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Environmental Protection; agricultural land—conservation easements

Public Resource Code §§ 10200, 10201, 10202, 10210, 10211, 10212, 10213, 10214, 10215, 10216, 10218, 10219, 10220, 10221, 10222, 10223, 10225, 10226, 10227, 10230, 10231, 10232, 10233, 10234, 10235, 10236, 10237, 10238, 10239, 10240, 10241, 10242, 10243, 10244, 10245, 10246, 10250, 10251, 10252, 10253, 10254, 10260, 10261, 10262, 10263, 10264, 10265, 10270, 10271, 10272, 10273, 10274, 10275, 10276, 10277 (new); Revenue and Taxation Code §§ 421.5, 422.5 (new).
SB 725 (Costa); 1995 STAT. Ch. 931

Existing law, the Williamson Act, promotes the conservation of the State's limited supply of agricultural land, by giving landowners preferential property tax assessment.[1] Under the Williamson Act, local governments and agricultural landowners voluntarily enter ten-year contracts that restrict the land to agricultural uses in exchange for lower property taxes.[2]

Chapter 931 enacts the Agricultural Land Stewardship Program Act of 1995 (Program)[3] and creates a state fund that provides grants for the acquisition of agricultural conservation easements.[4] An easement is a voluntary, legally recorded agreement, between a landowner and either local government, or a nonprofit

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1. CAL. GOV'T CODE §§ 51200-51295 (West 1983 & Supp. 1995); *see id.* (establishing the California Land Conservation Act of 1965 (the Williamson Act)); *id.* (declaring the need for preservation of the limited supply of agricultural land); *id.* (setting forth provisions and mechanics for enrolling lands in land contracts); Kelsey v. Colwell, 30 Cal. App. 3d 590, 594, 106 Cal. Rptr. 420, 422 (1973) (noting that the Williamson Act was adopted to preserve the state's natural resources and to combat urban sprawl); *see also* DEPARTMENT OF CONSERVATION, STATE OF CALIFORNIA, THE WILLIAMSON ACT 1991-1993 STATUS REPORT (1994) (providing information to the Legislature and general public on the implementation of the Williamson Act by the 47 counties and 16 cities currently participating in the Program).

2. CAL. REV. & TAX. CODE § 422 (West 1987); *see id.* (providing that, for purpose of Art. XIII, § 8, of the California Constitution, Williamson Act contract lands are enforceably restricted); *id.* § 423 (West Supp. 1995) (giving preferential tax treatment based on the capitalization-of-income method for enforceably restricted open space land).

3. *See* CAL. PUB. RES. CODE § 10200 (enacted by Chapter 931) (declaring that Public Resources Code §§ 10200-10277 shall be known as the Agricultural Land Stewardship Program Act of 1995).

4. *Id.* § 10230 (enacted by Chapter 931); *see id.* § 10230(a), (b) (establishing the Agricultural Land Stewardship Fund and permitting the Fund to receive money from gifts, donations, sale of bonds, federal grants or loans, and state appropriations); *id.* § 10230(c) (enacted by Chapter 931) (mandating that at least 90% of the grant funds be used to purchase easements and only up to 10% of the funds may be used for land improvements); *see also id.* § 10211 (enacted by Chapter 931) (defining "agricultural conservation easement" as an interest in land, less than fee simple, which represents the right to prevent the development or improvement of the land other than for agricultural purposes); *id.* § 10213(a) (enacted by Chapter 931) (defining "agricultural lands" as prime farmland, farmland of statewide importance, unique farmland, farmland of local importance, and commercial grazing land as defined in the Guidelines for the Farmland Mapping and Monitoring Program, pursuant to § 65570 of the California Government Code).

organization that restricts the land to agricultural uses, in perpetuity.[5] Because landowners retain less than fee title to the land, they are compensated for the restriction.[6]

Chapter 931 requires applicants[7] to provide a cash contribution to the program fund of not less than five percent of the grant's amount, or to donate not less than ten percent of the easement's value.[8] Additionally, applicants must provide the Department of Conservation (Department)[9] with a resolution demonstrating that the easement meets the eligibility criteria and that local government has approved the proposed acquisition.[10]

In addition to providing grants for easements, Chapter 931 permits the Department to provide funding for the purchase of fee title to agricultural land, and for improvements to lands protected by easements.[11]

Chapter 931 requires applicants to meet minimum eligibility criteria to qualify for a grant.[12] Most importantly, the applicant must show that without the grant, the proposed land is likely to be converted to non-agricultural use in the

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5. *Id.* § 10211 (enacted by Chapter 931); *see id.* (defining "agricultural conservation easement"); *id.* § 10219 (enacted by Chapter 931) (defining "local government" as city or county); *id.* § 10221 (enacted by Chapter 931) (defining "nonprofit organization" as an organization that has the conservation of agricultural lands as the objective and the organization must hold a tax exemption from the Internal Revenue Service); *id.* § 10232 (enacted by Chapter 931) (prohibiting a local government from receiving a grant if attaining lands through eminent domain, unless requested by landowner); *id.* § 10237 (enacted by Chapter 931) (mandating a 25-year restriction on land prior to receiving easement proceeds); *see also* AMERICAN FARMLAND TRUST, SAVING THE FARM: A HANDBOOK FOR CONSERVING AGRICULTURAL LAND, Ch. 4 (1990) (regarding the implementation of farmland conservation programs); CALIFORNIA COASTAL CONSERVANCY, EVALUATION OF AGRICULTURAL LAND TRUSTS 84 (1989) (discussing long-term agricultural protection); William L. Church, *Farmland Conversion the View from 1986*, 1986 U. ILL. L. REV. 521, 559 (concluding that it is necessary to purchase permanent cropland protection, rather than providing tax reduction programs that result in only temporary benefits).

6. CAL. PUB. RES. CODE § 10261 (enacted by Chapter 931); *see id.* § 10260 (enacted by Chapter 931) (providing that the value of the easement is to be calculated by determining the difference between the fair market value and the restricted value).

7. *See id.* § 10212 (enacted by Chapter 931) (defining "applicant" as a city, county, or nonprofit organization that applies for a grant to acquire an agricultural conservation easement).

8. *Id.* § 10233 (enacted by Chapter 931); *see id.* (allowing an equivalent combination thereof).

9. *See id.* § 601 (West 1984) (including the Department of Conservation within the Resources Agency, and providing that the Director of Conservation shall control the Department).

10. *Id.* § 10234 (enacted by Chapter 931).

11. *Id.* § 10239 (enacted by Chapter 931); *see id.* (permitting purchase of fee title if the land is subsequently encumbered with restriction, and the land is sold to private landowner within three years, however, the applicant is required to reimburse the fund after the sale to a private landowner); *see also id.* § 10230(b) (enacted by Chapter 931) (stating program funds may be appropriated for land improvement).

12. *Id.* § 10250 (enacted by Chapter 931); *see id.* (mandating eligibility and selection based on criteria established by the Department); *id.* § 10251 (enacted by Chapter 931) (requiring applicant to meet all criteria including that the land is currently agricultural and can sustain long-term commercial production, and local government has a long-term commitment to preservation as demonstrated by a general plan).

foreseeable future.[13] Once accepted, grant proposals will be rated and selected according to evaluation criteria established by the Department.[14]

After twenty-five years, landowners may request the Department to review a proposal for terminating an easement.[15] Chapter 931 permits the Department to approve the proposal if profitable farming is not feasible and terminating the easement is consistent with the purpose of the Program.[16]

Chapter 931 adds agricultural conservation easements to the list of enforceable restricted open spaces that are entitled to favorable tax treatment.[17]

COMMENT

Enactment of Chapter 931 demonstrates the State's commitment to preserving the limited supply of productive agricultural lands, promoting efficient urban growth, and protecting the agricultural economy of the State.[18]

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13. *Id.* § 10251(d) (enacted by Chapter 931).

14. *Id.* § 10252 (enacted by Chapter 931); *see id.* (providing criteria including, but not limited to, the following criteria: quality of land, ability to meet other conservation objectives, local government's participation, proximity to urban areas, local government's ability to carry out proposal, amount of matching funds, and cost effectiveness of easement).

15. *Id.* § 10270 (enacted by Chapter 931).

16. *Id.* § 10271 (enacted by Chapter 931); *see id.* (requiring the Department to conduct an outside investigation to determine the profitability of farming, and mandating a public hearing on the Department's findings); *id.* § 10272(a) (enacted by Chapter 931) (permitting the Department to approve termination if all of the following findings are made: (1) termination is in the public's interest, (2) termination is not likely to remove adjacent lands from production, (3) termination is for an alternate use supported by the local government, (4) termination will not result in discontinuous patterns of urban development, and (5) no other land is suitable for proposed alternate use); *id.* § 10274 (enacted by Chapter 931) (indicating that the profitability of operation is not determinative of decision to terminate the easement, rather a factor to be considered); *id.* § 10275(a) (enacted by Chapter 931) (mandating that the proposal for termination include a specific alternate use of the land); *see id.* § 10276(a) (enacted by Chapter 931) (stating if termination is approved then the landowner must repurchase the easement by paying the difference between the fair market value and the restricted value at the time of termination, which money is to be deposited into the state fund); *id.* § 10276(b) (enacted by Chapter 931) (requiring landowner to wait at least one additional year if landowner fails to repurchase the easement within 180 days of the appraisal); *id.* § 10277 (enacted by Chapter 931) (permitting landowner to reapply for termination of easement not sooner than one year after declination).

17. CAL. REV. & TAX. CODE § 421.5(a), (b) (enacted by Chapter 931); *see id.* (including agricultural conservation easement as open-space land); *id.* § 421(e) (West 1987) (defining "open-space easement"); *id.* § 422(d) (West 1987) (including open-space easement as enforceably restricted for tax purposes); *id.* § 422.5 (enacted by Chapter 931) (stating agricultural conservations easements are enforceable restricted lands); *id.* § 423 (West Supp. 1995) (setting forth valuation procedure for open-space land subject to an enforceable restriction; based on capitalization method); *see also* CAL. CONST. art. XIII, § 8 (stating that enforceable restricted land shall be valued for property tax purposes based on its restricted value, to promote the conservation preservation and continued existence of natural resources, including food and fiber).

18. *See* CAL. PUB. RES. CODE § 10201 (enacted by Chapter 931) (noting that farmlands contribute to the world food supply and the state's economy and that conservation is needed to balance pressures of urban growth); *id.* § 10202(c) (enacted by Chapter 931) (declaring that the intent of the Legislature is to encourage long-term conservation of farmlands).

Currently, California has no shortage of agricultural lands, and the domestic supply of food considerably exceeds demand.[19] However, the continued conversion of farmland to urban development, coupled with a growing population, will eventually result in rising food prices and the loss of open space near urban areas.[20]

Aware of the demand for raw land and increasing values caused by suburban sprawl, urban edge farmers are reluctant to renew or tie up their lands in Williamson Act contracts.[21] Instead, urban edge farmers are steadily taking advantage of the attractive offers presented by residential developers.[22] Thus, the Williamson Act has not been an effective tool in protecting the State's most productive food-producing lands.[23]

Chapter 931, however, was enacted to offer long-term protection to farmland by providing funding for the purchase of easements that restrict lands to agricultural uses in perpetuity.[24] The easements financially benefit landowners by allowing them to capitalize on the value of their lands while protecting against the perils of farmland conversion.[25]

The level of participation and success of the Program will inevitably depend on the availability of grants.[26] Unfortunately, California has not appropriated any funding for the Program, so perhaps Chapter 931 promises more than it can deliver.[27] Furthermore, the "fair market" value of agricultural land located near

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19. *See* Church, *supra* note 5, at 522 (concluding America has no shortage of agricultural land, that millions of acres of cropland are not now in production, and that supply exceeds demand).

20. *See* 2 AMERICAN FARMLAND TRUST, CALIFORNIA FIELD NOTES, *Urbanization of San Joaquin Valley Increases*, No. 1 (discussing the need for action by counties of the San Joaquin Valley to minimize the loss of productive farmland); CALIFORNIA DEPARTMENT OF CONSERVATION, FARMLAND CONVERSION REPORT, Pub. No. FM. 94-01, at 12 (listing summary of farmland conversion in California); CALIFORNIA DEPARTMENT OF CONSERVATION, FARMLAND MAPPING AND MONITORING PROGRAM, Pub. No. FM. 94-02 (providing data for use in planning for the present and future use of the state's agricultural lands); *Encroachment Steps up to Dinner Table*, RIVER HERALD, Nov. 24, 1994 (commenting that land that produces much of America's traditional holiday food is in danger of being removed from production).

21. *See* John B. Dean, *The California Land Conservation Act of 1965 and the Fight to Save California's Prime Agricultural Lands*, 30 HASTINGS L.J. 1859, 1875 (1979) (declaring that landowners are wary of limiting their land use options).

22. *See* CALIFORNIA STATE COASTAL CONSERVANCY, EVALUATION OF AGRICULTURAL LAND TRUSTS 83 (1989) (discussing the shortcomings of the Williamson Act).

23. *See id.* (concluding that the Williamson Act has not been effective on targeted lands).

24. CAL. PUB. RES. CODE § 10202 (enacted by Chapter 931); *see id.* § 10202(a) (enacted by Chapter 931) (declaring that financial incentives are needed to encourage voluntary long-term preservation and to encourage orderly and efficient urban growth).

25. *See* AMERICAN FARMLAND TRUST, A GUIDE TO AGRICULTURAL CONSERVATION EASEMENTS (Mar. 1995) (discussing the benefits and mechanics of easements).

26. *See* Church, *supra* note 5, at 546 (concluding that the success of easement programs is limited by the difficulty in attaining realistic funding).

27. SENATE HOUSING AND LAND USE COMMITTEE, COMMITTEE ANALYSIS OF SB 275, at 2 (Mar. 23, 1995); *see id.* (calling the program an empty vessel and suggesting that the Committee should have reconsidered the program).

urban areas is worth many times its "agricultural value."[28] Therefore, the cost of acquiring easements on urban edge farmland can be prohibitive.[29]

Additionally, participation might be affected by the unique problems that face urban edge farmers—high land prices, complaining neighbors, loss of infrastructure, theft, and vandalism.[30] In other words, farmers may simply want to sell out rather than contend with the new obstacles presented by suburban sprawl.[31]

Anthony A. Babcock

Environmental Protection; air pollution—motor vehicles

Health and Safety Code § 43013 (amended).
SB 37 (Kelley); 1995 STAT. Ch. 930

Under existing law, the Air Resources Board (ARB)[1] is authorized to adopt and implement motor vehicle emission standards,[2] in-use performance standards and motor vehicle fuel specifications that the state board has found to be

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28. *See* Church, *supra* note 5, at 545 (discussing the prices of urban edge farmland).

29. *See id.* at 546 (concluding the program can be cost prohibitive).

30. AMERICAN FARMLAND TRUST: FARMLAND UPDATE, *Urban Edge Agriculture Is Distinct, Important and in Peril*, Newsletter at 1 (Summer 1993); *see id.* (discussing the problems that are unique to urban edge farmers).

31. AMERICAN FARMLAND MAGAZINE, *Farming on the Edge* at 11 (Summer 1993) (stating that the new proximity to suburbia and suburbia's nuisances are enough to send farmers to a realtor).

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1. *See* CAL. HEALTH & SAFETY CODE § 39003 (West 1986) (describing the State Air Resources Board as the state agency charged with coordinating efforts to attain and maintain ambient air quality standards, conduct research into the causes of and solution to air pollution, and to attack the problem caused by motor vehicles, which are the major source of air pollution in many areas of the state); *see also id.* §§ 39606, 39607, 39701 (West 1986 & Supp. Pamphlet 1995) (listing some of the major duties of the State Board as (1) dividing the state into air basins; (2) adopting standards of ambient air quality in consideration of public health, safety, and welfare; (3) collecting air quality data; (4) keeping inventory on sources of air pollution; (5) monitoring air pollutants; (6) adopting test procedures to test data; (7) evaluating the state standards; and (8) conducting and collecting research data on air pollution).

2. *See id.* § 39027 (West 1986) (defining "emissions standards" as specified limitations on the discharge of air contaminants into the atmosphere); *see also* CAL. VEH. CODE § 27157 (West 1985) (setting the vehicle emission standards so that each vehicle will be equipped with devices or systems to control emission of pollutants from the exhaust, but only to a level not stricter than the emission standards required of that model year motor vehicle when first manufactured). *But see* Dan Fagin, *Region Backs Smog Rules; Strict Standards on Auto Transmissions*, NEWSDAY, Feb. 2, 1994, at 6 (finding that state legislators in the Northeast have refrained from approving California emission standards in their own states because of auto industry claims that it would be too expensive to impose such strict measures). *See generally* California State Motor Vehicle Pollution Control Standards, 59 Fed. Reg. 46978, 46979 (1994) (finding that the California Air Resources Board is permitted to create its own test procedures for emission standards because California was granted a waiver by the Environmental Protection Agency (EPA) under the Clean Air Act § 209(b)).

necessary, cost-effective, and technologically feasible.[3]

Chapter 930 requires the Air Resources Board to consult with significantly impacted entities[4] and conduct cost-effectiveness as well as technological feasibility analyses before adopting or amending a standard or regulation relating to motor vehicle fuel specifications.[5] Chapter 930 further requires that an economic impact analysis be performed to quantify the significant impacts of any new proposed standard or specification on affected segments of the state's economy.[6] The economic analysis includes, but is not limited to, any significant change in motor vehicle fuel efficiency, the existing motor vehicle fuel distribution system, and the cost to consumers.[7]

COMMENT

Chapter 930 will impose specific additional requirements to be met prior to the adoption of motor vehicle fuel standards.[8] Proponents argue that the new requirements will limit the introduction of new and more expensive fuels that may have environmental benefits, but would put California businesses at a competitive disadvantage with other states.[9] Opponents of Chapter 930 state that this measure

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3. CAL. HEALTH & SAFETY CODE § 43013(a) (amended by Chapter 930); *see id.* (authorizing the State Air Resources Board to adopt and implement motor vehicle emission standards); *see also* SENATE COMMITTEE ON TRANSPORTATION, COMMITTEE ANALYSIS OF SB 37, at 1 (Apr. 18, 1995) (referring to "cost-effectiveness," "technological feasibility," and "impact on the economy in the existing law" in general terms); *cf.* 42 U.S.C.A. § 7521(c)(1) (West 1995) (requiring the administrator of the Environmental Protection Agency (EPA) to conduct a study of the technological feasibility of emission and fuel standards).

4. *See* CAL. HEALTH & SAFETY CODE § 43013(f)(2) (amended by Chapter 930) (defining "significantly impacted entities" as including, but not limited to, fuel distributors, independent marketers, vehicle manufacturers, and fuel users).

5. *Id.* § 43013(e) (amended by Chapter 930); *cf.* ARIZ. REV. STAT. ANN. § 49-447 (1988) (granting the director of the air quality control commission the power to adopt rules and regulations); COLO. REV. STAT. ANN. § 25-7-106(1)(e) (West Supp. 1989) (stating that the air quality control commission in the state has the authority to control or prohibit the use of a fuel in a motor vehicle, if the control or prohibition is based on sound scientific data). *See generally* 42 U.S.C.A. § 7545(a) (West Supp. 1995) (granting the EPA administrator autonomy to determine whether fuel meets federal standards).

6. CAL. HEALTH & SAFETY CODE § 43013(f)(1) (amended by Chapter 930); *see id.* (requiring the economic analysis to document the significant impacts of the proposed standard or specification).

7. *Id.*; *see id.* (defining "economic analysis" to include change in motor vehicle fuel efficiency, existing motor vehicle fuel distribution system, the competitive position of the affected segment relative to border states, and the cost to consumers).

8. SENATE COMMITTEE ON TRANSPORTATION, COMMITTEE ANALYSIS OF SB 37, at 2 (Apr. 18, 1995).

9. *Id.; see also* Fagin, *supra* note 2, at 6 (stating that the auto industry opposes adoption of the California emission standards because it would put United States auto makers at a competitive disadvantage with the added cost of new emissions equipment). *But see 25 Years of Tough Air Quality Regulations Have not Hurt State's Economy, Study Says*, ENV'T REP. (BNA) No.49, at 2463 (Apr. 14, 1995) (stating that strict vehicle and fuel regulations have not damaged California's economy because the regulated community has sought effective new technologies).

will hamper efforts to improve California's air quality.[10] The feasibility analysis requirement in Chapter 930 is likely to add time and cost to the adoption of motor vehicle fuel standards.[11]

Todd D. Ruggiero

Environmental Protection; air pollution—trip reduction

Health and Safety Code § 40717.6 (new).
SB 382 (Lewis); 1995 STAT. Ch. 368

Existing law requires air pollution control districts and air quality management districts to adopt, implement, and enforce transportation control measures[1] to achieve state or federal ambient air quality standards.[2] Existing law

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10. ASSEMBLY COMMITTEE ON NATURAL RESOURCES, COMMITTEE ANALYSIS OF SB 37, at 3 (July 10, 1995); *see id.* (stating that opponents argue the bill will "significantly reduce the ability of the ARB to use its regulatory program to stimulate innovative and market-responsive technologies to deal with critical air quality problems").

11. SENATE COMMITTEE ON TRANSPORTATION, COMMITTEE ANALYSIS OF SB 37, at 2 (Apr. 4, 1995); *see* FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW, § 2.04, at 2-527 (1995) (stating that when allowing additional input from other significant entities there is usually an extended period of conciliation before more decisive enforcement action is taken).

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1. *See* CAL. HEALTH & SAFETY CODE § 40717(g) (West Supp. Pamphlet 1995) (defining "transportation control measure" as any strategy to reduce vehicle trips, vehicle use, vehicle miles traveled, vehicle idling, or traffic congestion for the purpose of reducing motor vehicle emissions); *cf.* N.J. STAT. ANN. § 27:26A-3 (West Supp. 1995) (defining "travel demand management" as a system of actions whose purpose is to alleviate traffic-related problems through improved management of vehicle trip demand).

2. CAL. HEALTH & SAFETY CODE § 40717(a) (West Supp. Pamphlet 1995); *see id.* § 40717(b), (d) (West Supp. Pamphlet 1995) (mandating that each district develop a plan for transportation control measures); *see also id.* § 40719(d) (West Supp. Pamphlet 1995) (requiring each district with serious air pollution to meet the requirements of the plan including transportation control measures to substantially reduce the rate of increase in passenger vehicle trips and miles traveled per trip); *id.* § 40918(c) (West Supp. Pamphlet 1995) (mandating that each district with moderate air pollution effectuate its plan by reasonably available transportation control measures sufficient to substantially reduce the rate of increase in passenger vehicle trips and miles traveled per trip if the district contains an urbanized area with a population of 50,000 or more); *id.* § 40920(c) (West Supp. Pamphlet 1995) (instructing each district with severe air pollution to meet requirements to effectuate the plan including transportation control measures to achieve an average during weekday commute of 1.5 hours or more persons per passenger vehicle by 1999); *cf.* 42 U.S.C.A. § 7543 (West 1995) (providing the standards for controlling vehicle emissions); ARIZ. REV. STAT. ANN. § 49-424 (Supp. 1994) (setting forth the duties of the Air Pollution Control Department to control air pollution and to achieve ambient air quality standards); PA. STAT. ANN. tit. 35, § 4005 (1993) (requiring the Environmental Quality Board to adopt rules and regulations for the control of air pollution); WASH. REV. CODE ANN. § 70.94.715 (West 1992) (enacting plans for the phased reduction of emissions). *See generally* People v. Downey County Water Dist., 202 Cal. App. 2d 786, 795, 21 Cal. Rptr. 370, 374-75 (1962) (holding that the powers of special districts are unique powers limited solely to those conferred by the Legislature); Anthony J. Enciso, *Review of Selected 1994 California Legislation*, 26 PAC. L.J. 202, 535-37 (1995) (describing generally air pollution quality management control districts).

mandates that local or regional agencies[3] adopt congestion management programs, and authorizes local agencies to adopt planning measures.[4]

Chapter 368 prohibits districts or other local or regional agencies from imposing any requirement on any private entity to reduce shopping trips or require parking charges or eliminate parking spaces at retail facilities.[5]

COMMENT

Chapter 368 was enacted in reaction to regulations proposed by the South Coast Air Quality Management District to reduce vehicle trips to shopping centers.[6] According to the sponsors, the South Coast Air Quality Management District's proposed regulation will reduce retail sales, and thus a reduction in sales tax revenues to state and local governments will result.[7] The sponsors also contend that regional shopping centers already permit shoppers to consolidate

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3. *See* CAL. GOV'T CODE § 65088.1(a) (West Supp. 1995) (defining "regional agency" as the agency responsible for preparing the regional transportation improvement program).

