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Flaming Out: Will Chapter 481 Extinguish Agricultural Burning in the San Joaquin Valley?

Ben Nicholson

Code Sections Affected

Health and Safety Code §§ 41855.5, 41855.6 (new).
SB 705 (Florez); 2003 STAT. Ch. 481.

I. INTRODUCTION

The economics of agricultural waste disposal in the San Joaquin Valley are changing.¹ Farming in the eight-county valley generates more than one million tons of agricultural waste every year.² Traditionally, this waste presented growers with a decision: burn the waste to avoid processing costs and complications, or find alternative means of disposal.³

Commencing June 1, 2005, farmers may no longer be faced with this decision.⁴ Recently enacted Chapter 481 sets the foundation for prohibiting the issuance of permits required to burn agricultural waste, thereby forcing valley farmers to rely on alternative means for its disposal.⁵

II. BACKGROUND

A. *Factual Background*

Largely because of its unique geography, the San Joaquin Valley is one of the most productive agricultural regions in the world. Wedged between the Coastal and Sierra Nevada mountain ranges, every summer the San Joaquin Valley's farmers transform it from an arid 25,000 square-mile plain into a "lush farming Eden"⁶ that drives the state's \$27 billion agricultural industry.⁷

1. See Mark Grossi, *Growers Air Stand on Pollution Limits*, FRESNO BEE, Mar. 8, 2003, at A1 (describing a farmer who years ago spent nothing and now spends \$250,000 per year disposing of agricultural waste); Letter from Mike Falasco, Legislative Representative, Wine Institute, to Hannah-Beth Jackson, Chairperson, Assembly Natural Resources Committee (June 26, 2003) (on file with the *McGeorge Law Review*) (stating that the cost of a vineyard removal without burning is one-quarter the price of the land itself).

2. Mark Grossi, *State-Permitted Ag Burning Gets Valley Fired Up*, FRESNO BEE, Dec. 15, 2002, at Special Section 17.

3. See *id.* (discussing burning and other alternatives).

4. See CAL. HEALTH & SAFETY CODE § 41855.5 (enacted by Chapter 481) (commencing a phased-in prohibition on the issuance of burn permits on June 1, 2005); see also *id.* § 41855.6 (allowing for the postponement of the prohibition if the district makes specified determinations and the State Air Resources Board concurs in the district's judgment).

5. *Id.* § 41855.5.

6. Editorial, *Cows and Cotton vs. Clean Air*, S.F. CHRON., June 1, 2003, at D4 [hereinafter *Cows and Cotton*].

7. Lesli A. Maxwell, *Florez Revises Push for Clean Valley Air*, FRESNO BEE, Apr. 21, 2003, at A1.

The same geography and climate that sustain farming, however, have combined with a multitude of manmade factors to create a growing problem in the San Joaquin Valley: it has quickly become one of the most polluted air basins in the United States.⁸ As it turns out, the bowl-shape and hot climate that make the valley so conducive to farming also make it a hotbed for pollution.⁹

The number of days per year the San Joaquin Valley fails to meet state air quality standards for particulate matter and ozone is steadily increasing.¹⁰ A 2001 report indicated that three of the most polluted places in the nation are in the San Joaquin Valley,¹¹ which recently overtook Los Angeles in the number of days each year that it violates federal ozone standards.¹²

The effects of the valley's growing air pollution problem are not lost on its residents.¹³ Sixteen percent of valley residents have asthma.¹⁴ Surveys indicate anxiety about air quality is higher in the San Joaquin Valley than any other region in California.¹⁵ Even the valley's beloved high school sporting events are occasionally cancelled due to air quality concerns.¹⁶

While the pollution problem seems clear, apportioning culpability¹⁷ and the burden of correcting the valley's pollution problem are points of considerable contention.¹⁸

8. Lesli A. Maxwell, *Bills to Clean Up Air Pass First Test*, FRESNO BEE, Apr. 29, 2003, at A1.

9. San Joaquin Valley Air Pollution Control District, *Frequently Asked Questions About the Air Pollution Problem: Why Is It So Severe?*, at http://www.valleyair.org/General_info/faq_frame.htm (last visited Mar. 17, 2004) [hereinafter *Air Pollution FAQ*] (copy on file with the *McGeorge Law Review*).

