

# REGULATORY AGENCY ACTION



waste in a mass-burning facility, as specified, is pending in the Senate Governmental Organization Committee.

## RECENT MEETINGS:

At its February 27-28 meetings, the Board discussed numerous contract concepts for the remainder of the 1990-91 fiscal year. Among the contracts under consideration are a Waste Generation Rates Study and the development of a Geographic Information System. The Board reviewed seventeen contract concepts, instructing staff to develop detailed scopes of work for each concept; the scopes of work will be considered by the Board at subsequent meetings.

The February 27-28 meeting also included a discussion of budget change proposals for the 1991-92 fiscal year. The funding for these proposals comes from the disposal cost fee mandated by AB 939; the fee is paid quarterly to the Board of Equalization (BOE) and is based on the amount of waste disposed of at each site. The fee is limited to 75 cents per ton of waste disposed during fiscal 1990-91 and may increase to \$1 per ton for the 1991-92 fiscal year. The amount of waste disposed of at landfills exceeds 40 million tons annually (based on BOE receipts), so the Board expects \$10 million in increased funds for fiscal 1991-92.

## FUTURE MEETINGS:

August 18 in Sacramento.  
September 25 in San Diego.  
October 23 in Bakersfield.  
November 20 in Sacramento.  
December 11 in Sacramento.

## COASTAL COMMISSION

*Executive Director: Peter Douglas*  
*Chair: Thomas Gwyn*  
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The California Coastal Commission was established by the California Coastal Act of 1976, Public Resources Code section 30000 *et seq.*, to regulate conservation and development in the coastal zone. The coastal zone, as defined in the Coastal Act, extends three miles seaward and generally 1,000 yards inland. This zone, except for the San Francisco Bay area (which is under the independent jurisdiction of the San Francisco Bay Conservation and Development Commission), determines the geographical jurisdiction of the Commission. The Commission has authority to control development of, and maintain public access to, state tidelands, public trust lands within the coastal zone, and

other areas of the coastal strip. Except where control has been returned to local governments, virtually all development which occurs within the coastal zone must be approved by the Commission.

The Commission is also designated the state management agency for the purpose of administering the Federal Coastal Zone Management Act (CZMA) in California. Under this federal statute, the Commission has authority to review oil exploration and development in the three-mile state coastal zone, as well as federally sanctioned oil activities beyond the three-mile zone which directly affect the coastal zone. The Commission determines whether these activities are consistent with the federally certified California Coastal Management Program (CCMP). The CCMP is based upon the policies of the Coastal Act. A "consistency certification" is prepared by the proposing company and must adequately address the major issues of the Coastal Act. The Commission then either concurs with, or objects to, the certification.

A major component of the CCMP is the preparation by local governments of local coastal programs (LCPs), mandated by the Coastal Act of 1976. Each LCP consists of a land use plan and implementing ordinances. Most local governments prepare these in two separate phases, but some are prepared simultaneously as a total LCP. An LCP does not become final until both phases are certified, formally adopted by the local government, and then "effectively certified" by the Commission. Until an LCP has been certified, virtually all development within the coastal zone of a local area must be approved by the Commission. After certification of an LCP, the Commission's regulatory authority is transferred to the local government subject to limited appeal to the Commission. Of the 125 certifiable local areas in California, 73 (59%) have received certification from the Commission as of January 1, 1991.

The Commission meets monthly at various coastal locations throughout the state. Meetings typically last four consecutive days, and the Commission makes decisions on well over 100 line items. The Commission is composed of fifteen members: twelve are voting members and are appointed by the Governor, the Senate Rules Committee, and the Speaker of the Assembly. Each appoints two public members and two locally elected officials of coastal districts. The three remaining nonvoting members are the Secretaries of the Resources Agency and the Business and Transportation Agency, and the Chair of the State Lands Commission. The Com-

mission's regulations are codified in Division 5.5, Title 14 of the California Code of Regulations (CCR).

