepared a new EIR.

The county had referred to a document entitled Response to Technical Order (RTO) in responding to comments on the draft SEIR. The trial court had found that the county had failed to make the RTO available for public review. The writ commanded the county to make "relevant" documents available for a sufficient time for public review. The revised SEIR deleted the references to the RTO. The court of appeal upheld the trial court's conclusion that the deletion of references to the RTO meant that it was no longer a "relevant" document required to be made available. The court stated that the RTO was not an integral part of, and was not necessary to, the draft SEIR's water impact analysis. That

analysis was based only on the data in documents listed in the SEIR. It stated that the county corrected any problem in not making the RTO available by deleting the reference to the RTO in the revised documents. The court noted that when, as here, the responses as a whole show "good faith and reasoned analysis," they adequately serve the disclosure purpose of the EIR process even though they might not be "exhaustive or thorough in some specific respects," citing *Twain Harte Homeowners Assn., Inc. v. County of Tuolumne* [(1982) 138 Cal. App. 3d 664, 188 Cal. Rptr. 233].

Attorneys' Fees. The trial court denied Christward's motion for attorneys' fees under Code Civ. Proc. § 1021.5 (attorneys' fees to successful party in any action that results in enforcement of important right affecting the public interest if significant benefit has been conferred on general public or large class of persons; the necessity and financial burden of private enforcement are such as to make award appropriate; and such fees should not in the interest of justice be paid out of the recovery) on the ground the benefit here went primarily to the landowners adjoining the landfill. The court of appeal affirmed. It cited Christward I, in which it had also affirmed a denial of fees. The court noted that in Christward I, the trial court had concluded that although a public interest may have been served by the writ, it was Christward's private interest with respect to the use of its property that was the real basis for the action.

▲ **References:** 1 Manaster & Selmi, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, §§ 22.03[4][i] (Recirculation of Draft EIR), 22.04[10][b] (Final EIR — Responses to Comments).

Final EIR for Amendment to Port Master Plan Properly Deferred Detailed Analysis to Subsequent Project-Specific EIRs

Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners
No. B063820, 2d App. Dist., Div. 3
9/3/93 Daily J. D.A.R. 11338
September 1, 1993

The final EIR for an amendment to the City of Long Beach Port Master Plan adopting a five-year plan properly considered alternatives and impacts of the overall plan while deferring more detailed consideration of anticipated projects to subsequent project-specific EIRs.

Facts and Procedure. Plaintiffs filed a petition challenging the certification by the City of Long Beach and its Board of Harbor Commissioners (the "Board") of a final environmental impact report for an amendment to the city's Port Master Plan and the adoption of the amendment ("PMP 90"). PMP 90 set forth a five-year plan to meet increased demand for the handling of commercial cargo through six "anticipated" projects. The trial court granted the petition. It found that the FEIR violated CEQA requirements with respect to alternatives and cumulative impacts analysis, and ordered the Board to vacate its certification of the FEIR and adoption of PMP 90 and suspend activity considered in PMP 90, pending compliance with CEQA. The court of appeal reversed.

Alternatives. The court first stated that although the FEIR was labeled a "program" EIR, it should be considered a "tiered" EIR. The court explained that a program EIR is an optional procedure used to review in one document a "series of actions that can be characterized as one large project" [14 Cal. Code Reg. § 15168(a)], while a tiered EIR allows general matters to be covered in an initial broad EIR, followed by narrower or site-specific EIRs [Pub. Res. Code §§ 21068.5, 21093; 14 Cal. Code Reg. § 15385]. The court found that the "project" in this case was the five-year plan set forth in PMP 90, citing *Stand Tall on Principles v. Shasta Union High School Dist.* [(1991) 235 Cal. App. 3d 772, 1 Cal. Rptr. 2d 107], 1991 CELR 249 (EIR not required when school board selected "preferred" site for a school, contingent on CEQA compliance; consideration of alternate locations could be deferred to time of project EIR). It noted that PMP 90 did not change the master plan land use designations or zoning for the six anticipated projects. Furthermore, PMP 90 and the FEIR committed the Board to conducting individual environmental assessments on a project-by-project basis for each of the anticipated projects. The court noted that two separate project-specific EIRs that had been concurrently developed and approved by the Board each considered alternatives to the specific projects, including alternative locations, without giving any weight to the "planning" of locations in PMP 90.

