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Foreword - Symposium: Environmental Law

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FOREWARD

SYMPOSIUM: ENVIRONMENTAL LAW

Donald G. Hagman*

It is not clear how one is selected to write forewards. Expertise no doubt helps, but I eschew being an expert. However, as I explained recently in response to a semi-drunk member of the audience who was berating experts in the question-and-answer epilogue to my speech, I sometimes admit to being a specialist. That admission resulted in receipt of a small book from the chair¹ of the program at which I was speaking. The short story started as follows:

You've heerd a lot of pratin' and prattlin' about this bein' the age of specialization. I'm a carpenter by trade. At one time I could of built a house, barn, church or chicken coop. But I seen the need of a specialist in my line, so I studied her. I got her; she's mine. Gentlemen, you are face to face with the champion privy builder of Sangamon County.²

From here on I'll eschew being even a specialist. Whether qualified to comment or not, I do commend the editors of the *Santa Clara Law Review* for assembling this excellent symposium on environmental law. Both species of the environmental genus are covered: pollution law and environmental impact statutes. The articles span the geography: one deals largely with the San Francisco area, two with California, and two with matters of state and national concern. I will introduce them in that up-from-the-bottom order.

As Chair of the Tactics and Strategies Committee of the Advisory Council of the South Coast Air Quality Management

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1. Daniel W. O'Connell, General Counsel, Office of the Sect'y of State, Florida, at National Land Use Conference on Growth Management, San Francisco, Cal. (March 21, 1979).

2. C. SALE, *THE SPECIALIST* 1 (1974).

District (SCAQMD),³ I read Thomas Crawford's article, *The Bay Area Air Quality Management District: Air Pollution Control at the Local Level*,⁴ with anticipation. I wondered if I had been correct in my earlier despondency that local governments would do nothing to improve air quality.⁵ Mr. Crawford's article is not about "local" as in city or county; it is about "regional" as in the nine-county Bay Area Air Quality Management District (BAAQMD). Nevertheless, the BAAQMD and the SCAQMD are sister districts that have much more in common than their unimaginative acronyms, so it was with interest that I read how regional air pollution controls are enforced in the San Francisco area.

While both districts use a variety of enforcement mechanisms, the BAAQMD relies extensively on civil penalties. State statutes require proof that the pollution violation was intentional or negligent before penalties can be collected. The SCAQMD relies more on misdemeanor criminal actions for which there is strict liability under the statute — violate the pollution law and go to jail (or at least pay a criminal penalty). Only in the last few months has the SCAQMD sought civil fines. This difference is of particular interest for further empirical investigation of enforcement efficacy: several comments are in order.

First, it is curious that the criminal penalty is easier to obtain than the civil penalty. Second, since BAAQMD assessed \$431,000 of civil penalties in the two-year period of 1977-1978,⁶ one wonders whether BAAQMD has found a good means to finance its post-Proposition 13 operations. Third, in observing that from twenty-one to one hundred twenty-eight violations were civilly-fined against each of eight corporations, one wonders if the BAAQMD is selling the right to pollute and calling it a civil fine. If so, the statutory maximum of \$500 per violation must be a below-market price since the demand is quite high.

Other statistics are of interest. For example, Mr. Crawford reports that the BAAQMD has forty-four trained inspectors

3. This position is inversely powerful to the length of the title.

4. Crawford, *The Bay Area Air Quality Management District: Air Pollution Control at the Local Level*, 19 SANTA CLARA L. REV. 619 (1979).

5. Hagman, *Why the Local Government Portion of the AQMP Will Be Inadequate and What to Do About It*, *Airogram*, Aug., 1978, at 5.

6. Crawford, *supra* note 4, at 624.

and five field engineers engaged in the enforcement effort.⁷ Yet it has thirty-five polluters emitting 500 or more tons of any pollutant per year and forty-seven polluters emitting 100-499 tons.⁸ In the Los Angeles area, the SCAQMD has eighty inspectors whose work generated civil fines of \$13,000 for the eight months ending February 1, 1979. In the same period, \$57,500 in criminal penalties were paid. There are more big polluters in the SCAQMD, but the data are not directly comparable.⁹ Repeated violators are subject to sanctions designed to end the pollution, such as revocation of permits rather than to sanctions that seem to be selling the right to pollute.

One does not know from Mr. Crawford's article how much it costs the BAAQMD to maintain an enforcement officer, but \$30,000 per year would be a reasonable guess. The BAAQMD appears to be collecting about \$200 per violation (\$30,000 X 49 officers X 2 years = \$2,940,000 expenditure to collect \$430,000 in fines).¹⁰ The price is right from the polluters' viewpoint, but it is hardly an effective way to support the District. A maximum civil penalty of \$5,000 — tenfold its current limits — is clearly justified either on the basis that the BAAQMD is selling pollution rights or on the basis that violators should be charged the costs of enforcement.¹¹

The SCAQMD, on the other hand, cannot be looking to fines to support its operation since the criminal penalties go to other governments. In addition, the budget of the SCAQMD comes primarily from permits and emission fees, and it may be regarded as unfair that the law-abiding rather than the violating polluters pay the cost of enforcement.

