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THE MORE THINGS CHANGE: AN INTRODUCTION TO THE ISSUE

BY PAUL STANTON KIBEL*

In 1998, California elected Gray Davis as its first Democratic Governor since Jerry Brown, who stepped down in 1982. The 16 years of Republican gubernatorial control, under two terms of George Deukmejian and two terms of Pete Wilson, had taken its toll on California's environment, and on the morale of California's private environmental organizations and many state environmental agency employees. This is not to say that there were no legislative or political environmental accomplishments during these 16 years. These accomplishments, however, were often achieved with little help, and frequently opposition, from the Governor's office.

For instance, during Deukmejian's administration, Proposition 65 (the Safe Drinking Water and Toxic Enforcement Act) was passed by California voters in 1986 to promote reformulation of products containing toxic chemicals.¹ Yet, Proposition 65 was adopted by voter initiative in large part because Deukmejian would not support legislation that would have achieved the same result. Similarly, during the 1990s the Bay Conservation and Development Commission (BCDC), a California state agency, refused to approve several damaging construction and infill projects that were proposed along the San Francisco Bay shoreline.² Yet, Governor Wilson attempted to

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¹ Cal. Health & Safety Code, Section 25249 et seq. (West 1992 and Supp. 1999); Bruce H. Jennings, Senate Office of Research, Report to the Senate of 1990, *California's Experience with Proposition 65: Implementing the Safe Drinking Water and Toxic Enforcement Act*, No. 498-7 (1990).

² See Jonathan Smith & Alan Pendleton, *The San Francisco Bay Conservation*

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eliminate BCDC altogether in 1995 after the agency imposed restrictions on bayside highways proposed by the California Department of Transportation.³

When Gray Davis campaigned for Governor, he did not run as a strong environmental candidate. Although he promised to improve on the environmental record of his predecessors, he indicated that this improvement would be pursued in an incremental manner. Notwithstanding his reluctance to clearly outline a new direction for the state's environmental policy, the election of Gray Davis as Governor was met with cautious optimism by California environmental organizations and many dispirited state environmental agency employees. This optimism was further buoyed when Davis appointed Mary Nichols as Secretary of the California Resources Agency and Tom Hannigan to direct the Department of Water Resources. Nichols and Hannigan were both established players and progressive voices in California environmental politics.⁴ These appointments suggested that environmental leadership might be forthcoming from the Davis administration.

More than two years into Gray Davis' first term, it is now possible to undertake a preliminary assessment of the governor's environmental record. Those who have done so have reached varied conclusions.

Some have noted that, since taking office, Governor Davis has taken tangible steps to improve environmental protection in California, such as signing into law California's first environmental justice statute.⁵ This new law calls upon the state's Office of Planning Research to work with other state agencies to ensure the "fair treatment of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations and policies."⁶ Defenders of Davis' environmental performance

and Development Commission: Challenge and Response After 30 Years, 28 Golden Gate University Law Review 282-285, 294-312 (1998).

³ *Id.* at 285-290. In his proposed 1995-1996 state budget, Governor Wilson called for BCDC's elimination by 1996.

⁴ Dan Hamburg, *Who's Protecting California's Environment?*, San Francisco Chronicle, Front Page Sunday Section, November 14, 1999.

⁵ California Gov't Code, Section 65040.12. See Ellen M. Peter, *Implementing Environmental Justice: The New Agenda for California State Agencies* (forthcoming in Golden Gate University Law Review, 2001).

⁶ Cal Gov't Code, Section 65040.12 (c) (West Supp. 2001).

have also pointed to the governor's role in securing reauthorization of California's Hazardous Substance Account Act (HSAA), the state's counterpart to the federal Superfund law.⁷ As a result of a sunset clause in the statute, the HSAA had been repealed by operation of law on January 31, 1999.⁸

Others, however, have criticized Davis for not responding to pressing natural resource and public health problems. For instance, in the summer of 2000 a report was released by Public Employees for Environmental Responsibility (PEER), an organization of publicly employed natural resource professionals in California.⁹ Among other findings, the PEER report revealed that most state resource professionals believe that Governor Davis' administration is obstructing the protection of fish, wildlife and other biological resources. Similarly, the California Environmental Health Policy Alliance, a network of health care professionals, scientists and policy experts from universities and private organizations, published a *Medical Report Card* for the state in February 2000.¹⁰ This *Medical Report Card* concluded that Governor Davis' administration was not adequately protecting California's children and workers from lead, pesticides and other toxics.¹¹