4. *Id.* § 65089(a) (West Supp. 1995); *see id.* § 65089(b)(1)-(5) (West Supp. 1995) (requiring the congestion management program to contain traffic level service standards for highways and roadways, a performance element that includes multimodal performance standards for the movement of people and goods, a trip reduction and travel demand that encourages alternative transportation, and a program to analyze land use decisions on transportation systems). *See generally* Pamela Cohn, Comment, *Automobile Pollution: Japan and the United States—Cooperation or Competition?*, 9 EMORY INT'L L. REV. 179, 181 (1995) (noting that the United States has more motor vehicles than any other nation, and that the United States comprises 4% of the world's population, but consumes 40% of the world's gasoline, which is double that of Japan, Canada, France, South Korea, and Germany combined); *Donate Living Gifts*, ARIZ. REPUBLIC/PHOENIX GAZETTE, Dec. 3, 1994, at 2 (announcing that the United States is the leading producer of pollution, contributing to 19.4% of the world's greenhouse effect); Peter H. Kostmayer, *A Centralized Scapegoat*, PITTSBURGH POST-GAZETTE, Nov. 9, 1994, at B3 (indicating that cars contribute to 36% of the air pollution in the United States); Jean O. Melious, *Los Angeles County Congestion Management Program*, L.A. LAW., June 1992, at 38 (discussing the characteristics of the congestion management program and the specific characteristics of the program being implemented in Los Angeles).

5. CAL. HEALTH & SAFETY CODE § 40717.6(a) (enacted by Chapter 368); *see id.* § 40717.6(b)(1)-(3) (enacted Chapter 368) (providing that this section prevents the city or county from (1) requiring retailers to disburse information regarding alternative transportation systems, (2) imposing requirements on new developments as a condition of development, or (3) enacting requirements on retailers as a result of voter-imposed growth management initiative); *id.* § 40717.6(c) (enacted by Chapter 368) (mandating that nothing in this section imposes a limitation on the land use authority of the cities and counties); *see also* 76 Op. Cal. Att'y Gen. 11, 13 (1993) (finding that air quality management districts and air pollution control districts may not impose a permit system upon indirect sources of air pollution, which include sporting complexes and shopping centers); 74 Op. Cal. Att'y Gen. 196, 196 (1991) (finding that a regional air pollution control district may not impose parking fees for the purpose of reducing air pollution).

6. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 382, at 2 (July 13, 1995); *see* ASSEMBLY COMMITTEE ON TRANSPORTATION, COMMITTEE ANALYSIS OF SB 382, at 2 (July 10, 1995) (discussing the South Coast Air Quality Management District's proposal to require customer-paid parking charges at shopping centers, transit shuttles from work or residential areas to shopping centers, and transit passes for shopping center customers).

7. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 382, at 2 (July 13, 1995).

their shopping, consequently reducing the number of separate shopping trips.[8]

According to opponents, since state and federal laws require compliance with ambient air quality standards, each region must utilize all available strategies, including trip reduction plans to meet these requirements.[9] In addition, the opponents criticize Chapter 368 for overlooking measures enacted in 1994, regarding impact by indirect source regulations, without permitting an exception from trip reduction requirements.[10] Thus, according to the opponents of Chapter 368, there is little justification for excluding shopping malls or centers from the obligation to help reduce vehicle emissions.[11]

Chad D. Bernard

Environmental Protection; air pollution—variances

Health and Safety Code § 43013.2 (new).
SB 709 (Maddy); 1995 STAT. Ch. 675

The California Air Resources Board[1] is authorized under existing law to

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8. SENATE COMMITTEE ON TRANSPORTATION, COMMITTEE ANALYSIS OF SB 382, at 1 (May 2, 1995); *see id.* (noting that shopping trips are already the second highest average vehicle ridership of any category). *But see* Robert H. Freilich & S. Mark White, *Transportation Congestion and Growth Management: Comprehensive Approaches to Resolving America's Major Quality of Life Crisis*, 24 LOY. L.A. L. REV. 915, 922 (1991) (contending that suburban employment centers, with their liberal parking requirements and auto-intensive commercial and retail uses, encourage vehicle commutes over public transit).

9. SENATE COMMITTEE ON TRANSPORTATION, COMMITTEE ANALYSIS OF SB 382, at 1 (May 2, 1995); *see id.* (noting the opposition's contention that if the regions are prohibited from using trip reduction plans, then they must find some other strategy that may be more costly or controversial); *see also* Stackler v. Department of Motor Vehicles, 105 Cal. App. 3d 240, 245, 164 Cal. Rptr. 203, 206 (1980) (finding that an agency may exercise any additional powers as are necessary for efficient administration of powers expressly granted by statute, or as may fairly be implied from the statute granting the powers).

10. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 382, at 2 (July 13, 1995); *see* 1994 Cal. Legis. Serv. ch. 924, secs. 1-7, at 4539-44 (amending CAL. GOV'T CODE § 65089, repealing and enacting CAL. HEALTH & SAFETY CODE § 40717.5, enacting and repealing CAL. VEH. CODE § 22365) (prohibiting air districts from placing trip reduction requirements on indirect sources, like malls and event centers, without ascertaining whether the source is responsible for pollution due to vehicle trips); *id.* (preventing air districts and agencies from mandating duplicative trip reduction requirements); 1994 Cal. Legis. Serv. ch. 430, sec. 1, at 1981-82 (amending CAL. HEALTH & SAFETY CODE § 40916) (requiring the Air Resource Board to produce methods to compare vehicle emission reduction benefits to alternative strategies in all air quality non-attainment areas); 1994 Cal. Legis. Serv. ch. 425, sec. 1, at 1974-75 (enacting CAL. HEALTH & SAFETY CODE § 40928) (requiring air districts to permit event centers to implement strategies other than conventional trip reduction programs that achieve equivalent vehicle emissions reductions).

11. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 382, at 2 (July 13, 1995); *see id.* at 2-3 (noting that large employers or event centers are not exempted from assisting reduction of vehicle emissions).

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1. *See* CAL. HEALTH & SAFETY CODE § 39003 (West 1986) (providing that the California Air Resources Board is a California agency and is responsible for the coordination of efforts (1) to attain and maintain ambient air quality standards, (2) to research for solutions to air pollution and its causes, and (3) to

establish and monitor (1) motor vehicle[2] emission standards;[3] (2) in-use performance standards; and (3) motor vehicle fuel specifications[4] for the control of air contaminants[5] and sources of air pollution found necessary, cost effective, and technologically feasible to regulate air pollution by the California Air Resources Board.[6]

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address the serious nature of motor vehicle air pollution, one of the primary sources of air pollution in California).

2. *See* CAL. VEH. CODE § 415 (West Supp.1995) (defining a "motor vehicle" as a self-propelled vehicle, not to include self-propelled wheelchairs, invalid tricycles, or motorized quadcycles if operated by any person unable to move as a pedestrian due to physical disability).

3. *See* CAL. CODE REGS. tit. 13, §§ 1950-2048 (1993) (offering the emission standards for new and used motor vehicles).

4. *See id.* §§ 2250-2293 (1993) (setting forth the standards for motor vehicle fuels).

5. *See* CAL. HEALTH & SAFETY CODE § 39013 (West 1986) (defining "air contaminant" and "air pollutant" to mean any discharge, release, or other propagation into the atmosphere that includes smoke, charred paper, dust, soot, grime, carbon, fumes, gases, odors, particulate matter, acids, or a combination of any of the preceding).

6. *Id.* § 43013(a) (West Special Pamphlet 1995); *see id.* § 43000(a)-(d) (West Special Pamphlet 1995) (providing that (1) emission from motor vehicles of air pollutants is the main contributor of air pollution in many areas of California; (2) in an effort to protect and preserve public health and welfare, and to prevent irritation of the senses, interference with visibility, and damage to vegetation and property, the control and elimination of air pollution is crucial; and (3) California is responsible for establishing uniform procedures for compliance with emission control standards with which all motor vehicles must comply); *id.* § 43000.5(a)-(c) (West Special Pamphlet 1995) (stating that the Legislature finds and declares that (1) although vehicle emissions have decreased, continued growth in the population of California and vehicle miles traveled may potentially prevent the achievement of California Air pollution standards and result in the erosion of California's air quality; (2) in order to attain and maintain air quality standards, substantial reductions in new vehicle emissions and substantial improvements in the durability of emission control devices must be achieved; and (3) all classes of vehicles should share in the equitable distribution of the burden in order to achieve California Air Quality Standards); *id.* § 43013(a), (e), (g) (West Special Pamphlet 1995) (authorizing the California Air Resources Board to implement standards for gasoline specifications, considering the effects on the California economy, including fuel efficiency, in order to reduce nitrogen oxide emissions from motor vehicle emissions that contribute to the air pollution problems of California); *id.* § 43016 (West 1986) (making any person in violation of the California Health and Safety Code §§ 43000-44257, for which a penalty is not already provided, subject to a fine not in excess of $500 per vehicle payable to the California Treasurer for deposit to the Air Pollution Control Fund); *id.* § 43017 (West Special Pamphlet 1995) (asserting the California Air Resources Board may enjoin any violation of the California Health and Safety Code §§ 43000-44257 in a civil action brought in the name of the People of California, except that the People of California are not required to allege facts in order to show the lack of an adequate remedy at law, or irreparable damage or loss); *id.* § 43018(a), (b), (c)(4), (e) (West Special Pamphlet 1995) (authorizing the California Air Resources Board to take necessary actions, while considering the California economy and fuel efficiency, that include the adoption of standards and regulations for motor vehicle fuel, specifically vehicle fuel composition, and to reduce reactive organic gases by at least 55 %, and nitrogen oxide by at least 15 %); *id.* § 43020 (West Special Pamphlet 1995) (declaring that any person who knowingly violates any regulation pursuant to motor vehicle fuels under the California Health and Safety Code §§ 43000-44257 is guilty of a misdemeanor, and may be fined not in excess of $1000, or imprisoned for not more than six months, or both; however, recovery of civil penalties under the California Health and Safety Code § 43016 precludes prosecution under this section for the same offense, and criminal prosecution for the same offense as any civil action brought under the California Health and Safety Code § 43016 is grounds for dismissal of that civil action); *see also* Western Oil & Gas Ass'n v. Orange County Air Pollution Dist., 14 Cal. 3d 411, 420, 534 P.2d 1329, 1334, 121 Cal. Rptr. 249, 254 (1975) (providing that the California Air Resources Board has the authority to regulate the lead content of gasoline). *But see* 51 Op. Cal. Att'y Gen. 221, 221 (1968) (elucidating that the California Air Resources

Chapter 675 sets forth procedures for the granting of variances from the gasoline specifications prescribed by the Air Resources Board.[7] Moreover, Chapter 675 requires revenue resulting from variance fees to be used, upon appropriation by the Legislature, to implement a program for the early retirement of light-duty vehicles in an effort to reduce emissions.[8] Chapter 675 also provides that certain provisions are a declaration of existing law.[9]

COMMENT

Prior to Chapter 675, the law was silent on the procedure and criteria for

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Board lacks the authority to make special allowances with regard to exhaust and evaporative loss standards for off-road utility vehicles). *See generally* 50 CAL. JUR. 3D *Pollution and Conservation Laws* § 31 (1993) (discussing the withdrawal of a county from a regional district); 8 CAL. JUR. 3D *Automobiles* § 85 (1993) (discussing exhaust systems of motor vehicles); 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 74(a) (9th ed. 1987 & Supp. 1995) (discussing engine exhaust emissions).

7. CAL. HEALTH & SAFETY CODE § 43013.2 (enacted by Chapter 675); *see id.* § 43013.2(a)(1), (c) (enacted by Chapter 675) (providing that the California Air Resources Board must adopt regulations in order to establish guidelines for the consideration of variances and the imposition of fees and conditions for producers who cannot meet the specifications in a timely manner due to circumstances reasonably beyond their control, with such fees and conditions imposed in a fair and equitable manner); *id.* § 43013.2(a)(2) (enacted by Chapter 675) (declaring that it is the intent of the Legislature that the process for the issuance of variances must encompass consideration of the impact of such a variance on all parties, including the applicant, public, and producers of complying fuel, and on air quality); *id.* § 43013.2(e) (enacted by Chapter 675) (maintaining that in considering an application for a variance, the California Air Resources Board must take into account whether granting a variance would place the applicant at a cost advantage over others, including those who produce complying gasoline); *id.* § 43013.2(f)-(h) (enacted by Chapter 675) (setting forth that, except in the case of an emergency variance, the California Air Resources Board must provide a minimum of 10 days public notice of its consideration of any variance or extension, and moreover a variance is only valid for up to 120 days, beginning on or following March 1, 1996, however, such variance may be extended for a period up to 90 days upon the showing of need, or for a period as set by the California Air Resources Board in the event of a physical catastrophe with approval of the Board). *See generally* Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861, 865 (1974) (holding that a health inspector did not violate the Fourth Amendment of the United States Constitution by entering an outdoor premises without the knowledge or consent of the occupier to observe and make opacity tests of smoke emitted from chimneys on the premises, from which information was obtained that resulted in a denial of their application for a variance); David Slawson, *The Right To Protection From Air Pollution*, 59 S. CAL. L. REV. 672, 724-25 (1986) (discussing the framework behind the implementation and effect of variances).

8. CAL. HEALTH & SAFETY CODE § 43013.2(d) (enacted by Chapter 675); *see id.* (authorizing the California Air Resources Board to retain that portion of variance fees that covers reasonable and necessary costs incurred by the California Air Resources Board for the processing of variances, while the remaining portion of fee revenue is to be transmitted to the California State Treasurer for deposit into the High Polluter Repair or Removal Account available to aid in the removal or accelerated retirement of light-duty vehicles in an effort to reduce emissions); CAL. CODE REGS. tit. 13, § 1900(b)(8) (1993) (defining a "light-duty truck" as any motor vehicle rated at 6000 pounds gross vehicle weight or less designed primarily for the purpose of property transportation, or a derivative thereof, or is available with special features for off-highway or off-street operation and use); *see also* CAL. HEALTH & SAFETY CODE § 44091(a) (West Special Pamphlet 1995) (implementing the High Polluter Repair or Removal Account to be used for the operation of a program to repair or replace high polluters).

9. CAL. HEALTH & SAFETY CODE § 43013.2(i) (enacted by Chapter 675); *see id.* (providing that California Health and Safety Code § 43013.2(b), (e) are declaratory of existing law).

granting variances from motor vehicle fuel specifications.[10] Chapter 675 provides for the uniform application of what previously was the discretionary granting of variances.[11] However, since Chapter 675 may be viewed as anticompetitive, the Air Resources Board may require greater flexibility not available under Chapter 675 when granting variances to smaller refiners.[12]

Daniel L. Keller

Environmental Protection; commercial fishing

Fish and Game Code §§ 7704, 8576, 8757 (amended).
SB 458 (Beverly); 1995 STAT. Ch. 371

Under existing law, it is unlawful to permit or cause the deterioration or waste[1] of any fish brought into, or caught in the waters of California.[2] Additionally, existing law requires that a permit issued by the Department of Fish

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10. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 709, at 2 (Aug. 23, 1995). *See generally Supplemental Tailpipe Emissions Testing Proposed by EPA for Light-Duty Cars, Trucks*, 25 ENV'T REP., No. 40, at 1910 (Feb. 10, 1995) (providing that the EPA is proposing to supplementally consider aggressive driving and air-conditioning control before considering intermediate soak requirements in federal tailpipe emissions testing procedures for light-duty vehicles and trucks); *id.* (defining "soak requirements" to include (1) aggressive driving behavior, (2) rapid speed fluctuations, (3) driving behavior after ignition, (4) actual air-conditioning operation, and (5) periods during which the engine is off).

11. CAL. HEALTH & SAFETY CODE § 43013.2(c) (enacted by Chapter 675).

12. SENATE COMMITTEE ON TRANSPORTATION, COMMITTEE ANALYSIS OF SB 709, at 2 (Apr. 18, 1995). *See generally* Willy Morris, *Pacific to Cease Refining*, W. COUNTY TIMES (Richmond, Cal.), at A1 (June 8, 1995) (discussing the proposed closing of the Pacific Refinery due to business conditions, poor refinery margins, and substantial additional investments needed to comply with new state and federal regulations); Memorandum from Kahl Associates, Research Consultants and Advocates on SB 709 (copy on file with the *Pacific Law Journal*) (providing that Phase II gasoline will be required in March 1996 and is one of the most expensive undertakings ever required to reduce emissions as it will cost the petroleum industry $4-7 billion as proposed, but is expected to lower emissions by 15-30%); Letter from Joseph E. Sparano, Chairman and CEO, Pacific Refining Company, to James D. Boyd, Executive Officer, *The California Air Resources Board* (June 7, 1995) (copy on file with the *Pacific Law Journal*) (announcing the suspension of process operations at their Hercules refinery, discontinuance of operating at Western Fuel Oil's San Pedro terminal, and a reduction in staff at corporate headquarters due to the imposition of new state and federal regulations).

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1. *See* People v. Monterey Fish Prods. Co., 195 Cal. 548, 562, 234 P. 398, 403 (1925) (stating that "waste" means the use of fresh fish for any purpose other than human consumption).

2. CAL. FISH & GAME CODE § 7704(a) (amended by Chapter 371); *see id.* § 7704(b) (amended by Chapter 371) (stating that it is also unlawful to use any fish in a reduction plant or by a reduction process); *see also* People v. K. Hovden Co., 215 Cal. 54, 56, 8 P.2d 481, 482 (1932) (holding that the use of excess quantities of edible fish in a reduction plant may be an actionable nuisance); *Monterey Fish Prods. Co.*, 195 Cal. at 561-62, 234 P. at 403 (stating that "reduction" consists of the process of cooking the fish and grinding the residue into poultry food or fertilizer).

and Game[3] to use drift gill nets[4] to take shark or swordfish for commercial purposes,[5] must prohibit the use or possession of various types of drift gill nets,[6] and establishes the season when such nets may be used.[7]

Chapter 371 prohibits the sale, purchase, delivery for commercial purposes, or the possession, on any registered commercial fishing vessel,[8] of any shark fin or tail that has been removed from the shark's carcass.[9] Further, Chapter 371 authorizes the use of certain drift gill nets[10] to take various species of sharks [11]

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3. *See* CAL. FISH & GAME CODE § 700 (West Supp. 1995) (creating the Department of Fish and Game); *see also id.* § 703 (West 1984) (providing that the general policies of the California Fish and Game Department are formulated by the Fish and Game Commission); *id.* § 1600 (West 1984) (stating that fish and wildlife resources are of public importance; thus, their conservation is properly a responsibility of the state); *id.* § 7701 (West 1984) (stating that the Fish and Game Commission can regulate and control fishing boats to prevent deterioration and waste of fish); *id.* § 7708 (West 1984) (directing the Fish and Game Commission to make and enforce any regulations necessary for carrying out its power); Ferrante v. Fish & Game Comm'n, 29 Cal. 2d 365, 374, 175 P.2d 222, 227 (1946) (stating that the Legislature entrusted the protection of fish and game to the Fish and Game Commission, and unless its regulatory actions are not grounded upon a reasonable basis, the court should not interfere with its discretion).

4. *See* CAL. FISH & GAME CODE § 8573(d) (West Supp. 1995) (defining a "shark or swordfish gill net" as a drift gill net of 14-inch or greater mesh size).

5. *See id.* §§ 8561(a), 8681(a) (West Supp. 1995) (stating that the use of drift gill nets for taking shark and swordfish for commercial purposes requires a revocable, nontransferable permit issued by the Department of Fish and Game); *cf.* HAW. REV. STAT. § 188-30.5 (1992) (stating that it is unlawful for any person to possess or use any drift gill net in any waters of the state).

6. *See* CAL. FISH & GAME CODE § 8573(b)(1)-(4) (West Supp. 1995) (specifying restrictions on the size and type of net allowed).

7. *Id.* § 8576(a)-(c) (amended by Chapter 371); *see id.* § 8576(a), (b) (amended by Chapter 371) (stating that drift gill nets may not be used to take shark between February 1 to April 30, or between May 1 to August 14, within 75 nautical miles of the California coast).

8. *See id.* § 7881(a)-(c) (West Supp. 1995) (providing that every person who owns or operates a vessel for profit-making fishing operations must pay a fee and register the vessel with the Department of Fish and Game).

9. *Id.* § 7704(c) (amended by Chapter 371); *see* Svenson v. Engelke, 211 Cal. 500, 502, 296 P. 281, 282 (1931) (holding that it is the right of the state, under its police power, to regulate and control the taking, possession, and sale or other transportation of fish and game); *see also* CAL. FISH & GAME CODE § 2002 (West 1984) (stating that it is unlawful to possess any bird, mammal, fish, reptile, or amphibian, or parts thereof, taken in violation of any of the provisions of the California Fish and Game Code); *id.* § 2118 (West Supp. 1995) (providing that it is unlawful to import, transport, possess, or release various wild animals); *id.* § 3081(a), (b) (West Supp. 1995) (establishing that it is unlawful to possess deer, elk, bear, or antelope meat except during open season and for 15 days thereafter, or at any time if marked); *id.* § 8387 (West Supp. 1995) (stating that it is unlawful to possess various quantities of yellowtail); *id.* § 8393(a) (West 1984) (providing that marlin meat, whether fresh, smoked, canned, or preserved by any means cannot be bought, sold, possessed, or transported for the purpose of sale); *cf.* N.Y. ENVTL. CONSERV. LAW § 13-0338 (McKinney 1995) (prohibiting the removal of a shark's fin when not keeping the remainder of the shark's carcass). *See generally* 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Public Peace and Welfare* § 1109 (2d ed. 1988 & Supp. 1995) (explaining unlawful taking and possession of fish and game).

10. *See* CAL. FISH & GAME CODE § 8576(c) (amended by Chapter 371) (allowing the use of drift gill nets with a mesh size smaller than eight inches in stretched mesh and twine equivalent to size number 18 or smaller).

11. *See id.* (allowing the taking of sharks, other than thresher, shortfin mako, and white shark, during the proper season).

and prescribes conditions for incidental takings.[12] Moreover, existing law prohibits the use of round haul nets[13] except in specified areas to take live bait.[14] Chapter 371 conditionally extends the specified areas exempted from the prohibition on the use of round haul nets.[15]

COMMENT

Chapter 371 was enacted to end the wasteful practice of finning,[16] as well as to encourage efficiency in the commercial fishing industry.[17] Specifically, by

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12. *Id.; see id.* (permitting no more than two thresher sharks and two shortfin mako sharks to be possessed and sold, if incidentally taken using a drift gill net while fishing for barracuda or white seabass, and if at least 10 barracuda or five white seabass were landed at the same time as the incidentally taken sharks); *see also id.* § 8380(a) (West Supp. 1995) (stating that giant seabass may be sold if incidentally taken in commercial fishing operations); *id.* § 8599(b) (West Supp. 1995) (stating that white sharks may be incidentally taken by commercial fishing operations using gill nets, drift gill nets, or round haul nets); Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407, 2414 (1995) (concluding that the Secretary of the Interior's definition of "harm," which includes modifying a species' habitat that leads to death or injury of the species as such is a taking, is reasonable). *Compare* 16 U.S.C.A. § 5002(14) (West Supp. 1995) (defining "incidental taking" as catching, taking, or harvesting a species or stock of fish while conducting directed fishing for another species or stock of fish) *and* 50 C.F.R. § 402.02 (1994) (defining "incidental taking" as takings which result from, but are not the purpose of, carrying out an otherwise lawful activity) *with* CAL. FISH & GAME CODE § 86 (West 1984) (providing that "take" means to hunt, pursue, catch, capture, or kill, or to attempt any of the aforementioned).