The court found no abuse of discretion in the Board's decision to tailor PMP 90 and the FEIR to a consideration of alternatives to the overall five-year plan, while reserving the approval of each anticipated project and its location to a project EIR. It stated that the "tiering" process allowed the agency and the public to first decide whether it was a good idea to increase port capacity in a given five-year period and then to review each individual project on its merits in a project EIR. The court stated that this approach simply recognized the agency's discretion on the "timing" of the presentation of EIRs: since no approval of specific projects or sites took place in the FEIR, the Board had the discretion to choose the project EIRs as the time to consider alternatives to individual projects and sites.

The court found that the consideration of alternatives with respect to the overall plan was adequate. It rejected plaintiffs' contention that the FEIR had to consider alternative sites in the "entire region" rather than the Port itself. It also rejected the contention that the FEIR was required to consider the alternative of using a Naval Station on the possibility it might be closed by the federal government, noting that the availability of the Naval Station within the relevant five-year time frame was highly speculative. Finally, the court stated that the FEIR was not required to consider the alternative of retaining private ownership at certain project sites, because the form of property ownership is simply an ancillary facet of a project for which alternatives need not be considered in an EIR.

Cumulative Impacts. The court held that the FEIR properly focused on a "general overview" of cumulative impacts, with detailed analysis of cumulative impacts and related mitigation measures deferred to the subsequent environmental review of specific projects. It stated that the fact the two project-specific EIRs contained more detailed information than the FEIR on those projects did not render the FEIR inadequate. The court noted that an EIR on an amendment to or adoption of a local general plan need not be as detailed as an EIR on the specific construction projects that might follow, citing 14 Cal. Code Reg. § 15146(b) and *Rio Vista Farm Bureau v. County of Solano* [(1992) 5 Cal. App. 4th 351, 7 Cal. Rptr. 2d 307], 1992 CELR 257.

The only specific information plaintiffs identified as omitted from the FEIR were construction costs and employment for a specific project. The court stated that to make the FEIR completely accurate, an estimate of the costs should have been included. However, it found that the inclusion of this information would only have bolstered the FEIR's overall conclusion that the projects would create a net gain in regional employment levels. The court concluded that the omission could have no material effect on informed decision making or informed public participation, and thus was not a prejudicial abuse of discretion, citing Pub. Res. Code § 21005 (absence of information in EIR does not per se constitute prejudicial abuse of discretion) and *Del Mar Terrace Conservancy, Inc. v. City Council* [(1992) 10 Cal. App. 4th 712, 12 Cal. Rptr. 2d 785], 1992 CELR 515.

The court found that the FEIR's discussion of cumulative impacts was weakest in separately identifying and detailing the cumulative impacts of anticipated non-Port projects with respect to air quality and transportation. The FEIR stated that "construction and operation of the cumulative projects would result in increased air emissions that would contribute to the already high levels of air pollutants within the South Coast Air Basin." It also stated that "non-port baseline traffic is expected to increase substantially" and that "cumulative transportation impacts are considered significant." The court stated that although the FEIR might preferably have provided a more separate, detailed discussion of the non-Port contribution to cumulative impacts in these areas, it did not "minimize or ignore the impacts." It noted that plaintiffs did not suggest any manner in which the omission of more detained information misled the agency or the public, omitted or understated any problem, or was prejudicial in any way. Accordingly, the court concluded that the omission of more detailed information was not prejudicial.

Commentary

By Albert I. Herson

This case is the third appellate case in the last year to uphold the first tier of a tiered EIR approach. The other two cases are *A Local and Regional Monitor v. City of Los Angeles* [(1993) 12 Cal. App. 4th 1773, 16 Cal. Rptr. 2d 358], 1993 CELR 268 (staged EIR for phased development project upheld) and *Rio Vista Farm Bureau Center v. County of Solano* [(1992) 5 Cal. App. 4th 351, 7 Cal. Rptr. 2d 307], 1992 CELR 257 (program EIR for county hazardous waste management plan upheld).

In all three cases, the courts have rejected arguments that project-level impacts or alternatives must be assessed in first tier documents. Instead, the courts have properly permitted lead agencies to expressly defer such analyses to project-level EIRs supporting specific project decisions.

