



McGeorge Law Review

Volume 9 | Issue 1

Article 30

1-1-1978

Environmental Protection

University of the Pacific; McGeorge School of Law

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>

 Part of the [Legislation Commons](#)

Recommended Citation

University of the Pacific; McGeorge School of Law, *Environmental Protection*, 9 PAC. L. J. 546 (1978).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol9/iss1/30>

This Greensheet is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Environmental Protection

Environmental Protection; aerosol propellants

Health and Safety Code §§25898, 25898.5, 25899 (new).

SB 153 (Dunlap); STATS 1977, Ch 761

Support: Natural Resources Defense Council, Inc.; State Department of Consumer Affairs; State Department of Health; Sierra Club.

Opposition: United Steel Workers of America

Through the use of available scientific information, the legislature has determined that fluorocarbon compounds discharged into the atmosphere may dissipate or impair the earth's protective ozone layer, which may have an adverse affect on the public health and environment [CAL. STATS. 1977, c. 761, §2, at —]. Furthermore, the legislature has determined that an increasing number of people, particularly children and young adults, have died from the inhalation of chlorofluorocarbons not containing hydrogen when used as an aerosol propellant in certain containers [CAL. STATS. 1977, c. 761, §2. at —]. Prior to the enactment of Chapter 761, there were no provisions in California law to control the manufacture or sale of fluorocarbon compounds. Chapter 761 has been enacted to provide strict controls over the manufacture and sale of fluorocarbons in the state [See CAL. HEALTH & SAFETY CODE §25898] and is an apparent attempt to minimize the potential adverse effects of fluorocarbon use [See CAL. STATS. 1977, c. 761, §2, at —].

Chlorofluorocarbon, as generally used, is part of the chemical family known as halocarbons and usually refers to a nonreactive compound containing chlorine, fluorine, and carbon [See 41 Fed. Reg. 52,071, 52,072 (1976)]. Chlorofluorocarbons not containing hydrogen are the principal aerosol propellants for self-pressurized containers that dispense a variety of common household and commercial products [See *id.*]. Section 25898 of the Health and Safety Code prohibits, after October 14, 1978, the *manufacture* of any *chlorofluorocarbon propellant* compounds not containing hydrogen for use as an aerosol propellant [CAL. HEALTH & SAFETY CODE §25898(a)] and, after December 14, 1978, the *manufacture* of any *container* intended to use such a propellant [CAL. HEALTH & SAFETY CODE §25898(b)]. Furthermore, after April 14, 1979, no person may *sell* any *container* that uses such a chlorofluorocarbon as a propellant [CAL. HEALTH & SAFETY CODE § 25898(c)]. Notwithstanding the provisions of Section 25898, however, the manufacture and sale of chlorofluorocarbons will still be permitted for certain pesticides and metered dose drugs, contraceptive vaginal foams, cytology fixatives, and specific essential uses [See CAL.

HEALTH & SAFETY CODE §25898.5; 42 Fed. Reg. 24541, 24541 (1977); 42 Fed. Reg. 24542, 24548 (1977)], but this list of exceptions is subject to modification by federal regulation [*See* CAL. HEALTH & SAFETY CODE §25898.5].

COMMENT

The purpose of Chapter 761 appears to be twofold. By banning the manufacture and sale of chlorofluorocarbons not containing hydrogen, the legislature appears to be taking steps to reduce the potential adverse environmental impact of discharged fluorocarbon compounds [CAL. STATS. 1977, c. 761, §2, at —]. The legislature has noted that available scientific information indicates that there is:

. . . a substantial possibility that chlorofluoromethanes, or fluorocarbon compounds, when discharged into the atmosphere, dissipate or impair the earth's protective layer of ozone; that the dissipation or impairment of even a small portion of the ozone layer is likely to decrease its screening of ultraviolet radiation; that any significant increase in human exposure to ultraviolet radiation is likely to increase the risk of skin cancer and other serious illness; that any significant increase in exposure of the environment to ultraviolet radiation may endanger the environment and adversely affect public health and welfare; that the use of aerosol containers discharges a saturated chlorofluorocarbon not containing hydrogen which is eventually dissociated in the stratosphere by ultraviolet radiation, causing, among other results, the production of chlorine which serves as a catalyst in the dissipation of stratospheric ozone. . . .

[CAL. STATS. 1977, c. 761, §2, at —]. Since Chapter 761 only proscribes the manufacture and sale of chlorofluorocarbons not containing hydrogen [*See* CAL. HEALTH & SAFETY CODE §25898], it would appear that manufacturers will modify their products by choosing among available alternative delivering systems, such as roll-ons, nonaerosol propellants, or hydrogen-containing chlorofluorocarbon propellants. A controversial alternative propellant appears to be the substitution of hydrogen-containing chlorofluorocarbons, since their use could cause a deterioration in product quality [FEDERAL INTERAGENCY TASK FORCE ON INADVERTENT MODIFICATION OF THE STRATOSPHERE, COUNCIL ON ENVIRONMENTAL QUALITY & FEDERAL COUNCIL FOR SCIENCE AND TECHNOLOGY, FLUOROCARBONS AND THE ENVIRONMENT 93 (1975)]. On the other hand, it has been argued that these hydrogen-containing propellants, when discharged, may be less stable in the troposphere and therefore, less likely to reach the stratosphere where they might combine with other elements to destroy the ozone layer [*See* 42 Fed. Reg. 24536, 24539 (1977)]. *See generally* Sandorfy, *Review Paper—U. V.*

Absorption of Fluorocarbons, 10 ATMOSPHERE ENVIRONMENT 343, (1975); Yale & Sheidt, *Aliphatic Compounds—Hydrogen-containing Chlorofluorocarbons*, 86 CHEMICAL ABSTRACTS, June 6, 1977, at 494 (Abstract No. 86:170760r)]. Thus, the exclusion of hydrogen-containing chlorofluorocarbons from the prohibitions of Section 25898 appears to be consistent with the intent of Chapter 761, which, among other things, seems to be the preservation of the earth's protective ozone layer [See CAL. STATS. 1977, c. 761, §2, at —].

The second express purpose for the enactment of Chapter 761 may be found in the legislature's concern over the rising number of child and young adult deaths purportedly caused by the inhalation of saturated chlorofluorocarbons not containing hydrogen [CAL. STATS 1977, c. 761, §2, at —]. In support of the legislature's findings is a recent report by the California Department of Health, which estimates that there were approximately 5,000 aerosol related injuries during the 1973 fiscal year and there have been at least 147 fatalities since 1966 resulting from aerosol related causes [HEALTH & WELFARE AGENCY, CAL. DEP'T OF HEALTH, A REPORT TO THE 1976 LEGISLATURE ON NON-STICK AEROSOL PRODUCTS: HEALTH AND SAFETY CONSIDERATIONS 7 (1976)]. It is arguable, however, that if manufacturers choose to substitute nonhydrogen-containing chlorofluorocarbons with hydrogen-containing chlorofluorocarbons, the number of injuries and fatalities attributable to inhalation will not be reduced. This conclusion finds support in numerous reports that indicate that inhalation of *both* hydrogen-containing and nonhydrogen-containing chlorofluorocarbons can cause death [See 38 Fed. Reg. 6191 (1973)]. Furthermore, the Federal Food and Drug Administration has adopted regulations to require the labels of self-purified containers that use *in whole or in part any* chlorofluorocarbon to bear a warning that inhalation may be harmful or fatal [21 C.F.R. §§369.21, 501.17, 740.11 (1977)]. Thus, it would appear that the absence or presence of hydrogen in chlorofluorocarbon propellants is not a determinative factor in causing deaths that result from chlorofluorocarbon inhalation. Consequently, it would seem that the express legislative intent to reduce fatalities caused by the inhalation of saturated chlorofluorocarbons not containing hydrogen has limited meaning, since death may apparently result from the inhalation of *any* saturated chlorofluorocarbon.