13. *See* CAL. FISH & GAME CODE § 8750 (West 1984) (defining "round haul nets" as circle seines, including purse seines—ring or half ring, and lampara nets); *see also* Report from Department of Fish and Game to the Legislature (June 1994) (copy on file with the *Pacific Law Journal*) (addressing the use of drum seines in the live-bait fishery and their effects on Santa Monica Bay); *id.* (defining "purse seine" as nets that are set around a school of fish and then pursed closed by a cable that is threaded through the net at the bottom); *id.* (describing a "lampara net" as a net that is set around a school of fish and as the wings of the net are brought together the fish are enclosed in a central bag).

14. CAL. FISH & GAME CODE § 8757 (amended by Chapter 371); *see id.* (stating that round haul nets may be used in districts 19, 19B, and 20); *see also id.* § 11027 (West 1984) (defining "district 19" as the ocean waters, tidelands, and islands off the coast between district 18 on the north and the Mexico-United States border on the south); *id.* § 11029 (West 1984) (defining "district 19B" as the ocean waters and tidelands encompassing the San Pedro Breakwater, the Long Beach Breakwater, and the jetty of Anaheim Bay); *id.* § 11030 (West 1984) (defining "district 20" as the state waters within three nautical miles of Santa Catalina Island).

15. *Id.* § 8757 (amended by Chapter 371); *see id.* (extending the use of round haul nets to district 19A on the condition that no round haul nets will be used within 750 feet of any public pier); *see also id.* § 11028 (West 1984) (defining "district 19A" as the ocean waters and tidelands between Malibu Point on the south and Palos Verdes Point on the west).

16. *See* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 458, at 1 (May 11, 1995) (defining the practice of "finning" as the cutting off of a shark's fins after it is caught and then wasting the body by throwing it overboard); *see also* Tim Roche, *131 Shark Fins Are Seized From Boat*, St. PETERSBURG TIMES, May 24, 1995, at 1B (stating that dozens of shark species have been fished to near oblivion to meet the Asian demand for fin meat); *Strict Ban on Shark Finning*, Canada Newswire, June 6, 1994, *available in* LEXIS, News Library, Curnws File (stating that Canada strictly prohibits shark finning).

17. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 458, at 1-3 (May 11, 1995); *see* Glen Martin, *Demand for Shark Fins Threatens West Coast Species*, S.F. CHRON., Sept. 6, 1994, at A11 (stating that increased demand for fins of California sharks could seriously decrease shark populations).

allowing commercial fishers to incidentally take sharks while using drift gill nets in coastal waters, Chapter 371 authorizes drift gill net fishing operations to sell any incidentally taken sharks rather than force the sharks to be thrown overboard.[18] The prior prohibition on taking sharks in all drift nets was intended to reduce pressure on shark resources; however, the use of drift gill nets in coastal waters was found to pose no threat to these resources.[19]

Since experiments using round haul nets to take live bait have created no adverse effects, Chapter 371, by authorizing the use of such nets, provides that live bait supplies will be more dependable and available to fishers and commercial fishing vessels.[20]

Timothy J. Moroney

Environmental Protection; environmental advertising—representation of a product as recyclable

Business and Professions Code § 17508.5 (repealed); § 17580.5 (new); § 17508 (amended).
SB 426 (Leslie); 1995 STAT. Ch. 642

Prior law made it unlawful for a person to represent[1] that a consumer good[2] manufactured or distributed was ozone friendly, biodegradable, photodegradable, recyclable, or recycled, unless that consumer good complied with definitions set forth in the California Business and Professions Code.[3] Chapter 642 makes it

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18. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 458, at 1 (May 11, 1995).

19. *Id.* at 2; *see id.* (stating that round haul nets have been used for four years in the area under experimental gear permits and have created no adverse effects); *see also* CAL. FISH & GAME CODE § 8606(a)(2), (c) (West Supp. 1995) (stating that experimental gear permits shall not be issued for more than four consecutive years, and thus, the Legislature's authorization to continue the use of round haul nets must be codified).

20. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 458, at 2 (May 11, 1995); *see also* Department of Fish and Game Report, *supra* note 13 (reporting that the use of round haul nets have been found to have no significant adverse effect on live-bait stocks, endangered species, or bottom sediments).

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1. *See* CAL. BUS. & PROF. CODE § 17580(c) (amended by Chapter 642) (limiting a representation by a wholesaler or retailer to the advertising or placement of a representation on a package).

2. *See* 1991 Cal. Legis. Serv. ch. 1091, sec. 11, at 4431 (amending CAL. BUS. & PROF. CODE § 17508.5(f)) (providing that a "consumer good" is any article that is used or bought primarily for personal, family, or household purposes).

3. 1991 Cal. Legis. Serv. ch. 1091, sec. 11, at 4431 (amending CAL. BUS. & PROF. CODE §17508.5); 1990 Cal. Stat. ch. 1413, sec. 2, at 6426-27 (enacting CAL. BUS. & PROF. CODE §17580); *see* 1991 Cal. Legis. Serv. ch. 1091, sec. 11, at 4431 (amending CAL. BUS. & PROF. CODE § 17508.5(a)-(e)) (listing environmental advertising definitions as follows: (1) "ozone friendly" or any like term means that any chemical or material released into the atmosphere during the use or production of a consumer good will not migrate into the stratosphere, and cause unnatural and accelerated ozone deterioration; (2) "biodegradable" refers to a material

unlawful to use the same terms, but as defined by the Federal Trade Commission.[4]

Furthermore, existing law provides that any person who represents in advertising that a consumer good is not harmful to, or is beneficial to, the natural environment, using environmental terms, must maintain specified documentation supporting the validity of such representation.[5] Required documentation, under

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with the proven capability of decomposing within one year through natural, biological processes into nontoxic cabonaceous soil, water, or carbon dioxide after being disposed in the most common disposal environment; (3) "photodegradable" means that a material has the proven capability of decomposing within one year through physical processes into nontoxic carbonaceous soil, water, or carbon dioxide; and (4) "recycled" means that an article contains a minimum of 10%, by weight, of postconsumer material, as defined in the California Public Contract Code § 12200); *see also* CAL. PUB. CONT. CODE § 12200(b) (West Supp. 1995) (providing that "postconsumer material" means a finished material that otherwise would be disposed of as solid waste, excluding manufacturing waste, after its life cycle as a consumer product is complete); CAL. PUB. RES. CODE § 40180 (West Special Pamphlet 1995) (defining "recycling" as the process of collecting, sorting, cleansing, treating, and reconstructing materials that would otherwise become solid waste, and reducing them to raw materials for economic mainstreaming); *cf.* IND. CODE ANN. § 24-5-17-2(b) (West 1995) (restricting the use of environmental terms to Federal Trade Commission Guidelines); R.I. GEN. LAWS § 23-18.14-3(a) (Supp. 1994) (prohibiting the use of the terms "degradable," "biodegradable," "photodegradable," or "environmentally safe" on retail packaging). *See generally* Betty-Jane Kirwan & Leslie A. Tucker, *Green Labeling Standards*, L.A. LAW., Sept., 1992, at 30 (discussing established environmental marketing standards by California, Indiana, New York, and Rhode Island in the absence of federal regulation).

4. CAL. BUS. & PROF. CODE § 17580(a)(5) (amended by Chapter 642); *see id.* (requiring any person using such terms as "environmental choice," "ecologically friendly," "earth friendly," "environmentally friendly," "ecologically sound," "environmentally sound," "environmentally safe," "ecologically safe," "environmentally lite," "green product" or any like term to document, among other things, whether such consumer good is in compliance with the uniform standards as set forth in the Federal Trade Commission guidelines for environmental marketing claims for use of the terms "recycled," "recyclable," "biodegradable," "photodegradable," or "ozone friendly"); *see also* 16 C.F.R. § 260.7(b) (1995) (noting that an unqualified claim that a product is degradable, biodegradable, or photodegradable is a misrepresentation); *id.* (providing that in order to be qualified, a claim must be substantiated by competent and reliable scientific evidence that the entire product or package will completely break down and return to nature within a reasonably short period of time after customary disposal); *id.* § 260.7(d) (1995) (providing that a product may not be marketed as recyclable unless it can be collected, separated, or otherwise recovered from a solid waste stream for use as a raw material); *id.* § 260.7(e) (1995) (providing that a claim that a product contains recycled contents must be substantiated and/or qualified and may only be made for materials recovered or diverted from a solid waste stream); *id.* § 260.7(h) (1995) (providing that it is deceptive to claim a product does not harm the ozone layer if that product contains an ozone depleting substance).

5. CAL. BUS. & PROF. CODE § 17580(a)(5) (amended by Chapter 642); *see id.* (requiring any person using such terms as "environmental choice," "ecologically friendly," "earth friendly," "environmentally friendly," "ecologically sound," "environmentally sound," "environmentally safe," "ecologically safe," "environmentally lite," "green product" or any like term to document (1) reasons the representation is true; (2) significant adverse environmental effects directly associated with the product or its manufacture, distribution, use, or disposal, or measures taken to reduce such effects; (3) violations of any permit laws in conjunction with the production or distribution of the consumer good; and (4) whether the consumer good is in compliance with the uniform standards as set forth by the Federal Trade Commission Guidelines for Environmental Marketing Claims for use of the terms "recycled," "recyclable," "biodegradable," "photodegradable," or "ozone friendly").

existing law, must be provided and fully disclosed to the public upon request.[6] Existing law also makes a violation of these provisions a misdemeanor.[7]

Moreover, Chapter 642 prohibits any person from making an untruthful, deceptive, or misleading environmental marketing claim, explicit or implied, but also provides for a defense as specified.[8] Chapter 642 defines an environmental marketing claim as including any claim set forth in the Federal Trade Commission's guide for the use of environmental marketing claims.[9]

COMMENT

By following the Federal Trade Commission's guidelines on environmental marketing, California takes a step towards establishing a nationwide standard, enabling efficient, interstate, environmental marketing of consumer goods.[10]

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6. *Id.* § 17580(b) (amended by Chapter 642); *see* 1995 Cal. Legis. Serv. ch. 642, sec. 1, at 3972 (repealing CAL. BUS. & PROF. CODE § 17508.5, enacting *id.* § 17580.5, amending *id.* § 17580) (declaring that the Legislature finds it to be the public policy of California that environmental marketing claims, explicit or implied, be substantiated by competent and reliable evidence to counter misleading or deceiving consumers with regard to the environmental impact of products and their packaging, and that until uniform standards, such as the Federal Trade Commission's guidelines for environmental marketing claims, are adopted by various states, accurate information about a products environmental impact will remain unavailable); *cf.* FLA. STAT. ANN. § 403.7193(1) (West Supp. 1995) (requiring any person represents a product as environmentally safe, environmentally friendly, ozone safe, ecologically sound, recyclable, recycled or with any other like term to maintain supporting documentation); IND. CODE ANN. § 24-5-17-13 (West 1995) (providing that support for environmental claims must be disclosed upon request to the Indiana Department of Environmental Management or Attorney General and made available to the public through the requesting office).

7. CAL. BUS. & PROF. CODE § 17534 (West 1987); *see id.* § 17536(a) (West Supp. 1995) (providing that any person who violates any provisions of the California Business and Professions Code §§ 17530-17539.6 is liable for a civil penalty of no more than $2500 per violation).

8. *Id.* § 17580.5 (enacted by Chapter 642); *see id.* § 17580.5(b) (enacted by Chapter 642) (providing that compliance of a person's environmental marketing claims with the examples contained in the Guides for the Use of Environmental Marketing Claims may serve as a defense to a suit or complaint brought under this section of the California Business and Professions Code); *see also* 16 C.F.R. § 260.7 (1995) (setting forth examples to illustrate claims that do and do not comply with the federal guide); *cf.* FLA. STAT. ANN. § 403.7193(2) (West Supp. 1995) (providing that a false representation regarding the environment by a manufacturer or distributor about its product is a misdemeanor and punishable by a fine); IND. CODE ANN. § 24-5-17-2(b) (West 1995) (making it unlawful for a distributor or manufacturer to represent its product or packaging as ozone friendly, compostable, photodegradable, biodegradable, recyclable, or recycled, unless such good meets the definitions as set forth by the Indiana trade regulations or the Federal Trade Commission); ME. REV. STAT. ANN. tit. 38, § 2142 (West Supp. 1994) (providing that it is unlawful to promote, advertise, or label a product if the same is in violation of the guidelines for environmental marketing claims as set forth by the Federal Trade Commission).

9. CAL. BUS. & PROF. CODE § 17580.5(a) (enacted by Chapter 642).

10. SENATE COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF SB 426, at 2 (Mar. 27, 1995); *see* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 426, at 2 (July 29, 1995) (providing that prior to SB 426, 48 states deferred to the Federal Trade Commission Guidelines, which prevented the confusion of advertisers); *see also* Letter from Hubert H. Humphrey III, Attorney General for the State of Minnesota, to Jerry Hayes, SONOCO Products Company (Mar. 3, 1995) (copy on file with the *Pacific Law Journal*) (describing an increased flow of accurate consumer information that has resulted from uniform national standards which has since negated the need for state-by-state legislative action); Letter from Barry S. Brokaw

Existing law was enacted before the Federal Trade Commission Guidelines had been established, and by following the federal guidelines that have already proven enforceable, California avoids the unenforceability problems of the prior law environmental provisions.[11]

Chapter 642 repeals California Business and Professions Code § 17508.5 which was held, in part, to be constitutionally vague and unenforceable based on its definition of recyclable.[12] Under the Federal Trade Commission Guidelines, recyclable is defined with more particularity, attempting to avoid potential challenges of unconstitutional vagueness and unenforceability.[13]

Daniel L. Keller

Environmental Protection; environmental subdivisions

Government Code § 66418.2 (new); § 66426 (amended).
AB 1287 (Cortese); 1995 STAT. Ch. 955.

& Gary R. Neese, Sacramento Advocates firm, to Assemblymember Jackie Speier, Chair, Committee on Consumer Protection, Governmental Efficiency and Economic Development (June 22, 1995) (copy on file with the *Pacific Law Journal*) (providing that California has enacted an environmental labeling law, in place since 1990, that has yet to be enforced, serving only to separate California consumers from the rest of the United States); Interview with Roger Wildermuth, Press Secretary to Senator Tim Leslie in Sacramento, Cal. (Sept. 8, 1995) (notes on file with the *Pacific Law Journal*) (explaining that many companies neglected to even use environmental labeling in California or Rhode Island, the only two states at that time that had yet to align themselves with the Federal Trade Commission guidelines, since in many cases such environmental labeling would require the use of more than one label for the same product distributed nationally); *cf.* David F. Welsh, Note, *Environmental Marketing and Federal Preemption of State Law: Eliminating the "Gray" Behind the "Green,"* 81 CAL. L. REV 991, 991 (1993) (discussing the impact of Federal Trade Commission Guidelines on environmental marketing and suggesting an alternative approach). *See generally* Kirwan & Tucker, *supra* note 3 (discussing the clarification of the environmental marketing standards).

11. SENATE COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF SB 426, at 2 (Mar. 27, 1995).

12. *See* Association of Nat'l Advertisers, Inc. v. Lungren, 809 F. Supp. 747, 762 (N.D. Cal. 1992) (holding that due to the potential for criminal sanctions and potential confusion between the definitions of "recyclable" and "conveniently recycled," "recyclable" as defined under the California Business and Professions Code § 17508.5(d), is unconstitutionally vague and unenforceable); ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 426, at 2 (July 29, 1995) (providing that California law was vague, and that different manufacturers interpreted it differently resulting in conflicting usage of environmental claims); SENATE COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF SB 426, at 2 (Mar. 27, 1995) (discussing the constitutional challenge against California Business and Professions Code § 17508.5(d)). *See generally* Peter J. Tarsney, Note, *Regulation of Environmental Marketing: Reassessing the Supreme Court's Protection of Commercial Speech*, 69 NOTRE DAME L. REV. 533 (1994) (discussing discrepancies in the Supreme Court's position on commercial speech).

13. 16 C.F.R. § 260.7(d) (1995); *see id.* (providing that a product may not be marketed as recyclable unless it can be collected, separated, or otherwise recovered from a solid waste stream for use as a raw material).

Existing law, the Subdivision Map Act, regulates the division of land for purposes of sale, lease, or finance.[1] Existing law also regulates the division of land by requiring the preparation, approval, and recordation of tentative and final maps for subdivisions creating five or more parcels.[2] Subdivisions creating less than five parcels generally only require a parcel map.[3]

Existing law also permits local agencies to require a subdivider to dedicate easements,[4] and impose other changes regarding design and improvements, as a

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1. *See* CAL. GOV'T CODE §§ 66410-66499.37 (West 1983 & Supp. 1995) (setting forth the Subdivision Map Act); Morehart v. County of Santa Barbara, 7 Cal. 4th 725, 748, 872 P.2d 143, 157, 29 Cal. Rptr. 2d 804, 818 (1994) (stating that the Subdivision Map Act regulates the division of land into parcels only for the purposes of sale, leasing, or financing and that the overall purpose of the act is to regulate subdivisions); 64 Op. Cal. Att'y Gen. 814, 816 (1981) (finding that the Subdivision Map Act requires that, before property is subdivided for sale, lease, or financing, a subdivision map must be prepared by the subdivider and be approved by the governing body of the city or county in which the land is located); *id.* (adding that the purposes of the Act are to promote orderly community development, to ensure proper improvement of the areas within the subdivision which are dedicated for public purposes by the subdivider, and to prevent fraud and exploitation by the subdivider); *see also* CAL. GOV'T CODE § 66424 (West Supp. 1995) (defining "subdivision" as the division of any unit or units of improved or unimproved land, or any portion thereof, shown on the latest equalized county assessment roll as a unit or as contiguous units, for the purpose of sale, lease, or financing, whether immediate or in the future).

2. CAL. GOV'T CODE § 66426 (amended by Chapter 955); *see id.* (requiring the preparation of tentative and final maps for subdivisions creating five or more parcels, five or more condominiums, a community apartment project containing five or more parcels, or for the conversion of a dwelling to a stock cooperative containing five or more dwelling units, except where certain conditions are met); *id.* §§ 66451-66472.1 (West 1983 & Supp. 1995) (setting forth the procedures to be followed in approving a tentative, final, or parcel map); *see, e.g., id.* § 66457 (West Supp. 1995) (governing the conditions for filing a final or parcel map with a local agency for approval); *id.* § 66458 (West Supp. 1995) (setting forth the conditions upon which the local agency shall approve or disapprove a map filed with it for review); *id.* §§ 66464-66468.2 (West 1983 & Supp. 1995) (setting forth the procedures for recording final and parcel maps).

3. *Id.* § 66426 (amended by Chapter 955); *see id.* (limiting the requirement of a tentative and final map to subdivisions creating, among other things, five or more parcels); *see also* 63 Op. Cal. Att'y Gen. 601, 602 (1980) (finding that generally, the filing of a tentative map and a final map is mandatory for subdivisions creating five or more parcels, but that only a parcel map is required for subdivisions creating four or fewer parcels). *But see* CAL. GOV'T CODE § 66426(a)-(f) (amended by Chapter 955) (providing that even where a tentative and final map may otherwise be required, only a parcel map shall be required for subdivisions meeting one of the following conditions: (1) the land before division contains less than five acres, each parcel created by the division abuts a public street or highway, and no dedications or improvements are required by the legislative body; (2) each parcel created by the division has a gross area of 20 acres or more and has an approved access to a maintained public street or highway; (3) the land consists of a parcel or parcels of land having approved access to a public street or highway, which comprises part of a tract of land zoned for industrial or commercial development, and which has the approval of the governing body as to street alignments and widths; (4) each parcel created by the division has a gross area of not less than 40 acres or is not less than a quarter of a quarter section; or (5) until January 1, 2003, the land is being subdivided solely for the creation of an environmental subdivision pursuant to Chapter 955); *id.* § 66426(f) (amended by Chapter 955) (providing that a parcel map shall be required for those subdivisions of land which, pursuant to California Government Code § 66426(a)-(e), do not require a tentative and final map).

4. *See* RESTATEMENT OF PROPERTY § 450 (1944) (defining an "easement" as an interest in land in the possession of another which meets the following conditions: (1) it entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists, (2) it entitles the owner of the interest to protection as against third persons from interference in such use or enjoyment, (3) it is not subject to the will of the possessor of the land, (4) it is not a normal incident of the possession of any land possessed by the owner

condition of map approval.[5] Before approving or carrying out a discretionary project,[6] local agencies are required, under the California Environmental Quality Act[7] (CEQA), to ensure changes are incorporated into the project that mitigate or avoid its significant effects on the environment.[8]

Existing law also permits the creation and transfer of conservation

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of the interest, and (5) it is capable of creation by conveyance); *see also* 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 434 (9th ed. 1987) (defining an "easement" as an interest in the land of another which entitles the owner of the easement to a limited use or enjoyment of the other's land).

5. *See, e.g.*, CAL. GOV'T CODE § 66411 (West Supp. 1995) (vesting authority to control and regulate the design and improvement of subdivisions in the legislative bodies of local agencies); *id.* § 66475 (West 1983) (authorizing the enactment of local ordinances that require the dedication of real property within a subdivision for streets and utilities and other public easements); *id.* § 66475.1 (West 1983) (permitting local ordinances to require the dedication of land for bicycle paths); *id.* § 66475.2 (West 1983) (addressing dedications for local transit facilities); *id.* § 66475.3 (West 1983) (addressing easements to ensure each parcel in the subdivision has the right to receive sunlight for solar energy systems); *id.* § 66477 (West Supp. 1995) (permitting dedication requirements for parks or recreational purposes); Friends of Lake Arrowhead v. San Bernardino County Bd. of Supervisors, 38 Cal. App. 3d 497, 505, 113 Cal. Rptr. 539, 543-44 (1974) (holding that powers to adopt local ordinances and regulations under the Subdivision Map Act can be implied, provided they bear a reasonable relation to, and are not inconsistent with, the purposes and requirements of the Act). *But see* CAL. GOV'T CODE § 66411.1(a) (West Supp. 1995) (limiting the scope of permissible local regulation in subdivisions of less than five lots, to dedication of rights-of-way, easements, and the construction of reasonable offsite and onsite improvements for the parcels being created); *id.* § 66475.4(b) (West Supp. 1995) (providing that a dedication requirement imposed as a condition of approval of a subdivision map is invalid if it is not reasonably necessary to meet public needs arising as a result of the subdivision).

6. *See* CAL. PUB. RES. CODE § 21080(a) (West Supp. 1995) (defining "discretionary projects" for the purposes of CEQA and to which CEQA applies, as including projects proposed to be carried out or approved by public agencies, including, but not limited to, the enactment and amendment of zoning ordinances, the issuance of zoning variances, the issuance of conditional use permits, and the approval of tentative subdivision maps, unless the project is otherwise exempt from CEQA); *see also* Natural Resources Defense Council, Inc. v. Arcata Nat'l Corp., 59 Cal. App. 3d 959, 969-70, 131 Cal. Rptr. 172, 178-79 (1976) (defining a "discretionary act" under CEQA, and to which CEQA applies, as one which requires personal deliberation, decision, and judgment, while "ministerial acts," to which CEQA does not apply, constitute performance of a duty in which the local agency or officer is left to exercise no choice or discretion).

7. *See* CAL. PUB. RES. CODE §§ 21000-21178.1 (West 1986 & Supp. 1995) (setting forth the provisions of CEQA).