The three tiering cases must be carefully distinguished from other CEQA timing cases attacking project descriptions, such as *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* [(1988) 47 Cal.3d 376, 253 Cal. Rptr. 426]. In the project description cases, the courts have properly rejected lead agency attempts to segment projects or ignore reasonably foreseeable future project phases.

The recent judicial support for tiering can materially help implement CEQA's policy requiring that EIRs be tiered whenever feasible [Pub. Res. Code § 21093(b)]. Notwithstanding this policy, fear of legal challenges has in the past discouraged preparation of tiered or program EIRs and thereby made CEQA compliance inefficient.

On a technical level, the *Al Larson Boat Shop* opinion does raise two concerns. First, the case muddles the distinction between a program EIR and a tiered EIR, reinforcing the need for a complete overhaul and integration of the Guidelines' provisions related to program EIRs, tiering, and staged EIRs. Second, language in the court's discussion of cumulative impacts could be interpreted overbroadly to

establish lenient "harmless error" and "substantial compliance" standards of review for EIR cumulative impact analysis.

Commentary

By Ron Bass

The ultimate holding in this case is similar to that in *Rio Vista Farm Bureau Center v. County of Solano* [(1992) 5 Cal.App. 4th 351, 7 Cal. Rptr. 2d 307], 1992 CELR 257. Like the *Rio Vista* case, the decision strongly supports the concept of tiering and allows agencies wide latitude in how to prepare a tiered EIR. However, the current decision appears to misapply some of CEQA's fundamental concepts concerning how tiering should work.

First, the court holds that the EIR prepared for a five-year port master plan is the "first-tier" of a tiered EIR and may, therefore, be more general than subsequent EIRs on individual components of the plan. In arriving at this conclusion, the court makes what appears to be an erroneous distinction between a "tiered EIR" and a "program EIR." It is unclear why the court makes this distinction since there does not appear to be any reason why a "program EIR" may not also be a "first-tier EIR." In fact, the CEQA Guidelines specifically indicate that a program EIR may be the first tier of a "tiered EIR" [14 Cal. Code Reg. § 21003(e)]. Fortunately, however, the court's attempt to make this distinction does not affect the rest of the decision; the enunciated principles would appear to apply to either a "tiered EIR" or a "program EIR."

Second, the decision holds that the "first-tier" EIR for a five-year port master plan need only evaluate alternatives to the plan itself and need not evaluate alternatives to individual components of the plan, which will be subject to their own "second-tier" EIRs. Third, it holds that an EIR for a port master plan need not evaluate alternative locations for port facilities that are outside the port's jurisdiction. This aspect of the case appears to conflict with the California Supreme Court's direction in *Citizens of Goleta Valley v. Board of Supervisors* [(1990) 52 Cal.3d 553, 276 Cal. Rptr. 410]. In *Citizens of Goleta Valley*, the Supreme Court admonished agencies not to use an individual project EIR as a vehicle to evaluate broad changes to planning policy. Rather, the court suggests that agencies use master plans and master plan EIRs as tools for evaluating broad policy issues, including alternative locations for future land uses. Despite this advice, in the current case, the appellate court frowns on the use of the plan-level EIR to alternative locations for future port facilities. If the two cases are read together, there would never be any opportunity to evaluate alternative locations.

Third, the decision holds that an agency has broad discretion to choose the timing of EIR preparation for an individual project to be developed under a master plan so long as a project-specific EIR is completed and project-specific alternatives are evaluated, before project approval.

Fourth, the court holds that a "first-tier" EIR for a five-year port master plan may cover cumulative impacts of the plan in general terms only and defer the more detailed cumulative impact analysis to future "second-tier" EIRs. This aspect of the decision appears to conflict with sound planning principles that suggest that cumulative issues be addressed during master planning rather than deferred to specific project EIRS, when regional and community wide issues tend to be fragmented and more difficult to evaluate. It also appears to conflict with the advice in State CEQA Guidelines that suggests that one of the advantages of a programmatic EIR (again assuming that a plan-level EIR is a type of program EIR) is that it enables a Lead Agency to consider policy issues that might be slighted on a case-by-case analysis [14 Cal. Code Reg. § 15168(b)(2)]. Thus, Lead Agencies should be cautious about relying on the current decision as precedent for skimping on the cumulative analysis in a plan-level EIR. Better planning practice would suggest that plan-level EIRs should focus primarily on cumulative impacts, rather than relegate them to a lesser role.