"As enacted into law on September 17, 1970 . . . [the California Environmental Quality Act] CEQA was rather simple and uncomplicated."¹² Indeed, it was largely regarded as a paper tiger by the governmental agencies whose public works projects were thought by many to be the sole addressees of the

7. *Id.* at 620.

8. *Id.* at 621-22.

9. The SCAQMD keeps statistics by pollutant. There are, for example, 37 sources of 500 or more tons of hydrocarbons and 18 emitting 100-499 tons of hydrocarbons. These statistics were provided by Arthur Segal, Director of Enforcement, SCAQMD, and George Thomas, Supervising Air Pollution Engineer II, SCAQMD.

10. Calculated from Crawford, *supra* note 4, at 624.

11. See Organization for Economic Cooperation and Dev., *The Polluter Pays Principle* (1975).

12. Hagman, *NEPA's Progeny Inhabit the States — Were the Genes Defective?*, 7 URB. L. ANN. 3 (1974).

Act. The measure had so little bite that it was not even amended in 1971, although almost all major legislation needs a "clean-up" bill.¹³ In fact, the two-year period through September 21, 1972, might better be thought of as a period of gestation. The CEQA was really "born" on the day that the California Supreme Court decided *Friends of Mammoth v. Board of Supervisors of Mono County*.¹⁴ The court "legislated" that the Act applied to publicly-permitted private sector projects and served notice that it would not be outdone by any other branch of government in the environmental absolutism sweepstakes.¹⁵ Less than two months later, the people passed the California Coastal Zone Conservation Act of 1972 by initiative.¹⁶ The second half of 1972 was clearly vintage environmentalism.

In retrospect, late 1972 also turned out to be an apogee. Once its regulatory scope was defined in *Friends of Mammoth*, the CEQA has been amended every year, including the year of judicial midwifery.¹⁷ The CEQA is approaching the complication of the Internal Revenue Code. A road map to it is necessary. This symposium fortunately contains an excellent description in Selina Bendix's *A Short Introduction to the California Environmental Quality Act*.¹⁸ Combining sage advice with orderly, succinct, and accurate summaries of the CEQA and its guidelines, Bendix's contribution is useful reading for all but the most experienced practitioners.

Despite the Bendixes of the world, the state's legislative processes spun an environmentally-oriented regulatory web, and many administrators were unable to comply and still produce their development permissions within a reasonable period

13. The term "clean-up" is a euphemism used in California for "we goofed."

14. 8 Cal. 3d 247, 502 P.2d 1040, 104 Cal. Rptr. 761 (1972).

15. In a forthcoming study, DiMento, Dozier, Emmons, Hagman, Kim, Greenfield-Sanders, Waldau & Woollacott, Land Development and Environmental Law in the California Supreme Court: For(e)wa(o)rd for the 1980's(.)?, the *Friends of Mammoth* decision is the top-ranked land developmental control decision of the California Supreme Court in the 1967-1977 era.

16. CAL. PUB. RES. CODE §§ 27000-27650 (Deering 1976) (repealed by *id.* § 27650) (replaced by California Coastal Act of 1976, CAL. PUB. RES. CODE §§ 30000-30900 (West 1977 & Supp. 1979)).

17. 1972 Cal. Stats. chs. 971, 1154; 1973 Cal. Stats. ch. 895; 1974 Cal. Stats. chs. 56, 176, 276; 1975 Cal. Stats. chs. 222, 242, 1187; 1976 Cal. Stats. chs. 593, 753, 1312; 1977 Cal. Stats. chs. 854, 1045, 1200; 1978 Cal. Stats. chs. 308, 356, 760, 791, 1075, 1093, 1113, 1271.

18. Bendix, *A Short Introduction to the California Environmental Quality Act*, 19 SANTA CLARA L. REV. 521 (1979).

of time. That in turn led to much carping by developers whose problems were dramatized by the 1977 decision of Dow Chemical Company to cancel its multi-million dollar petrochemical plant in Northern California. In 1979, allegedly for similar reasons, Sohio cancelled its multi-million dollar Alaskan oil transfer facility in Southern California.¹⁹ Rather than repeal things such as the CEQA and integrate its concepts into a comprehensive, regional, environmentally-conscious land development control system,²⁰ the Governor and the Legislature responded to the carping and the Dow incident by further regulation.

That regulation took the form of time limits imposed on completing work under the CEQA and on issuing development permits. The time limits on development permits were imposed by the development project law.²¹ Rather than putting environmental legislation in order, these laws in effect ordered the administrators to work faster. As Barbara Sahm explains in fascinating commentary in *Project Approval Under the Environmental Quality Act: It Always Takes Longer Than You Think*,²² the time limits may result in poorer decision-making, slower decision-making, and a host of other counter-productive situations.