8. *Id.* § 21081(a) (West Supp. 1995); *see id.* (forbidding any public agency from approving or carrying out a project for which an environmental impact report has been certified that identifies one or more significant effects of the project on the environment, unless the public agency makes one or more of the following findings with respect to each significant effect: (1) changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment; (2) the changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or should be, adopted by that other agency; or (3) specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report); *id.* § 21081(b) (West Supp. 1995) (requiring that if the project's significant effects are subject to a finding that economic, legal, social, technological, or other considerations, such as employment opportunities for highly trained workers, make mitigation infeasible, the public agency must also find that specific economic, legal, social, technological, or other benefits of the project outweigh its significant effect on the environment); *see also id.* § 21068 (West 1986) (defining "significant effect on the environment" as a substantial, or potentially substantial, adverse change in the environment).

easements,[9] designed to retain land in its natural, scenic, historical, agricultural, forested, or open-space condition.[10] The Open-Space Easements Act of 1974,[11] provides local governments and non-profit organizations the authority to acquire an open-space easement[12] in lands to preserve its unimproved character.[13]

Chapter 955 permits the subdivision of land, at the request of the landowner and upon approval by a local agency, to facilitate the sale of individual parcels and their use as mitigation[14] for impacts to the environment.[15] Before approving

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9. *See* CAL. CIV. CODE § 815.1 (West 1982) (defining "conservation easement" as any limitation in a deed, will, or other instrument in the form of an easement, restriction, covenant or condition, which is or has been executed by or on behalf of the owner of the land subject to such easement and which is binding on successive owners of such land, and the purpose of which is to retain land predominantly in its nature, scenic, historical, agricultural, forested, or open-space condition).

10. *Id.* § 815.2 (West 1982); *see id.* (describing a conservation easement as having the following characteristics: (1) voluntarily created and freely transferable, in whole or in part, as an interest in real property; (2) perpetual in duration; (3) constituting an interest in real property, and not personal in nature, despite the fact that it may be negative in character; and (4) having its characteristics governed by those specified in the instrument creating or transferring it); *id.* § 815.3 (West 1982) (authorizing only the following entities to acquire and hold conservation easements: (1) tax-exempt nonprofit organizations that are qualified under § 501(c)(3) of the Internal Revenue Code and qualified to do business in this state and which have as their primary purpose the preservation, protection, or enhancement of land in its natural, scenic, historical, agricultural, forested, or open-space condition or use; and (2) the state, or any city, county, city and county, district, or other state or local governmental entity, if otherwise authorized to acquire and hold title to real property, if the conservation easement is voluntarily conveyed); *see also id.* § 815.3(b) (West 1982) (providing that no local governmental entity may condition the issuance of an entitlement or use on the applicant's granting of a conservation easement). *See generally* 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 438 (9th ed. 1987) (discussing the nature, creation, transfer, and enforcement of conservation easements and the parties entitled to hold them).

11. *See* CAL. GOV'T CODE §§ 51050-51097 (West 1983) (setting forth the provisions of the Open-Space Easements Act).

12. *See id.* § 51075(d) (West 1983) (defining an "open-space easement" as any right or interest in perpetuity or for a term of years in open-space land acquired by a county, city, or nonprofit organization where the deed or other instrument granting such right or interest imposes restrictions which, through the limitation of future use, will effectively preserve for public use or enjoyment the natural or scenic character of such open-space land); *see also id.* (providing that an open space easement shall contain a covenant with the county, city, or nonprofit organization running with the land, either in perpetuity or for a term of years, that the landowner shall not construct or permit the construction of improvements except those for which the right is expressly reserved in the instrument, provided that such reservation would not be incompatible with maintaining and preserving the natural or scenic character of the land and would not be inconsistent with the purposes of the Act).

13. *Id.* § 51075(d) (West 1983); *see id.* (providing that an open-space easement, by definition, requires that the right or interest in the open land be acquired by a county, city, or nonprofit organization); *id.* (requiring the open-space easement to contain a covenant with the city, county, or nonprofit organization running with the land or in perpetuity that, among other things, is not incompatible with maintaining and preserving the natural or scenic character of the land); *id.* § 51083.5 (West 1983) (declaring when the grant of an open-space easement to a nonprofit organization shall be effective); *see also id.* § 51080 (West 1983) (providing that any county or city with an open-space plan may accept or approve the grant of an open-space easement on privately owned lands within the county or city).

14. *See* SENATE COMMITTEE ON HOUSING AND URBAN AFFAIRS, COMMITTEE ANALYSIS OF AB 1287, at 1 (July 3, 1995) (citing, as an example of mitigation techniques, situations where government officials require developers to permanently protect an acre of wildlife land for every acre of habitat their project would develop); ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT, COMMITTEE ANALYSIS OF AB 1287, at 3 (Apr. 19,

an environmental subdivision under Chapter 955, a local agency must find that the land, among other things, is assured of perpetual maintenance to meet the mitigation requirements it is proposed to serve.[16]

Only a parcel map, and not a tentative or final map, is required if land is being subdivided solely for the purpose of creating an environmental subdivision.[17] In addition, local agencies under Chapter 955, may not impose dedication, improvement or design requirements as conditions for approval of an environmental subdivision unless they are to ensure compliance with the conditions imposed by the agency requiring the mitigation.[18]

1995) (stating that mitigation generally occurs when local agencies permit development on one area of environmentally sensitive land with the assurance that another area is being dedicated for environmental preservation).

15. CAL. GOV'T CODE § 66418.2(a), (b) (enacted by Chapter 955); *see id.* § 66418.2(a) (enacted by Chapter 955) (providing that an "environmental subdivision" is a subdivision of land for biotic and wildlife purposes, meeting specified conditions); *see also id.* § 66418.2(f) (enacted by Chapter 955) (providing the use of environmental subdivisions shall apply only upon the written request of the landowner at the time the land is divided and that Chapter 955 is not intended to limit or preclude subdivision by other lawful means for the mitigation of impacts to the environment, or of the land devoted to these purposes, or to require the division of land for these purposes).

16. *Id.* § 66418.2(b) (enacted by Chapter 955); *see id.* (requiring a local agency, before approving or conditionally approving an environmental subdivision, to find each of the following: (1) factual biotic or wildlife data, or both, are available or will be available to the local agency to support the application for approval; (2) provisions have been made for the perpetual maintenance of the property as a biotic or wildlife habitat, or both, in accordance with the conditions specified by any local, state, or federal agency requiring mitigation; (3) an easement has been recorded in the county in which the land is located to ensure compliance with the conditions specified by any local, state, or federal agency requiring the mitigation; and (4) the real property is at least 20 acres in size, or less than 20 acres but is contiguous to other land that would also qualify as an environmental subdivision and the total combined acreage would be 20 acres or more); *id.* § 66418.2(b)(3) (enacted by Chapter 955) (requiring the easement to contain a covenant with a county, city, or nonprofit organization running with the land in perpetuity, that the landowner shall not construct or permit the construction of improvements other than those for which the right is expressly reserved in the instrument, and that such reservation shall not be inconsistent with the purposes of Chapter 955, nor incompatible with maintaining and preserving the biotic or wildlife character, or both, of the land).

17. *Id.* § 66426(e) (amended by Chapter 955); *see id.* § 66426(f) (amended by Chapter 955) (providing that tentative and final maps are not required for environmental subdivisions); *see also id.* § 66445 (West Supp. 1995) (directing that a parcel map, among other things, shall be prepared by a registered civil engineer or licensed land surveyor, showing the location of streets and property lines bounding the property, with each parcel and block numbered or lettered and each street named, and showing the location of each parcel and its relation to surrounding surveys). *But see id.* § 66428(a) (West Supp. 1995) (granting local agencies, via local ordinance, the authority to require a tentative map where a parcel map is required).

18. *Id.* § 66418.2(c) (enacted by Chapter 955); *see id.* (providing that notwithstanding California Government Code § 66411.1(a), any improvement, dedication, or design required by the local agency as a condition of approval of an environmental subdivision shall be solely for the purposes of ensuring compliance with the conditions required by the local, state, or federal agency requiring the mitigation); *see also id.* § 66411.1(a) (West Supp. 1995) (providing that local ordinances requiring improvements for the subdivision of less than five lots shall be limited to the dedication of rights-of-way, easements, and the construction of reasonable onsite and offsite improvements for the parcels being created); *id.* § 66419(a) (West Supp. 1995) (providing that improvements refer to, among other things, any street work and utilities to be installed by the subdivider for public or private streets and easements needed for the use of the owners in the subdivision, and local neighborhood traffic and drainage needs, as a precondition to approval of a final map); *id.* § 66419(b) (West Supp. 1995) (providing that "improvements" also include any other specific improvements which are

Once an environmental subdivision is recorded, a subdivider may only abandon its classification and use restrictions by reversion of the subdivided land to acreage if, among other things, none of the parcels created by the environmental subdivision have been used, set aside, or required for mitigation purposes.[19] Chapter 955 contains a sunset date, such that no legislative body is permitted to approve or conditionally approve an environmental subdivision pursuant to Chapter 955 on or after January 1, 2003.[20]

COMMENT

Chapter 955 was introduced to provide an economic, market-based use for land that has been rendered undevelopable due to its environmentally sensitive nature.[21] The measure allows an owner of environmentally-sensitive land to subdivide it for sale and preservation if the proper findings are made as provided by Chapter 955, and approval by the local agency is won.[22]

To facilitate the use of environmental subdivisions, Chapter 955 streamlines existing preservation procedures, such as the use of environmental easements, by only allowing dedications or improvements to be required by local agencies if they are needed to meet the mitigation requirements for which the land was

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necessary to ensure consistency with, or implementation of, the general plan or applicable specific plan).

19. *Id.* § 66418.2(d) (enacted by Chapter 955); *see id.* (providing that once an environmental subdivision is recorded, a subdivider may only abandon it by reversion to acreage if the local agency finds that all of the following conditions exist: (1) None of the parcels created by the environmental subdivision have been sold or exchanged; (2) none of the parcels have been used, set aside, or required for mitigation purposes; and (3) upon abandonment and reversion, the easement for biotic and wildlife purposes is extinguished); *see also id.* § 66418.2(e) (enacted by Chapter 955) (noting that if the environmental subdivision is abandoned and reverts to acreage pursuant to California Government Code § 66418.2(d), all local, state, and federal requirements shall apply); *id.* § 66499.12 (West 1983) (granting authority to initiate proceedings to revert subdivided land to acreage to the legislative body on its own motion, or by petition of all owners of record of the real property in the subdivision); *id.* § 66499.13 (West 1983) (setting forth the required contents of the petition for reversion to acreage).

20. *Id.* § 66418.2(g) (enacted by Chapter 955); *id.* § 66426(e) (amended by Chapter 955).

21. *See* AUTHOR'S BACKGROUND STATEMENT OF ASSEMBLY BILL 1287, at 2 (copy on file with the *Pacific Law Journal*) (stating that an environmental subdivision will apply the market principles of supply and demand to environmental mitigation by permitting owners of environmentally sensitive lands to meet the increasing demand of developers for off-site mitigation); SENATE COMMITTEE ON HOUSING AND URBAN AFFAIRS, COMMITTEE ANALYSIS OF AB 1287, at 1 (July 3, 1995) (stating that surveyors and officials in San Diego County want to promote the concept of environmental subdivisions to provide owners of land, that has been designated as wildlife habitat, the ability to sell the land to other developers who need such land for off-site mitigation); *id.* (noting that in San Diego, over 300 plant and animal species could be listed as endangered and, could thereby restrict development).

22. CAL. GOV'T CODE § 66418.2 (enacted by Chapter 955); *see supra* note 17 and accompanying text (listing the required findings the local agency must make prior to approving the creation of an environmental subdivision).

held.[23] Approval of environmental subdivisions is further expedited by the requirement that only parcel maps, and not more-detailed tentative and final maps, be prepared by the subdivider.[24]

During debate over its adoption, the need for a new species of subdivision was questioned due to the fact that pre-existing mechanisms, such as conservation easements and open-space easements, are available to accomplish largely the same purpose.[25] The author of Chapter 955, however, disagreed and contended, among other things, that environmental subdivisions provided flexibility for meeting the demand for mitigation not provided by existing conservation mechanisms.[26]

In addition, Chapter 955 may raise new issues in the debate over regulatory takings[27] because existing law holds a government regulatory action may not, in some situations, constitute a compensable taking if the landowner retains

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23. CAL. GOV'T CODE § 66418.2(c) (enacted by Chapter 955); *see id.* (providing that any improvement, dedication, or design required by the local agency as a condition of approval of an environmental subdivision shall be solely for the purpose of ensuring compliance with the conditions required by the local, state, or federal agency requiring the mitigation).

24. *Compare supra* note 18 and accompanying text (discussing the requirement under Chapter 955 that only a parcel map is necessary for approval of environmental subdivisions and listing the more limited statutory elements of parcel maps) *with* CAL. GOV'T CODE § 66434 (West Supp. 1995) (directing that final maps must be based on a survey and contain all survey and mathematical information and data necessary to accomplish the following: (1) locate all monuments; (2) locate and retrace any and all interior and exterior boundary lines appearing on the map, including bearings and distances of straight lines, radii and arc length or chord bearings and length for all curves; and (3) convey any information which may be necessary to determine the location of the centers of the curves and ties to existing monuments used to establish the boundaries of the subdivision); *id.* § 66434.2 (West Supp. 1995) (permitting a city or county to require additional information with a final map which may include, but is not limited to, information regarding building setback lines, flood hazard zones, seismic lines and setbacks, geologic mapping, and archaeological sites).

25. *See* SENATE COMMITTEE ON HOUSING AND URBAN AFFAIRS, COMMITTEE ANALYSIS OF AB 1287, at 3 (July 3, 1995) (stating that landowners can use existing law to create environmental subdivisions by combining various elements of existing subdivision and conservation laws); *see also* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1287, at 2 (June 1, 1995) (noting the similarity between the environmental subdivisions contained in AB 1287 and conservation easements, and questioning whether provisions for conservation easement should simply be expanded to meet the goals of AB 1287).

26. *See* AUTHOR'S BACKGROUND STATEMENT OF ASSEMBLY BILL 1287, at 2 (copy on file with the *Pacific Law Journal*) (arguing that land, subdivided into smaller parcels as provided in AB 1287 and sold in fee, provides flexibility in meeting developer's mitigation needs for which other mechanisms, such as conservation easements, may not be best suited); *id.* (noting that environmental subdivisions are not intended to replace or prevent the use of conservation easements, but are merely to provide a means of protecting environmentally sensitive areas with market-based principles).

27. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (formulating an early definition of a compensable regulatory taking as governmental regulation that "goes too far"); *see also* John E. Theuman, Annotation, *Supreme Court's Views as to What Constitutes "Taking," Within Meaning of Fifth Amendment's Prohibition Against Taking of Private Property for Public Use Without Just Compensation*, 89 L. Ed. 2d 977, 993 (1995) (reporting that according to the Supreme Court, a "regulatory taking" is a governmental action restricting the use of private property that is not sufficiently justified as serving a legitimate public interest or too severely restricts the owner's use of the property); *infra* notes 28-29 (discussing more recent formulations by the United States Supreme Court of the definition of a regulatory taking).

sufficient economic value despite the regulatory action.[28] Chapter 955 could serve to bolster the arguments of a government agency, presumably seeking to avoid paying compensation for the reduced value of private property that is a product of its action, because the availability of environmental subdivisions could provide a marginal increase in the retained value of the regulated property.[29]

Anthony J. Stanley

Environmental Protection; grass carp—aquatic plant pest control

Fish and Game Code §§ 6450, 6451, 6452, 6453, 6454, 6455, 6456, 6457, 6458 (new).
SB 157 (Kelley); 1995 STAT. Ch. 249

Existing law makes it unlawful to plant or place any aquatic plant, live fish, or fresh or salt water animal into California waters without first submitting it for inspection to the California Department of Fish and Game.[1]

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28. *See* Del Oro Hills v. City of Oceanside, 31 Cal. App. 4th 1060, 1076, 37 Cal. Rptr. 2d 677, 687-88 (1995) (*citing* Lucas v. So. Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992)) (noting that the Supreme Court has described two categories of regulatory actions which are compensable without a case-specific inquiry into the regulation's public benefit: (1) where a physical invasion has occurred; and (2) where the regulation denies the property owner all economically beneficial or productive use of the land); *see also* Lucas v. So. Carolina Coastal Council, 112 S. Ct. 2886, 2895 (1992) (finding "good reasons" for the court's "frequently expressed belief" that where the challenged action denies all economically beneficial or productive use of the land, a compensable taking has occurred); *Del Oro Hills*, 31 Cal. App. 4th at 1076, 37 Cal. Rptr. 2d at 687-88 (citing Gilbert v. City of Cambridge 932 F.2d 51, 57 (1st Cir. 1991)) (noting that a governmental ordinance is safe from a facial challenge if it preserves some economically viable use of the property).

29. *Compare* AUTHOR'S BACKGROUND STATEMENT OF ASSEMBLY BILL 1287, at 2 (copy on file with the *Pacific Law Journal*) (declaring that an environmental subdivision benefits landowners by "creat[ing] value from the environmentally sensitive land . . .") *and* SENATE COMMITTEE ON HOUSING AND URBAN AFFAIRS, COMMITTEE ANALYSIS OF AB 1287, at 1 (July 3, 1995) (providing that landowners who are prevented from developing their land, due to its likely designation as protected habitat, could be provided an economic return on their investments if, with the use of environmental subdivisions, they can sell pieces of their property to other developers) *with* Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994) (providing that one prong of the takings analysis examines whether the owner is denied an economically viable use of the land); *Lucas*, 112 S. Ct. at 2893 (*citing* Agins v. Tiburon, 447 U.S. 255, 260 (1980)) (noting that a challenger need not attack the public-interest element of the test if the challenged regulation denies all economically beneficial or productive use of the land).

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1. CAL. FISH & GAME CODE § 6400 (West 1984); *see id.* § 700 (West Supp. 1995) (establishing the California Department of Fish and Game within the California Resources Agency); *id.* § 5503 (West 1984) (making it unlawful to take fish solely for the removal of its eggs in order to develop a brood stock for aquaculture purposes); *id.* § 6401 (West 1984) (providing that one may purchase or receive fish from a registered aquaculturist and may stock a stream or lake with fish after having first obtained a permit from the California Department of Fish and Game); *id.* § 6650 (West 1984) (requiring every person harvesting kelp or other aquatic plants for profit in California waters to first obtain a license); CAL. CODE REGS. tit. 14, § 236(a) (1995) (prohibiting the import into California of prohibited species of live aquatic plants or animals); *cf.* FLA.

Chapter 249 requires the California Department of Fish and Game to establish regulations for the control of aquatic plant pests, using artificially-introduced, triploid species of grass carp in Imperial, Riverside, and San Bernardino Counties.[2] Chapter 249 provides that the California Department of Fish and Game must impose conditions in each permit in order to prevent the escape of grass carp from stocked areas, a violation of which is a crime.[3] Under Chapter 249, the California Department of Fish and Game is required to impose permit and inspection fees in order to recover the costs of the grass carp program, however, the initial program costs will be funded by a loan from the pooled money investment account in the general fund.[4]

STAT. ANN. § 369.20(7) (West Supp. 1995) (making it unlawful for any person to eradicate, control, remove, or in any manner alter any aquatic weeds or plants within Florida waters); LA. REV. STAT. ANN. § 328(b) (West 1995) (prohibiting the import of noxious plants into Louisiana without first obtaining a written permit); OKLA. STAT. ANN. tit. 29, § 6-601(a) (West 1991) (making it unlawful for one to import, transport, place or cause to be placed, cultivate, or propagate any noxious plant in the waters of Oklahoma); TEX. PARKS & WILD. CODE ANN. § 66.007(a), (b) (West 1991) (providing that no person may possess, sell, import, or cause to be placed into the waters of Texas any exotic, harmful, or potentially harmful fish or aquatic plants unless authorized by a permit from the Texas Department of Parks and Wildlife).

2. CAL. FISH & GAME CODE § 6450 (enacted by Chapter 249); *see id.* (requiring the California Department of Fish and Game to adopt regulations for the control of aquatic pests using triploid grass carp, including (1) restriction of the grass carp introductions to those rendered sterile immediately after eggs have been fertilized, (2) monitoring the retention of triploidy, (3) limiting aquatic plant pest control programs using the grass carp to the use of documented sterile grass carp only, (4) tagging of individual grass carp as the property of the owner, (5) requiring the posting of warnings against removing grass carp from stocked bodies of water, and (6) limiting the permits for use in waters on golf courses located in residential areas secure from the removal of grass carp to unauthorized waters); *id.* § 6455(e) (enacted by Chapter 249) (providing that permits may only be issued in Imperial, Riverside, and San Bernardino Counties); *see also* CAL. CODE REGS. tit. 14, § 5.37 (1995) (providing that no grass carp may be taken or possessed at any time); *id.* § 671(a), (c) (1994) (prohibiting the import, possession, or transportation of grass carp without a permit from the California Department of Fish and Game).

3. CAL. FISH & GAME CODE § 6455(a)-(d) (enacted by Chapter 249); *see id.* (limiting the issuance of permits to (1) waterways in which no open, fresh-water connections are present, (2) waterways under the full control of the permittee, (3) waterways with sufficient dissolved oxygen and aquatic vegetation to support the ecosystem after the introduction of the grass carp, and (4) waterways not within a 100-year flood plain); *id.* § 6455(f) (enacted by Chapter 249) (providing that anyone introducing grass carp into a waterway without a permit is subject to a fine of not more than $5000, imprisonment of not more than one year, or both); 1995 Cal. Legis. Serv. ch. 249, sec. 1(b), at 714 (enacting CAL. FISH & GAME CODE §§ 6450-6458) (providing that since 1985 the triploid grass carp has been used in the Coachella and Imperial Valleys in a program organized by the California Department of Fish and Game, and the program was restricted to this area due to its closed drainage, nuisance aquatic vegetation threatening surrounding agriculture, and the presence of hydrilla, a noxious aquatic weed); *see also* CAL. FISH & GAME CODE § 15505(a)-(e) (West 1984) (providing that the director of the California Department of Fish and Game, upon finding a disease or parasite to be detrimental to aquatic plants or animals, may quarantine the area, post warning notices, hold or impound parasitized plants and animals, restrict the movement of plants or animals within the area, and order the destruction and removal of affected plants and animals); *id.* § 15509 (West 1984) (restricting the movement of aquatic plants or animals, subject to quarantine, unless a permit is first obtained).

4. CAL. FISH & GAME CODE § 6454 (enacted by Chapter 249); *see id.* (requiring the California Department of Fish and Game to impose permit and inspection fees in order to recover the initial and ongoing cost of the grass carp program); *id.* § 6458 (enacted by Chapter 249) (providing that the costs to operate this program for the first year will be financed by a loan from the pooled money investment account in the general

Furthermore, Chapter 249 specifies that permitees are to submit an annual report to the California Department of Fish and Game and the Department is to submit a compilation of all permittee reports to the appropriate legislative policy and fiscal committees.[5] Moreover, Chapter 249 does not restrict grass carp programs approved by the California Department of Fish and Game on or before June 1, 1995.[6]

COMMENT

There has been a strong interest in using the grass carp for weed control as expressed by golf course owners and residential communities, since the grass carp represents a cost effective and longer lasting method of weed control than mechanical or chemical means.[7] However, anytime an exotic species such as the

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fund, and the amount to be financed is to be determined by the pool money investment board and the California Department of Fish and Game); *see also* Cal. Legis. Serv. ch. 249, sec. 1(j), at 714 (enacting CAL. FISH & GAME CODE §§ 6450-6458) (stating that Chapter 249 establishes a user-funded program to compensate for the additional workload placed upon existing state agency personnel).