Fifth, the decision holds that the preparation of a more detailed "second-tier" EIR simultaneously with a general "first-tier" EIR does not render the "first-tier" EIR inadequate. This concept would enable an agency to process individual projects while it is updating a comprehensive plan without having to include the project-specific data in the master plan EIR.

Finally, the decision restates several of the general principles of EIR preparation. Specifically, it reminds agencies that an EIR need not include all information available about a particular subject, however:

* it should be "analytic rather than encyclopedic";
* it must contain or include a "good-faith effort at full-disclosure," and;
* it need not be perfect.

Although these keystone principles of CEQA would have made a perfectly good conclusion to the case, the court felt compelled instead to end with a quote from *Citizens of Goleta Valley*, which is becoming a common concluding statement in anti-CEQA decisions: "that rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement."

Commentary

By Ellison Folk

Shute, Mihaly, & Weinberger
San Francisco, CA

In view of the recent decisions coming out of the California court of appeal, it is difficult to understand why the State Legislature has felt such a compelling need to amend CEQA. The decisions in *Al Larson Boat Shop v. Board of Harbor Commissioners* and *Christward Ministry v. County of San Diego* (also reported in this issue), are typical of the unsympathetic treatment that CEQA cases receive in the courts. *Larson*, in particular, demonstrates the manner in which courts have applied a limited reading of CEQA to the cases before them — even to the point of ignoring the most important functions of the statute.

The court in *Larson* addressed the adequacy of the EIR for the Long Beach Harbor Port Master Plan ("PMP"). At issue was the EIR's analysis of alternatives and cumulative impacts, two critical elements of CEQA review. The court based much of its determination that the EIR was adequate on the fact that it was a "tiered" EIR that was to be used as the baseline document on which more specific "project" EIRs would build.

The discussion of "tiered," "program," and "project" EIRs provides one of the more useful aspects of the *Larson* decision because, although CEQA has authorized the use of each type of EIR, there is very little case law on the issue. According to the court, the EIR was not a "program" EIR, which analyzes a series of specific actions as a single project, and therefore would not be held to the standards of analysis for a project EIR. By the logic of the *Larson* court, a "program" EIR would be as specific as a project EIR, but would encompass a broader series of actions than an EIR for a single project. In contrast, a "tiered" EIR, such as the PMP EIR, can serve as a more general document that analyzes a conceptual proposal. Subsequent project EIRs would then analyze the specific projects and impacts that had not been previously addressed in the tiered EIR. [*See* Sierra Club v. County of Sonoma (1992) 6 Cal. App. 4th 1307, 8 Cal. Rptr. 2d 473, 1992 CELR 301].

Notwithstanding its determination that the PMP EIR should be viewed as tiered EIR, the *Larson* court applied an unnecessarily lenient standard of review to the EIR's analysis of alternatives and cumulative impacts. With respect to the alternatives analysis, the court found that the EIR did not need to analyze alternatives to the six specific projects that formed the basis of the PMP, because none of these projects had been approved and because such an analysis would be performed in the context of project specific review. Citing *Stand Tall on Principles v. Shasta Union High School Dist.* [(1991) 235 Cal. App. 3d 772, 1 Cal. Rptr. 2d 107], 1991 CELR 249, the court held that approval of the PMP would not commit the agency to a particular project or project site because such selection was expressly conditioned on future CEQA compliance.

Similarly, with respect to the analysis of cumulative impacts, the court found that even though the EIR's discussion was "conclusory," it was adequate for the purposes of a general EIR, such as the tiered PMP EIR. Because subsequent EIRs would address specific projects, the *Larson* court clearly took a "no harm, no foul" attitude towards the PMP EIR. However, the adequacy of the alternatives and cumulative impacts analyses are most important at the "tiered" stage of an EIR.

As stated by the court, the PMP represents the Port's judgment. It would increase its capacity "through the means of the six 'anticipated' projects." Although the court's analysis of the CEQA issues turns on the fact that these projects were only "anticipated," but not "approved," the court's decision appears to be based more on semantics than reality. Once it is determined that the PMP based on the six "proposed" projects should be approved, the Port has in effect committed itself to that combination of projects and locations. The PMP itself is a cumulative project and it is at this stage that an EIR should look most closely at cumulative impacts and alternative combinations of projects and project locations.