## MAJOR PROJECTS:

*Batiquitos Lagoon Enhancement Project.* On March 12, the Coastal Commission approved the City of Carlsbad's coastal permit application for Alternative A of the Batiquitos Lagoon Enhancement Project (BLEP). The enhancement plan has been the subject of months of political, legal, and scientific debate regarding the scope and rationale of the project. Because of the unique and sensitive nature of the lagoon, the Commission is required to find that the proposed project is a true "restoration project" under section 30233(c) of the Coastal Act, and that there is no feasible less environmentally damaging alternative. In approving the enhancement plan, the Commission rejected its own staff's report concluding that under existing law, Alternative A could not be termed a restoration project, and that only under nearly a dozen special conditions could any of the project alternatives be considered a restoration project. Because a lawsuit from citizen and environmental groups naming the Coastal Commission as a defendant is inevitable, a brief description of the project and its history is warranted.

Batiquitos Lagoon is located along the northern San Diego County coastline, and has been designated by the Department of Fish and Game as one of California's 19 "high priority" wetlands for its valuable natural resources. Historic charts and maps from the 1800s indicate that Batiquitos Lagoon was once a large embayment that was open to tidal action. The lagoon has since been hydrologically disturbed by three constrictions (from the construction of two roads and a railway across the lagoon) and excessive sedimentation caused by runoff from inland development. These forces have transformed the lagoon into a broad, very shallow water body which is nontidal through most of the year; however, the mouth of the lagoon is dredged open occasionally, usually for public health and safety reasons.

Because the lagoon usually lacks tidal flushing, the hydrology of the system is somewhat erratic, with high levels of fresh water at some times and low levels of hypersaline water at others. Because of the unpredictable and often wide fluctuations in hydrology and water quality, the diversity of plants and aquatic animal species at Batiquitos is limited in comparison to tidal lagoons in the area. Nevertheless, Batiquitos provides expansive and varied habitats for



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migratory shorebirds and waterfowl, many of which are declining in numbers and several of which are protected by state and federal endangered species laws. The lagoon's recognized value as an extraordinary bird habitat led to its designation as one of California's 19 "high priority" wetland systems.

The Batiquitos Lagoon Enhancement Plan is a massive dredging and lagoon reformation project which will convert the lagoon from a shallow, brackish semi-tidal wetland to a marine-dominated subtidal (aquatic) system. The purported rationale for the project is to restore regular tidal flushing to the lagoon by creating enough water coming in and out of the mouth of the lagoon to keep the mouth permanently open. By keeping the mouth of the lagoon open, conditions within the lagoon will become more predictable and, it is proposed, more productive. In order to further this goal, much of the existing wetland habitat will be destroyed so that the new subtidal habitat can be created. The long-term effect of this change on the birds currently using the lagoon is unclear; however, there will undoubtedly be short-term losses of habitat and some switch-over to species that are more adapted to open-water conditions.

Opponents of the project—including scientific, environmental, and citizens groups—feel that the project sacrifices too much existing wetland habitat, is too uncertain of success, and is not what is best for the resources at the lagoon. The degree of dredging required to maintain a self-perpetuating tidal lagoon has been the subject of considerable scientific uncertainty among hydrologic engineers. Engineering critics have argued that no matter how much the lagoon is dredged, it will never become a self-perpetuating system because of the roads which cross the lagoon causing hydrologic constrictions. This view was impliedly supported by the project's engineers during the early phases of the project's environmental review, when the plan was altered to include a groin system at the mouth of the lagoon and a schedule of dredging at the mouth to keep it open to tidal flushing. With this acknowledgment that dredging alone will not keep the lagoon mouth open, critics questioned the purpose of large-scale dredging at all; they suggested a schedule of maintenance for localized dredging at the mouth, in order to save hundreds of acres of wetland habitat. Others suggested that no tidal flushing be encouraged at all, preferring to leave the lagoon as it is.