With the enactment of Chapter 761, California has taken a major step toward the elimination of potentially hazardous chlorofluorocarbons. Nevertheless, the efficacy of Chapter 761 may be hampered by the conspicuous absence of any enforcement provisions. Sections 205 and 206 of the Health and Safety Code, however, do provide that the Department of Health may maintain an action for injunctive relief to protect and preserve the public health and to abate any nuisance dangerous to the public health.

As a result, it would appear that the Department of Health may enforce the aerosol propellant ban imposed by Chapter 761 [OP. CAL. LEGIS. COUNSEL, No. 3230 (Feb. 18, 1977) *Aerosol Propellants* at 2 (copy on file at the *Pacific Law Journal*)]. This remedy, however, would place the burden of proving violations on the Department of Health [See CAL. EVID. CODE §500] and, therefore, would appear to provide only an indirect deterrent to continued manufacture and sale of chlorofluorocarbon propellants not containing hydrogen.

Section 25899 of the Health and Safety Code provides that should any federal law or regulation be adopted to prohibit the manufacture of chlorofluorocarbons not containing hydrogen or any products utilizing such chlorofluorocarbons, the federal provisions shall supersede the state ban on manufacturing imposed by Chapter 761. Section 25899 *does not*, however, provide for federal supersession of the ban on retail sales of chlorofluorocarbons [CAL. HEALTH & SAFETY CODE §25898(c)]. Pursuant to the Federal Toxic Substances Control Act [Pub. L. No. 94-469, 90 Stat. 2003 (1976)], federal regulations to prohibit the manufacture, processing and distribution in interstate commerce of chlorofluorocarbons have been proposed jointly by the Federal Environmental Protection Agency [42 Fed. Reg. 24,535, 24,547-24,549 (1977)] and the Federal Food and Drug Administration [42 Fed. Reg. 24,535, 24,541-24,542 (1977)]. As proposed, the Environmental Protection Agency regulations would prohibit, after October 15, 1978, the manufacture of chlorofluorocarbons not containing hydrogen [42 Fed. Reg. 24,535, 24,548 (1977)]; after December 15, 1978, the processing, importation, and distribution by a manufacturer [*Id.*]; and after April 15, 1979, the distribution by the processor [*Id.*]. These proposals would exempt certain pesticides and specific essential uses, and would leave control over food, drugs, devices, and cosmetics to the Food and Drug Administration [*Id.* at 24,548]. The proposed Food and Drug Administration regulations would establish controls, within the same time frame, over the use of chlorofluorocarbons as propellants in containers for foods, drugs, devices, and cosmetic products [*Id.* at 24,542]. These proposals would exempt certain metered dose drugs, contraceptive vaginal foams, and cytology fixatives [*Id.* at 24,541] and additionally would allow any person to file a petition to exempt other foods, drugs, devices, and cosmetic products [*Id.*]. Since the time limitations and exemptions of Chapter 761 and the proposed federal regulations are identical as they apply to manufacture and processing of chlorofluorocarbon propellants [*Compare* 42 Fed. Reg. 24,535 (1977) *with* CAL. HEALTH & SAFETY CODE §§25898(a), 25989(b)], the supersession clause of Chapter 761 [CAL. HEALTH & SAFETY CODE §25899] should not alter the administration of the law in California.

The Federal Toxic Substances Control Act provides that if the Administrator of the Environmental Protection Agency prescribes a rule or regulation to control a chemical substance, such rule or regulation will preempt any state regulation of the substance *unless* the state regulation is identical to the federal provisions, is adopted under the authority of federal law, or prohibits the use of the substance, other than use in manufacturing or processing [Toxic Substances Control Act, Pub. L. No. 94-469, §19(a)(2)(B), 90 Stat. 2038-39 (1976)]. Since California's laws regulating the manufacture and sale of chlorofluorocarbons are not identical to the proposed federal regulations, and the intent of Congress in such circumstances is apparently to allow a state to prohibit use of a chemical substance other than in manufacturing or processing [*See* H.R. CONF. REP. NO. 94-1679, 94th Cong., 2d Sess., 94-95, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 4539, 4579-80], the ban imposed by Chapter 761 on the retail sale of chlorofluorocarbons will apparently not be preempted. Should the federal law, however, be interpreted to preclude a state ban on retail sales of chlorofluorocarbons, a state could still be granted an exemption under the federal law if it could show that such a ban provides for a higher degree of protection against the risk involved and would not unduly burden interstate commerce [Toxic Substances Control Act, Pub. L. No. 94-469, §19(b)(2)(A)-(B), 90 Stat. 2039 (1976)]. Since the apparent intent of the proposed federal regulations and Chapter 761 is to reduce the health and environmental risks associated with depletion of the ozone layer [*Compare* 42 Fed. Reg. 24,535, 24,542 (1977) *with* CAL. STATS. 1977, c. 761, §2, at —], it would appear that a ban on the retail sale of chlorofluorocarbons would satisfy the "higher protection" requirement of the Toxic Substances Control Act [Toxic Substances Control Act, Pub. L. No. 94-469, §19(b)(2)(A)-(B), 90 Stat. 2039 (1976) *with* CAL. HEALTH & SAFETY CODE §25898(c)]. Furthermore, it appears that a ban on the sale of chlorofluorocarbons would not unduly burden interstate commerce since the United States Supreme Court has recognized a state's right to restrict or prohibit sales within its borders, although it *cannot* prevent introduction of the product into the state [*See* *Bowman v. Chicago*, 125 U.S. 465, 498, 500 (1887) (sale and importation of intoxicating liquors)]. Thus, since after the imposition of federal regulations, Chapter 761 will only limit the retail sales of chlorofluorocarbon propellants, it would appear that California could be granted an exemption pursuant to the Toxic Substances Control Act [*See* Toxic Substances Control Act, Pub. L. No. 94-469, §19(b)(2)(A)-(B), 90 Stat. 2039 (1976)].

Chapter 761 provides for strict control over the manufacture and sale of chlorofluorocarbon propellants not containing hydrogen, and thus, California joins other states [*E.g.*, MICH. COMP. LAWS ANN. §§336.101-.107; OR.

REV. STAT. §466.605] in their efforts to preserve the national environment and to protect the public health from the deleterious effects of chloro-fluorocarbon-related ozone depletion.

See Generally:

- 1) Comment, *Risk-Benefit Analysis and Technology-Forcing Under the Toxic Substances Control Act*, 62 IOWA L. REV. 942 (1977).
- 2) CHEMICAL SPECIALITIES MANUFACTURERS ASSOCIATION, HALOCARBONS AND THEIR POSSIBLE EFFECT ON THE STRATOSPHERE (1974) (copy on file at the *Pacific Law Journal*).
- 3) NATIONAL RESEARCH COUNCIL, COMMITTEE ON IMPACTS OF STRATOSPHERIC CHANGE, ASSEMBLY OF MATHEMATICAL AND PHYSICAL SCIENCES, HALOCARBONS—ENVIRONMENTAL EFFECTS OF CHLOROFLUOROMETHANE RELEASE (1976) (copy on file at the *Pacific Law Journal*).

Environmental Protection; recycling of oil

Public Resources Code Article 9 (commencing with §3460) (new).