Ms. Sahm and Ms. Bendix must be a dynamic duo. Resistant to the charms of San Francisco, they spend their off-duty hours from the City and County of San Francisco to write law review articles. The reader inclined to psychological profiling can infer from these manuscripts that both women are hard workers, doing their best to comply with the state edicts concerning development control. They're environmentalists, not property-rightists. They'd like to do their jobs right. One can hope that the legislators are listening to those folks down there in the trenches. I'm glad to confess that my empathy for the likes of Ms. Bendix and Ms. Sahm is vicarious. It's far easier to study, teach, and write about regulatory nonsense than to have to administer a nonsensical system.

The opportunity to read things that might otherwise not

19. W.B. Rood, *Legislative Leaders Balk at Terms Sought by Sohio*, L.A. Times, Mar. 27, 1979, pt. 1, at 3, col. 2.

20. See Hagman, *supra* note 12, at 45-51; see also Hagman, *Life After Jarvis: How to End "Cordimeetparalysis" and Reorganize Local Government*, 9 CAL. J. 336 (1978).

21. CAL. GOV'T CODE §§ 65950-65957.1 (West Supp. Pamph. 1966-1978).

22. Sahm, *Project Approval Under the California Environmental Quality Act: It Always Takes Longer Than You Think*, 19 SANTA CLARA L. REV. 579 (1979).

come to one's attention is a major reward of writing a symposium foreward. There are so many rooms in the environmental mansion these days that to classify oneself as an environmental lawyer means only that one is more likely than not able to communicate with like-classified persons. That was my reaction to the DuBey and Fidell article, *The Assessment of Pollution Damage to Aquatic Resources: Alternatives to the Trial Model*.²³ While I know little about the subject, I expect those more knowledgeable will find their article thoughtful and imaginative. It describes the existing state of the art, derived largely from the fact that oil spills and piscatorial interests do not mix. The article generalizes from that fact to the issues of what damages flowing from environmental degradation should be counted, how valuation problems are to be solved, and how the process should be administered efficiently and equitably.

The topic is an important one. If we are to soberly understand the damage to public and natural resources such as air, water, marshlands, biotic communities, and ecosystems without strident, emotive combat between producer-polluters and environmentalists, the rule of law must somehow be able to provide, measure, and administer a damages system. The alternatives are to scream at each other in the dark, to impose such high administrative costs that putting a proper price on the environment is not worth the candle, or to enjoin activities entirely and accept the resultant inefficiencies simply because there is no currency of exchange that society can use to value the environment. By their own admission, DuBey and Fidell do not answer all the questions, but their article substantially cuts the distance to the horizon.

Zan Henson and Ken Gray have written *Injunction Bonding in Environmental Litigation* for this symposium.²⁴ Their thesis is that plaintiffs in environmental litigation should not be required to provide bonds as a condition for obtaining preliminary injunctions. Theirs is a very effective piece of advocacy,²⁵ but reaction to it may well depend on the degree to which one regards environmental plaintiffs as knights in altruistic shining armor. Preservers of the status quo, in my opinion, are not always entitled to a presumption that they are

23. DuBey & Fidell, *The Assessment of Pollution Damage to Aquatic Resources: Alternatives to the Trial Model*, 19 SANTA CLARA L. REV. 641 (1979).

24. Henson & Gray, *Injunction Bonding in Environmental Litigation*, 19 SANTA CLARA L. REV. 541 (1979).

25. I don't mean to disparage advocacy, merely to identify it.

acting in the public good. There are many self-seekers among plaintiffs in environmental lawsuits, and some of them are also elitists, excluders, or owners of existing shopping centers who don't want the new competition. Even if truly altruistic, it is not clear that altruists should be entitled to different rules on bonds in preliminary injunction cases than anyone else. Sympathy for litigants who prevent change may depend on whether the status is anything to quo about. For example, the Pacific Legal Foundation, a public interest law firm which defends capitalism, has brought a number of successful environmental lawsuits in recent years to prevent imposition of regulations designed to enhance the environment. Since it wasn't clear in their draft, I asked Henson and Gray to conduct a self-examination of their thesis by assuming that ninety-five percent of environmental lawsuits were brought by Pacific Legal Foundation-type plaintiffs rather than by "white hat" type environmentalists. Would their enthusiasm for eliminating bonds in environmental litigation still hold? They tell me it does. Thus, uninformed readers such as myself can have confidence that Henson and Gray are as correct in their conclusions as they are effective in their advocacy.

The five pieces in this symposium are rich in variety, ranging from policy to advocacy, from theory to practicum. They reflect the richness and diversity of this complex subject called environmental law. Considerable material about the subject has already been published, but this symposium demonstrates there's always room for more good articles.