The consensus among the opposition is that the source of the mitigation dol-

lars which are to fund the project has been a more controlling influence on the project design than what is best for the local and regional wetland resources. The funding source for the project is the Port of Los Angeles, which must find "mitigation credits" for its proposed filling of portions of San Pedro Bay and the accompanying loss of subtidal habitat. Critics of BLEP allege that the real goal of the enhancement plan is to create the maximum amount of subtidal habitat possible within the bounds of Batiquitos so that the Port may continue its San Pedro project. The Port and the City of Carlsbad deny these allegations.

Prior to March 12, the Coastal Commission hearing and report on the controversial project had been postponed for several months, as staff prepared answers to comments from scientific, legal, environmental, and citizens groups. In the end, staff noted in its report that it is proper to review the enhancement project as separate and distinct from any potential mitigation projects which may supply funding for the project. Staff then recommended that Alternative B, the least damaging feasible alternative, if coupled with eleven major special conditions, is the only alternative that could be considered a "restoration project" under the Coastal Act. However, the staff report noted: "[i]n the absence of the long history of this project and the prior commitments to allow restoration of Batiquitos Lagoon as mitigation for port-related fill in San Pedro Bay, ... staff would probably have been reluctant to recommend that the proposed restoration effort constitutes the most conservative and protective approach to wetland restoration." In other words, despite its announcement that it would separate the mitigation source from the merits of the project, staff acknowledged that the mitigation source was the deciding factor in declaring Alternative B a "restoration project" under the Coastal Act.

The "prior commitments" referred to in the staff report include an expired Memorandum of Agreement (MOA) between several resources agencies (the California Department of Fish and Game, the U.S. Fish and Wildlife Service, the State Lands Commission, and the National Marine Fisheries), the cities of Los Angeles and Carlsbad, and Pactex Corporation, which MOA was approved by the Coastal Commission in October 1988. As part of its approval of the Pactex application to dredge 11.28 million cubic yards of material in San Pedro Bay, the Coastal Commission found that the proposed dredge and landfill would result in significant adverse impacts to

the marine resources of San Pedro Bay requiring mitigation. As the required mitigation, the applicants proposed—and the Commission approved—a marine resource restoration project for Batiquitos Lagoon. However, the Pactex permit has expired, and the Pactex development is no longer anticipated to be implemented. Although the MOA is not binding on the Commission due to its expiration, the Commission allowed the Port of Los Angeles to simply step into the shoes of Pactex and use the Batiquitos "restoration" project to mitigate marine habitat losses within the Harbor District of the City of Los Angeles. To date, the Commission has not reviewed or modified the MOA in any way to account for changed circumstances, changes in the parties involved, changes in the types of projects the Port of Los Angeles is undertaking (as opposed to those Pactex was undertaking), and/or the propriety or sufficiency of BLEP as offsite mitigation for the activities currently being conducted by the Port of Los Angeles in San Pedro Bay. In so doing, critics contend that the Commission is setting dangerous precedent by allowing the resurrection of expired agreements for projects instead of conducting a de novo review.

In addition to the MOA, staff's report points to Public Resources Code section 6306.1, a 1986 statute which expressly authorizes the City of Los Angeles to mitigate the expansion of the Port of Los Angeles by the enhancement, restoration, and management of Batiquitos Lagoon. However, that statute states that "[n]othing in this section exempts the Batiquitos Lagoon Restoration Project from the regulatory requirements or jurisdiction of any public entity." Thus, the Commission is still required to find that the alternative chosen is (1) a true "restoration project," and (2) the least environmentally damaging feasible alternative. However, of the alternatives presented, the Commission chose Alternative A, characterized by staff as "involv[ing] the most dredging of any of the restoration alternatives." Staff also concluded that "the impacts of the proposed project exceed that of the least environmentally damaging alternative."