5. CAL. FISH & GAME CODE §§ 6451, 6453(a), (c) (enacted by Chapter 249); *see id.* § 6451 (enacted by Chapter 249) (requiring all providers of grass carp to submit certification that the grass carp used are triploid, disease-free, and acceptable to the California Department of Fish and Game); *id.* § 6452 (enacted by Chapter 249) (setting forth the information that must be submitted before a permit may be issued by the California Department of Fish and Game, which includes (1) the type of waterway to be stocked; (2) lack of connection to adjacent fresh water; and (3) aquatic management problems including acreage of aquatic plants, desired vegetation, number and size of grass carp needed, and sensitive plants or animals within the waterway to be stocked); *id.* § 6453(a) (enacted by Chapter 249) (requiring permittees to annually provide to the California Department of Fish and Game the following: (1) the recommended number and size of triploid grass carp, (2) the existing number and size of triploid grass carp in the waterway, (3) acreage of aquatic plants in the year prior to the introduction of the grass carp as well as in the current year); *id.* § 6453(c) (enacted by Chapter 249) (providing that the California Department of Fish and Game must report to the appropriate policy and fiscal committees of the Legislature, using the information contained in permittee reports, a summary of the use of the triploid grass carp for aquatic plant pest control); *see also* 1995 Cal. Legis. Serv. ch. 249, sec. 1, at 714 (enacting CAL. FISH & GAME CODE §§ 6450-6458) (providing that the expanded use of triploid grass carp into the proper areas of California will allow for information to be compiled to facilitate evaluation of future introductions of triploid grass carp into more sensitive areas); *id.* (finding that the reporting requirements of Chapter 249 will allow regulatory agencies to more readily assess problematic aquatic pests, specifically study their distribution, and determine the effectiveness and impact of grass carp introductions).

6. CAL. FISH & GAME CODE § 6456 (enacted by Chapter 249).

7. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 157, at 2 (July 10, 1995); *see id.* (stating that the use of grass carp for weed control has been successfully used in Russia, and studies have shown positive results in the California counties of Imperial and Coachella); Citizens Against 2,4-D v. Watt, 527 F. Supp. 465, 469 (W.D. Okla. 1981) (providing four alternatives to chemical weed control of watermilfoil, including: (1) lowering the water level to expose the watermilfoil, (2) mechanically harvesting the watermilfoil, (3) screening the suns rays with fiberglass, and (4) biological control through the use of grass carp which eat watermilfoil); *see also* 1995 Cal. Legis. Serv. ch. 249, sec. 1, at 714 (enacting CAL. FISH & GAME CODE §§ 6450-6458) (providing that nuisance aquatic vegetation has proven problematic for water delivery, forced closure of recreational bodies of water, hampered navigation, in which case the grass carp has been successful in effectively reducing these problems, as well as may provide for considerable savings, thereby preventing the potential, devastating economic impact of a noxious plant pest like hydrilla); *id.* (stating that the enactment of California Fish and Game Code §§ 6450-6458 will provide California with ten years of aquatic management

grass carp, endemic to China and Siberia, is introduced into a non-native ecosystem, concerns are raised regarding its effect on the existing ecosystem.[8]

Daniel L. Keller

Environmental Protection; hazardous substance and material spills—reporting

Government Code §§ 8589.7, 51018 (amended); Health and Safety Code §§ 25270.8, 25359.4 (amended).
AB 204 (Cannella); 1995 STAT. Ch. 155

Existing law provides that the Office of Emergency Services (OES)[1] is the central point for emergency reporting of spills, unauthorized releases, or accidental releases of hazardous materials.[2]

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experience with the triploid, sterile grass carp, gained from public funding by the Imperial Irrigation District, the Coachella Valley Water District, the California Department of Food and Agriculture, the United States Department of Agriculture, and other California agencies).

8. *See* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 157, at 2 (July 10, 1995) (discussing the grass carp as having been officially designated as prohibited by the California Department of Fish And Game since the early 1960's and commenting on the mixed results that followed other exotic species into California waters); *see also* 1995 Cal. Legis. Serv. ch. 249, sec. 1, at 714 (enacting CAL. FISH & GAME CODE §§ 6450-6458) (providing that some illegal introductions of nonsterile grass carp have occurred in California and that the availability of legal sterile grass carp will reduce the impact of fertile grass carp on the ecosystem); Texas Parks & Wildlife Dept. v. Texas Ass'n of Bass Clubs, 622 S.W.2d 594, 595 (Tex. Ct. App. 1981) (dismissing a suit undertaken by the Association of Bass Clubs concerned with the potential effect that transplanting grass crap into Lake Conroe would have on the quality of bass fishing). *See generally* Ameraquatic, Inc. v. State, No. 93-2619, 1995 Fla. App. LEXIS 864, at *21-22 (W.D. Fla. Feb. 7, 1995) (holding that there is no scientific basis for allowing a permit exemption for weed control by mechanical or physical means, and not for chemical means, since chemical means may preserve the habitat whereas the alternatives would not); *Testimony of Phyllis N. Windle, Project Director Office of Technology Assess: House Merchant Marine Harmful Non-indigenous Species into United States* (Oct. 5, 1993) (discussing the introduction of the black carp and comparing it with the grass carp).

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1. *See* CAL. GOV'T CODE § 8585 (West 1992) (establishing, within the Governor's office, the OES); *see also id.* § 8574.17 (West 1992) (noting that the OES is required to set up a notification and reporting system that works in conjunction with the state toxic disaster procedures and plans).

2. *Id.* § 8589.7(a), (b) (amended by Chapter 155); *see id.* (requiring the OES to notify and coordinate the appropriate state and local administering agencies that may be required to respond to the spill, unauthorized release, or accident involving hazardous materials); *see also id.* § 8589.2(b) (West Supp. 1995) (indicating that for the purposes of California Government Code § 8589.7, a "hazardous material" is the same as defined in California Health and Safety Code § 25501(k)); *id.* § 8589.7(b)(1)-(3) (amended by Chapter 155) (delineating the different agencies the OES must notify depending upon the type of spill, unauthorized release, or accident); CAL. HEALTH & SAFETY CODE § 25501(k) (West 1992) (defining a "hazardous material" as any material that, because of its nature, poses a significant hazard to the environment or human health and safety); *id.* (including within the classification of a "hazardous material," "hazardous substances" as defined in California Health and Safety Code § 25501(l)(1)-(4), and "hazardous waste" as defined by California Health and Safety Code §§

Existing law requires that every owner[3] or operator[4] of a tank facility[5] notify the OES immediately upon discovering that a spill of one barrel[6] or more of petroleum has occurred.[7]

Prior law held that the owner or operator of a tank facility had to notify the local administering agency by using a twenty-four hour emergency number or 911, immediately upon discovering that a spill of one barrel or more of petroleum had occurred.[8]

Existing law establishes that in situations involving a rupture,[9] explosion, or fire involving a pipeline, the owner or operator of that facility must notify the OES and local agency with fire suppression capabilities.[10]

25115, 25117 and 25316). *See generally* SENATE COMMITTEE ON TOXICS AND PUBLIC SAFETY MANAGEMENT, COMMITTEE ANALYSIS OF AB 204, at 1 (June 19, 1995) (clarifying that the reason for making the OES the central point for spill reporting was to reduce confusion as to which state and/or local administering agencies needed to be notified in case of an emergency spill).

3. *See* CAL. HEALTH & SAFETY CODE § 25270.2(d) (West Supp. 1995) (defining an "owner" as the person who owns the tank facility or part of the tank facility).

4. *See id.* § 25270.2(c) (West Supp. 1995) (stating that an "operator" is the person responsible for the overall operation of a tank facility).

5. *See id.* § 25270.2(k) (West Supp. 1995) (establishing a "tank facility" as one or more aboveground storage tanks which contain petroleum and are used by a single business at one site); *id.* (noting that a "tank facility" includes any integral pipeline between the tanks); *id.* (indicating that a pipeline is "integral" if it meets any of the following criteria: (1) the pipe is within the containment area, (2) the pipe is between the containment area and the first valve outside the containment area, or (3) the pipe is connected to the first valve on the exterior of the tank if a containment area is not required); *see also id.* § 25270.2(i) (West Supp. 1995) (clarifying that "storage" means the containment, handling, or treatment of petroleum for any amount of time); *id.* § 25270.2(j) (West Supp. 1995) (providing that a "storage tank" is any aboveground tank used to store petroleum, but does not include any of the following: (1) a pressure vessel or boiler, (2) a storage tank containing hazardous waste where the owner or operator of the tank has been issued a hazardous waste facility permit by the Department of Toxic Substances Control (DTSC), or (3) an aboveground oil production tank which is subject to California Public Resources Code § 3106 which provides for supervision of tanks used for the production of gas and oil). *See generally id.* § 58000 (West Supp. 1995) (establishing the Department of Toxic Substance Control within the governmental body known as the California Environmental Protection Agency).

6. *See id.* § 25270.8 (amended by Chapter 155) (providing that "one barrel" is equivalent to 42 gallons).

7. *Id.*; *see id.* (establishing that the reporting requirement is founded pursuant to California Water Code § 13272(a)); *see also* CAL. WATER CODE § 13272(a) (West Supp. 1995) (providing that any person who causes or permits petroleum to be spilled into any waters of the state must report the spill to the OES).

8. 1994 Cal. Legis. Serv. ch. 1214, sec. 5, at 6163 (amending CAL. HEALTH & SAFETY CODE § 25270.8).

9. *See* CAL. GOV'T CODE § 51018(c) (amended by Chapter 155) (defining a "rupture" as every unintentional leak, except in the case of a crude oil leak of less than five barrels in a rural or plant system, so long as no fire, explosion, bodily injury or contamination of a waterway results).

10. *Id.* § 51018(a) (amended by Chapter 155). *See generally Chemical Spills, Pipeline Ruptures Among Aftereffects of L.A. Earthquake,* ST. ENVTL. DAILY (BNA) (Jan. 20, 1994) (indicating one of the worst after-effects of the Los Angeles earthquake was an incident involving the rupture of a crude oil pipeline); *id.* (providing that as a result of the rupture, an estimated 2903 barrels of oil spilled in to the Santa Clara River, another 597 barrels emptied onto the side streets, and another break in the same pipeline resulted in an explosion and fire that burned 17 parked cars, 4 homes, and injured a motorcyclist).

Existing law further requires that any release of a reportable quantity[11] of a hazardous substance[12] must be reported to the Department of Toxic Substances Control (DTSC) in writing, within thirty days of discovery, unless certain criteria apply.[13]

Chapter 155 clarifies the definition of a reportable quantity by defining it as any reportable quantity as established in section 302, Title 40 of the Code of Federal Regulations.[14] Chapter 155 requires that, in situations involving spills or releases of petroleum products from aboveground storage tanks, the owner or operator of the facility must notify the OES.[15] However, Chapter 155 does not always require the owner or operator to notify the local administering agency when such spills occur, as they will receive notification in turn by the OES.[16]

Chapter 155 further clarifies that the requirement to report hazardous substance releases is applicable only to those incidents that occurred on or after January 1, 1994.[17]

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11. *See* CAL. HEALTH & SAFETY CODE § 25359.4(c)(1) (amended by Chapter 155) (defining a "reportable quantity" as that which is established by Part 302 of Title 40 of the Code of Federal Regulations, commencing with § 302.1); *id.* § 25359.4(c)(2) (amended by Chapter 155) (including, within the definition of "reportable quantity," any quantity that is not reportable under California Health and Safety Code § 25359.4(c)(1), but that may cause a significant threat to public health and/or safety); *see also* 40 C.F.R. § 302.3 (1994) (finding that a "reportable quantity" is any quantity as set forth in Title 40 of the Code of Federal Regulations §§ 302.1-302.8). *See generally id.* § 302.4 (listing the types and quantities of hazardous wastes and substances that require notification).

12. *See* CAL. HEALTH & SAFETY CODE § 25316 (West 1992) (providing that a "hazardous substance" is any number of substances as defined by the United States Code or the Environmental Protection Agency (EPA), including those substances classified as hazardous wastes by the California Health and Safety Code). *But see id.* § 25317 (West 1992) (excluding certain petroleum, natural gas products, ash, and nontoxic stormwater runoff from the definition of a hazardous substance).

13. *Id.* § 25359.4(b) (amended by Chapter 155); *see id.* (finding that if any of the following criteria are met, the hazardous substance release does not need to be reported within 30 days to the DTSC: (1) the release is permitted, (2) the release is authorized by the state, (3) the release requires immediate reporting to the OES, or (4) the release has already been reported to the DTSC or the OES).

14. *Id.* § 25359.4(c)(1) (amended by Chapter 155); *see id.* § 25359.4(c)(2) (amended by Chapter 155) (indicating that the "reportable quantity" also includes any quantity of a hazardous substance that is not listed in Title 40 of the Code of Federal Regulations §§ 302.1 to 302.8, but may pose a significant threat to public health and safety or to the environment). *See generally* 40 C.F.R. §§ 302.1-302.8 (1994) (defining terms and listing substances which, if spilled in specific amounts, need to be reported).

15. CAL. GOV'T CODE § 8589.7(a) (amended by Chapter 155).

16. *Id.* § 8589.7(b)(4) (amended by Chapter 155); *see id.* (requiring the OES to notify the local administering agency that has jurisdiction over the spill or release); SENATE FLOOR, COMMITTEE ANALYSIS OF AB 204, at 2 (July 3, 1995) (declaring that such spills need to be reported to the OES only, as the OES will in turn notify the local agency); *see also* CAL. HEALTH & SAFETY CODE § 25270.8 (amended by Chapter 155) (indicating that the only time an owner or operator of a hazardous waste facility would be required to notify the local responding agency, would be in those situations where the owner or operator determines that such emergency response is needed).

17. CAL. HEALTH & SAFETY CODE § 25359.4(b)(5) (amended by Chapter 155); *see* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 204, at 2 (July 3, 1995) (noting that the report will not have to be made if the incident occurred before January 1, 1994); *see also* DEPARTMENT OF TOXIC SUBSTANCES CONTROL, ADDENDUM TO SB 2057 AND AB 2061 FACT SHEET, at 1 (Jan. 4, 1995) (providing that there was some confusion relating to California Health and Safety Code § 25359.4 as to whether its provisions were to be

COMMENT

Chapter 155 is intended to be a followup to last year's Chapter 1214 (AB 3404) which established the OES as the central processing and notification point for hazardous substance releases.[18]

Chapter 155 is also designed to reduce redundancy in reporting requirements by exempting owners and operators from notifying local administration agencies in the event of hazardous substance spills from aboveground storage tanks.[19]

Chapter 155 is further intended to clarify the definition of a "reportable quantity" by indicating that it is not just a fixed quantity of a released hazardous substance, but is rather a measure of the amount of a hazardous substance released within a twenty-four hour period, where a release beyond that amount, in that time, will trigger the requirement to notify.[20]

Finally, Chapter 155 is supposed to clarify that the provisions of California Health and Safety Code section 25359.4 do not apply to releases of hazardous substances that occurred before January 1, 1994.[21]

Darrell C. Martin II

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retroactively applied to past spills); *id.* (asking the Legislature to clarify whether the provisions were to be retroactive or if they were to apply only to those spills occurring after January 1, 1994).

18. *See* Senator Sal Cannella, Statement Read to the Senate Toxics Committee Regarding AB 204 (June 19, 1995) (copy on file with the *Pacific Law Journal*) (noting that AB 204 is clean-up legislation from Chapter 1214 of 1994); SENATE COMMITTEE ON TOXICS AND PUBLIC SAFETY MANAGEMENT, COMMITTEE ANALYSIS OF AB 204, at 2 (July 3, 1995) (finding that AB 204 is a follow-up bill to AB 3404 from the 1994 session); *see also* 1994 Cal. Legis. Serv. ch. 1214, sec. 2, at 6160 (enacting CAL. GOV'T CODE § 8589.7); *id.* sec. 4.5, at 6162 (amending CAL. GOV'T CODE § 51018); *id.* sec. 5, at 6163 (amending CAL. HEALTH & SAFETY CODE § 25270.8).

19. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 204, at 2 (July 3, 1995); *see id.* (finding that such reports of such spills need be made only to the OES, which will in turn notify the local agency); *see also* Letter from Victor Weisser, President, California Council for Environmental and Balance, to Assemblymember Bernie Richter, Chair, Assembly Environmental Safety and Toxic Materials Committee, at 2 (Mar. 20, 1995) (copy on file with the *Pacific Law Journal*) (demonstrating support for the provisions of AB 204 and speculating that the provisions will greatly simplify reporting requirements, thus facilitating quicker response to accidental spills of hazardous substances). *But see* Letter from Bonnie Holmes, Legislative Advocate, Sierra Club California, to Assemblymember Bernie Richter, Chair, Assembly Environmental Safety and Toxic Materials Committee (Mar. 25, 1995) (copy on file with the *Pacific Law Journal*) (noting that redundancy in the reporting of incidents involving ruptures, explosions, or fires involving pipelines was essential to protecting the public health and environment).

20. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 204, at 2 (July 3, 1995).

21. *Id.*

Environmental Protection; hazardous waste—recycling

Health and Safety Code §§ 25143.11, 25200.14.1, 25201.14 (new).
AB 483 (Alpert); 1995 STAT. Ch. 625

Existing law establishes the California Environmental Protection Agency (CEPA) and, within it, the Department of Toxic Substances Control (DTSC).[1] Existing law generally requires that all hazardous waste facilities,[2] including hazardous waste storage facilities,[3] receive a permit issued by the DTSC which

1. CAL. HEALTH & SAFETY CODE § 58000 (West Supp. 1995); *see* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1060, at 1 (Aug. 31, 1995) (stating that the Department of Toxic Substances Control (DTSC) is to be the lead agency for enforcing the provisions of the Resource Conservation and Recovery Act (RCRA)); *id.* (finding that under the RCRA, persons who generate, transport, treat, store, or dispose of hazardous waste are subject to a number of regulatory requirements); *id.* (noting that the Hazardous Waste Control Law (HWCL) and the Hazardous Waste Treatment Reform Act (HWTRA) require that the DTSC issue hazardous waste facilities permits to facilities which generate hazardous waste and subsequently store that hazardous waste beyond specified time limits); *see also* 42 U.S.C.A. § 6904(a) (West 1995) (establishing that the provisions of the RCRA to be carried out by the states may be carried out by interstate agencies); *id.* § 6926(b) (West 1995) (declaring that any state seeking to administer and enforce a hazardous waste program pursuant to the RCRA must submit an application for approval); *id.* (indicating further that upon approval, the state will be authorized to carry out such a program in lieu of the federal program and issue permits for the storage, treatment, or disposal of hazardous waste).

2. *See* CAL. HEALTH & SAFETY CODE § 25117.1 (West 1992) (defining a "hazardous waste facility" as any land or structure that is used for treatment, storage, or disposal of hazardous waste); *see also id.* § 25117(a)(1) (West 1992) (explaining that "hazardous waste" is a waste which, because of its quantity or characteristics, may cause or contribute to an increase in mortality, injury, or illness, or pose a substantial hazard to human health or the environment when improperly treated, stored, or disposed of); *id.* § 25117(a)(2), (c) (West 1992) (establishing further that "hazardous waste" is a waste which meets any of the criteria for the identification of a hazardous waste adopted by the DTSC pursuant to California Health and Safety Code § 25141); *cf.* 42 U.S.C.A § 6903(5)(A), (B) (West 1995) (defining "hazardous waste" similarly). *See generally* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 483, at 1 (Sept. 8, 1995) (noting that because the DTSC has adopted tests which are more stringent than the equivalent federal tests, more types of wastes meet the definition of "hazardous waste" in California than meet the federal definition).

3. *See* CAL. HEALTH & SAFETY CODE § 25123.3(b)(1)-(7) (West Supp. 1995) (providing the definition of a "hazardous waste storage facility," along with the exemptions for classification of such a facility).

allows them to store,[4] manage,[5] or treat[6] hazardous waste.[7]

Existing law exempts certain hazardous waste facilities from DTSC permitting requirements if they are processing recyclable materials[8] onsite[9] and recycling the materials within ninety days of their generation.[10] Existing law provides that some recyclable materials, managed according to specific criteria and meeting the definition of a non-RCRA hazardous waste,[11] will be exempt from classification and regulation as hazardous waste.[12] However, existing law

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4. *See id.* § 25123 (West 1992) (defining "storage" as the holding of hazardous wastes for a temporary period); *cf.* 42 U.S.C.A. § 6903(33) (West 1995) (defining "storage," when used in connection with hazardous waste, similarly).

5. *See* CAL. HEALTH & SAFETY CODE § 25117.2 (West 1992) (noting that "hazardous waste management" is the transportation, transfer, recycling, recovery, disposal, handling, processing, storage, and treatment of hazardous waste); *cf.* 42 U.S.C.A. § 6903(7) (West 1995) (defining "hazardous waste management" similarly).

6. *See* CAL. HEALTH & SAFETY CODE § 25123.5 (West Supp. 1995) (defining "treatment" as any method, technique, or process which changes or is designed to change the physical, chemical, or biological character or composition of any hazardous waste or any material contained therein, or removes or reduces its harmful properties or characteristics for any purpose); *id.* (establishing further that "treatment" does not include the removal of residues from manufacturing process equipment for the purposes of cleaning that equipment); *cf.* 42 U.S.C.A. § 6903(34) (West 1995) (defining "hazardous waste treatment" similarly).

7. CAL. HEALTH & SAFETY CODE § 25201(a) (West Supp. 1995); *cf.* 42 U.S.C.A. § 6925(a) (West 1995) (stating that each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste must have a permit issued pursuant to the provisions of that section).

8. *See* CAL. HEALTH & SAFETY CODE § 25120.5(a)-(c) (West 1992) (defining a "recyclable material" as a hazardous waste that is capable of being recycled, including (1) a residue, (2) a spent material such as a stripping solution, or (3) a material that is so contaminated that it cannot be used for the purpose for which it was once used).

9. *See id.* § 25117.12 (West 1992) (noting that an "onsite facility" is a hazardous waste facility at which hazardous waste is produced and which is owned by, leased to, or under the control of the producer of the waste).

10. *Id.* § 25143.2(c)(2)(B) (West Supp. 1995).

11. *See id.* § 25117.9 (West 1992) (defining "non-RCRA hazardous waste" as all hazardous waste regulated in the state, other than RCRA hazardous waste); *see also* ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 1060, at 2-3 (May 24, 1995) (noting that "non-RCRA hazardous waste" generally means any non-aqueous waste that is not otherwise classified as RCRA hazardous waste, an extremely hazardous waste, or a special waste, and is classified as hazardous solely because, when it is combined with an equivalent weight of water, it exhibits characteristics of corrosiveness that are applicable to liquid wastes, or it corrodes steel at a specified rate, or if, when subjected to specified leaching tests, it contains substances that breach specific threshold limits); CAL. CODE REGS. tit. 22, § 66261.101 (1994) (defining "non-RCRA hazardous waste" similarly). *See generally* CAL. HEALTH & SAFETY CODE § 25120.2 (West 1992) (defining "RCRA hazardous" waste as all waste identified as a hazardous waste in Title 40 of the Code of Federal Regulations §§ 261.1-261.35); CAL. CODE REGS. tit. 22, §§ 66261.30 (1995), 66261.100 (1994) (defining "RCRA hazardous waste").

12. CAL. HEALTH & SAFETY CODE § 25143.2(d)(5) (West Supp. 1995); *see id.* (explaining that, in order to be exempt from classification as a hazardous waste, the material must be used or reused as an ingredient in an industrial process to make another product and that any hazardous wastes discharged into the atmosphere as a result of this process must be in compliance with applicable air pollution laws); *id.* § 25143.2(d)(5)(A)-(H) (West Supp. 1995) (finding that if the material is being reused as an ingredient in a process to make another product, the material cannot be treated before introduction into the process unless it is being treated by one of the following procedures: (1) filtering, (2) screening, (3) sorting, (4) sieving, (5) grinding, (6) physical or

also holds that some recyclable materials will always be classified and regulated as hazardous waste by the DTSC.[13]

Existing law requires owners and operators of hazardous waste facilities, operating pursuant to a permit-by-rule[14] or grant of conditional authorization,[15] to complete and file a Phase I environmental assessment[16] with the DTSC.[17]

Chapter 625 requires that, on or before January 1, 1997, the DTSC adopt regulations exempting secondary materials[18] from specified hazardous waste control laws.[19]

Chapter 625 exempts from DTSC permitting requirements those facilities that puncture, drain, or crush aerosol cans.[20] Chapter 625 also exempts those facilities

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gravity separation without additional heat or chemicals, (7) pH adjustment, or (8) viscosity adjustment); *Id.* § 25143.9 (West Supp. 1995) (requiring that in order for a recyclable material to be excluded from classification as a hazardous waste, all of the following criteria must be met: (1) the container or tank holding the hazardous waste is marked with a label indicating that it contains excluded recyclable material or used oil if applicable; (2) the owner or operator has emergency response plans and procedures that are applicable to the material being held and are in accordance with the requirements of California Health and Safety Code § 25504(b); (3) the material is being stored and handled in accordance with all applicable local ordinances; and (4) if applicable, the person exporting the material is proceeding in accordance with California Health and Safety Code § 25162.1 regulating the exportation of recyclable materials classified as a hazardous waste).