The findings in the PEER and California Environmental Health Policy Alliance reports found support in an October 2000 article in *California Environmental Insider*, which noted: "As he did last year, Governor Davis has vetoed a significant number of bills, including several of those favored by environmental groups. The Governor's vetoes over the past two years emphasize his determination to strike a balance between environmental objectives and the concerns of the state's business community. In addition to the vetoed bills, the Governor succeeded in either ambushing some objectionable bills before they reached him, or talking the bill's author into modifying it

⁷ See Denise Hoffman & Barbara Coler, *Brownfields and the California Department of Toxic Substances Control: Key Programs and Challenges* (forthcoming in *Golden Gate University Law Review*, 2001).

⁸ *Id.*

⁹ *California's Failed Forest Policy: State Biologists Speak Out* (Report by California Public Employees for Environmental Responsibility, Summer 2000).

¹⁰ *Medical Report Card* (California Environmental Health Policy Alliance (released February 16, 2000)).

¹¹ *Id.*

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to make it acceptable to him.”¹²

In this special symposium edition of the Golden Gate University Law Review, the environmental agenda and record of Governor Davis will be evaluated by those within, and those outside, the administration.

In the first article, Patrick Wright, Director of the CALFED Bay-Delta Program and Deputy Secretary for the California Resources Agency, examines water policy issues in the Davis Administration. More specifically, Wright analyzes recent efforts by California and federal agencies, as well as other environmental, agricultural and municipal stakeholders, to develop solutions to the long-standing controversy over the diversion of water from the San Francisco Bay Delta. His article provides both an historical summary of the events that led to the CALFED Bay-Delta Program, and an insider’s view of the water policy challenges that lay ahead for Governor Davis.

Next, Tom Lippe and Kathy Bailey analyze the implementation and enforcement of the California Forest Practices Act under Governor Davis. This law regulates logging on private land through the approval of timber harvest plans by the California Department of Forestry. In recent years, there has been heated debate and litigation over the approval of timber harvest plans, in particular those submitted by Pacific Lumber Company and Sierra Pacific Industries. Tom Lippe has served as attorney for many of the environmental plaintiffs challenging timber harvest plans, and Kathy Bailey is state forest practices chair for the Sierra Club. Their assessment of the current state of the California Forest Practices Act draws heavily on their direct legal and political experience.

The third article, by Denise Hoffman and Barbara Coler, discusses the California Department of Toxic Substances Control’s (DTSC) programs to cleanup and redevelop brownfields. Brownfields refer to properties that are underdeveloped because of actual or perceived liabilities relating to contamination. Denise Hoffman is a former attorney with DTSC, and Barbara Coler is chief of DTSC’s Statewide Cleanup Operations Division. Their article provides a comprehensive update

¹² *Governor’s Vetoes Emphasize Center*, California Environmental Insider, October 31, 2000, pp. 2-3.

of the brownfields programs available to and initiated by the Davis Administration.

Turning to agricultural matters, the fourth article considers the enforcement of pesticide regulation in California. It begins with a detailed explanation of the interplay between California and federal law, and the role of the California Department of Pesticide Regulation and County Agricultural Commissioners, in pesticide regulation. The article then offers a case study on efforts to regulate the pesticide methyl bromide in California, with particular emphasis on methyl bromide policies under the Davis Administration. The article's author, Victoria Clark, is an attorney with the Environmental Defense Center in Santa Barbara.

In the last article, Ellen Peter provides an assessment of Senate Bill 115, the first environmental justice statute ever adopted in California. Environmental justice is shorthand for the principle that government policies should ensure that citizens are not subjected to disproportionate environmental health risks because of their race, ethnicity or income. SB 115 was signed into law by Governor Davis on October 9, 1999, after a series of earlier environmental justice bills were vetoed by Governor Wilson. As a Deputy California Attorney General in the Natural Resource Section's Public Rights Division, and as Chair of the California Attorney General's Environmental Justice Working Group, Ellen Peter has been involved in developing a consistent statewide policy for the implementation of SB 115 by California agencies.

As the articles in this special symposium reveal, the process of changing California's environmental policy agenda is no easy task. Even with the change from Republican to Democratic gubernatorial leadership, there are powerful political forces and economic interests at work which make it difficult to alter course. Notwithstanding these obstacles, if Governor Davis wishes to retain the support of California environmentalists going forward, it appears that he may need to do more in the second half of his term than he has done in his first. Whether such a change is compatible with Governor Davis' moderate environmental views remains an open question.