10. See Rob Gurwitt, *Into the Haze*, GOVERNING MAG., June 2003, at 64 (citing statistics from 1998 to 2002); Earthjustice, *Urgent Cases: Cleaning the Air in California's San Joaquin Valley*, at <http://www.earthjustice.org/urgent/display.html?ID=65> (last visited June 27, 2003) [hereinafter *Urgent Cases*] (copy on file with the *McGeorge Law Review*) (stating that the San Joaquin Valley exceeded smog limits eighty-two times in 1998).

11. *Urgent Cases*, *supra* note 10 (referring to Fresno, Bakersfield and the Visalia-Tulare-Porterville areas and predicting that the San Joaquin Valley may soon become the nation's most polluted region).

12. Gurwitt, *supra* note 10.

13. See *Cows and Cotton*, *supra* note 6 (reporting that one out of every six Fresno children has asthma, the sky is a "thick lid of smog, soot and dust," and valley residents indicate they would pay additional taxes to improve air quality).

14. Michael LaSalle, Editorial, *Before Choking Ag, Look at All Air Studies*, FRESNO BEE, May 17, 2003, at B9.

15. Gurwitt, *supra* note 10, at 64.

16. See Jim Davis, *Valley Smog Blows Whistle on Games*, FRESNO BEE, Sept. 14, 2002, at A1 (describing high school football games cancelled on account of poor air quality).

17. Compare, e.g., LaSalle, *supra* note 14, at B9 (arguing that asthma rates may be tied to housing conditions and not to the effects of air pollution), and Maxwell, *supra* note 7, at A1 (quoting a farmer's statement that the rise in pollution is due to an influx of people and traffic into the valley), with Grossi, *supra* note 2, at Special Section 17 (quoting a valley resident who attributes air problems to agricultural burning).

18. See Maxwell, *supra* note 8, at A1 (discussing the differing perspectives on the issue).

III. LEGAL BACKGROUND

A. Existing Law

In 1975, California enacted legislation that regulated agricultural burning without prohibiting it.¹⁹ Intended to balance the viability of the state's farming economy with the impact of burning on the population, the legislation called for the creation of a system whereby permit holders could burn agricultural waste only on specified "burn days," which were to be determined by reference to meteorological data.²⁰ Days with "ample air movement to pick up and quickly disperse the smoke" were declared "burn days" allowing permit holders "to burn specific types of crop debris to eliminate waste and control pests."²¹

Even under the old burn-permit system, however, a combination of dwindling "burn days," environmental concerns, and mounting pressure to abandon the practice altogether drove farmers to seek alternatives to agricultural burning.²²

B. Federal Ultimatum

In October 2002, various citizen groups filed a complaint in federal court against the Environmental Protection Agency ("EPA") seeking to compel the EPA to enforce portions of the Clean Air Act with respect to the San Joaquin Valley's air pollution.²³ In their complaint, plaintiffs alleged that in 1991 the EPA failed to set deadlines for the San Joaquin Valley to promulgate a federal implementation plan to control particulate matter as required by the Clean Air Act.²⁴ As a result, the San Joaquin Valley escaped penalties, such as the imposition of federal highway funding sanctions, that would have followed the failure to meet deadlines.²⁵

The EPA settled the lawsuit with the citizen groups by agreeing to regulate air pollution in the San Joaquin Valley unless the regional air district devises a suitable air clean up plan prior to July 31, 2004.²⁶ This looming deadline has

19. CAL. HEALTH & SAFETY CODE §§ 41850-41855 (West 2003 & Supp. 2004).

20. *Id.*

21. *Air Pollution FAQ*, *supra* note 9.

22. See Robert Rodriguez, *Farm Cleanup in the Chips*, FRESNO BEE, Mar. 23, 2003, at D1 (discussing the many reasons farmers shifted to alternative means of disposing of agricultural waste prior to the enactment of Chapter 481).

23. Earthjustice, *Newsroom: Groups Sue EPA Over Neglect of San Joaquin Valley Particulate Air Pollution*, Oct. 22, 2002, at <http://www.earthjustice.org/news/display.html?ID=459> (last visited Mar. 17, 2004) (copy on file with the *McGeorge Law Review*).