13. *Id.* § 25143.2(e) (West Supp. 1995); *see id.* (finding that certain recyclable materials will always be classified as hazardous wastes and be subject to the regulatory requirements of the DTSC regardless of whether the recyclable material meets the exemption requirements of California Health and Safety Code § 25143.2(b)); *see also id.* § 25143.2(b)(1)-(3) (West Supp. 1995) (indicating that unless otherwise provided, a recyclable material shall not be classified as a waste if all of the following are met: (1) if it is used or reused as an ingredient in an industrial process to make a product, (2) if it is used as a safe and effective substitute for a commercial product, and (3) if it is returned to the original process from which the material was generated without first being reclaimed).

14. *See id.* § 25117.14 (West Supp. 1995) (defining "permit-by-rule" as a provision of the regulations stating that a facility or activity is deemed to have a hazardous waste facilities permit if it meets the requirements of that section).

15. *See id.* § 25200.3(a)-(o) (West Supp. 1995) (describing the requirements for classification and operation as a hazardous waste generator operating under a grant of conditional authorization); *id.* (including within its provisions (1) methods of treatment, (2) fees under such grants, (3) exceptions to classification, and (4) revocation of grants of conditional authorization).

16. *See id.* § 25200.14(b) (West Supp. 1995) (defining a "Phase I environmental assessment" as a preliminary site assessment based on reasonably available knowledge of the facility, including historical use of the property, prior releases, visual surveys, records, consultant reports, and regulatory agency correspondence); *id.* (indicating that assessments produced for other purposes may be used in place of the Phase I environmental assessment, provided that the assessment meets the requirements of this section and was completed no more than 3 years prior to the date which the Phase I environmental assessment was required).

17. *Id.* § 25200.14(a) (West Supp. 1995).

18. *See id.* § 25143.11(b) (enacted by Chapter 625) (defining "secondary materials" as materials that are reclaimed and returned for use into the original process in which they were generated).

19. *Id.* § 25143.11(a) (enacted by Chapter 625); *see id.* (finding that when adopting the regulations for exemptions, the DTSC must consider the restrictions listed in Title 40 of the Code of Federal Regulations § 261.4(a) which relate to federal exemptions for secondary materials).

20. *Id.* § 25201.14(a)(1) (enacted by Chapter 625); *see id.* § 25201.14(a)(1)(A) (enacted by Chapter 625) (finding that the equipment used for the puncturing, draining, or crushing of aerosol cans must meet the following requirements: (1) it is designed to capture the gaseous and liquid contents of the cans; (2) it must prevent fire, explosion, or unauthorized releases of hazardous constituents within the cans; and (3) it must

that separate used oil from water if the process is administered through approved methods.[21] Chapter 625 finally exempts totally enclosed treatment facilities,[22] as long as the owners or operators of the facilities meet specified criteria for conducting treatment operations.[23]

Chapter 625 requires that, on or before July 1, 1997, the DTSC must complete an evaluation of the Phase I environmental assessment requirements to determine if changes in the requirements are needed.[24] Chapter 625 further

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prevent worker exposure to the hazardous materials released from the cans); *id.* § 25201.14(a)(1)(B) (enacted by Chapter 625) (requiring that the cans used in these processes be recycled as scrap metal); *see also id.* § 25201.14(c)(1)-(4) (enacted by Chapter 625) (providing that the owner or operator of a facility that punctures, drains, or crushes aerosol cans must meet all of the following criteria: (1) compliance with California Health and Safety Code § 25201.5, which provides conditions for generators treating less than 500 pounds or 55 gallons of hazardous waste in any calendar month; (2) keeping adequate records to demonstrate that the generator has complied with the provisions of Chapter 625; and (3) submission of a one-time fee in the amount of $100, unless the generator is already subject to another fee under California Health and Safety Code § 25200.3).

21. *Id.* § 25201.14(a)(2) (enacted by Chapter 625); *see id.* § 25201.14(a)(2)(A)-(E) (enacted by Chapter 625) (providing that in the process of separating the used oil from water, the process must be administered by using one of the following methods: (1) gravity separation; (2) a centrifuge; (3) membrane technology; (4) heating the water containing the used oil, so long as the temperature does not exceed a temperature that is 20 degrees below the flashpoint temperature of the used oil component within the water; or (5) the addition of demulsifiers to the water containing the used oil); *id.* (requiring that after the oil has been separated, it must be transported to an authorized oil recycler); *see also id.* § 25201.14(b)(1)-(3) (enacted by Chapter 625) (indicating that separation methods using any of the following materials will not be acceptable for exemption: (1) contaminated groundwater, (2) water containing any measurable amount of gasoline or more than two percent of a combination of Number One or Number Two diesel fuel, or (3) used oil and water which contain constituents that render the material a hazardous material); *id.* § 25201.14(c)(5)(A) (enacted by Chapter 625) (establishing that the owners or operators of those facilities separating used oil from water must comply with the Phase I environmental assessment requirements of California Health and Safety Code § 25200.14(a)-(c), (e), (h)); *id.* (providing further that compliance with the Phase I environmental requirement will not be required until the DTSC completes an evaluation of the assessment requirement under California Health and Safety Code § 25200.14.1, and until any revisions resulting from the evaluation are implemented); *id.* § 25201.14(c)(5)(B) (enacted by Chapter 625) (clarifying that the owner or operator of the facility will not be required to conduct any site investigations or initiate remediation activities until the DTSC adopts regulations specifying the criteria and procedures for such action).

22. *See* CAL. CODE REGS. tit. 22, § 66260.10 (1995) (defining a "totally enclosed treatment facility" as a facility that is directly connected to an industrial process and which is constructed in such a manner that the release of a hazardous waste into the environment during treatment is prevented); *see also* SENATE COMMITTEE ON TOXIC AND PUBLIC SAFETY MANAGEMENT, COMMITTEE ANALYSIS OF AB 483, at 3 (July 17, 1995) (defining a "totally enclosed treatment facility" identically as defined in California Code of Regulations § 66260.10).

23. CAL. HEALTH & SAFETY CODE § 25201.14(a)(3) (enacted by Chapter 625); *see id.* § 25201.14(c)(1)-(4) (enacted by Chapter 625) (providing that the owner or operator of a totally enclosed treatment facility must meet all of the following criteria: (1) compliance with California Health and Safety Code § 25201.5 which provides conditions for generators treating less than 500 pounds or 55 gallons of hazardous waste in any calendar month; (2) keeping adequate records to demonstrate that the generator has complied with the provisions of Chapter 625; and (3) submission of a one-time fee in the amount of $100, unless the generator is already subject to another fee under California Health and Safety Code § 25200.3).

24. *Id.* § 25201.14.1(a) (enacted by Chapter 625); *see id.* § 25201.14.1(b)(1), (2) (enacted by Chapter 625) (providing that while making the evaluation, the DTSC must consider the following: (1) whether the Phase I environmental assessment should continue to encompass the entire facility or just a portion; and (2)

mandates that, on or before March 1, 1998, the DTSC must recommend any needed changes to the Governor and the Legislature.[25]

COMMENT

Chapter 625 is intended to encourage California businesses to implement hazardous waste reduction plans, including the recycling of hazardous waste that they produce, by exempting certain facilities and processes from regulatory control of the DTSC.[26] The sponsor of Chapter 625, the San Diego Industrial Environmental Association, states that California businesses are making good faith efforts to reduce the amount of hazardous waste being produced, but the DTSC fails to recognize their efforts as recycling and hence imposes its regulations and fees.[27] Supporters of Chapter 625 state that the DTSC has incorrectly categorized and regulated several processes as treatments when they should have been categorized as recycling.[28]

Opponents of Chapter 625 argue that its provisions deregulating certain hazardous waste operations will be detrimental to the environment and the workers in these operations.[29]

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the extent to which, and under what conditions, the information in a Phase I environmental assessment should me maintained as confidential information not available to the public or governmental agencies other than the DTSC).

25. *Id.* § 25201.14.1(a) (enacted by Chapter 625).

26. SENATE COMMITTEE ON TOXIC AND PUBLIC SAFETY MANAGEMENT, COMMITTEE ANALYSIS OF AB 483, at 4 (July 17, 1995); *see id.* (noting that the San Diego Industrial Environmental Association believes that other types of treatment programs such as totally enclosed treatment facilities and secondary material reclamation and reuse, should also be exempt from DTSC regulation).

27. STATE BOARD OF EQUALIZATION, LEGISLATIVE BILL ANALYSIS OF AB 483, at 1 (Apr. 12, 1995) (copy on file with the *Pacific Law Journal*).

28. Letter from Victor Weisser, President, California Council for Environmental and Economic Balance, to Assemblymember Bernie Richter, Chair, Assembly Environmental Safety and Toxic Materials Committee, at 1-2 (Apr. 11, 1995) (copy on file with the *Pacific Law Journal*).

29. Letter from Gary A. Patton, General Counsel, The Planning and Conservation League, to Senator Jack O'Connell, Chair, Senate Committee on Toxics and Public Safety Management (Aug. 11, 1995) (copy on file with the *Pacific Law Journal*); *see id.* (stating that deregulation of an oil and water separation facility that use heat in its processes will allow significant opportunities for toxic air contamination to be carried out without regulatory oversight, thus exposing workers to toxic dangers).

Environmental Protection; hazardous waste—transportable treatment units

Health and Safety Code §§ 25200.2, 25250.1,[1] 25250.16 (amended).
SB 289 (Wright); 1995 STAT. Ch. 423

Existing law requires the Department of Toxic Substances Control (DTSC)[2] to regulate transportable hazardous waste treatment units[3] through a permit process implemented by the DTSC.[4] Existing law also requires the operator of a unit to pay a fee equivalent to that paid by treatment[5] facilities operating pursuant

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1. California Health and Safety Code § 25250.1 was amended by Chapter 630 (AB 1964) due to its subsequent enactment to Chapter 243 (SB 289). However, because both bills would amend the section in an identical manner, an analysis of Chapter 630 is beyond the scope of this legislative review. *Compare* 1995 Cal. Legis. Serv. ch. 423, sec. 2, at 2665 (amending CAL. HEALTH & SAFETY CODE § 25250.1) *with* 1995 Cal. Legis. Serv. ch. 630, sec. 10, at 3691 (amending CAL. HEALTH & SAFETY CODE § 25250.1). *See generally* CAL. GOV'T CODE § 9605 (West 1992) (explaining the effect of an amendment of a section by two or more acts during the same session of the Legislature).

2. *See* CAL. HEALTH & SAFETY CODE § 58000 (West Supp. 1995) (creating the Department of Toxic Substance Control within the California Environmental Protection Agency); *see also id.* § 58004 (West Supp. 1995) (enumerating the responsibilities of the DTSC).

3. *See id.* § 25123.4 (West Supp. 1995) (defining a "hazardous waste treatment unit" as mobile equipment which performs treatment, is transported to the facility to perform treatment, and is only temporarily stationed at the facility); CAL. CODE REGS. tit. 26, § 22-66260.10 (1995) (defining "transportable treatment unit" as any mobile equipment which performs a treatment, is transported to a facility to perform treatment, and is not permanently stationed at a single facility); *see also* Sabin Russell, *Rolling Chemical Plant Truck Treats Liquid Poisons*, S.F. CHRON., Jan. 21, 1988, at C1 (explaining that a transportable treatment unit, working through three tanks on a flatbed truck, pumps 1000 gallons of waste into a first tank for dissolved metals to be chemically separated from water, then a second tank neutralizes and reduces solids to clay-like clods to be hauled to a landfill, and finally a third tank purifies the water to be pumped into a municipal sewer).

4. CAL. HEALTH & SAFETY CODE § 25200.2(a) (amended by Chapter 423); *see* CAL. CODE REGS. tit. 26, §§ 22-67450.1, 22-67450.2(a) (1993) (requiring hazardous waste treatment units to operate under permits, and setting forth the procedure for acquiring a permit-by-rule for a transportable hazardous waste treatment unit). *See generally* Greg Johnson, *Mobile Incinerator*, L.A. TIMES, Apr. 1, 1986, at 1 (discussing mobile incinerators that destroy polychlorinated biphenyls and their advantage of eliminating the costly and dangerous practice of hauling PCB-laden soil across the country to a permanent facility for treatment).

5. *See* CAL. HEALTH & SAFETY CODE § 25027.8 (West 1992) (defining "treatment" as any method, technique, or process designed to change the biological character or composition of medical waste in order to eliminate its potential for causing disease); *see also id.* § 25090(a)-(d) (West Supp. 1995) (setting forth the methods of treating hazardous waste as including incineration and steam sterilization); *cf.* ARIZ. REV. STAT. ANN. § 49-921(11) (1995) (defining "treatment" as any method, technique, or process designed to alter the physical, chemical, or biological character or composition of hazardous waste so as to neutralize such waste or to render such waste nonhazardous, safer for transport, amendable for recovery, amendable for storage or reduced in volume).

to a permit-by-rule.[6] A violation of laws regulating hazardous waste[7] is a criminal offense.[8]

Chapter 423 allows the DTSC to regulate transportable hazardous waste treatment units through a standardized permit, as well as by a permit-by-rule and a hazardous waste facilities permit.[9] Chapter 423 allows the DTSC to determine the appropriate type of permit without regard to whether the units are used at onsite[10] or offsite[11] treatment units.[12] Under Chapter 423, if the DTSC has not

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6. CAL. HEALTH & SAFETY CODE § 25205.7(b)(1) (West Supp. 1995); *see id.* § 25117.14 (West Supp. 1995) (defining "permit-by-rule" as a provision of the adopted regulations, which states that a facility or activity is deemed to have a hazardous waste facilities permit if it meets the requirements of that provision); *see also* William Trombley, *Plan to Ease Toxic Waste Rules Opposed*, L.A. TIMES, July 29, 1992, at A3 (explaining that the permit-by-rule approach was designed to decrease the burden on smaller businesses that were treating limited amounts of toxic substances); *id.* (declaring that the permit-by-rule requires the business to report what materials are being treated and how the work is accomplished, but is problematic because the permit-by-rule relies upon the honor system due to the Department of Toxic Substance Control's inability to inspect each business more than once every three or four years).

7. *See* CAL. HEALTH & SAFETY CODE § 25115 (West 1992) (defining "extremely hazardous waste" as any hazardous waste or mixture of hazardous wastes which may cause death, disabling personal injury, or serious illness because of its quantity, concentration, or chemical characteristics); *id.* § 25117(a) (West 1992) (defining "hazardous waste" as a waste which, because of its quantity, concentration, or physical, chemical, or infectious characteristics, may cause, or contribute to an increase in mortality illness, or pose a hazard to human health or the environment); *id.* § 25316(a)-(g) (West 1992) (defining "hazardous substance" as including, but not limited to, any substance, other than oil, discharged into or upon navigatable waters, any hazardous chemical substance or mixture upon which the Environment Protection Agency has taken action, and any hazardous waste or extremely hazardous waste); *id.* § 25317 (West 1992) (excluding from the definition of "hazardous substance" petroleum, natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel, or the ash produced by a resource recovery facility utilizing a municipal solid waste stream); *cf.* COLO. REV. STAT. ANN. § 25-15-101(6)(a) (West Supp. 1995) (defining "hazardous waste" as any material which has no commercial use or value, or which is, or will be, discarded by the possessor because of its quantity, concentration, or physical or chemical characteristics may cause, or significantly contribute to, mortality, serious irreversible, or incapacitating reversible illness or pose a threat to human health or the environment when improperly treated, transported, or stored).

8. CAL. HEALTH & SAFETY CODE § 25154 (West 1992); *see id.* § 25191(a) (West Supp. 1995) (setting the punishment for a first offense at not less than $2000 or more than $25,000 for each day of violation, or by imprisonment in jail for not more than 1 year, or both); *id.* (setting the punishment for any subsequent offense at not less than $2000 or not more than $50,000 for each day of violation, or imprisonment in prison for 16, 20, 24 months or not more than one year in jail); *id.* § 25191(b) (West Supp. 1995) (setting forth the acts subject to punishment as including, but not limited to, making false statements or representations, destroying, altering, or concealing any record relating to hazardous waste, or withholding information regarding a danger to the public health or safety when that information has been requested by the DTSC).

9. *Id.* § 25200.2(a) (amended by Chapter 423); *see id.* § 25201.6(a) (West Supp. 1995) (stating that a series A standardized permit is issued when a facility meets any of the following: (1) the total influent volume of liquid hazardous waste treated is more than 50,000 gallons per calendar month; (2) the total influent volume of solid hazardous waste treated is more than 100,000 pounds per calendar month; (3) treatment of both exceeds the amount allowed of either liquid or solid waste; (4) the total facility storage is greater than 500,000 gallons for liquid hazardous waste; (5) the total facility storage is greater than 500 tons of solid hazardous waste; (6) when the storage facility exceeds the requirements of either liquid or solid hazardous waste; or (7) the volume of liquid or solid hazardous waste is stored in a facility for more than one calendar year).

10. *See id.* § 25117.12 (West 1992) (defining "onsite facility" as a hazardous waste facility at which hazardous waste is produced and is owned by, leased to, or under control of, the producer of the facility); *cf.* KAN. STAT. ANN. § 65-3430(l) (1995) (defining "on-site facility" as a facility that the generator uses

issued proposed regulations or has not adopted emergency regulations by March 1, 1996, all transportable hazardous waste treatment units operating under permit-by-rule would continue to be regulated under permit-by-rule, and all transportable hazardous waste treatment units operating under a full permit would be eligible for operation under a standardized permit.[13]

Existing law requires management of used oil[14] as a hazardous waste until it meets specified purity standards, or is excluded under hazardous waste regulation because it is deemed a recyclable material.[15] In addition, existing law defines "used oil" to exclude oil which contains more than 1000 ppm halogens, and presumes that such oil is a hazardous waste because it has been mixed with halogenated hazardous waste.[16] However, an individual may rebut this presumption by showing that the oil does not contain hazardous waste.[17]

Existing law prohibits a person from recycling oil without obtaining authorization from the DTSC, pursuant to issuance of a hazardous waste facilities permit or a grant of interim status, unless exempted under management of recyclable materials.[18]

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exclusively for the treatment, storage, or disposal of wastes generated on the property, and includes the geographically contiguous property which may be divided by a right-of-way, provided the access between the properties is at a crossroads intersection and access is gained by going across the right-of-way or noncontiguous properties, but connected by a right-of-way to which the public does not have access); OKLA. STAT. ANN. tit. 27A, § 2-7-103(14) (West Supp. 1995) (defining "on-site treatment, storage, recycling or disposal" as treatment, storage, recycling, or disposal at a hazardous waste facility of hazardous waste generated by the owner of the facility).

11. *See* CAL. HEALTH & SAFETY CODE § 25117.11 (West 1992) (defining "offsite facility" as not being an onsite facility); *id.* § 25117.12 (West 1992) (defining "onsite facility" as a hazardous waste facility that produces such waste and that is owned, leased to, or under the control of, the producer of the waste); *cf.* KAN. STAT. ANN. § 65-3430(k) (1995) (defining "off-site facility" as a facility where treatment, storage, or disposal activities are conducted by a person other than the hazardous waste generator); OKLA. STAT. ANN. tit. 27A, § 2-7-103(13) (West Supp. 1995) (defining "off-site treatment, storage, recycling or disposal" as the treatment, storage, recycling, or disposal at a hazardous waste facility of hazardous waste not generated by the owner of the facility).

12. CAL. HEALTH & SAFETY CODE § 25200.2(a) (amended by Chapter 423).

13. *Id.* § 25200.2(d) (amended by Chapter 423).

14. *See id.* § 25250.1(a)(1)(A) (amended by Chapter 630) (defining "used oil" as oil refined from crude oil, or any synthetic oil, that has been used, and has been contaminated with physical or chemical impurities).

15. *Id.* § 25250.4 (West 1992); *see id.* § 25143.2(a)-(h) (West Supp. 1995) (excluding certain materials as hazardous waste because they are recyclable); *id.* § 25250.1(b)(1) (amended by Chapter 630) (providing that used oil is not subject to regulation by the DTSC if it meets the recycled oil requirements, is not hazardous pursuant to requirements set forth by DTSC, and is not mixed with waste listed as a hazardous waste under federal law); *see also* 40 C.F.R. § 261.1 (1995) (setting forth wastes that are deemed hazardous); CAL. HEALTH & SAFETY CODE § 25250.1(a)(3)(A)-(B) (amended by Chapter 630) (setting forth purity standards for recycled oil).

16. CAL. HEALTH & SAFETY CODE § 25250.1(a)(1)(B)(v) (amended by Chapter 630).

17. *Id.*

18. *Id.* § 25250.16(a) (amended by Chapter 423); *see id.* § 25200(a)-(d) (West 1992) (setting forth the authority of the DTSC to issue permits for hazardous waste facilities and proscribing the duties, conditions and requirements under the permit); *id.* § 25200.5 (West Supp. 1995) (allowing the issuance of a permit under an interim status and prohibiting certain activities under this status); *see also id.* § 25143.2(a)-(d) (West Supp.

Chapter 423 requires any person authorized to recycle used oil pursuant to the issuance of a hazardous waste facilities permit or a grant of interim status to assure that halogens removed from used oil in the recycling process are not burned, except at an authorized facility.[19]

COMMENT

Chapter 423 is a legislative response to requests to provide an intermediate classification for a hazardous waste treatment unit.[20] By creating an intermediate permit classification, Chapter 423 allows a standardized permit to regulate more than a permit-by-rule, but less than a full permit.[21] Thus, Chapter 423 creates a hybrid regulation for "transportable treatment units" (TTU) that reflects their hybrid status.[22] Chapter 423 still allows the DTSC to develop regulations to govern the classifications of hazardous waste treatment units.[23] However, if the DTSC has not issued proposed regulations or adopted emergency regulations within sixty days of enactment, then Chapter 423 provides guidelines to be implemented until the DTSC has established specified regulations.[24]

In 1994, the Legislature enacted Chapter 1154 which changed the allowed small quantities of halogens in used oil, but this legislation threatens to substantially damage the state's used oil recycling collection program.[25] Thus, the

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1995) (excluding certain materials as hazardous waste because they are recyclable).

19. *Id.* § 25250.16(b) (amended by Chapter 423).

20. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS of SB 289, at 2 (Apr. 27, 1995); *see* SENATE COMMITTEE ON TOXIC AND PUBLIC SAFETY MANAGEMENT, COMMITTEE ANALYSIS OF SB 289, at 2 (Apr. 3, 1995) (stating that existing law only allows regulation under either a full permit or a permit-by-rule without providing a middle ground for hazardous waste treatment units that treat wastes onsite, and thus does not meet the requirements of California Health and Safety Code § 25201.6); *see also* CAL. HEALTH & SAFETY CODE § 25201.6 (West Supp. 1995) (requiring that standardized permits can only be used offsite).

21. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS of SB 289, at 2 (Apr. 27, 1995); *see* SENATE COMMITTEE ON TOXIC AND PUBLIC SAFETY MANAGEMENT, COMMITTEE ANALYSIS OF SB 289, at 2 (Apr. 3, 1995) (stating that there is a significant difference between a full permit and a permit-by-rule, and that a standardized permit will allow stricter regulation than a permit-by rule, but less than a full permit, which is reserved for facilities required to be regulated under federal law); *see also* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 289, at 3 (July 23, 1995) (noting that hazardous waste treatment units would appropriately be regulated under a level below full permit because these units are not required to be regulated under federal law).

22. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 289, at 3 (July 15, 1995); *see* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 289, at 3 (July 23, 1995) (noting that TTUs are considered to treat waste onsite, rather than offsite, even though the units are moved offsite once treatment is completed).

23. CAL. HEALTH & SAFETY CODE § 25200.2(a) (amended by Chapter 423); *see* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS of SB 289, at 2 (Apr. 27, 1995) (indicating that the DTSC could regulate transportable treatment units under a standardized permit, a permit-by-rule, or a full permit).

24. CAL. HEALTH & SAFETY CODE § 25200.2(d) (amended by Chapter 423).

25. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 289, at 3 (July 15, 1995); *see* 1994 Cal. Legis. Serv. ch. 1154, sec. 3, at 5660-62 (enacting CAL. HEALTH & SAFETY CODE § 25250.13, amending CAL. HEALTH & SAFETY CODE §§ 25143.2, 25143.9, 25250.1, 25250.5, 25250.8, 25250.12, 25250.17, 25250.19) (changing the allowed total halogens from 1000 ppm to 3000 ppm).

purpose of Chapter 630[26] is to add provisions mistakenly deleted from this 1994 legislation which clarified that "do-it-yourself" spent motor oil be exempted from existing limits on halogen content.[27] Since Chapter 630 provides this exception, there is an incentive for businesses to continue offering used oil collection programs.[28] Thus, Chapter 630 is a step towards protecting the environment from people who dispose of used oil improperly.[29]

Chad D. Bernard

Environmental Protection; laboratory certification—hazardous waste testing

Health and Safety Code § 25198 (amended, repealed, and new).
SB 651 (Wright); 1995 STAT. Ch. 301

Under existing law, the analysis of any hazardous waste[1] required by the hazardous waste control laws must be performed by an environmental laboratory[2]

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26. *See supra* note 1 (explaining that Chapter 630 chaptered out portions of Chapter 423).

27. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 289, at 2 (June 28, 1995); *see id.* at 3 (declaring that this provision is necessary so that commercial operators who accept spent motor oil may continue without problems regarding halogen content).

28. ASSEMBLY COMMITTEE ON ENVIRONMENTAL SAFETY, COMMITTEE ANALYSIS OF SB 289, at 4 (June 6, 1995); *see id.* (noting that once federal law and the DTSC issued a guidance that exempted Conditionally Exempt Small Quantity Generators from the halogen limit, stores like Chief and Kragen entered into the used oil collection program, but the same companies are now threatening to pull out of the program).

29. *See* Kyle D. Roberts, Comment, *Texas Responds to the Used Oil Problem: The Used Oil Collection, Management, and Recycling Act*, 45 SMU L. REV. 1247, 1255 (1991) (noting that the Texas Legislature enacted laws governing used oil because citizens were disposing of oil improperly due to the lack of adequate collection facilities, and that improper disposal harms the environment and wastes valuable source of energy). *But see* John R. White, *Recycling Proposal Is Flawed*, BOSTON GLOBE, Mar. 28, 1992, at 55 (asserting that having a facility to collect used oil does not guarantee that anyone will bring the waste in for recycling). *See generally* Elizabeth A. Beiring, Comment, *Used Oil in the United States: Environmental Impact, Regulation, and Management*, 41 BUFF. L. REV. 157, 161-64 (1993) (discussing the environmental harm that used oil causes when improperly disposed of); Jeff Pelline, *New Drive to Recycle Motor Oil Firms React to Environmental Pressure and State Deposit Law*, S.F. CHRON., Mar. 9, 1992, at B1 (indicating that, nationwide, do-it-yourself oil changers generate more than 200 million gallons of used oil, nearly 180 million of which is disposed of improperly); *id* (noting that California generates 36 million gallons of "do-it-yourself oil," 33 million gallons of which are disposed of improperly).

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1. *See* CAL. HEALTH & SAFETY CODE § 25117 (West 1992) (defining "hazardous waste" as any waste that may cause or significantly contribute to an increase in mortality or serious irreversible or incapacitating illness, or pose a substantial present or potential hazard to human health or environment when properly contained, or as defined by the State Department of Health Services pursuant to California Health and Safety Code § 25141); *id.* § 25141 (West 1992) (directing the Department of Health and Human Services to develop criteria for the identification of hazardous waste); *see also* CAL. CODE REGS. tit. 22, § 66261.3(a)-(e) (1995) (setting forth the procedure for identifying hazardous waste which includes reference to federal regulations). *See generally* 40 C.F.R. § 261.3 (1994) (defining "hazardous waste").

2. *See* CAL. HEALTH & SAFETY CODE § 1010(c)(2) (West Supp. 1995) (defining "environmental laboratory" as any facility or vehicle equipped to carry out environmental analyses).

certified by the State Department of Health Services.[3] A violation of health control laws is a crime.[4] Chapter 301 permits a hazardous waste facility to perform certain analyses of hazardous waste in a laboratory not certified as an "environmental laboratory," but which is owned or operated by the same person who owns or operates the hazardous waste facility where that waste is managed.[5] Chapter 301 allows these exceptions only until January 1, 2001.[6]

COMMENT

Chapter 301 was introduced to reduce the burden on hazardous waste facilities which must routinely submit waste for testing to a certified laboratory, often resulting in delay.[7] Chapter 301 allows hazardous waste facilities to use an uncertified laboratory to perform these routine tests, thereby avoiding the cost and delay resulting from the required use of certified labs.[8] In order to ensure proper

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3. *Id.* § 25198(b) (amended, repealed, and enacted by Chapter 301); *see id.* (instructing that the required analyses be performed by a laboratory certified by the department); *see also id.* § 1011 (West Supp. 1995) (requiring the Department of Health Services to regulate environmental laboratory certification); *id.* § 25111 (West 1992) (defining "department" as the Department of Toxic Substances Control); CAL. CODE REGS. tit. 22, §§ 67440.1-67440.7 (1993) (specifying application procedures, test categories, Quality Assurance Program requirements, equipment requirements, analytical procedures, personnel qualifications, and proficiency testing); *id.* § 66264.13(a), (b) (1993) (referring generally to other regulations controlling the testing of specific types of hazardous waste); *cf.* ME. REV. STAT. ANN. tit. 22, § 567 (West 1992) (requiring a certification program for laboratories submitting any data to the Department of Environmental Protection); N.H. REV. STAT. ANN. § 147-A:5-a(I)-(III) (1990) (providing that any laboratory conducting tests for the presence of hazardous waste may voluntarily apply for certification from the division of waste management).

4. CAL. HEALTH & SAFETY CODE § 1021 (West 1990); *see id.* (allowing the Department of Health Services to issue citations and levy civil penalties, if it determines that a laboratory is in violation of this chapter or any other regulation); *see also id.* §§ 1022-1028 (West 1990 & Supp. 1995) (setting forth penalties, fines, and imprisonment for other violations).

5. *Id.* § 25198(c)(1) (enacted, amended, and repealed by Chapter 301); *see id.* § 25198(c)(2)(A)-(C) (enacted, amended, and repealed by Chapter 301) (allowing hazardous waste facilities to perform the following analyses in an uncertified laboratory: (1) an initial analysis to determine whether a facility will accept the hazardous waste for transfer storage or treatment, (2) analyses to check the accuracy of the initial analysis, and (3) analyses used to determine if hazardous waste received matches the waste designated on an accompanying manifest); *see also id.* § 25198(c)(2)(E) (enacted, amended, and repealed Chapter 301) (clarifying that the exemption set forth in California Health and Safety Code § 25198(c) does not apply to analyses performed for disposal purposes).

6. *Id.* § 25198(g) (enacted, amended, and repealed by Chapter 301); *see id.* (repealing § 25198 of the California Health and Safety Code as of January 1, 2001, unless a statute enacted on or before that date, extends or deletes that date); *id.* § 25198(c), (d) (enacted, amended, and repealed by Chapter 310) (reinstating the laboratory certification requirements that were in place before passage of Chapter 301).

7. SENATE COMMITTEE ON TOXICS AND PUBLIC SAFETY MANAGEMENT, COMMITTEE ANALYSIS OF SB 651, at 2 (May 15, 1995); *see id.* (noting that it is difficult and impractical for facilities to wait for two or three days for a certified lab to complete these routine tests, and that the cost of being certified is roughly $1400 to $3000 per year); *id.* at 2-3 (stating that requirements vary from region to region within California).

8. CAL. HEALTH & SAFETY CODE § 25198(c) (enacted, amended, and repealed by Chapter 301); *see* Thomas W. Moran, *Choosing an Environmental Consultant for Your Auditing Needs*, BUILDINGS, June 1991, at 32 (stating that in-house laboratory analyses can keep costs down, and make the auditing process more efficient); *see also* Lynda Lesowski, *Public Relations Firms Clean Up on Toxic Waste*, BUS. J. (Portland), Feb.

disposal of waste, Chapter 301 expressly requires that a facility, before disposing of any hazardous waste, obtain an analysis from a certified laboratory.[9]

California is the only state to offer this exception to environmental testing laboratories.[10]

Michael A. Guiliana

Environmental Protection; oil spills—response

Government Code § 8670.13.1 (new); §§ 8670.3,[1] 8670.7 (amended); Health and Safety Code § 41801 (amended); Water Code § 13169 (repealed).
SB 1083 (Beverly); 1995 STAT. Ch. 265

Existing law, the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act,[2] vests authority for the prevention, response, preparedness,

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13, 1989, at 4 (suggesting that because of environmental regulations, environmental engineering and consulting companies that offer analysis of hazardous waste experienced unprecedented growth, and saw revenues exceeding $468 million in 1987). *See generally* Michael Martz, *Natural Fit: ETS Expands Services in Richmond,* RICHMOND TIMES-DISPATCH, May 8, 1995, at D16 (describing a Virginia company's growth into the environmental laboratory testing market).

9. SENATE COMMITTEE ON TOXICS AND PUBLIC SAFETY MANAGEMENT, COMMITTEE ANALYSIS OF SB 651, at 3 (May 15, 1995); *see id.* (stating that in order to protect public health and safety, analyses for disposal purposes should continue to be carried out by certified labs); *see also* CAL. HEALTH & SAFETY CODE § 25198 (c)(2)(E) (enacted, amended, and repealed by Chapter 301) (providing that the exception to the certified lab requirement does not apply to analyses used for disposal purposes).

10. *See* Telephone Interview with Kathryn Morrison, Legislative Consultant to Senator Cathie Wright (May 30, 1995) (notes on file with the *Pacific Law Journal*) (suggesting that California is the only state to offer this exception to environmental testing laboratories).

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1. Section 8670.3 of the California Government Code was subsequently, but neutrally, amended by AB 1549 (Chapter 940); *see* 1995 Cal. Legis. Serv. ch. 940, sec. 1.5, at 5605-08 (amending CAL. GOV'T CODE § 8670.3 and enacting demarcation changes which re-lettered some subdivisions contained in § 8670.3); *see also* CAL. GOV'T. CODE § 9605 (West 1992) (explaining the effect of an amendment of a section by two or more different acts during the same legislative session). For purposes of this article, references to subdivisions contained in California Government Code § 8670.3 will be in accord with that section as last amended, by AB 1549, Chapter 940.

2. *See* CAL. GOV'T CODE § 8670.1 (West 1992) (setting forth the sections of the Government and Public Resources Codes which comprise the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act, which consist of: CAL. GOV'T CODE §§ 8574.1-8574.10; *id.* §§ 8670.1-8670.72; and CAL. PUB. RES. CODE §§ 8750-8760).

training, containment, and cleanup of oil[3] spilled or discharged[4] in the marine waters[5] of the state with the Administrator for Oil Spill Response.[6] The

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3. *See* CAL. GOV'T CODE § 8670.3(k) (amended by Chapter 940) (defining "oil" "as any kind of petroleum, liquid hydrocarbons, or petroleum products or any fraction or residues therefrom, including, but not limited to crude oil, bunker fuel, gasoline, diesel fuel, aviation fuel, oil sludge, oil refuse, oil mixed with waste, and liquid distillates from unprocessed natural gas").

4. *See id.* § 8670.3(t) (amended by Chapter 940) (defining "spill or discharge," under existing law, as any release of at least one barrel (42 gallons) of oil into marine water which is not authorized by any federal, state, or local government entity).

5. *See id.* § 8670.3(h) (amended by Chapter 940) (defining "marine waters" as those waters subject to tidal influence, except for waters in the Sacramento-San Joaquin Delta upstream from a line running north and south through the point where Contra Costa, Sacramento, and Solano Counties meet).

6. *See id.* § 8670.4. (West 1992) (providing that the Administrator for Oil Spill Response is a chief deputy director of the Department of Fish and Game who is appointed Administrator by the Governor and serves at the pleasure of the Governor); *see also id.* (providing that the appointment of the Administrator is subject to the advice and consent of the Senate).

7. *Id.* § 8670.5 (West Supp. 1995); *see id.* (providing that the Governor shall ensure that the state fully and adequately responds to all oil spills in marine waters); *id.* (requiring that the Administrator, at the direction of the Governor, implement activities relating to oil spill response, preparedness, spill containment, and clean-up); *id.* (requiring the Administrator to also cooperate with any federal on-scene coordinator, as provided in the National Contingency Plan); *id.* § 8670.7(a) (amended by Chapter 265) (providing that the Administrator, subject to the Governor's control, has primary authority to direct prevention, removal, abatement, response, containment, and cleanup with regard to all aspects of any oil spill in the marine waters of the state); *id.* § 8670.8(a) (West 1992) (mandating that the Administrator carry out training programs in response, containment, cleanup operations, equipment deployment, and the planning and management of these programs); *id.* (noting that the training programs may include training for members of the California Conservation Corps, other response personnel employed by the state and other public entities, interested members of the public, personnel from marine facilities, commercial fishermen, or volunteers); *id.* § 8670.10(a) (West 1992) (requiring the Administrator, in coordination with all appropriate federal, state, and local government entities, to carry out announced and unannounced emergency drills to test response and cleanup operations, equipment, contingency plans, and procedures implemented pursuant to the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act); *id.* § 8670.10(b) (West 1992) (directing the Administrator to establish standards for all operators of vessels and marine facilities to meet during the emergency drills, and mandating that the standards establish the time allowable for an adequate response and specify conditions for canceling a drill due to hazardous or other operational circumstances that may exist at the facility); *id.* § 8670.10(c) (West 1992) (ordering the Administrator to issue a report after each drill to evaluate the performance of the participants); *cf.* OR. REV. STAT. § 466.610(1) (1993) (providing that, subject to the direction of the Environmental Quality Commission, the Department of Environmental Quality may conduct and prepare studies, investigations, research and programs relative to the containment, collection, removal or cleanup of oil and hazardous materials); *id.* § 466.610(2) (1993) (permitting the Department of Environmental Quality to advise and participate with other agencies, states, and the federal government in all matters pertaining to responses, remedial actions or cleanup of oil); *id.* § 466.610(4) (1993) (permitting the Department of Environmental Quality to conduct and supervise educational programs about oil and hazardous material, including the preparation and distribution of information regarding the containment, collection, removal, or cleanup of oil and hazardous material); *id.* § 468b.395(5) (1993) (directing the Oregon Department of Environmental Quality to adopt an incident command system to enhance oil spill response activities); *id.* § 468b.395(6) (1993) (directing the Oregon Department of Environmental Quality to work with other potentially affected states to develop oil spill discharge prevention and education programs); *id.* § 468b.395(73 (1994) (directing the Oregon Department of Environmental Quality to review and revise interagency response plans for oil spills); *id.* § 468b.395(8) (1993) (directing the Oregon Department of Environmental Quality to assist local agencies and industry groups on the Oregon coast to coordinate oil spill contingency planning); WASH. REV. CODE ANN. § 90.56.020 (West 1992) (vesting in the Director of the Department of Ecology primary authority to oversee

Administrator is directed, under existing law, to review all oil spill contingency plans to ensure the best achievable protection of the coastline.[8] Prior law vested authority for regulating, testing, and licensing the use of any chemical for cleaning up oil on any state waters in the state Water Resources Control Board.[9] Prior law did not authorize the use of "in situ" burning[10] as an authorized oil spill response and clean up mechanism.[11]

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prevention, abatement, response, containment, and cleanup efforts with regard to any oil or hazardous substance spill in the navigable waters of the state).

8. CAL. GOV'T CODE § 8670.19 (West Supp. 1995); *see id.* § 8670.19(a) (West Supp. 1995) (requiring the Administrator to segment the coast into appropriate areas, as necessary for the evaluation, and to evaluate the contingency plans for each area to determine if deficiencies exist in equipment, personnel, training, and any other area determined to be necessary); *id.* § 8670.3(c)(1) (amended by Chapter 940) (defining "best achievable protection" as the highest level of protection which can be achieved through both the use of the best achievable technology and those manpower levels, training practices, and operational methods that provide the greatest degree of protection achievable); *id.* (providing that the Administrator's determination of best achievable protection shall be guided by the critical need to protect valuable coastal resources and marine waters, while also considering the protection provided by the measures, the technological achievability of the measures, and the cost of the measures); *id.* § 8670.3(c)(2) (amended by Chapter 940) (noting that the Legislature did not intend for the Administrator to use a cost-benefit or cost-effective analysis in determining which measures to require, but rather only to give reasonable consideration to the protection, technological achievability, and the cost of the measures when establishing requirements for best achievable protection); *see also id.* § 8670.3(d) (amended by Chapter 940) (defining "best achievable technology" as that technology which provides the greatest degree of protection, considering processes which are being, or could feasibly be, developed, or which are currently in use anywhere in the world); *id.* (directing the Administrator, in determining what is best achievable technology, to consider the effectiveness and engineering feasibility of the technology).

9. 1969 Cal. Stat. ch. 409, sec. 2, at 943, and 1969 Cal. Stat. ch. 482, sec. 29.2, at 1087 (enacting CAL. WATER CODE § 13169); *see id.* (providing that the state Water Resources Control Board may adopt regulations governing the testing, licensing, and use of any chemical, or any other substance, for removing, dispersing, or otherwise cleaning oil or any residuary petroleum product in or on any waters of the state); *id.* (permitting the state board to establish a fee schedule to cover the cost of testing and licensing substances to clean up oil in or on state waters, and granting authority for supervising and enforcing the proper use of any such substances to the Department of Fish and Game); *cf.* WASH. REV. CODE ANN. § 90.56.050(5) (West 1992) (vesting authority in the Department of Ecology to adopt rules for when and under what circumstances, if any, chemical agents, such as coagulants, dispersants, and bioremediation, may be used in response to an oil spill).

10. *See* Northwest Focus, *Burning an Oil Spill*, WASH. STATE DEPT. OF ECOLOGY, at 1, Nov. 1994 (copy on file with the *Pacific Law Journal*) (defining "in situ burning" as burning in place); *id.* (discussing the process of preparing an in situ burn with the towing of fire-resistant booms by boats to surround and collect the oil in a concentrated area, followed by the ignition of the pool of collected oil). *See generally* Robert P. LaBelle, et al., *Viewpoint: The 1993 Oil Spill off Tampa Bay, a Scenario for Burning?*, 1 SPILL SCIENCE & TECH. BULLETIN, No. 1, at 5-9 (1994) (advocating the use of in situ burning to convert large amounts of oil into small amounts of residue and reduce shoreline contamination from oil spills); Richard Lazes, *Technical Note: A Study on the Effects of Oil Fires on Fire Booms Employed During the* In Situ *Burning of Oil*, 1 SPILL SCIENCE & TECHNOLOGY BULLETIN, No. 1, at 85-87 (1994) (describing successful test results of in situ burning that demonstrate it is potentially one of the most effective means of cleaning an oil spill on water); *id.* (noting that other studies have shown that an operating fire boom can eliminate 15,000 barrels of oil per day and that the cost of in situ burning is about 20% of the costs associated with mechanical oil recovery).

11. *See* 1976 Cal. Stat. ch. 1063, sec. 35.3, at 4716 (amending CAL. HEALTH & SAFETY CODE § 41801) (authorizing the setting or permitting of a fire for the following purposes, if the fire is determined to be necessary in the opinion of a public officer: (1) preventing a fire hazard which cannot be abated by any other means; (2) instructing public employees in methods of firefighting; or (3) instructing employees in methods

Chapter 265 shifts responsibility for all oil spill response methods to the Administrator for Oil Spill Response.[12] Chapter 265 also authorizes the use of in situ burning by the Administrator for Oil Spill Response as a mechanism for cleaning oil spills.[13] The authority of the State Water Resources Control Board to regulate and license oil spill cleanup agents[14] is removed by Chapter 265 and transferred to the Administrator for Oil Spill Response.[15] In addition, under Chapter 265, the Administrator for Oil Spill Response is required to conduct testing of oil spill cleanup agents and adopt regulations for their expedited license and use.[16]

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of firefighting when such fire is set, pursuant to permit, on property used for industrial purposes); *id.* (authorizing the setting of a backfire, without requiring a determination of necessity by a public officer, if it is necessary to either save life or valuable property pursuant to California Public Resources Code § 4426, or abate a fire hazard pursuant to California Health and Safety Code § 13055); *see also* CAL. HEALTH & SAFETY CODE § 13055 (West 1984) (permitting any public agency authorized to engage in fire protection activities to use fire to abate a fire hazard); CAL. PUB. RES. CODE § 4426 (West 1984) (providing that a person shall not set a backfire, or cause a backfire to be set, except under the direct supervision or permission of a state or federal forest officer, unless it can be established that the setting of such backfire was necessary for the purpose of saving life or valuable property).

12. CAL. GOV'T CODE § 8670.7(f) (amended by Chapter 265); *see id.* (declaring that the Administrator shall have state authority over the use of all response methods, including, but not limited to, in situ burning, dispersants, and any oil spill cleanup agents in connection with an oil discharge); *id.* (requiring the Administrator to consult with the federal on-scene coordinator prior to exercising this authority over response methods); *see also* 1995 Cal. Legis. Serv. ch. 265, sec. 1(d) at 777 (stating it is the intent of the Legislature for a single agency to be responsible for the state's oil spill prevention and response program for marine waters to ensure uniformity in requirements and standards and to provide a unified structure for research, testing, public education, training, enforcement, and contingency planning elements, as well as a single coordinated decision-making authority on behalf of the state in the event of an oil spill emergency).

13. CAL. HEALTH & SAFETY CODE § 41801(g) (amended by Chapter 265); *see id.* (affirming the authority of any public officer to set or permit a fire when such fire is necessary for the remediation of an oil spill pursuant to California Government Code § 8670.7); *see also* CAL. GOV'T CODE § 8670.7(f) (amended by Chapter 265) (granting the Administrator state authority over the use of all response methods, including, but not limited to, in situ burning, dispersants, and any oil spill cleanup agents in connection with an oil discharge); *id.* (requiring the Administrator to consult with the federal on-scene coordinator prior to exercising authority under this subdivision).

14. *See* CAL. GOV'T CODE § 8670.3(l) (amended by Chapter 940) (defining "oil spill cleanup agent" as a chemical, or any other substance, used for removing, dispersing, or otherwise cleaning up oil or any residual products of petroleum in, or on, any of the waters of the state).

15. 1995 Cal. Legis. Serv. ch. 265, sec. 6, at 782 (repealing CAL. WATER CODE § 13169); *see* CAL. GOV'T CODE § 8670.13.1(a) (enacted by Chapter 265) (directing the Administrator, rather than the State Water Board, to adopt regulations for the expedited licensing of oil spill cleanup agents).