The most immediate effect of the Commission's decision will likely be a lawsuit to stop the project and force the consideration of less damaging alternatives. The Sierra Club, among others, has intimated that such a suit is imminent. However, the message that the decision sends to both those trying to develop and those trying to save coastal wetland resources is more crucial. The Commission has implied that it will



approve mitigation projects which are technically not "restoration projects" under the Coastal Act, and that it will condone offsite mitigation that will convert habitat in one area as compensation for the loss of habitat in another area.

Opponents also argue that the Commission's action encourages a net loss of regional wetland resources, and conflicts with the state policy calling for a 50% increase in state wetland resources by 2000 (Chapter 92, Statutes of 1979). In its report, the Commission staff acknowledged that "the proposed creation of marine tidal habitat will be accomplished by the loss of existing shallow subtidal open water area, intertidal area and non-tidal flats that currently provide habitat for avian populations that inhabit the lagoon." The report also states that "it is not possible to determine, in advance, the relative success of the restoration program." In other words, the Commission has approved a project which cannot be termed a "restoration project" according to the Coastal Act, will damage sensitive wetlands habitat which is supposed to be preserved, and for which there is no estimation of potential success.

**LCP Status Report Released.** In January, the Commission released its twice-yearly Status Report on the Local Coastal Programs (LCP). The City of Laguna Niguel was the only total LCP certified during the second half of the 1990 calendar year. One land use plan (City of Guadalupe) and three implementation ordinances (City of Guadalupe, National City, and Marina del Rey segment) were certified; 28 (18 major and 10 minor) LCP amendments were approved; and 34 amendments to Port Master Plans were acted on. Since February 1981, the Commission has acted on 468 amendments to LCPs.

From these statistics, it is clear that the LCP program remains highly dynamic. The apparent ease with which local governments gain amendments to their coastal plans and the volume of these amendments raise the issue of the ability of the LCP program to be used as a long-term, statewide planning and conservation program. Some flexibility in these programs is essential to accommodate changes in circumstances and technology. However, when this flexibility is carried to the extreme, developers begin to see the LCPs merely as guidelines that may be changed by convincing local officials to pursue amendments that may benefit individual projects.

**Governor Wilson Increases Budget for Coastal Commission.** Following through on his campaign promises to support the Coastal Commission and its

actions, Governor Wilson's proposed 1991-92 budget includes a 12% increase in the Coastal Commission's budget, allowing the Commission to improve its enforcement staff with six new positions and reopen its Eureka branch office. More importantly, Wilson declared that this move is merely an important first step to rebuilding the Commission to its fully authorized strength.

While a state assemblymember in the 1970s, Wilson supported the creation of the Commission and has historically been much more amenable to coastal development regulation than his predecessor. During the Deukmejian era, the Coastal Commission became known as the "Third World Democracy" as the Governor cut the Commission's budget by \$1 million and its staff by 40 positions in his first year in office alone. The fiscal assault on the Commission continued throughout his tenure, eventually resulting in an overall budget reduction of 50%, with staff reduced from 170 to 98, one Commission office closed (Eureka), and repeated attempts to close two others (Santa Cruz and Santa Barbara). Enforcement staff for the Commission was eventually reduced to one person, with some help from temporary interns. This reduction led to a backlog of over 700 complaints of coastal encroachment, including one unpermitted 20-mile road through Big Sur. The dedication of support by the Wilson administration is welcome relief for the Commissioners and staff.

#### LEGISLATION:

**AB 854 (Lempert, et al.),** as introduced February 27, would create the Marine Resources Sanctuary, including all state marine bay, estuarine, and ocean waters, and prohibit any state agency from entering into any new lease for the extraction of oil or gas from the sanctuary except in specified, limited circumstances. This bill would also authorize the Coastal Commission to issue cease and desist orders under specified conditions, with respect to any permit, lease, license, or other approval or authorization for any activity requiring a permit, lease, license, or other approval or authorization, and to levy administrative civil fines pursuant to specified procedures and limitations. The bill would prohibit the maximum liability for violation of any cease and desist order from exceeding \$25,000 per day. This bill is pending in the Assembly Natural Resources Committee.