CEQA compliance for specific projects analyzed after the PMP approval merely becomes an after-the-fact rationalization of a decision already made. The fact that two project EIRs closely followed the PMP EIR and assessed two of the proposed projects in the PMP emphasizes this point. Although the PMP EIR did not analyze alternatives to specific projects or combinations thereof because such approvals would occur in the future, in reality the Port was already in the process of approving specific projects. Moreover, because the PMP identifies a combination of projects, it becomes much more difficult to assess the cumulative impacts of or alternatives to a specific project, because the determination that one project should be modified will necessarily affect the other "anticipated" projects and their impacts.

As a result, the most logical place to do a complete alternatives and cumulative impacts analysis is at the "tiered" stage, where the combined effect of proposed projects and alternative projects can be most easily analyzed — before the agency has committed itself to a course of action. Although the *Larson* court recognized the difference

between the different types of EIRs that can be prepared under CEQA, its decision ignores the key function of a "tiered" EIR.

▲ **References:** 1 Manaster & Selmi, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, § 22.02[1][b] (Types of EIRs and Their Uses — Tiering).

WATER QUALITY CONTROL

Cases

BRIEFLY NOTED: EPA Lacked Authority to Order Irrigation District Compliance With Safe Drinking Water Act

Imperial Irrigation District v. United States EPA
No. 93-70094, 9th Cir.
9/8/93 Daily J. D.A.R. 11483
September 7, 1993

The Imperial Irrigation district delivers annually approximately 2.6 million acre feet of Colorado River water through a system of open canals. The district sells most of the water for agricultural use, but also sells untreated canal water to an estimated 5700 residential customers along the canals in rural areas, some of whom use the water for drinking water.

The district's canals are open and unprotected, and are susceptible to contamination from numerous sources, including runoff from fields and roads. Tests conducted by the State Department of Health Services found untreated canal water to be contaminated with total coliform and in some cases fecal coliform. After an investigation, the EPA issued an emergency order under the Safe Drinking Water Act [42 U.S.C. § 300i(a)(1)], finding that the district's canal network constituted a "public water system" within the meaning of the SDWA and requiring the district to submit plans for making an alternative source of water available to its drinking water customers, for monitoring canal water contaminants and managing the canals in accordance with the SDWA drinking water regulations, and specifying the means by which it would deliver water complying with SDWA standards.

The district petitioned the Ninth Circuit for review pursuant to 42 U.S.C. § 300j-7(a)(2). The court of appeals vacated the order. It held that the EPA lacked subject matter jurisdiction to enter the emergency order because the district canal system was not a "public water system" within the meaning of the SDWA. The SDWA provides that the EPA may issue emergency orders when it receives information that a contaminant that is present or likely to enter a public water system may present a substantial and imminent danger to public health [42 U.S.C. 300i(a)]. "Public water system" is defined as "a system for the provision to the public of piped water for human consumption. . ." [42 U.S.C. § 300f(4)]. The court concluded that the term "piped" has a plain and unambiguous meaning: it means to convey or conduct by means of pipes, as distinct from open river channels or canals.

The EPA contended that the term "piped" is ambiguous because it means either to convey by pipes or to convey *as if* by pipes, and thus the EPA's reasonable interpretation was entitled to deference. The court found the EPA's interpretation strained, at best. It concluded that if Congress had intended to apply the SDWA's strict standards to water systems delivering water via open conveyance as well as to systems using pipes, it would not have used the term "piped."

Regulatory Activity

Final Regulations

The following regulatory action has been filed with the Secretary of State. Actions generally become effective 30 days after filing; emergency regulations are effective upon filing and other exceptions may apply. For effective dates and other information, contact the agency or obtain a copy of the regulation from the Secretary of State, Archives, 201 N. Sunrise, Roseville, CA 95661, (916) 773-3000 (give agency name, title and section number, and filing date).

State Policies — Water Quality Control. Filed 8/5/93; repeals 23 Cal. Code Reg. §§ 2900–2906. Information: Kathleen A. Kleber, (916) 657-2086.

Enacted Legislation

The following bills were chaptered in the 1993 legislative session. Additional bills will be included in our next issue.