SB 68 (Smith); STATS 1977, Ch 1158

Support: California Environmental Protection Agency

In recognition of the significant quantity of used oil that is wastefully disposed of, despite the fact that it can be recycled [CAL. PUB. RES. CODE §3462], and in an attempt to conserve petroleum resources, to enhance environmental protection, and to protect the public health and welfare, Chapter 1158 has been enacted to provide for the recycling of waste oil from automotive and industrial sources [CAL. PUB. RES. CODE §3463].

Nearly 100 million gallons of used oil are generated annually in California, of which almost 31 million gallons are disposed of in ways that are potentially damaging to the environment [See Senator Jerry Smith, Press Release, Oil Recycling Update, March 9, 1977]. Such disposal of oil spoils the taste of water, endangers the health of various organisms, and releases poisonous metals into the environment [Maugh, *Rerefined Oil: An Option that Saves Oil, Minimizes Pollution*, 193 SCIENCE 1108 (1976)]. Although new and environmentally sound rerefining processes have been developed [*Id.*], only about 8 million gallons of used oil are currently being recycled in California each year [Senator Jerry Smith, Press Release, Oil Recycling Update, March 9, 1977]. Furthermore, according to the Federal Energy Administration, much of the oil that could be recycled, but is in fact disposed of, is generated by “do-it-yourselfers” who change and dispose of crankcase oil [See Lund, *World’s Biggest Oil Leak*, POPULAR MECHANICS, September 1976, at 30]. In an apparent response to this problem, Chapter 1158 requires, *inter alia*, the State Solid Waste Management Board [hereinafter referred to as SWMB] to conduct a public education program on the necessity for, and benefits of, collecting and recycling used oil [CAL. PUB. RES. CODE §3465]. Furthermore, the SWMB is required to: (1) adopt rules requiring any person who annually sells, in containers for use off the

premises, more than 500 gallons of oil to inform purchasers by posting at or near the point of purchase the locations of conveniently located collection facilities [CAL. PUB. RES. CODE §3465(a)]; (2) establish a used oil information center [CAL. PUB. RES. CODE §3465(b)]; (3) encourage voluntary used oil collection and recycling programs and provide technical and financial assistance to organizers of such programs [CAL. PUB. RES. CODE §3465(c)]; and (4) encourage use of rerefined oils for all state and local uses whenever such oil is available at prices competitive with new oil produced for the same purpose [CAL. PUB. RES. CODE §3465(d)]. In addition to educating the public on the collection and recycling of used oil, the SWMB and every state officer and employee are required to encourage the purchase of recycled oil products if such products are substantially equivalent to new oil products [CAL. PUB. RES. CODE §§3469, 3471].

Pursuant to Section 3466 of the Public Resources Code, the SWMB is required to prescribe means for the provision of safe and conveniently located collection facilities for deposit of used oil by persons possessing five or less gallons, at no cost to such persons. Chapter 1158 also establishes a comprehensive registration scheme governing oil collectors, recyclers, and certain storage facilities [CAL. PUB. RES. CODE §§3467-3472]. Section 3467 of the Public Resources Code provides that no person, except a person collecting from personally owned and operated waste oil sources, may annually transport over a public highway over 500 gallons, or store more than 10,000 gallons, of used oil without first registering with the SWMB as a used oil collector [CAL. PUB. RES. CODE §3467(a)]. Furthermore, a used oil collector may transfer used oil only to another registered used oil collector, a registered recycler, or a person outside the state [CAL. PUB. RES. CODE §3467(b)] and the transferor is required to provide receipts to the transferee and to maintain records of his or her transactions, which are subject to review by the SWMB [CAL. PUB. RES. CODE §3467(c)]. Pursuant to Section 3468(a), no person, except a person recycling from his own sources, may recycle more than 5,000 gallons of used oil annually without first registering with the SWMB, and such persons are required to provide receipts to any persons from whom they receive used oil and must maintain records, which are subject to review by the SWMB [CAL. PUB. RES. CODE §3468(b)]. All registered used oil collectors and all registered used oil recyclers are required to submit annual reports of their activities to the SWMB [CAL. PUB. RES. CODE §§3467(d), 3468(c)].

Section 3470 requires the SWMB to adopt rules governing the contents of and fees for the registration applications for used oil collectors and recyclers and procedures for the review of these applications [CAL. PUB. RES. CODE §3470(g)]. The SWMB is required to register any applicant if it determines that his or her proposed operation is environmentally sound and consistent

with the provisions of Chapter 1158 [CAL. PUB. RES. CODE §3470(c)]. Once this determination is made, a registration issued pursuant to Section 3470(c) will remain valid until revoked [CAL. PUB. RES. CODE §3470(c)].

Section 3464(b) of the Public Resources Code prohibits the disposal of used oil into sewers; drainage systems; surface or ground waters, water-courses, or marine waters; or by incineration or deposit on land, unless authorized by law. Furthermore, no person may collect, transport, transfer, store, recycle, use, or dispose of used oil in violation of any provision of Chapter 1158 [CAL. PUB. RES. CODE §3464(a)]. Additionally, any product made from used and recycled oil must be represented as made from previously used oil unless the product is either proven substantially equivalent to a product made from new oil or conforms *fully* with the specifications applicable to that product made from new oil [CAL. PUB. RES. CODE §3471].

The SWMB is empowered to ensure compliance with the provisions of Chapter 1158 [CAL. PUB. RES. CODE §3472(a)] and is authorized to inspect operations of a registrant, issue administrative orders with specified compliance schedules, revoke registrations, and bring civil actions for equitable relief [CAL. PUB. RES. CODE §3472(b)]. Furthermore, any person who in the course of business violates the provisions of Chapter 1158 is subject to a civil penalty up to \$1,000, plus any other penalty provided by law and all other persons who violate these provisions are subject to civil penalties of not more than \$100 per violation, plus any other penalty provided by law [CAL. PUB. RES. CODE §3472(c)]. Additionally, Section 3472(c) defines certain circumstances that the court must consider in establishing the amount of liability. Finally, the SWMB is required to fully implement this program no later than January 1, 1979 [CAL. PUB. RES. CODE §3470(f)] and to submit annual reports to the legislature analyzing the effectiveness of the program and recommending any necessary changes [CAL. PUB. RES. CODE §3470(e)].

COMMENT

As of this writing, federal legislation to enact a comprehensive national oil recycling law is pending in the House of Representatives [H.R. 5350, 95th Cong., 1st Sess. (1977)]. House Bill 5350 would, among other things, through the use of tax incentives and federal grants, encourage the use of recycled oil, establish labeling requirements for recycled oil, and impose record keeping requirements on major users of industrial oil. Although House Bill 5350 would expressly allow states to impose stricter controls on recycled, used, or new oil [H.R. 5350, 95th Cong., 1st Sess. §7 (1977)], it would preempt any state law requiring *recycled oil* to be labeled as “previously used” or “reprocessed” [H.R. 5350, 95th Cong., 1st Sess. §8(a)(2)].

(1977)]. The labeling provisions of Chapter 1158, however, only require *products* made from used oil to be represented as made from previously used oil [CAL. PUB. RES. CODE §3471] and, thus, it would appear that California's labeling requirements could survive an attack of federal preemption based on the federal law. On the other hand, the Federal Trade Commission has found that many consumers prefer new and unused lubricating oil [16 C.F.R. §406.2 (1977)] and thus, California's labeling requirements could perpetuate consumer use of new as opposed to recycled oil by allowing consumers to continue to distinguish between the two types of products. If so, a nonpreemptive interpretation of the language in House Bill 5350 would appear to frustrate the purpose of the federal law, which is, among other things, to facilitate oil conservation [H.R. 5350, 95th Cong., 1st Sess. §2 (1977)]. Even if the preemption provisions of House Bill 5350 should extend to labeling of *products*, these regulations only affect those portions of Chapter 1158 expressly preempted and would not invalidate the remainder of this new law [See CAL. PUB. RES. CODE §3473].