24. Plaintiff's Complaint at 1-2, *Med. Advocates for Healthy Air v. Whitman*, No. 02-05102 (N.D. Cal. filed Oct. 22, 2002) (copy on file with the *McGeorge Law Review*).

25. *Id.* at 41-46.

26. Earthjustice, *Newsroom: Consent Decree with EPA Will Clean Up Valley Air Pollution*, May 14, 2003, at <http://www.earthjustice.org/news/display.html?ID=600> (last visited Mar. 17, 2004) [hereinafter *Consent Decree*] (copy on file with the *McGeorge Law Review*).

increased pressure on local legislators to come up with a plan to control air pollution, lest the EPA take control of the situation.²⁷

IV. CHAPTER 481

One of ten measures relating to air quality introduced by Senator Dean Florez in February 2003,²⁸ Chapter 481 adds section 41855.5 to the Health and Safety Code to allow for the prohibition of issuing permits to burn enumerated categories of agricultural waste within the San Joaquin Valley Unified Air Pollution Control District (“District”) by June 1, 2010.²⁹ Significantly, however, the prohibition may be postponed if the District, with the concurrence of the Air Resources Board, determines the following:

there is no economically feasible alternative means of eliminating the waste[;]

there is no long-term federal or state funding commitment for the continued operation of biomass facilities . . . or development of alternatives to burning[;]

[and] the continued issuance of permits for that specific category or crop will not cause, or substantially contribute to, a violation of an applicable federal ambient air quality standard.³⁰

Additionally, a conditional permit may be issued to burn a diseased crop.³¹ Where the county agriculture commissioner finds that a disease threatens the health of adjacent crops “during the current or next growing season” and there “is no economically feasible alternative means of eliminating the disease other than burning,” the commissioner can grant a conditional permit.³²

Chapter 481 also requires the District to develop and adopt rules establishing the best practices for controlling weeds and maintenance not later than June 1, 2005.³³

27. See Gurwitt, *supra* note 10, at G4 (citing pending EPA sanctions and the accompanying loss of federal funding as a catalyst for environmental legislation in California).

28. See Maxwell, *supra* note 8, at A1 (referring to several of Senator Florez’s bills aimed at improving air quality).

29. CAL. HEALTH & SAFETY CODE § 41855.5 (enacted by Chapter 481) (commencing the prohibition with respect to permits to burn field crops, prunings, and weed abatements on June 1, 2005; orchard removals on June 1, 2007; and vineyard removals, surface harvested prunings, and other materials on June 1, 2010).

30. *Id.* § 41855.6(a)-(c).

31. *Id.* § 41855.5(d).

32. *Id.*

33. *Id.* § 41855.5(b).

V. ANALYSIS OF THE NEW LAW

A. *Effectiveness and Effect of Chapter 481*

Absent a postponement of the commencement dates,³⁴ prohibiting the issuance of burn permits under almost all circumstances³⁵ effectively phases out agricultural burning by the year 2010.³⁶ Without a burn permit, setting a fire for the purpose of disposing of agricultural waste is clearly prohibited by state law.³⁷ Thus, by prohibiting the issuance of permits, Chapter 481 will effectively end agricultural burning in the San Joaquin Valley.

Opponents of the bill, however, argue in part that the prohibition will have little effect on the region's pollution problem.³⁸ State regulators report that cars and trucks generate forty percent of the valley's smog-forming gases, while farming produces twenty-five percent.³⁹ Agricultural burning produces only three percent of the particle pollution in the valley every year.⁴⁰ In light of these facts, some San Joaquin Valley farmers believe they are singled out unfairly as the main culprit in creating the valley's pollution and are thus forced to bear too much of the clean-up burden.⁴¹

Supporters, on the other hand, argue that Chapter 481 "is a sensible approach to regulating agricultural burning in the San Joaquin Valley and would also promote alternative uses of agricultural waste."⁴² Further, supporters point out that while agriculture might be the current target of an effort to clean up the valley's air, other polluters already have been or soon will be burdened by the clean up effort.⁴³

34. *Id.* § 41855.6 (allowing for a postponement of the commencement dates where the district makes specified findings).

