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Environmental Laws Play Bigger Role in Projects

Environmental review of development projects in California has gotten noticeably tougher in the last two years — for several reasons.

Several recent court cases have changed the standards for environmental review under the California Environmental Quality Act. Under the so-called *Sunstrom* decision, planners must "show their work" when using a checklist to determine whether an environmental impact report must be done for a project. And the analysis of alternatives to any proposed project — required in an EIR — has been expanded by the courts in the last two years.

Perhaps even more important is the enactment of AB 3180, a law designed to force local governments to closely monitor the mitigation measures on specific projects approved under CEQA. The legislature is typically reluctant to step into the CEQA fray, but evidence was mounting that CEQA was being undermined because mitigation measures — meant to lessen the environmental harm of a project and therefore make it more acceptable — simply weren't being carried out.

As if all that isn't enough, federal agencies are getting into the act, too. More and more, developers are altering their projects in order to obtain wetlands permits from the Army Corps of Engineers and the Environmental Protection Agency. And builders in remote areas are running into the U.S. Fish & Wildlife Service, which is charged with administering the Endangered Species Act.

The effect of new environmental requirements on planning and development is the subject of a Special Report beginning on page 4.

Special Report: Environmental Laws Turn to Page 4

Counties, State Clash Over Tanner Waste Plans

California's counties are girding for a nasty fight with the state Department of Health Services over approval of their hazardous-waste siting plans.

The plans are required under the so-called "Tanner bill," a 1986 law that established state oversight of local hazardous-waste siting decisions. The intent of the law was to make sure that no county prohibits hazardous-waste disposal facilities.

However, many counties are including so-called "fair-share" provisions in their plans, specifying that they will take responsibility for disposing only of the waste produced inside their borders. This provision may lead to a wholesale rejection of county "Tanner" plans by the Department of Health Services, which reviews the plans. Already, Kern County's plan — the first one to go through DHS review — has been rejected largely for this reason. Kern officials are preparing to resubmit the plan to DHS, but they have refused to delete the "fair share" policy. Instead, they are beefing up the evidence section to justify the policy. The county already accepts 2.5 pounds of hazardous waste for every pound it produces, according to local officials.

Some 25 counties in the state must submit their plans to DHS for review by June 1. The other 33 counties, which have been moving more slowly through the process, have until September 1 to submit their plans.

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Bond Issues Rise in '88 To Pre-Tax Reform Level

State and local bond financing in California returned to pre-tax reform levels in 1988, totalling more than $22 billion, according to the California Debt Advisory Commission's figures. And while local bonding accounted for two-thirds of the total, most of the increase from the state, which almost doubled its bonding activity last year.

Last year was a big year for housing finance, mostly because of Cal-Vet bond issues. Mello-Roos bonds continue to grow in importance and apparently now exceed new redevelopment bonds. Total redevelopment bonds were down, but new issues apparently showed a healthy increase over 1987. Meanwhile, local IDBs dropped 41%.

Statewide, total local agency issues rose 15%, from $12.4 billion to $14.3 billion. But bonding by state agencies rose from $4.2 billion in 1987 to $7.9 billion in 1988 — and that figure doesn't include any of the $6 billion or so authorized by state voters last June and November. None of those bonds have been sold yet.

The $22.4 billion total is the third-highest figure in California history, exceeded only by the pre-tax reform go-go years of 1985 ($32 billion) and 1986 ($24 billion). Almost 30% of the state and local debt was issued for interim financing, meaning a little less than $16 billion was used for capital projects of one sort of another.

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Bond Issues Rise to Pre-Tax Reform Level in '88

Continued from page 1

The California Debt Advisory Commission is an arm of the state treasurer's office that tracks debt financing by state and local agencies. Here are some other highlights from CDAC's 1988 figures:

- General obligation bonds are continuing to make a comeback, doubling last year to $465 million.
- Total redevelopment bonding went down, but apparently the funds obtained from new issues went up. Total redevelopment bond dropped from $1.2 billion in 1987 to about $892 million in 1988. However, according to redevelopment consultant Martin Coren, refunding accounted for 74% of redevelopment debt in 1987 and only 43% of redevelopment debt in 1988. Thus, new redevelopment deals apparently rose from about $300 million in 1987 to about $500 million in 1988.

Coren also said that some cities are issuing bonds for redevelopment use not through the redevelopment agency, but through an entity known as a "public financing authority." This technique permits negotiated bond issues rather than competitive issues, and also helps redevelopment agencies without eminent domain power meet the tax exemption requirements under the 1986 Tax Reform Act. Though no one has an exact count of how much redevelopment financing is channeled through public financing authorities, such authorities issued close to $1.2 billion in bonds statewide, according to the CDAC figures.