This proposed federal legislation also provides for grants to states that implement waste oil management plans meeting minimum requirements [H.R. 5350, 95th Cong., 1st Sess. §6(a) (1977)]. Although federal grant monies could provide a boon to California's recycling efforts, it appears that the state has failed to meet all the requirements for federal assistance [Compare H.R. 5350, 95th Cong., 1st Sess. §6(a)(3) (1977) (requirement for use of recycled oil in state contracts) and H.R. 5350, 95th Cong., 1st Sess. §6(a)(5) (1977) (requirement that used oil be prohibited for use as fuel oil or for the oiling of state roads unless such oil has been processed to meet minimum federal pollution standards) with CAL. PUB. RES. CODE §§3460-3473]. Thus, it would seem that California will not be eligible to obtain this federal funding to operate and maintain the provisions of Chapter 1158 should House Bill 5350 become law. Nevertheless, by providing for specific means of disposal and recycling of used oil, strict registration of used oil collectors and recyclers, and legislative review of its effectiveness, it would appear that Chapter 1158 could diminish the wasteful disposal of used oil in California. Consequently, Chapter 1158 would appear to provide a viable procedure whereby the environmental degradation caused by used oil contamination may be reduced.

Environmental Protection; litter control, recycling, and resource recovery

Government Code §§66786.8, 66791.5, 66796.22, Title 7.8 (commencing with §68000) (new); Health and Safety Code Chapter 3.5 (commencing with §24385) (new); Penal Code §§374b.5, 969e (new); Revenue and

Taxation Code Part 19 (commencing with §39000) (new).

SB 650 (Nejedly); STATS 1977, Ch 1161

(Effective September 30, 1977)

Support: Beverage Canmakers Committee, Can Manufacturers Institute; California Beer Wholesalers Association, Inc.; California Nevada Soft Drink Association; Glass Packing Institute; Kaiser Aluminum & Chemical Corporation; Kimberly-Clark Corporation

Prior to the enactment of Chapter 1161, there was no statewide program for litter control and resource recovery in California. In an attempt to fill this void, Chapter 1161 has enacted new procedures, which will only be in effect until July 1, 1983 [CAL. STATS. 1977, c. 1161, §11, at —]. for resource recovery and recycling, placement of litter receptacles and use of litter bags, and the imposition of revised penalties for littering in the state.

Resource Recovery and Recycling

Recognizing that uniform state action is necessary to accomplish effective litter control [CAL. GOV'T CODE §68001(a)], Chapter 1161 has enacted the Litter Control, Recycling, and Resource Recovery Act of 1977 [CAL. GOV'T CODE §§68000-68052] to curtail the proliferation and accumulation of litter, which is necessary to maintain a healthful, clean, and beautiful environment [CAL. GOV'T CODE §68001(a)]. This act establishes a statewide program for litter reduction control and procedures for allocating grants and loans for resource recovery and recycling facilities [CAL. GOV'T CODE §§68000-68052]. In order to acquire funds for this program, the State Solid Waste Management Board [hereinafter referred to as SWMB], beginning on January 1, 1979, must impose on the operator of each solid waste disposal site within a standard metropolitan statistical area a surcharge equivalent to 25 cents per ton of solid waste disposed [CAL. GOV'T CODE §66796.22(a)]. This surcharge must be based upon an appropriate parameter, such as weight, volume, or type of solid waste disposed [CAL. GOV'T CODE §66796.22(b)], but it does not apply to solid waste that cannot practically be disposed of by means other than burial or to any solid waste disposed of after source separation at the first point of disposal [CAL. GOV'T CODE §66796.22(c)]. The fees derived from this surcharge must be collected and forwarded to the SWMB in the prescribed manner [CAL. GOV'T CODE §66796.22(d)]. It is the intent of the legislature that this surcharge be paid by initial disposers of solid waste [CAL. GOV'T CODE §66796.22(f)] and, therefore, the SWMB must require that the surcharge be reflected in the rates charged by the appropriate person or agency [CAL. GOV'T CODE §66796.22(f)]. Furthermore, the SWMB is authorized to accept grants, gifts, and donations for the purposes laid down in the new litter law [CAL. GOV'T CODE §66791.5].

Under the California Sales and Use Tax Law [CAL. REV. & TAX CODE §§6001-7176] any person engaged in the business of selling tangible personal property is required to have a permit [CAL. REV. & TAX CODE §6071; *see* CAL. REV. & TAX CODE §6066] and Chapter 1161 requires, commencing January 1, 1978, that each permit holder pay an annual assessment to the SWMB of \$10, \$20, or \$30, depending on the sales tax liability generated by annual retail sales [*See* CAL. REV. & TAX. CODE §39101(a), (c)(1)-(3)]. Furthermore, subject to certain exceptions [*See* CAL. REV. & TAX. CODE §39102], commencing January 1, 1978 manufacturers and wholesalers of tangible personal property are required to pay an annual assessment of \$25, \$100, \$200, or \$1,000, depending on the average number of full-time employees regularly employed [*See* CAL. REV. & TAX. CODE §§39101(b), (c)(4)-(7)]. Notwithstanding such an assessment, depending upon the number of employees, a special assessment of \$200, \$400, or \$2,000 will also be made against manufacturers and wholesalers of specified tire, beverage, container, and paper products [CAL. REV. & TAX. CODE §39101(d)]. No person will be required, however, to pay more than one assessment in any given year and if he or she is subject to more than one such assessment he or she will be required to pay only the largest amount [CAL. REV. & TAX. CODE §39101(e)]. Additionally, Section 39103 of the Revenue and Taxation Code exempts from these assessments any persons or transactions constitutionally protected from such taxation.

The funds collected pursuant to the disposal surcharge and the tax assessment must be deposited in the State Treasury to the credit of the State Litter Control, Recycling, and Resource Recovery Fund [CAL. GOV'T CODE §66796.22(e), CAL. REV. & TAX. CODE §39250]. These funds will then be dispersed to public agencies and private entities who apply and qualify for resource recovery and recycling facility grant funds [CAL. GOV'T CODE §§68041, 68042] in the following manner: (1) 30 percent for cleanup of recreation land and public thoroughfares [CAL. GOV'T CODE §68043]; (2) 20 percent to implement the state research and development program for recovery of resources and energy from wastes [CAL. GOV'T CODE §68046]; (3) 25 percent for creation and expansion of community recycling centers [CAL. GOV'T CODE §68047]; (4) seven and one-half percent for programs to increase public awareness of the litter problem [CAL. GOV'T CODE §68048]; (5) five percent for improved enforcement of litter-related laws [CAL. GOV'T CODE §68049]; (6) two and one-half percent for purchase, installation, maintenance, and replacement of litter receptacles [CAL. GOV'T CODE §68050]; (7) five percent for demonstration and evaluation of new methods of utilization of recoverable materials [CAL. GOV'T CODE §68051]; and (8) five percent for research and administrative support of these programs, maintenance of solid waste management plans, and surveys of litter and

solid waste composition and rates of deposit [CAL. GOV'T CODE §68052]. These funds will be continually appropriated by the SWMB between July 1, 1978, and June 31, 1983 [CAL. STATS. 1977, c. 1161, §8, at —] and it is the intent of the legislature that these funds be “substantially expended each year” [CAL. GOV'T CODE §68042(c)].