35. *Id.* § 41855.5(d) (providing for the issuance of conditional burn permits where a crop disease exists).

36. *Id.* § 41855.5(a) (prohibiting the issuance of any burn permit after June 1, 2010).

37. *Id.* § 41800 (West 2003) (enumerating forms of prohibited burning including "outdoor fires for the purpose of disposal of . . . trees [and] wood waste").

38. Letter from Bill Pauli, President, California Farm Bureau Federation, to the Editor of the Fresno Bee (May 24, 2003) [hereinafter Pauli Letter] (on file with the *McGeorge Law Review*) (arguing that the existing statutory scheme and farmers' voluntary efforts to limit air pollution diminished the effects of agricultural burning on valley air).

39. Maxwell, *supra* note 8, at A1.

40. Grossi, *supra* note 2, at Special Section 17.

41. See Maxwell, *supra* note 7, at A1 (reporting a farmer's opinion that pollution clean up efforts are being disparately apportioned to the agricultural community without similarly burdening other polluters); Maxwell, *supra* note 8, at A1 (Quoting a farm lobbyist, "We know we have to be part of the air solution . . . but we do not want to be treated more restrictively than other industries.").

42. SENATE RULES COMMITTEE, FLOOR ANALYSIS OF SB 705, at 4 (Sept. 10, 2003).

43. See Maxwell, *supra* note 7, at A1 (Quoting Senator Dean Florez, "We can't take on all these issues at once. Through the process of negotiation, we've figured out which fights we can win this year that will get at the heart of cleaning up our air.").

B. Alternatives to Agricultural Burning

One of the few alternatives to agricultural burning is chipping the waste and either returning it to the soil to decompose and add organic matter, or shipping it off to biomass plants to be converted into energy.⁴⁴ Proponents of this practice believe its benefits outweigh its costs,⁴⁵ while opponents argue that the costs of chipping are prohibitive⁴⁶ and that the chipping and biomass industries do not have the capacity to handle agriculture's needs on a long-term basis.⁴⁷

Since 1998, a state-funded program has helped defray the costs associated with chipping agricultural waste.⁴⁸ Pursuant to the program, farmers are paid \$20 per acre for chipping or shredding their agricultural waste.⁴⁹ Recently passed Chapter 480 allocates an additional \$6 million in incentives to encourage farmers to send their waste to biomass facilities rather than burn it.⁵⁰

Despite this funding, the state's farmers are still skeptical of the costs and capabilities of the chipping industry.⁵¹ Farmers estimate that the cost of chipping ranges between \$18 and \$60 per acre compared to \$5 per acre to burn.⁵² While the state-funded programs bear a portion of this increased cost,⁵³ chipping will be more expensive than burning.

Also, there is some question as to the chipping industry's ability to meet agriculture's needs.⁵⁴ For example, one chipping machine operator reported that the number of acres he chipped has more than doubled over the last two years, causing him to turn down approximately thirty percent of the acres farmers wanted him to chip.⁵⁵

44. Rodriguez, *supra* note 22, at D1.

45. See *id.* (describing an almond grower who believes the benefits to the soil are worth the cost of chipping, which he estimated to be seven times as much as burning); Mark Grossi, *Senate Approves Three Florez Air Bills*, FRESNO BEE, June 5, 2003, at A1 (stating that when biomass plants burn wood farm debris, they remove more than 95% more particle pollution than field burning the same matter).

46. See Rodriguez, *supra* note 22, at D1 (estimating that chipping can cost from \$18-\$60 per acre while burning costs approximately \$5 per acre).

47. See *id.* (reporting that chipping companies and machine manufacturers cannot keep up with demand); Grossi, *supra* note 45 (describing the difficulties of one biomass plant).

48. See Rodriguez, *supra* note 22, at D1 (describing a three-year, \$30 million state program to fund chipping as an alternative to agricultural burning).

49. *Id.*

50. CAL. HEALTH & SAFETY CODE § 41606 (enacted by 2003 Stat. Ch. 480, § 2).

51. See Rodriguez, *supra* note 22 (noting that "[s]ome farmers balk at the cost of burning various chipping and shredding").

52. *Id.*

53. *Id.* (describing a state-funded program that pays farmers up to twenty dollars per acre to chip).

