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Environmental Protection

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Environmental Protection; flip-top containers

Health and Safety Code Chapter 3 (commencing with §24380) (new).
AB 1037 (Z'berg); STATS 1975, Ch 428

Chapter 428 has added Sections 24380 through 24384 to the Health and Safety Code to prohibit the sale of flip-top containers in California, other than for shipment out of state, on and after January 1, 1979. Violation of this prohibition is an infraction. A flip-top container, as defined in Section 24380, is an individual, sealed metal bottle or can containing beer or other malt beverages mineral or soda water, or similar carbonated beverages in liquid form, which is so designed and constructed that a part of the container is severable in opening the container.

The Secretary of the Resources Agency may extend permission to a manufacturer to sell flip-top containers after January 1, 1979, for a total period not to exceed one year. Before such an extension may be granted, however, the Secretary must determine that the manufacturer has made good faith efforts to comply with the provisions of this chapter and will suffer severe economic hardship as a direct result of the requirements of conversion from the production of flip-top containers. Any subsequent resale after January 1, 1979, of flip-top containers produced by a manufacturer who has been granted an extension, is *not* prohibited by Chapter 428. In order to be eligible for such an extension, a manufacturer must file a request for an extension by July 1, 1978, and include with the request a report which contains the information specified in Section 24382 regarding the manufacturer's progress, as of May 31, 1978, toward phasing out his production of flip-top containers for use in this state. The Secretary is required to make public disclosure of all such reports received and to conduct public hearings on the extension requests. If granted an extension, a manufacturer may be required by the Secretary to make periodic reports on his further progress. A manufacturer may seek judicial review of the Secretary's decision on the manufacturer's request for an extension, and any member of the public has standing, without the necessity of showing damages, to challenge the Secretary's decision on the grounds of abuse of discretion (§24384).

Because the containers regulated by this chapter are defined as those "containing a beverage," it is questionable whether a manufacturer who sells empty flip-top containers to beverage producers could be found in violation of the prohibition against the sale of such containers. Practically speaking, however, a manufacturer would have difficulty in finding a market for flip-top containers since beverage producers would be unable to lawfully resell the containers once they contained a beverage. It would appear to follow that, if this chapter does not apply to the manufacturers of empty containers, these manufacturers could not be granted an extension under the provisions of Section 24382 and their flip-top containers once filled could not be lawfully *resold* after January 1, 1979.

See Generally:
1) ORE. REV. STATS. §459.850 (similar to California's provisions).

Environmental Protection; environmental impact reports

Public Resources Code §§21175, 21176 (new); §21062 (amended).
AB 335 (Knox); STATS 1975, Ch 222
(Effective July 4, 1975)
Support: Local Agency Formation Commissions

State and local agencies are required by the California Environmental Quality Act [CAL. PUB. RES. CODE §21000 *et seq.* (hereinafter referred to as CEQA)] to prepare an environmental impact report for all projects they intend to carry out or approve which may have a significant effect on the environment [CAL. PUB. RES. CODE §§21100, 21151]. The procedures for implementing the provisions of CEQA, however, are not the same for all sectors of government. While *local* agencies must file a notice of their approval or determination to carry out a project subject to CEQA with the clerk of the county in which the project is to be located [CAL. PUB. RES. CODE §21152], *state* agencies must file the corresponding notice with the Secretary of Resources [CAL. PUB. RES. CODE §21108]. In addition, state agencies, unlike those at the local level, must: (1) include the environmental impact report as a part of the regular project report used in the existing review and budgetary process; (2) request in their budgets the funds necessary to protect the environment in relation to problems caused by their activities; and (3) make the environmental impact report available to the legislature [CAL. PUB. RES. CODE §§21105, 21106].

In a recent supreme court case, actions by Local Agency Formation

Commissions (LAFCO's) were held to be projects which may have a significant effect on the environment and therefore subject to the provisions of CEQA [Bozung v. Local Agency Formation Comm'n of Ventura County, 13 Cal. 3d 263, 278, 281, 118 Cal. Rptr. 249, 259, 261 (1975)]. Local Agency Formation Commissions were established by the legislature for the purposes of discouraging urban sprawl and stimulating the orderly formation and development of local governmental agencies based upon local conditions and circumstances [CAL. GOV'T CODE §54774]. Chapter 222 specifies that LAFCO's are *local* agencies, thereby subjecting LAFCO environmental impact reports to local rather than state notice and review. Further, any project approval given by a LAFCO prior to February 7, 1975, is validated notwithstanding failure to comply with the requirements of CEQA, provided such projects were not the subject of pending litigation on February 7, 1975 due to failure to comply with CEQA, or had not already been determined void, on or before July 4, 1975, the effective date of this chapter. Any matter pending before a Local Agency Formation Commission on February 7, 1975, may be continued for as long as necessary to comply with the California Environmental Quality Act (§21176).