Litter Receptacles and Bags

Chapter 1161 also establishes procedures in the Health and Safety Code for the procurement, placement, and maintenance of litter receptacles throughout the state [CAL. HEALTH & SAFETY CODE §§24385-24392] and requires the SWMB to establish requirements for the design, production, and distribution of litter bags for use in motor vehicles and boats [CAL. HEALTH & SAFETY CODE §24393]. All litter receptacles must meet certain minimum standards for markings, size, design, location, frequency of emptying, maintenance and replacement [CAL. HEALTH & SAFETY CODE §24389] and such receptacles must be placed in all public places and other specified establishments as set forth in Section 24387 of the Health and Safety Code. A public place is defined by Chapter 1161 to mean “any area that is used or held out for use of the public whether owned by public or private interests, but not including indoor areas” [CAL. HEALTH & SAFETY CODE §24386(a)]. Moreover, it is the responsibility of any owner or operator of any establishment or public place required by the new law to have litter receptacles, to procure, place, and maintain such receptacles at their own expense [CAL. HEALTH & SAFETY CODE §24385(a)]. The responsibility for removal of litter from these receptacles, however, rests with the appropriate public agency, except those receptacles placed on private property [CAL. HEALTH & SAFETY CODE §24385(b)]. Additionally, no person may damage, deface, abuse, or misuse any litter receptacle [CAL. HEALTH & SAFETY CODE §24390(a)] or use such receptacle to deposit certain types of waste, such as garden refuse or household solid waste [CAL. HEALTH & SAFETY CODE §24390(b), (c)]. All litter receptacles must conform to the standards established by the new law within the prescribed time limits [CAL. HEALTH & SAFETY CODE §24391] and a violation of any of these Health and Safety Code provisions is punishable by a fine of not less than \$50 [CAL. HEALTH & SAFETY CODE §24392].

The Legislative Analyst is required by Chapter 1161 to submit to the legislature and the Governor an annual report on the effectiveness of these litter control, recycling, and resource recovery programs, commencing on or before January 1, 1980, which should enable the state to evaluate the effectiveness of such programs [See CAL. STATS. 1977, c. 1161, §9, at —]. Furthermore, the SWMB is required to provide information to the legislature and Governor every other year commencing on December 1, 1979,

concerning its findings and recommendations from actions taken by the Board to identify markets for recoverable materials, identify barriers to the use of such materials, and encourage development of new uses of these materials [CAL. GOV'T CODE §66786.8].

Litter Penalties

With the enactment of Chapter 1161, California's criminal litter and dumping laws have been significantly altered [*Compare* CAL. PENAL CODE §374b *with* CAL. PENAL CODE §374b.5]. Section 374b of the Penal Code provides that any person convicted of littering must be punished by a fine of \$50 to \$500 on a first conviction, \$100 to \$500 on a second conviction, and \$150 to \$500 on a third or subsequent conviction. Furthermore, the court is allowed, as a condition of probation, to require persons, upon a second or subsequent conviction, to pick up litter along the highways [CAL. PENAL CODE §374b]. Section 374b.5, however, makes the punishment for littering a mandatory \$10 fine, and in addition to any other condition of probation, still allows the court to require such persons to pick up litter along the highways. The punitive provisions of Section 374b.5 specifically supersede the provisions of Section 374b until July 1, 1983, at which time Section 374b.5 is repealed unless a later enacted statute deletes or extends this date [CAL. PENAL CODE §374b.5]. Furthermore, Section 969e has been added to the Penal Code to make it sufficient, when charging a previous conviction for a violation of the litter laws, merely to state the name of the court in which the defendant was convicted and the code section violated.

The courts have continually recognized the right of a defendant to refuse probation as a necessary safeguard against the possibility that the probationary conditions might be more onerous than the sentence itself [*E.g., In re Osslo*, 51 Cal. 2d 371, 381, 334 P.2d 1, 8 (1958); *People v. Fisherman*, 237 Cal. App. 2d 356, 362, 47 Cal. Rptr. 33, 37 (1965)] and Section 1205 of the Penal Code specifically limits the number of days of imprisonment for failure to pay a fine to not more than one day for each \$30 of the fine imposed. Thus, it would appear that upon a first conviction of Section 374b.5 a person would have the option of paying a \$10 fine or spending eight hours in jail [*Compare* CAL. PENAL CODE §374b.5 *with* CAL. PENAL CODE §1205]. Upon subsequent convictions, however, the fine could not be increased and apparently only a voluntary *acceptance* by the defendant of a probationary condition could require such a person to pick up litter in lieu of the fine or imprisonment [*Compare* CAL. PENAL CODE §374.5b *with In re Osslo*, 51 Cal. 2d 371, 381, 334 P.2d 1, 8 (1958) and *People v. Fisherman*, 237 Cal. App. 2d 356, 362, 47 Cal. Rptr. 33, 37 (1965)].

At least one legislative opponent of Chapter 1161 has argued that this new law is nothing more than "a very sophisticated attempt to derail the impetus

for a [bottle] deposit system” in California [Letter from Senator Omer Rains to Governor Edmund G. Brown, Jr., Sept. 26, 1977 (copy on file at *Pacific Law Journal*)]. Senator John Nejedly, the author of this new law, has argued on the other hand, that this legislation provides a broad approach to the litter problem in California and provides the means to recycle the full range of such litter [See *San Francisco Chronicle*, April 27, 1977, at 10]. Should this latter argument prove accurate, Chapter 1161 would appear to help clean up and preserve the beauty of California’s environment.

See Generally:

- 1) 2 B. WITKIN, CALIFORNIA CRIMES, *Punishment for Crimes* §936 (imprisonment until fine paid); §§1078, 1079 (defendants rejection of probation) (1963).
- 2) 3 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* §28(g) (recycling); §35(c) (solid waste) (8th ed. 1973).

Environmental Protection; hazardous wastes

Government Code §§66714.3, 66796.34 (amended); Health and Safety Code §§25110.5, 25117.5, 25117.6, 25123, 25124, 25141, 25142, 25143, 25144, 25145, 25163, 25165, 25166, 25167, 25175, 25176, 25186, 25187, 25188, 25189, 25190, 25191, 25192, 25200, 25201, 25202, 25203, 25204, 25210 (new); §§25100, 25101, 25113, 25114, 25115, 25116, 25117, 25118, 25119, 25121, 25150, 25152, 25153, 25154, 25155, 25160, 25170 (amended).

AB 1593 (Lockyer); STATS 1977, Ch 1039

Support: California Department of Health

In 1972, an addition was made to the Health and Safety Code to provide for safe handling and disposal of hazardous wastes [CAL. STATS. 1972, c. 1236, §1, at 2388]. Chapter 1039 has amended these provisions in order to provide for the safe handling, *use, storage*, and disposal of and *recovery of resources from*, hazardous wastes [CAL. HEALTH & SAFETY CODE §25101]. Section 25140 of the Health and Safety Code requires the State Department of Health to adopt, and revise when appropriate a list of hazardous wastes and extremely hazardous wastes. Prior to the enactment of Chapter 1039, the department was required to adopt minimum standards and regulations for the handling and disposal of such wastes to protect against hazards to public health, domestic livestock, and wildlife [CAL. STATS. 1972, c. 1236, §1, at 2390]. Before adopting such standards and regulations the State Department of Health was required to: (1) hold at least one public hearing in the area to be affected by the proposed regulations; (2) consult with interested local governments; and (3) secure technical assistance from various public agencies [CAL. STATS. 1972, c. 1236, §1, at 2390].