**AB 616 (Hayden),** as introduced February 20, would authorize the State Lands Commission and the Coastal Commission to issue cease and desist

orders in accordance with specified procedures with respect to any permit, lease, license, or other approval or authorization for any activity requiring a permit, lease, license, or other approval or authorization. This bill is pending in the Assembly Natural Resources Committee.

**SB 283 (Rosenthal).** Under existing law, any person who violates any provision of the California Coastal Act of 1976 is subject to a civil fine of not to exceed \$10,000 and may be subject to a specified additional daily civil fine and exemplary damages for any development in violation of that act. As introduced February 4, this bill would delete those penalties; specify the circumstances in which the Commission may enforce violations of the Coastal Act or a local coastal plan within the jurisdiction of a local government; and authorize civil liability to be imposed on any person who performs or undertakes development in violation of the Act, or inconsistent with any permit previously issued by the Coastal Commission, a local government that is implementing a certified LCP, or a port district that is implementing a port master plan, subject to specified maximum and minimum amounts. This bill is pending in the Senate Committee on Natural Resources and Wildlife.

**SB 284 (Rosenthal),** as introduced February 4, would require the Coastal Commission to develop and implement a comprehensive enforcement program including prescribed elements, to ensure that any development in the coastal zone is consistent with the California Coastal Act of 1976, and to oversee compliance with permits and permit conditions issued by the Commission. The bill would also require the Commission to develop and implement a cost recovery system to offset the costs of administering the enforcement program, consisting of fees charged to violators of the Act for the costs incurred by the Commission in the enforcement process. This bill is pending in the Senate Committee on Natural Resources and Wildlife.

**SB 317 (Davis),** as introduced February 7, would authorize the Commission and its Executive Director to issue cease and desist orders if it is determined that any person or governmental agency has undertaken, or is threatening to undertake, any activity that may require a permit from the Commission without securing a permit or that may be inconsistent with any permit previously issued by the Commission. The bill would also authorize the order to be issued pursuant to the request of a city or county for an activity that is inconsistent with the permit



requirements of the certified local coastal program of that city or county. This bill is pending in the Senate Committee on Natural Resources and Wildlife.

**AB 1374 (Hauser).** Under existing law, the Department of Parks and Recreation is authorized to collect fees for the use of any state park system area, the amounts to be determined by the Department. As introduced March 7, this bill would make the establishment or adjustment of fees for the use of any state park system area within the coastal zone subject to the jurisdiction of the Coastal Commission. This bill is pending in the Assembly Committee on Water, Parks and Wildlife.

**AB 1426 (Gotch).** Existing law prescribes the grounds for an appeal to the Coastal Commission of an action taken by a local government on a coastal development permit under the California Coastal Act of 1976. As introduced March 7, this bill would revise these grounds for appeal. This bill is pending in the Assembly Natural Resources Committee.

**SB 851 (Hart),** as introduced March 7, would require the Commission to carry out a public education program regarding conservation and use of coastal resources, to the extent that its resources permit. The bill would encourage the Commission to use prescribed methods of funding the program, and would require the Commission to report to the legislature regarding that funding and the progress of the program. This bill is pending in the Senate Committee on Natural Resources and Wildlife.

**SB 154 (McCorquodale).** The California Coastal Act of 1976 provides for the planning and regulation of development within the coastal zone, based on various coastal resources planning and management policies set forth in the Act. As introduced January 9, this bill would include in those policies a declaration that the economic, commercial, and recreational importance of fishing activities shall be recognized and protected. This bill is pending in the Senate Appropriations Committee.

**SB 904 (Hart),** as introduced March 8, would prescribe within the Coastal Act of 1976 coastal resources planning and management policies concerning the transportation of oil and gas, require pipeline transportation of oil and gas unless such a method is determined not to be feasible, and permit an alternative mode of transportation under specified circumstances. This bill is pending in the Senate Committee on Natural Resources and Wildlife.