54. See Letter from Rayne Thompson, Director, Government Affairs for the Agricultural Council of California, to Byron Sher, Chairperson, Senate Committee on Environmental Quality (Apr. 27, 2003) (on file with the *McGeorge Law Review*) (characterizing Chapter 481 as a "hasty decision" because the legislature failed to study whether the elimination of agricultural burning would work).

55. Rodriguez, *supra* note 22, at D1 (quoting another operator as saying he "could run seven days a week if [he] wanted").

Because of the chipping and biomass industries' perceived lack of capacity, farmers would have preferred the establishment of a proven alternative before agricultural burning was prohibited.⁵⁶

C. *Flexibility in Commencing the Prohibition?*

Intending to placate opponents' concerns that it was too inflexible,⁵⁷ Chapter 481 was amended at the last minute⁵⁸ to allow state agencies to postpone the three-tiered commencement dates if they find three circumstances to be present: no economically feasible alternative to burning, no long-term government commitment to funding biomass facilities or other alternative means of disposing of agricultural waste, and the potential to continue issuing permits without causing violations of applicable air quality standards.⁵⁹ While this amendment apparently attempts to balance supporters' concerns for cleaner air⁶⁰ with opponents' desire to have a feasible alternative to burning,⁶¹ it presents a potential problem if there is a post-commencement change in circumstances.

Chapter 481 only allows the District to "postpone the commencement dates" under specified circumstances.⁶² Because its plain language only allows for postponement and not for reverting to the existing statutory scheme, it appears that Chapter 481's flexibility ends on each commencement date.⁶³ That is, because once something has "commenced" its commencement can no longer be postponed, Chapter 481 provides no flexibility in the event circumstances change after the prohibition begins.⁶⁴

56. See Pauli Letter, *supra* note 38 (arguing that "sound science" should be generated "before heaping additional regulations on the backs of family farmers"); Letter from George Wurzel, Vice President, Kings County Farm Bureau, to Dean Florez, Cal. State Senator (Apr. 25, 2003) (on file with the *McGeorge Law Review*) (stating that "[i]t is imperative that alternatives to burning be established before the exemption" is ended).

57. See SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 705, at 3-4 (May 21, 2003) (arguing that alternatives to agricultural burning must be established before the practice is prohibited).

58. Vic Pollard, *California Assembly Approves Landmark Clean-Air Bills*, BAKERSFIELD CALIFORNIAN, Sept. 11, 2003 (copy on file with the *McGeorge Law Review*).

59. CAL. HEALTH & SAFETY CODE § 41855.6 (enacted by Chapter 481).

60. See SENATE RULES COMMITTEE, ANALYSIS OF SB 705, at 3 (stating supporters' claim that agricultural burning releases "particles and gases into the air that worsen air pollution . . . and create localized pollution spikes").

61. See *id.* at 3-4 (arguing that alternatives to agricultural burning must be established before the practice is prohibited).

62. See CAL. HEALTH & SAFETY CODE § 41855.6 (enacted by Chapter 481) (giving the District discretion to postpone the commencement dates where "there is no economically feasible alternative means of eliminating the waste," there is no long-term state or federal "funding commitment for the continued operation of biomass facilities," and "the continued issuance of permits for that specific category or crop will not cause, or substantially contribute to, a violation of an applicable federal ambient air quality standard").

63. *Id.*

64. *Id.*

V. CONCLUSION

Prohibiting agricultural burning is symbolically a step in the right direction to cleaning up the San Joaquin Valley's pollution problem and meeting the Environmental Protection Agency's July 2004 deadline for having a plan in place to clean up the valley's air.⁶⁵ However, because the prohibition will ultimately control a practice that is responsible for only three percent of the valley's particulate air pollution,⁶⁶ Chapter 481 may prove to be form without substance unless later accompanied by legislation that will limit more serious forms of air pollution.⁶⁷

65. *Consent Decree*, *supra* note 26.

66. Grossi, *supra* note 2, at Special Section 17.

67. *See, e.g., id.* (citing wood stoves and fireplaces as larger polluters than agricultural burning); Maxwell, *supra* note 8, at A1 (reporting that cars and trucks are responsible for 40% of the pollution problem).