Chapter 1039 now requires the State Department of Health to develop criteria and guidelines for the identification of hazardous and extremely

hazardous wastes [CAL. HEALTH & SAFETY CODE §25141] and provides that *any* wastes so identified must be handled, stored, used, processed, and disposed of in accordance with department standards and regulations [CAL. HEALTH & SAFETY CODE §25142]. Although not yet listed as a hazardous or extremely hazardous waste pursuant to Section 25140, a potentially hazardous waste would still appear to be subject to department standards and regulations [See CAL. HEALTH & SAFETY CODE §25142]. Moreover, the department may waive the requirements of Chapter 1039 for any waste that it determines to be insignificant or unimportant as a hazard to human health, domestic livestock, or wildlife or adequately regulated by another government agency [CAL. HEALTH & SAFETY CODE §25143]. Furthermore, Section 25144 of the Health and Safety Code specifically exempts from these requirements effluents continually discharged by oil treatment plants into navigable waters in compliance with federal law, unless the residue produced in the treatment process is identified as a hazardous or extremely hazardous waste.

The State Department of Health is further required to adopt minimum standards and regulations for the handling, processing, *use, storage*, and disposal of, and the *recovery of resources from*, hazardous and extremely hazardous wastes to protect against hazards to public health, domestic livestock, or wildlife [CAL. HEALTH & SAFETY CODE §25150]. Section 25150 of the Health and Safety Code also requires the department to establish standards and requirements for the use and operation of *facilities* for handling, processing, storing, and disposing of hazardous wastes and for recovery of resources therefrom. Before adoption of such standards and requirements, the State Department of Health is required to: (1) hold at least one public hearing in the area to be affected [CAL. HEALTH & SAFETY CODE §25152]; (2) consult with interested local governments [CAL. HEALTH & SAFETY CODE §25150]; and (3) in addition to securing technical assistance from the various boards previously listed in the Health and Safety Code, secure technical assistance from regional water quality control boards and the State Solid Waste Management Board [CAL. HEALTH & SAFETY CODE §25150].

In addition to duties previously established by law [See CAL. STATS. 1972, c. 1236, §1, at 2391], the State Department of Health is now required to: (1) coordinate research and development on methods of hazardous waste storage, use, and processing [*Compare* CAL. HEALTH & SAFETY CODE §25170(a) *with* CAL. STATS. 1972, c. 1236, §1, at 2391]; (2) provide for surveillance of the use and handling of such wastes [CAL. HEALTH & SAFETY CODE §25170(d)]; (3) coordinate research and study in the uses of and the recycling and recovery of resources from hazardous wastes [CAL. HEALTH & SAFETY CODE §25170(e)]; (4) determine production rates of

hazardous wastes [CAL. HEALTH & SAFETY CODE §25170(f)]; (5) determine the market potential and feasibility of use of, and recovery of resources from, these wastes [CAL. HEALTH & SAFETY CODE §25170(g)]; (6) prepare and adopt a list of hazardous wastes that are recycleable [CAL. HEALTH & SAFETY CODE §25175]; (7) develop incentives for recycling and recovery of resources from such wastes [CAL. HEALTH & SAFETY CODE §25170(h)]; (8) classify recycleable hazardous wastes according to the ease of recycling and present the classified list annually to the legislature, commencing in January of 1979 [CAL. HEALTH & SAFETY CODE §§25175, 25176]; and (9) develop and adopt, by June 1, 1978, regulations to define nonbiodegradable toxic chemicals [CAL. HEALTH & SAFETY CODE §25210].

The Health and Safety Code has been further amended to allow the classification of a waste as hazardous if it contains infectious characteristics that significantly contribute to an increase in mortality or serious illness, or pose a substantial hazard to human health or environment [CAL. HEALTH & SAFETY CODE §25117]. Infectious characteristics have been defined to include: (1) pathological specimens, tissues, specimens of blood elements, excreta or secretions and disposable articles attendant thereto from humans or animals at hospitals or veterinary institutions [CAL. HEALTH & SAFETY CODE §25117.5(a)]; (2) surgical operating room pathological specimens that may harbor or transmit pathogenic organisms [CAL. HEALTH & SAFETY CODE §25117.5(b)]; (3) pathological specimens from outpatient and emergency rooms [CAL. HEALTH & SAFETY CODE §25117.5(c)]; and (4) articles discarded from rooms of patients with suspected communicable diseases, which may contain pathogenic organisms [CAL. HEALTH & SAFETY CODE §25117.5(d)]. Thus, wastes from hospitals, and other such institutions, would appear to fall within the definition of hazardous wastes and therefore are subject to regulation by the State Department of Health [*Compare* CAL. HEALTH & SAFETY CODE §25117 *with* CAL. HEALTH & SAFETY CODE §25117.5]. Prior to the enactment of Chapter 1039, there were no procedures providing for the registration of persons engaged in the business of hauling hazardous wastes or for issuing permits to facilities that disposed of hazardous wastes. Chapter 1039 makes it unlawful for any person to haul hazardous wastes unless he or she has a valid registration issued by the State Department of Health, or for any person to transfer hazardous wastes to a person not so registered [CAL. HEALTH & SAFETY CODE §25163(a)]. Section 25163(b) of the Health and Safety Code exempts only those persons hauling septic tank, cesspool seepage pit, or chemical toilet waste that does not contain a hazardous waste other than human or animal waste, from these requirements if they are otherwise properly registered as required by law [*See generally* CAL. HEALTH & SAFETY CODE §25001]. Chapter 1039 further establishes the procedures for registration applications [CAL.

HEALTH & SAFETY CODE §25165], a description of the persons who must register and the fees to be charged for this registration [CAL. HEALTH & SAFETY CODE §25166], and the time for payment of such fees [CAL. HEALTH & SAFETY CODE §25167].

Furthermore, the State Department of Health is required to issue permits for persons to use and operate facilities that meet the standards established by the department for such facilities [CAL. HEALTH & SAFETY CODE §25200]. Three months after the State Department of Health establishes such standards, no operator may accept or dispose of hazardous wastes without a valid permit [CAL. HEALTH & SAFETY CODE §25201] and failure to comply with the conditions of a permit will render it invalid [CAL. HEALTH & SAFETY CODE §25202]. Additionally, no person may dispose of any hazardous waste at a disposal site unless the operator of that site possesses a valid permit [CAL. HEALTH & SAFETY CODE §25203].

Chapter 1039 also provides that any person who disposes of any waste deemed recycleable by the State Department of Health must, upon request, supply to the department a detailed statement justifying why the waste was not recycled [CAL. HEALTH & SAFETY CODE §25175]. Furthermore, Section 25210 of the Health and Safety Code makes it unlawful on or after January 1, 1979, to use, or to sell in any container that indicates that it may be so used, any toxic chemicals deemed by the State Department of Health as nonbiodegradable in chemical toilets, waste facilities of recreational vehicles, or waste facilities of vessels. The department is required to adopt rules or regulations by June 1, 1978, that will define nonbiodegradable toxic chemicals and that will place limitations on their sale [CAL. HEALTH & SAFETY CODE §25210].