**SB 909 (Hart).** Existing law authorizes the Commission, on an appeal, to approve, modify, or deny a proposed development. As introduced March 8, this bill would additionally authorize the Commission to remand the matter to the local government or port governing body which took the action, if there is new information. This bill is pending in the Senate Committee on Natural Resources and Wildlife.

The following is a status update on bills reported in detail in CRLR Vol. 11, No. 1 (Winter 1991) at page 124:

**AB 10 (Hauser),** which would prohibit the Commission from leasing, for oil and gas purposes, all state-owned tide and submerged lands situated in Mendocino County and Humboldt County not within a specified area, is pending in the Assembly Ways and Means Committee.

**AB 72 (Cortese),** which would enact the California Park, Recreation, and Wildlife Enhancement Act of 1992, is pending in the Assembly Committee on Water, Parks and Wildlife.

#### LITIGATION:

In November 1990, the San Francisco-based environmental group, Earth Island Institute Inc., filed suit in federal district court against Southern California Edison, alleging violations of the federal Clean Water Act stemming from operations at the San Onofre Nuclear Power Plant. The suit is based primarily on a 1989 report of the Coastal Commission's Marine Review Committee, which concluded after a 15-year study that the operation of the San Onofre plant kills tons of fish and kelp each year. (See CRLR Vol. 11, No. 1 (Winter 1991) p. 124 for background information.) In March, plaintiff filed a motion for preliminary injunction against Edison, alleging that the utility is stalling in its duty to provide a mitigation plan for damage caused by the release of cooling water from the power plant, and asking the court to "hold Edison's feet to the fire." Edison has in turn requested that U.S. District Court Judge Rudi Brewster postpone any ruling on the case until after the Regional Water Quality Control Board has held hearings and acted upon the Marine Review Committee's report. Earth Island Institute claims that this request is merely another delay tactic by Edison to avoid producing the mitigation plan and implementation timeline. The motion was scheduled for a hearing on April 22.

Coastal Commission staff are currently working on a mitigation plan which will require Southern California Edison to complete some form of habitat restoration to atone for the damages.

This mitigation plan will likely include some combination of artificial reef creation, wetland restoration, or plant modifications (although Edison is resisting the last as cost-prohibitive). The Earth Island suit alleges that such mitigation cannot compensate for the permit violations because the permits were conditioned on a guarantee of no significant harm to the marine environment.

#### FUTURE MEETINGS:

July 16-19 in Huntington Beach.  
August 13-16 in Eureka.  
September 10-13 in Marina del Rey.  
October 8-11 in Monterey.  
November 12-15 in San Diego.  
December 10-13 in Los Angeles.

#### DEPARTMENT OF FISH AND GAME

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The Department of Fish and Game (DFG), created pursuant to Fish and Game Code section 700 *et seq.*, manages California's fish and wildlife resources (both animal and plant). Created in 1951 as part of the state Resources Agency, DFG regulates recreational activities such as sport fishing, hunting, guide services, and hunting club operations. The Department also controls commercial fishing, fish processing, trapping, mining, and gamebird breeding.

In addition, DFG serves an informational function. The Department procures and evaluates biological data to monitor the health of wildlife populations and habitats. The Department uses this information to formulate proposed legislation as well as the regulations which are presented to the Fish and Game Commission.

The Fish and Game Commission (FGC), created in section 20 of Article IV of the California Constitution, is the policymaking board of DFG. The five-member body promulgates policies and regulations consistent with the powers and obligations conferred by state legislation in Fish and Game Code section 101 *et seq.* These regulations concern the taking and possession of birds, mammals, amphibians, reptiles, and fish. Each member is appointed to a six-year term. FGC's regulations are codified in Division 1, Title 14 of the California Code of Regulations (CCR).

As part of the management of wildlife resources, DFG maintains fish hatcheries for recreational fishing, sustains game and waterfowl populations, and protects land and water habitats.