Environmental Protection; agricultural burning

Health and Safety Code §39295.6 (amended).
AB 1402 (Mobley); STATS 1975, Ch 273

A major exception to the general ban on open burning of combustible wastes is agricultural burning [CAL. HEALTH & SAFETY CODE §§39296, 39297]. This type of burning is permitted but is limited to those days which are designated as "burn days" by the Air Resources Board, except when such a limitation would threaten to cause imminent and substantial economic losses. In either case, agricultural burning must be authorized by a permit issued by a Board designated fire protection agency (§§39298, 39298.1, 39299.2). Prior to the enactment of Chapter 273, agricultural burning was defined as open outdoor fires used in agricultural operation in the growing of crops or raising of fowl or animals, forest management, or range improvement, or used in the improvement of land for wildlife and game habitat (§39295.6). This statutory definition was interpreted by the Air Resources Board to include materials not produced wholly from agricultural operations but which are intimately related to the growing or harvesting of crops and which are used in the field, such as raisin trays, and pesticide containers [17 CAL. ADMIN. CODE §80100; *see* Simmons, *A Many Layered Wonder: Non-*

vehicular Air Pollution Control Law in California, 26 HAST. L. REV. 109, 150 (1974)].

Fires built in connection with the maintenance of irrigation ditches, while perhaps logically being "fires used in agricultural operations," were previously governed by a different section of the Health and Safety Code and, consequently, did not fall into the category of agricultural burning (§39297.3). Although it did not require a permit, burning for the purpose of ditch maintenance was strictly limited to "burn days" (§39297.3). Chapter 273 has expanded the definition of agricultural burning to now additionally encompass open outdoor fires used in the operation of a system for the delivery of water for the agricultural purposes listed in the former definition of agricultural burning (which has been retained as subdivision (a) of the amended version of §39295.6).

As a result of this definitional change, burning conducted in the operation of an irrigation system now requires a permit and, as agricultural burning, may qualify for an emergency exemption from the "nonburn day" ban on fires. The Air Resources Board feels that this is an unnecessary exemption as it is relatively easy to schedule irrigation operations to coincide with "burn days" and a spokesperson for the Board predicts that permits to do this type of burning on "nonburn days" will be issued infrequently [Interview with James J. Morgester, Air Resources Board Senior Air Pollution Operations Specialist, Sacramento, Aug. 7, 1975].

Environmental Protection; oilspill contingency plans

Government Code §8574.5 (new).
SB 914 (Carpenter); STATS 1975, Ch 750
Support: Department of Fish and Game

Contained in California's Emergency Services Act [CAL. GOV'T CODE §8550 *et seq.*] are provisions authorizing the Governor to adopt a state oil spill contingency plan (§8574.1). This plan is to provide for an integrated and effective state procedure to combat the results of major oilspills within the state (§8574.2). With the addition of Government Code Section 8574.5 by Chapter 750, any ship transferring oil at an offshore location from another vessel or from an oil production facility also will be required to prepare an oilspill contingency plan. "Offshore location" is defined as any area of the Pacific Ocean off the Coast of California including bays and estuaries.

Pursuant to Section 8574.5, it is a misdemeanor for any person to

transport or deliver within California's territorial waters any petroleum product which has been transferred offshore unless an oilspill plan applicable to the transfer has been prepared. Such plan is to contain a description of the procedures to be followed during the transfer which will reasonably prevent and mitigate the effects of any oil spillage upon the territorial waters of the state, and the plan must be approved by the Secretary of the Resources Agency. Violation of Section 8574.5 may result in a $500 fine, a six month imprisonment, or both (§8665). In addition, the violator may be liable for any expenditures resulting from the implementation of the Governor's oilspill contingency plan (§8574.4), as well as for any property damage or any injury to the natural resources of the state [CAL. HARB. & NAV. CODE §293].

It is unclear from the language of Chapter 750 whether *each* transfer operation requires an oilspill plan, or whether one plan may encompass all of a particular vessel's operations. Chapter 750, moreover, may be subject to a constitutional challenge, as the transportation of petroleum products involves foreign and interstate commerce, the regulation of which is a power specifically granted to Congress by the United States Constitution [U.S. CONST. art. I, §8]. Federal power over commerce is pervasive but not per se exclusive, however, and the power of a state to regulate matters of a local nature has been recognized by the courts [South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177, 184, 185 (1938)]. In each case, the burden on interstate commerce imposed by the state regulation must be weighed against the merit of the state's interest in the regulation [Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529 (1959)]. Balancing the interests involved here, the oilspill contingency plan would probably be held to be constitutional, as the burden on commerce is small as compared to the state's interest in protecting its natural resources, including its coastline.