In 1976, additions to the Government Code established procedures for solid waste control that required each county to designate an enforcement agency to carry out the provisions of the Z'berg-Kapiloff Solid Waste Control Act of 1976 [CAL. GOV'T CODE §§66795-66796.82, *added*, CAL. STATS. 1976, c. 1309, §15, at —]. Chapter 1039 makes further miscellaneous changes in the Solid Waste Control Law by amending the Government Code to allow each county to designate an enforcement agency for solid waste management, *except* solid waste facilities used for disposal of hazardous or extremely hazardous wastes [CAL. GOV'T CODE §66796]. In any solid waste facility dealing with disposal of hazardous or extremely hazardous wastes, the local governing body *must* designate either the State Department of Health or the county health entity to carry out the provisions of the new law and the body so designated is *not* subject to the provisions of the Government Code pertaining to Solid Waste Management [CAL. GOV'T CODE §66796]. Furthermore, Chapter 1039 has amended Section 66796.34

of the Government Code to provide that any disposal permit granted to a hazardous waste disposal site must include all conditions governing hazardous wastes as established by the Solid Waste Management Board.

Prior to the enactment of Chapter 1039, violations of the provisions of the Health and Safety Code dealing with hazardous wastes could only be curtailed by civil actions for injunctive relief [CAL. HEALTH & SAFETY CODE §§25180-25185]. Chapter 1039 now provides that, in addition to these remedies, after a public hearing, the director may revoke or suspend any hazardous waste disposal permit [CAL. HEALTH & SAFETY CODE §25186] and should he or she determine that any person is in violation of the requirements of the hazardous waste control provisions of the Health and Safety Code, the director may issue an order specifying a schedule of compliance [CAL. HEALTH & SAFETY CODE §25187]. Any person failing to comply with such a schedule will be subject to a maximum fine of \$25,000 per day [CAL. HEALTH & SAFETY CODE §25188]. Beyond this, any person who disposes of extremely hazardous wastes without a permit, makes any false statement in attempting to comply with any provisions governing hazardous wastes, or violates any permit that has been issued shall be liable for a civil penalty up to \$5,000 [CAL. HEALTH & SAFETY CODE §25189]. Additionally, any person who knowingly disposes of any hazardous waste in an unauthorized place shall be subject to a civil penalty up to \$25,000 per violation [CAL. HEALTH & SAFETY CODE §25190] and a fine up to \$25,000 and/or imprisonment for up to one year for each violation [CAL. HEALTH & SAFETY CODE §25191]. Thus, it now appears that, with broader controls, strict registration and permit requirements, and more potent enforcement provisions, the State Department of Health should be better able to provide for the safe handling, use, storage, and disposal of, and recovery of resources from, hazardous wastes.

See Generally:

- 1) 4 PAC. L.J., REVIEW OF SELECTED 1972 CALIFORNIA LEGISLATION 508 (hazardous waste materials) (1973).

Environmental Protection; Z'berg-Warren-Keene-Collier Forest Taxation Reform Act of 1976—revisions

Education Code §§41840, 42238 (amended); Government Code §51132 (repealed); Article 6 (commencing with §51150), §51110.3 (new); §§27423, 51100, 51110.1, 51113, 51113.5, 51119, 51119.5, 51121, 51133, 51134, 51230, 51246 (amended); Revenue and Taxation Code §§434.5, 435, 437, 17299.1, 18052.2, 24441, 24916.2, 38115, 38202, 38204, 38205, 38303, 38351, 38902, 38904, 38905, 38906, 38907 (amended).

AB 100 (Calvo); STATS 1977, Ch 853
(Effective September 17, 1977)

The Z'Berg-Warren-Keene-Collier Forest Taxation Reform Act of 1976 [hereinafter referred to as Forest Taxation Reform Act of 1976] was enacted to set up a new system of taxation for timber, which substituted a yield tax levied against the value of harvested timber for the old system of ad valorem property taxation levied annually against standing timber inventories [See CAL. STATS. 1976, c. 176, §2, at —]. The Forest Taxation Reform Act of 1976 further provides for the creation of timber preserve zones [CAL. STATS. 1976, c. 176, §4.5, at —]. Chapter 853 has revised various provisions of the 1976 Act relating to the adoption and administration of these timber preserve zones and to local planning.

Chapter 853 has eliminated the rezoning discretion of local governing bodies with respect to timberland preserves [CAL. GOV'T CODE §51113(c)(3)]. Pursuant to the Forest Taxation Reform Act of 1976, Section 51113(c)(3) of the Government Code allowed a landowner to have his or her land zoned as timberland preserve if the land met the current stocking requirements and forest practice rules, or if he or she signed an agreement with the local governing body to meet such requirements by the fifth anniversary of the signing of the agreement [CAL. STATS. 1976, c. 176, §4.5, at —]. If, after passage of the five year period, the parcel failed to meet the timber stocking standards, former Section 51113 *permitted* the local governing body to rezone the parcel [CAL. STATS. 1976, c. 176, §4.5, at —]. Chapter 853 now *requires* that a local governing body rezone any parcel failing to meet the timber stocking standards by the fifth anniversary of the agreement [CAL. GOV'T CODE §51113(c)(3)].

Furthermore, Chapter 853 appears to have limited the area in which timberland may be added to a timber preserve by placing further restrictions on land additions. Section 51100 of the Government Code defines "timberland" as land used for growing and harvesting timber, which is capable of growing an average annual volume of at least 15 cubic feet per acre [CAL. GOV'T CODE §51100(f)], and defines "timberland preserve zone" as an area zoned by a local governing body that qualifies as timberland [CAL. GOV'T CODE §51100(g)]. Former Section 51113.5(a) allowed an owner who possessed timberland within a timberland preserve zone to petition the local governing body to add recently acquired land to his or her preserve land if such land qualified as timberland under Section 51100 [CAL. STATS. 1976, c. 176, §4.5, at —]. Chapter 853, on the other hand, now allows land to be added to a timberland preserve zone only if it qualifies as timberland, is zoned as timberland preserve, and is contiguous to the land already zoned as timberland preserve [CAL. GOV'T CODE §51113.5(a)].

Under the prior provisions of the Forest Taxation Reform Act of 1976, a timber preserve could be subdivided into parcels less than 160 acres only if all of the owners of the resulting parcels entered into a binding agreement with the local governing body to harvest the timber jointly [CAL. STATS. 1976, c. 176, §4.5, at —]. Section 51119.5 now requires the original owner to record a deed of restrictions running with the land that limits the use of the land to the growing and harvesting of timber. It is generally recognized that an agreement restricting the use of real property is enforceable against a subsequent purchaser who takes with notice of the agreement [3 H. TIFFANY, *THE LAW OF REAL PROPERTY, Equitable Restrictions* §858 (1939); §858 (Supp. 1977)] and that recordation of a deed of restriction will serve as constructive notice to all subsequent purchasers [3 H. TIFFANY, *THE LAW OF REAL PROPERTY, Equitable Restrictions* §863 (1939) (Supp. 1977)]. Thus, by requiring the recordation of a deed of restriction, Section 51119.5 should ensure that a subsequent purchaser will take with notice of, and be bound by, the use restriction within the timber preserve land.

Prior to the enactment of Chapter 853, Sections 51132 through 51134 of the Government Code allowed persons to apply for immediate rezoning of parcels as timberland preserves and required only that the local governing body hold a public hearing before granting the rezoning [CAL. STATS. 1976, c. 176, §4.5, at —]. Substantively, Chapter 853 has amended Section 51133 to require that the local governing body, in addition to holding a public hearing, must make two determinations before granting permission to rezone: (1) that the rezoning is in the public interest [CAL. GOV'T CODE §51133(a)(3)]; and (2) that it is not inconsistent with the forest trees and timber property tax exemption provisions of the California Constitution [CAL. GOV'T CODE §51133(a)(2). *See generally* CAL. CONST. art. XIII, §3(j)]. In addition, Section 51134 has been amended by Chapter 853 to provide that approval for immediate rezoning be consistent with the forest trees and timber property tax exemptions provisions of the state constitution [CAL. GOV'T CODE §51134(a)(4). *See generally* CAL. CONST. art. XIII, §3(j)], and that, as before, the public interest, *inter alia*, be considered [*Compare* CAL. GOV'T CODE §51134(a)(1) *with* CAL. STATS. 1977, c. 176, §4.5, at —].