- Mello-Roos funding more than doubled, from $240 million in 1987 to $567 million in 1988. (Total transactions increased from 19 to 45.) Mello-Roos financing, which permits developers to use tax-exempt financing to provide up-front infrastructure, has grown in popularity and importance since the law went into effect in 1983. Each year since that time, the Mello-Roos bonding figure has risen by at least 60%.
- Special assessment bonds, which have also become more popular as a way to finance infrastructure in recent years, were up 49% last year, totalling just under $1 billion statewide.
- Commercial and industrial development bonding is dropping fast. Local IDB issues totalled $121 million last year, down 41% from the year before. The IDB total for state agencies was more than $900 million — but all those funds went to refund existing debt for pollution control.
- The big push in housing bonds is coming from the state — and the state is not without its critics in this area.

Bond financing for housing totalled $2.7 billion in 1988, compared with only $947 million in 1987. Virtually all this increase came at the state level, where debt issuance rose from $212 million in 1987 to $1.8 billion in 1988. And almost all of the state bonding total came from eight bond issues — two Cal-Vet bond issues totalling close to $800 million (one was a general-obligation bond) and six revenue bond issues by the California Housing Finance Agency totalling more than $700 million.

Earlier this year, CDAC issued a report analyzing the use of $6.7 billion in housing bond proceeds, covering issues dating back to 1985. Some $2.8 billion included in the CDAC survey was used to finance about 52,000 apartments. But only 22% of those apartments were targeted for low- and moderate-income people, and 74% of them were occupied by only one or two people. This led low-income housing advocates in the state to complain that state bond money was being used to subsidize the middle class rather than the poor.

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BRIEFS

The Los Angeles City Council may **revamp its system of committees to take more control** over controversial growth issues, especially housing, redevelopment, and the environment.

Legislative review is currently split among 15 council committees. Under pressure to take more direct control of city issues, however, the council is considering consolidating most growth-related review in two new committes: Environmental Quality and Waste Management, and Redevelopment and Housing.

Environmental legislation now goes through several different committees. The Redevelopment and Housing Committee would be intended to give City Hall more direct oversight of the Community Redevelopment Agency.

The federal Environmental Protection Agency **has settled an air-quality lawsuit with Sacramento environmentalists** that includes similar provisions to the EPA's agreement with clean-air activists in Los Angeles.

Under the terms of the agreement, the Sacramento Air Quality Maintenance Area will have 32 months to produce an acceptable air-quality plan, or else the EPA will step in and prepare the plan for Sacramento.

In fact, the EPA will be required to prepare its plan while Sacramento officials are working on their plan, so the EPA version will be ready in case the local plan is rejected.

Orange County's Transportation Corridor Agencies are **investigating conflicts of interest by a law firm** which represents both the agencies and developers who are negotiating with the agencies to pay for three new toll roads.

Greg Sanders of Nossaman Guthner Knox & Elliott represents not only the corridor agencies but also three developers who may contribute to construction of the roads they are planning. He denied impropriety. *Continued on page 8*

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COURT CASES

Hayward Initiative Violates Equal Protection, Judge Rules

In a case from Hayward, a federal judge has invalidated an ordinance requiring voter approval for a general plan amendment on a particular piece of property — saying the ordinance violates the equal protection clause of the U.S. Constitution.

In *Fry v. Hayward*, U.S. District Court Judge Edward Lynch said he could find no constitutionally valid reason for the City of Hayward to treat a 108-acre former golf course any differently than other open space parcels in the city. Since he had previously dismissed the "taking" aspects of the case, however, the only impact of the ruling is that a general plan amendment for the property need not go before voters.

In one of the peculiar side effects of a city defending an ordinance that was enacted by the voters, the case is a loss for citizens who lobbied to place the Fry measure on the ballot, but not for the city council, which now has more direct control over the property.

The Hayward case began in 1984 when landowner Marian Fry sought a general plan amendment to change the property's designation from open space to residential. The property, which has been in the Fry family for many years, was used as a golf course until the early '80s. Under pressure from citizens gathering petitions for a possible initiative, the city council placed a referendum on the ballot in 1986 "confirming and retaining" the open space designation. Measure 1 also required prior voter approval for a general plan amendment involving the Fry property. As a result of Measure 1's passage, Fry's request for a general plan amendment was denied.

Fry sued in federal court, alleging that her property had been taken via regulation and further arguing that the equal protection clause had been violated because Measure 1 affected only her property. In October of 1987, Lynch dismissed the taking claim, saying it was unripe because she had not submitted a specific development proposal.

The remaining part of the case turned on the question of whether the city, in passing Measure 1, had made a sufficient distinction between the Fry property and similar pieces of property that the measure did not affect.