16. CAL. GOV'T CODE § 8670.13.1 (enacted by Chapter 265); *see id* § 8670.13.1(a) (enacted by Chapter 265) (providing that the Administrator for Oil Spill Response shall adopt regulations for the expedited licensing and use of oil spill cleanup agents, and that the Administrator must utilize toxicity and efficacy tests and other information from government and private agencies developed for each specific category of chemical countermeasure in determining the acceptability of an oil spill cleanup agent for license and use); *see also id.* § 8670.13.1(b) (enacted by Chapter 265) (declaring that sorbents and other cleanup devices that do not employ the use of active chemical cleanup agents, or otherwise determined not to cause aquatic toxicity for purposes of oil spill response, are not subject to the regulation and testing requirements provided in California Government Code § 8670.13.1(a)); *id.* § 8670.13.1(c) (enacted by Chapter 265) (permitting the Administrator to charge applicants a fee of up to $1000 for the costs of processing an application for licensure of an oil spill

Chapter 265 also provides that the Administrator for Oil Spill Response must conduct workshops with the participation of local, state, and federal agencies on the subject of oil spill response technologies, including in situ burning, to review the latest research and development of oil spill response technologies.[17] The Administrator shall, in addition, publish decision guidelines regarding policies and procedures for the use of in situ burning.[18]

COMMENT

Chapter 265 was introduced to ensure that California has the most advanced technologies available to confront oil spill hazards.[19] Chapter 265 responds to the alleged incapacity of the Water Resources Control Board to adopt regulations and

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cleanup agent, and providing that only one license per cleanup agent shall be required statewide); 1995 Cal. Legis. Serv. ch. 265, sec. 1(c), at 777 (declaring that the Administrator is required to provide an expedited decisionmaking process for assessing the use of dispersants, cleanup agents, and other technologies, including in situ burning, to improve the efficiency of oil spill response and cleanup and to minimize the harm to the public health, safety, and the environment that may result from an oil spill).

17. CAL. GOV'T CODE § 8670.7(g)(1) (amended by Chapter 265); *see id.* (providing that the workshops shall review the latest research and findings regarding the efficacy and toxicity of oil spill cleanup agents and other technologies, their potential public health, safety, and environmental impacts, and any other relevant factors concerning their use in oil spill response; the Administrator also must solicit the views of all participating parties concerning the use of these technologies with particular attention to any special considerations that apply to coastal areas and marine waters of the state); 1995 Cal. Legis. Serv. ch. 265, sec. 1(b), at 777 (noting that the administrator for oil spill response must coordinate with appropriate local, state, federal, international, and private agencies during response efforts to oil spills that utilize the "best achievable technology" to provide the "greatest degree of protection, based on an evaluation of processes being developed or currently used anywhere in the world"); *see also* CAL. GOV'T CODE § 8670.3(d) (amended by Chapter 940) (defining "best achievable technology" as that technology that provides the greatest degree of protection, considering processes which are being, or could feasibly be, developed, or which are currently in use anywhere in the world); *id.* (directing the Administrator, in determining what is best achievable technology, to consider the effectiveness and engineering feasibility of the technology).

18. CAL. GOV'T CODE § 8670.7(g)(2) (amended by Chapter 265); *see id.* (requiring the Administrator, within 90 days following the conclusion of the workshops, or by June 30, 1996, whichever occurs first, to publish decision guidelines on the policies, procedures, and parameters for the use of in situ burning, and to publish a schedule for future workshops to help develop guidelines for the use of other identified technologies).

19. SENATE COMMITTEE ON GOVERNMENTAL ORGANIZATION, STAFF ANALYSIS OF SB 1083, at 2-3 (Apr. 4, 1995); *see id.* at 2 (stating that the Marine Spill Response Corporation (MSRC), sponsor of Senate Bill 1083, believes the measure will ensure that California has the best achievable protection for its marine waters); 1995 Cal. Legis. Serv. ch. 265, sec. 1(f), at 778 (noting that new technologies are available and should be considered essential to assuring the "best achievable protection" for the state's marine waters and that, therefore, it is the intent of the Legislature that the administrator implement processes to expedite the implementation of such technologies, such as dispersants, cleanup agents, and in situ burning); Letter from Kahl Associates to the public (copy on file with the *Pacific Law Journal*) (noting that prior to Senate Bill 1083, the mechanical means of cleaning oil spills operated at only 15-20% efficiencies, while the use of newer technologies which Senate Bill 1083 facilitates, such as in situ burning, can provide 98-100% efficiencies); *see also* LaBelle, *supra* note 10, at 1 (discussing the results of a test in situ burn off the shore of Newfoundland on August 12, 1993, and noting that two test burns left less than one percent of the volume of oil released for the test); *id.* (noting that after the test burns, no toxic compounds were found in the water samples taken directly beneath the burning oil).

issue licenses for new oil spill cleanup agents that have been developed in recent years.[20]

Chapter 265 was also intended to ensure California's full participation in the States-British Columbia Oil Spill Task Force which is designed to provide coordinated efforts to prevent, prepare for, and respond to oil spills along the West Coast.[21]

Anthony J. Stanley

Environmental Protection; recycled water

Water Code § 13553.1 (new).
SB 172 (Beverly); 1995 STAT. Ch. 78

Existing law declares that the use of potable[1] domestic water for toilet and urinal flushing in nonresidential structures and other specified structures is a waste, or unreasonable use of water, if reclaimed water is available to the user and meets certain requirements.[2] Existing law further authorizes a public agency to

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20. *See* Statement of Senator Robert Beverly, author of Senate Bill 1083, to Senate Members (copy on file with the *Pacific Law Journal*) (noting that new oil spill cleanup agents were not being licensed for use in California because the State Water Board, which had licensing authority, was not keeping itself apprised of advances in oil spill cleanup agents); Letter from Kahl Associates to the public, *supra* note 19 (noting that prior to the adoption of Chapter 265, the authority to approve new dispersants and other oil spill cleanup agents rested with the State Water Board under a "moribund program" which has accomplished "little since its authorization in the 1970's").

21. *See* Letter from Jean R. Cameron, Executive Coordinator of the States/British Columbia Oil Spill Task Force, to Senator Robert Beverly, author of SB 1083, at 1 (Apr. 6, 1995) (discussing the task force, which operates pursuant to a Memorandum of Cooperation signed by governors of California, Oregon, Washington and Alaska, and the Premier of British Columbia); *id.* (discussing task force recommendations that member states provide for the use of in situ burning in oil spill response efforts); *see also* News Release, *Oil Spill Burning Possible Under Draft Policy*, WASH. ST. DEPT. OF ECOLOGY, Nov. 1, 1994 (announcing the release of draft guidelines for the use of in situ burning to clean up oil spills in Washington waters).

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1. *See* BLACK'S LAW DICTIONARY 1168 (6th ed. 1990) (defining "potable" as suitable for drinking).

2. CAL. WATER CODE § 13553(a) (West 1992); *see id.* (declaring that the use of potable domestic water for toilet and urinal flushing in nonresidential structures is a waste or an unreasonable use of water within the meaning of the California Constitution if reclaimed water is available to the user for these uses and meets the requirements set forth in California Water Code § 13550, as determined by the state board after notice and a hearing); *id.* § 13553(b) (West 1992) (permitting the state board to require a public agency or person to furnish whatever information may be relevant to making the determination required in California Water Code § 13553(a)); *see also* CAL. CONST. art. X, § 2 (requiring that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, that the waste or unreasonable method of water use be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare); CAL. WATER CODE § 13050(f) (West Supp. 1995) (defining "beneficial uses" of state waters as including, but not limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves); *id.* § 13550(a)

require the use of reclaimed or recycled water[3] for these uses in certain nonresidential or other specified structures such as commercial establishments.[4]

(West 1992) (declaring that the use of potable domestic water for nonpotable uses, including cemeteries, golf courses, parks, highway landscaped areas, and industrial and irrigation uses, is a waste or an unreasonable use of water if reclaimed water is available which meets all of the following conditions: (1) the source of reclaimed water is of adequate quality for these uses and is available for these uses, determined by such factors as food and employee safety, and the level and types of specific constituents in the reclaimed water affecting these uses, on a user-by-user basis; (2) the reclaimed water may be furnished for these uses at a reasonable cost to the user, determined by such factors as the present and projected costs of supplying, delivering, and treating potable domestic water and the present and projected costs of supplying and delivering reclaimed water for these uses; (3) after concurrence with the State Department of Health Services, the use of reclaimed water from the proposed source will not be detrimental to public health; and (4) the use of reclaimed water for these uses will not adversely affect downstream water rights, will not degrade water quality, and is determined not to be injurious to plantlife, fish, and wildlife); *id.* § 13551 (West 1992) (stating that the use of reclaimed water in lieu of water suitable for potable domestic use must, to the extent of the reclaimed water so used, be deemed to constitute a reasonable beneficial use of that water and the use of reclaimed water must not cause any loss or diminution of any existing water right); *id.* § 13552.2(a) (West Supp. 1995) (declaring that the use of potable domestic water for the irrigation of residential landscaping is a waste or an unreasonable use of water within the meaning of the California Constitution if reclaimed water, for this use, is available to the residents and meets the requirements set forth in California Water Code § 13550, as determined by the state board after notice and a hearing); *id.* § 13552.6(a) (West Supp. 1995) (announcing the legislative finding that the use of potable domestic water for floor trap priming, cooling towers, and air-conditioning devices is a waste or an unreasonable use of water within the meaning of the California Constitution if reclaimed water, for these uses, is available to the user and meets the requirements set forth in California Water Code § 13550, as determined by the state board after notice and a hearing).

3. *See* CAL. WATER CODE § 13050(n) (West Supp. 1995) (defining "reclaimed water" or "recycled water" as water which, as a result of treatment of waste, is suitable for a direct beneficial use or a controlled use that would not otherwise occur and is therefore considered a valuable resource).

4. *Id.* § 13554(a) (West 1992); *see id.* (maintaining that any public agency, including a state agency, city, county, city and county district, or any other political subdivision of the state, may require the use of reclaimed water for toilet and urinal flushing in nonresidential structures, except a mental hospital or other facility operated by a public agency for the treatment of persons with mental disorders, if all of the following requirements are met: (1) reclaimed water, for these uses, is available to the user and meets the requirements set forth in California Water Code § 13350, as determined by the state board after notice and a hearing; (2) the use of reclaimed water does not cause any loss or diminution of any existing water right; and (3) the public agency has prepared an engineering report that includes plumbing design, cross-connection control, and monitoring requirements for the use site); *id.* § 13554(b) (West 1992) (making this section applicable only to either of the following: (1) new structures for which the building permit is issued on or after March 15, 1992, or, if a building permit is not required, new structures for which construction begins on or after March 15, 1992; or (2) any construction pursuant to California Water Code § 13544(a) for which the State Department of Health Services has, prior to January 1, 1992, approved the use of reclaimed water); *see also* SENATE COMMITTEE ON NATURAL RESOURCES AND WILDLIFE, COMMITTEE ANALYSIS OF SB 172, at 2 (Apr. 26, 1995) (stating that since 1991, California law has only allowed the use of recycled water to flush toilets or urinals in nonresidential structures in the belief that pets or children should be protected from ingesting recycled water that they might drink from toilets); *id.* (noting that using recycled water in commercial building toilets was believed to be acceptable since the toilets are typically used by adults who are not prone to drink from the toilets or who could read signs warning them not to drink from the toilets). *See generally* Kevin Smith, *Texas Municipalities' Thirst for Water: Acquisition Methods for Water Planning*, 45 BAYLOR L. REV. 685, 707 (1993) (citing law which mandated that potable water within a community or municipality and its environs be used for domestic, recreational, commercial, or industrial purposes or for the watering of golf courses, parks and parkways, or for the use of reclaimed water in lieu of potable water for the preceding purposes); *id.* (discussing Texas law and stating that a municipality's use or storage of reclaimed water cannot create nuisance conditions).

Chapter 78 declares that certain coastal areas of the state have been using sea water to flush toilets and urinals as a means of conserving potable water.[5] Chapter 78 extends the permissible use of recycled water to toilets in residential buildings in cities which provide a separate plumbing system for using sea water for flushing toilets and urinals.[6]

COMMENT

Chapter 78 was enacted in response to water treatment programs that precluded the beneficial reuse of treated wastewater.[7] These programs have been using sea water to flush toilets and urinals as a means of conserving potable water but have had a deleterious effect on the proper treatment process.[8] Chapter 78 creates a pilot program whereby alternative methods of water treatment can be utilized to remedy these problems and to test the feasibility of using recycled water in all residential toilets.[9] However, there is some concern that the use or

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5. CAL. WATER CODE § 13553.1(a) (enacted by Chapter 78).

6. *Id.* § 13553.1(c) (enacted by Chapter 78); *see id.* § 13553.1(b) (enacted by Chapter 78) (maintaining that there is a need for a pilot program to demonstrate that conversion to the use of recycled water in residential buildings for toilet and urinal flushing does not pose a threat to public health and safety); *id.* § 13553.1(c) (enacted by Chapter 78) (permitting a city that is providing a separate distribution system for sea water for use in flushing toilets and urinals in residential structures to, by ordinance, authorize the use of recycled water for the flushing of toilets and urinals in residential structures if the level of treatment and the use of the recycled water meets the criteria set by the State Department of Health Services); *id.* § 13554.2(e) (West Supp. 1995) (mandating that the State Department of Health Services or local health agency must complete its review of a proposed use of recycled water within a reasonable period of time); *id.* (instructing the department to submit, to the person or entity proposing the use of recycled water, a written determination as to whether the proposal submitted is complete, for the purposes of review, within 30 days from the date of receipt of the proposal); *id.* (further requiring the department to approve or disapprove the proposed use within 30 days from the date on which that department determines that the proposal is complete); *see also* SENATE COMMITTEE ON NATURAL RESOURCES AND WILDLIFE, COMMITTEE ANALYSIS OF SB 172, at 2 (Apr. 26, 1995) (commenting that proponents of the use of recycled water argue that recycled water treated to the acceptable standard contains no pathogens and is harmless).

7. CAL. WATER CODE § 13553.1(a) (enacted by Chapter 78); SENATE FLOOR, COMMITTEE ANALYSIS OF SB 172, at 1 (May 1, 1995); *see* ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF SB 172, at 2 (June 20, 1995) (explaining that after treatment, saltwater cannot be recycled or used for irrigation because post-treatment solids have a high salt content which results in non-reusable compost and increased landfill costs).

8. CAL. WATER CODE § 13553.1(a) (enacted by Chapter 78); *see id.* (maintaining that the use of sea water to flush toilets and urinals has led to the corrosion of the sea water distribution pipelines and wastewater collection systems); ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF SB 172, at 2 (June 20, 1995) (stating that saltwater corrodes plumbing systems and significantly reduces the life of wastewater treatment plants); Julio Moran, *Avalon Seeks Funding for Sewage Plant*, L.A. TIMES, Mar. 28, 1985, at 3 (Part 9) (reporting that the City of Avalon's sewage is unusual because of its high salt content from sea water used for flushing, and further reporting that salt intensifies corrosion of metal fixtures and equipment, aggravates problems with the buildup of hydrogen sulfide (which emits a rotten-egg smell), and reduces the efficiency of oxygen flow in the aeration process of water treatment).

9. CAL. WATER CODE § 13553.1(c) (enacted by Chapter 78); *see* ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF SB 172, at 2 (June 20, 1995) (stating that the City of Avalon on Santa Catalina Island built a dual plumbing system which uses sea water for residential toilets in order to

storage of reclaimed water could present health risks.[10] Therefore, the reclaimed water storage facilities might want to ensure that the storage of the reclaimed water will not impose any health risks upon neighboring residences.[11]

Tyson Shower

Environmental Protection; solid waste—diversion requirements

Public Resources Code § 41850 (amended).
AB 381 (Baca); 1995 STAT. Ch. 219

Existing law establishes the California Integrated Waste Management Act (IWMA).[1] Existing law also establishes the California Integrated Waste Management Board (IWMB).[2] In accordance with the provisions of the IWMA, existing law requires all cities and counties to develop a source reduction[3] and recycling[4]

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conserve fresh water); *id.* (maintaining that Avalon's dual plumbing system is uniquely suited to test the feasibility of using recycled water in residential toilets); Tom McQueeny, *Lowly Reclaimed Water Stars in High-Rise Potties*, L.A. TIMES, Mar. 28, 1991, at B6 (reporting on a program in Irvine where a 20-story office building was hooked up to the water district's reclaimed water system); *id.* (stating that the use of the treated waste water, instead of water pumped from regular supplies, in one office building will save enough potable water to supply about 35 homes in Irvine for a year).

10. *See* Krysten Crawford, *Napa Sanitation District v. Kirkland Cattle*, THE RECORDER, Jan. 13, 1994, at 2 (reporting on an incident where a reclaimed water project located 100 feet from a residential home, caused concern for the residents since they stated that the water reclamation project posed a considerable health risk and emitted an intolerable odor).

11. *See id.*

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1. CAL. PUB. RES. CODE § 40050 (West Supp. Pamphlet 1995); *see id.* § 40052 (West Supp. Pamphlet 1995) (indicating that the purpose of the IWMA is to reduce, recycle, and reuse solid waste to the maximum extent feasible while operating in the most cost effective manner); *id.* (providing further that the Act was implemented to promote the conservation of water, energy, and other natural resources).

2. *Id.* § 40400 (West Supp. Pamphlet 1995); *see id.* § 40401 (West Supp. Pamphlet 1995) (providing that the IWMB consists of one member appointed by the Governor who has private sector experience in the solid waste industry; one member appointed by the Governor who has served as an elected or appointed official for a non-profit environmental protection organization; and four members representing the public, two appointed by the Governor, one appointed by the Senate Rules Committee, and one appointed by the Speaker of the Assembly); *see also id.* § 40191 (West Supp. Pamphlet 1995) (defining "solid waste" as all solid, semi-solid and liquid wastes including garbage, trash and refuse, though not including hazardous waste or medical waste as regulated under the California Health and Safety Code).

3. *See id.* § 40196 (West Supp. Pamphlet 1995) (indicating that "source reduction" is any action which causes a net reduction in the generation of solid waste, including efforts to reduce the use of nonrecyclable materials or replace disposable materials with reusable materials).

4. *See id.* § 40180 (West Supp. Pamphlet 1995) (describing "recycling" as the process of collecting, sorting, cleansing, treating and reconstituting materials that would normally have become solid waste).

element.[5] Existing law further requires all cities and counties to develop a household hazardous waste[6] element.[7]

Existing law mandates that the IWMB review source reduction and recycling elements and the household hazardous waste elements submitted by local agencies.[8] Further, existing law authorizes the IWMB to impose penalties on local agencies if it finds that they have failed to implement the source reduction and recycling elements, and the household hazardous waste elements.[9] In making the determination that a city, county, or regional agency has failed to implement the source reduction and recycling elements, and the household hazardous waste elements, the IWMB must take into consideration a number of conditions, including the good faith efforts of the city, county, or regional agency toward implementing such elements.[10]

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5. *Id.* §§ 41000(a), 41300(a) (West Supp. Pamphlet 1995); *see id.* § 41000(a) (West Supp. Pamphlet 1995) (providing that all cities prior to or on July 1, 1992, must prepare, adopt, and submit a source reduction and recycling element in accordance with certain criteria); *id.* § 41300(a) (West Supp. Pamphlet 1995) (declaring that all counties must prepare, adopt and submit a source reduction and recycling element in accordance with certain criteria on or before July 1, 1992); *id.* § 41780(a) (West Supp. Pamphlet 1995) (requiring a city or county implementing the source reduction and recycling element to do the following: (1) divert 25% of all solid waste from landfill or transformation facilities by January 1, 1995 and (2) divert 50% of all solid waste by January 1, 2000). *See generally id.* § 40970 (West Supp. Pamphlet 1995) (finding that the Legislature intends to make compliance with the provisions of the IWMA cost effective and will allow cities and counties to form regional agencies to implement the provisions of the IWMA).

6. *See* CAL. HEALTH & SAFETY CODE § 25117(a)(1) (West 1992) (explaining that "hazardous waste" is a waste which, because of its quantity or characteristics, may cause or contribute to an increase in mortality, injury, or illness, or pose a substantial hazard to human health or the environment when improperly treated, stored, or disposed of); *id.* § 25117(a)(2)-(c) (West 1992) (establishing further that "hazardous waste" is a waste which meets any of the criteria for the identification of a hazardous waste adopted by the Department of Toxic Substance Control pursuant to California Health and Safety Code § 25141).

7. CAL. PUB. RES. CODE §§ 41500(a), 41510(a) (West Supp. Pamphlet 1995); *see id.* § 41500(a) (West Supp. Pamphlet 1995) (providing that each city must prepare, adopt and submit on or before July 1, 1992, a "household hazardous waste element" which identifies a program for the safe collection, recycling, treatment and disposal of hazardous wastes, as defined in California Health and Safety Code § 25117, which are generated by households in the city); *id.* § 41510(a) (West Supp. Pamphlet 1995) (indicating that each county shall prepare, adopt and submit similar provisions as stated in California Health and Safety Code § 41500(a)).

8. *Id.* § 41825 (West Supp. Pamphlet 1995); *see id.* (instructing that at least once every two years, such reviews must be made to determine whether the local agencies are in compliance with the provisions of the IWMA).

9. *Id.* § 41850(a)(1) (amended by Chapter 219); *see id.* (indicating that the IWMB may impose fines of up to $10,000 per day, until the city, county, or regional agency implements the plan).

10. *Id.* § 41850(b), (c) (amended by Chapter 219); *see id.* (clarifying that in determining whether to impose any penalties for failure to implement source reduction and recycling elements and household hazardous waste elements, the Board should consider all relevant factors, including but not limited to: (1) the occurrence of natural disasters within the city, county, or regional agency; (2) budgetary conditions within the city, county, or regional agency preventing implementation; (3) work stoppages within the city, county, or regional agency preventing implementation; (4) the extent to which a city, county, or regional agency has acted in good faith to implement such elements; (5) the extent to which a city, county, or regional agency has implemented additional source reduction activities; and (6) the extent to which a city, county, or regional agency is meeting diversion requirements of California Public Resources Code § 41780).

Chapter 219 revises the definition of "good faith effort" to include evaluations made by the cities, counties, or regional agencies that focus on improving the technology of handling and managing solid waste.[11]

COMMENT

Chapter 219 was sponsored by the city of San Bernardino and was intended to permit the city to implement new collection methods for wastes and recyclables.[12] The City of Visalia currently uses single trucks and containers for trash and recyclable materials collection, and collects both materials at the same time.[13] San Bernardino would like to implement a pilot collection method that is similar to the method in Visalia.[14]

The City of San Bernardino contends that this program will cut down on the number of trips made by separate trucks to individually collect trash and recyclables, and consequently will reduce air pollution, save money, and improve efficiency.[15] However, the City of San Bernardino indicates that by implementing this pilot program, they may have difficulty in meeting their diversion requirements as set forth in the IWMA.[16] The City of San Bernardino argues that Chapter 219 will allow cities and counties the leeway to utilize technological advancements, while still working towards the goals set forth by the IWMA, despite failure to meet the prescribed numbers.[17]

Darrell C. Martin II

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11. *Id.* § 41850(c)(1)(B)(ii) (amended by Chapter 219); *see id.* (noting that the evaluations of improved technology need be (1) related to reducing costs and improving the efficiency in the collection, processing, or marketing of recyclable materials or yard waste; and (2) related to enhancing the ability of the city, county, or regional agency to meet the diversion requirements of California Public Resources Code § 41780(a)(1)-(2)); *id.* (finding further that these evaluations will be considered only when the city, county, or regional agency has submitted a compliance schedule in accordance with California Public Resources Code § 41825 and has made all other reasonable efforts to implement the source reduction and recycling elements and household hazardous waste elements).

12. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 381, at 2 (July 3, 1995).

13. Letter from Mayor, Tom Minor, City of San Bernardino, to Assemblymember Joe Baca (Jan. 5, 1995); *see id.* (copy on file with the *Pacific Law Journal*) (indicating that the City of Visalia uses an automated split container system to collect both recyclables and trash in one container); *id.* (stating further that these automated containers are picked up by automated refuse trucks with two separate compartments).

14. *Id.*; *see id.* (declaring that the City of San Bernardino's pilot system would be an automated collection system of commingled recyclables and green materials, using three 90-gallon automated containers).

15. *Id.*

16. *Id.*; *see id.* (noting that implementation of such a plan would require the City of San Bernardino to delay implementation of its residential recycling program for one year, hence the city would fail to meet their 25% diversion requirement mandated by the IWMA).

17. *Id.*