Section 51230 of the Government Code sets forth procedures by which local governing bodies and landowners may enter into contracts to establish agricultural preserves, which must consist of at least 100 acres. When landowners want to set up agricultural preserves, the Forest Taxation Reform Act of 1976 allows land zoned as timberland to be taken into account in order to meet this minimum acreage requirement [CAL. GOV'T CODE §51230]. Chapter 853 has made technical amendments to Section 51230 to provide that land zoned as timberland *preserve* may be taken into account to

establish the minimum acreage requirement. Furthermore, although no local governing body may enter into or renew a contract with respect to land zoned as timberland preserve [CAL. GOV'T CODE §51246(b)], land formerly within an agriculture preserve, which was zoned as timberland preserve, may still be taken into account to establish these minimum acreage requirements [CAL. GOV'T CODE §51246(c)]. Thus, although an owner may lose the newly zoned timber preserve land from his or her agricultural preserve, it would appear that the contract establishing the agricultural preserve would remain in effect with respect to the remainder of his or her parcel, even if the agricultural acreage fell below the 100 acre minimum [See CAL. GOV'T CODE §51246(c)].

Chapter 853 has added Sections 51150 through 51155 to the Government Code to provide for eminent domain and other acquisitions of timberland preserves. Section 51151 establishes certain administrative procedures to be followed before a public improvement can be made within a timber preserve zone and failure to meet the requirements of these procedures invalidates any such improvement [CAL. GOV'T CODE §51151(b)]. Furthermore, subject to certain exceptions [CAL. GOV'T CODE §51153], if there is other land on which it is feasible to locate the public improvement, no land zoned as timberland preserve may now be acquired for such improvement [CAL. GOV'T CODE §51152(b)] and in any event, no public improvement may now be made within a timberland preserve zone if the primary purpose for making such an improvement is the lower cost of acquiring such lands [CAL. GOV'T CODE §51152(a)]. Chapter 853 further provides that Section 51152 can only be enforced by a mandamus proceeding initiated by the local governing body or the Secretary of Resources [CAL. GOV'T CODE §51154]. Should timber preserve land be acquired by eminent domain, or be "acquired in lieu of eminent domain for a public agency or person," Section 51155 of the Government Code provides, *inter alia*, that such land is deemed to be immediately rezoned and that the timber preserve zone is deemed to have never existed. These provisions for location of public improvements and acquisition of timberland preserves are similar to provisions for acquiring land located within agricultural preserves [Compare CAL. GOV'T CODE §§51150-51155 with CAL. GOV'T CODE §§51290-51295]. Thus, by amending various provisions of the Forest Taxation Reform Act of 1976, Chapter 853 appears to provide further protection of California's timber preserve lands and should help prevent the destruction of this valuable natural resource.

See Generally:

- 1) 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Taxation* §97 (real property) (8th ed. 1973).
- 2) 8 PAC. L.J., REVIEW OF SELECTED 1976 CALIFORNIA LEGISLATION 371 (Forest Taxation Reform Act of 1976) (1977).

Environmental Protection; water supply allocations

Water Code §§22252.3, 35454.5 (new).

AB 314 (Chappie); STATS 1977, Ch 78

(Effective May 26, 1977)

Support: Association of California Water Agencies

California law allows the board of directors of an irrigation district and any California water district [hereinafter referred to as districts] to fix a date prior to which applications for water for the ensuing irrigation season are to be received [CAL. WATER CODE §§22252.1, 35450]. The water distributed in the districts is then proportioned ratably to land owners based on the ratio of the last assessment against his or her land and the total assessment in the district [CAL. WATER CODE §§22250, 35420]. In the event of a water shortage, the districts may give water allocation preference to owners of land who have applied for water prior to the date set for application [CAL. WATER CODE §§22252.1, 35453] and, if necessary, either type district may require proportionate percentage reductions in the water allocation [CAL. WATER CODE §§22252.1, 35454].

Chapter 78 has been enacted in response to recent drought conditions in California and will allow districts to control water supply in an effort to ensure sufficient availability to bring crops to maturity [*See* CAL. STATS. 1977, c. 78, §3, at —]. Chapter 78 has added Sections 22252.3 and 35454.5 to the Water Code to establish special procedures for water allocation for years in which it is determined that the water supplies in a district will be insufficient to provide a supply of water equal to that furnished in years of average precipitation. Specifically, Chapter 78 would allow districts that do not have meters or other volumetric measuring equipment to measure substantially all agricultural water delivered in the district to: (1) establish reasonable annual water requirements for growing each type of crop grown in the district; (2) determine the amount of water available; (3) limit the number of acres upon which a landowner may use district water to irrigate by dividing his or her allotment by the water-per-acre figure of his or her chosen crop; and (4) when water is supplied by an irrigation district for crops that ordinarily require periodic irrigation, designate the number of irrigation runs and the amount of water to be used for each run and to establish credits for water users who underirrigate [CAL. WATER CODE §§22252.3, 35454.5]. Furthermore, Chapter 78 would permit a district to refuse to deliver water to, or assess penalties on, any landowner who uses district water on a greater acreage of crops than such landowner's share of the estimated available water will bring to maturity based upon the requirements established for growing such crops in the district [CAL. WATER CODE §§22252.3, 35454.5].

Although the apparent intent of Chapter 78 is to ration water in drought years [*Compare* CAL. WATER CODE §§22252.3, 35454.5 *with* CAL. STATS. 1977, c. 78, §3, at —], it is arguable that the new law has created a disincentive for the use of water conserving irrigation techniques. Recently developed irrigation techniques such as drip irrigation and tree-to-tree canal systems have provided the means for highly efficient water use in irrigation [*See* SUNSET, Apr. 1977, at 292; SUNSET, Mar. 1977, at 110]. The use of such water saving techniques could allow a landowner to irrigate more acres of land than conventional irrigation methods [*See id.*]. A district may, however, refuse to deliver water to any landowner who attempts to increase the number of acres he or she irrigates with district water [CAL. WATER CODE §§22252.3, 35454.5] and thus, the threat of total water shutoff may discourage innovation of new irrigation techniques by landowners. This problem may be further compounded since a district may require a cash deposit for the district water for which there has been an application [CAL. WATER CODE §§22252.1, 35450] and should the landowner not use the water applied for, his or her deposit may be forfeited if the district has a sufficient supply to meet his or her requirements [CAL. WATER CODE §§22252.1, 35452]. On the other hand, Chapter 78 vests a significant amount of discretion in districts with respect to the use of water and the number of acres for which district water may be used [*See* CAL. WATER CODE §§22252.3, 35454.5]. Furthermore, Section 22252.3 of the Water Code, as added by Chapter 78, would allow irrigation districts to establish water credits for water users who have given notice that they intend to underirrigate those crops that require periodic irrigation. Thus, unless the districts administer the provisions of the new law in a fashion that will allow for efficient irrigation techniques without penalty, it is arguable that Chapter 78 may severely limit the use of water conserving irrigation techniques during drought years. In conclusion, the legislature has granted new authority to certain irrigation and water districts to allocate water supplies during drought years, thereby apparently establishing a contingency allocation scheme to preserve agricultural production when water supplies are scarce.