Environmental Protection; pipeline construction prohibition

Public Resources Code Chapter 5.5 (commencing with §25450) (new).

AB 180 (Goggin); STATS 1975, Ch 458

Support: Board of Supervisors of the City and County of San Francisco; Board of Supervisors of Los Angeles County, Santa Cruz County, and Sonoma County; Cities of Santa Monica, Huntington Beach, San Anselmo, Newport Beach, El Cerrito, Rialto, Oxnard, and Hermosa Beach; Mayor of Los Angeles

The California Coastal Zone Conservation Act of 1972 [CAL. PUB. RES. CODE §27000 *et seq.*] requires the California Coastal Zone Conservation Commission, on or before December 1, 1975, to prepare, adopt, and submit to the legislature for implementation the California Coastal Zone Conservation Plan (§27300). The Act also establishes six regional commissions (§27201) which have interim permit control over a "permit area" of the coastal zone (§27400). The permit area is the land lying between the seaward limit of the state's jurisdiction (three miles) and 1,000 yards landward from the mean high tide line. Prior to the enactment of Chapter 458, any person wishing to develop land within the permit area before implementation of the Coastal Zone Conservation Plan was required to obtain a permit from the appropriate regional commission, such permit not to issue if the proposed development would result in an adverse environmental or ecological effect (§27402). Chapter 458 forbids even this permit development.

Section 25450 has been added to the Public Resources Code to prohibit *any* construction, expansion, placement, or location of any new oil or gas pipelines for the transportation of oil or gas from an offshore location on or across tidelands or submerged lands within the permit area of the coastal zone. This prohibition is effective until such time as the Coastal Zone Conservation Plan is implemented by the legislature, or until December 31, 1977, whichever occurs first (§25450). This prohibition is not applicable, however, to projects permitted or exempted by a regional commission prior to January 1, 1976, to lease agreements approved by the State Lands Commission on or before January 1, 1975, or to the replacement of existing pipelines and facilities.

Persons who violate the provisions added by Chapter 458 shall be subject not only to a civil fine of up to $100,000 (§25451), but also to an additional fine of $5,000 for each day the violation persists (§25452). Sections 25453 and 25454 provide that *any* person may bring a civil action to recover these penalties, or may seek declaratory and equitable relief to enjoin these violations without the necessity of posting a bond. Costs, including reasonable attorneys fees, shall be awarded the successful plaintiff (§25455).

The Outer Continental Shelf Lands Act of 1953 [43 U.S.C. §§1331-1343 (1970)] authorizes the Secretary of the Interior to lease certain submerged lands for the purposes of oil, gas, and other mineral exploration. One million acres of Southern California shelf land is scheduled to be leased for such exploration in 1975 [U.S. DEPT. OF INTERIOR, *Proposed 1975 Outer Continental Shelf Oil and Gas General Lease Sale*

Offshore Southern California (OCS Sale No. 35) (August, 1975) (final environmental impact statement)], and Chapter 458 is an apparent response to this proposed leasing and development. California's prohibition on oil and gas pipeline construction will interfere with the development of newly leased offshore lands and will obstruct the movement in interstate commerce of oil and gas found there. While the power of the state to regulate local matters affecting interstate commerce is recognized [South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177, 184, 185 (1938)], the state may not impose an unconstitutional burden on interstate commerce [Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529 (1959)]. The burden on commerce is unconstitutional if the national interest, that is, the uninterrupted flow of commerce, outweighs the state's interest in the regulation [*Id.* at 529]. Here, the legislature has determined that the need to develop petroleum on outer continental shelf lands off the coast of California has not been verified [CAL. STATS. 1975, c. 458, §1, at] and that current federal plans fail to ensure a minimum of social, environmental, and aesthetic costs [*Id.*, §4, at]. Furthermore, it is the belief of the legislature that to protect California's coastline, any new offshore oil and gas development should be conducted in a manner consistent with the imminent California Coastal Zone Conservation Plan [*Id.*, §5, at]. Thus, in this instance, the national interest in the development of the nation's energy resources must be balanced against California's desire to protect its coastal lands and waters.

See Generally:

1) 14 CAL. ADMIN. CODE §13001 *et seq.* (implementation of the California Coastal Zone Conservation Act).
2) Note, *A Decision-Making Process for the California Coastal Zone*, 46 S. CAL. L. REV. 513 (1973).