Hayward argued that Measure 1 was rationally related to a legitimate public policy goal, the protection of open space. But Lynch found that argument unconvincing — and, in fact, found that the city had failed to explain why the Fry property should be singled out by Measure 1. In an interview, City Attorney Alice Graff said the city used the same language as the proposed initiative in making the distinction — among them, location in the city, proximity to other open space, and the fact the the property was neither in the hills nor adjacent to San Francisco Bay.

Lynch was not persuaded, however. "(T)he record is devoid of any indication that Fry's property bears any unique characteristics that would warrant separate treatment," he wrote. "Indeed, the record is to the contrary." He even quoted a deposition of the city planning director, who Lynch said could not explain why the property was singled out.

Despite the loss on equal protection grounds, Graff was not displeased with the outcome of the case overall. The invalidation of Measure 1, ironically, strengthens the city council's position, because now the council need not submit a proposed general plan amendment for the Fry property to the voters. "We have no damage awards against us, no attorney fees, no change in general plan designation, no impact on the city's ability to make a decision," Graff said. "It was a clear and unadulterated victory for the city."

However, Tony Varni, Fry's lawyer, said he will now ask the city council to change the general plan designation of the property to residential, and will re-file the taking claim if the request is denied.

The full text of Fry v. Hayward, No. C-86-6607, appeared in the Los Angeles Daily Journal Daily Appellate Report on April 12, beginning on page 4724.

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Court Permits Reassessment of Property in Reorganization

Two more appellate cases have been handed down dealing with reassessment of property under Proposition 13.

In one case, *Pueblos del Rio South v. City of San Diego*, the Fourth District Court of Appeal ruled that a complicated sequence of ownership shuffles among affiliated real estate companies was not enough to avoid a reassessment. In *Wrather Port Properties v. County of Los Angeles*, the Second District Court of Appeal ruled that the City of Long Beach's extension of the Queen Mary property's lease from 40 to 66 years did not trigger a reassessment.

Reassessment has become a major issue among local governments in California because Proposition 13 artificially depresses assessments, while property values have risen sharply in many areas. In late February, the state Supreme Court issued a major ruling, upholding the practice of reassessing property owned by the subsidiaries of companies that are taken over by other companies. (*Title Insurance and Trust Co. v. County of Riverside*, 48 Cal.3d 84, See *CP&DR*, March 1989.)

The *Title Insurance* ruling formed part of the basis for the Second District's decision in the *Pueblos del Rio South* case. The case involved 28 parcels of land in San Diego owned by two entities, Pueblos del Rio South and River Run Apartments, that are limited partnerships. Until 1983, Lion Property Corp. was the general partner of Pueblos. Lion was, in turn, owned by Douglas O. Allred and Donald F. Sammis.

In 1983, as part of a reorganization, Lion's interest in Pueblos was transferred to a subsidiary, Douglas Allred Co. Immediately thereafter, the Allred Co. swapped its stock in Lion with Allred himself. The reorganization was effected for income tax purposes. The San Diego County assessor viewed this two-step deal as a change in ownership and reassessed the property. Subsequently, Pueblos sold six of the 28 parcels in question to River Run Apartments.

In a split decision, the Court of Appeal affirmed a lower court ruling that the reassessment was proper. The court pointed out that the purpose of the deal was to permit Sammis and Allred to part company, with Sammis gaining control of Lion and Allred gaining control of the Allred Co. subsidiary (and the property in question). The court's conclusion was that, even though the two companies were affiliated before the transaction, they were not affiliated afterwards and therefore a change in ownership did take place.

The *Wrather Port Properties* case turned on the question of whether Long Beach's decision to increase the time limit for all city leases triggered a reassessment. Wrather signed a lease in 1980 that would cover the longest period of time permitted by the city. Shortly after the lease was signed, the voters approved an increase in allowable lease length from 40 to 66 years.

The full text of Pueblos del Rio South v. City of San Diego, No. D007716, appeared in the Los Angeles Daily Journal Daily Appellate Report on April 21, beginning on page 5205. The full text of Wrather Port Properties v. County of Long Beach appeared in the D.A.R. on April 12, beginning on page 4714.

SPECIAL REPORT

Courts, Legislature Set Stricter Standards for CEQA

In the past eighteen months, several dramatic changes have altered the way development projects are reviewed under the California Environmental Quality Act — changes that both add to the already time-consuming review process and seek to make the law more effective by assuring that its requirements are actually carried out.

Last summer, the First District Court of Appeal essentially outlawed the so-called "Naked Checklist" — a list of yes-no questions with no further explanation — used by many cities to determine whether an environmental impact report is required. In two cases last year, appellate courts — including, in one case, the California Supreme Court — indicated that EIRs should contain a more serious analysis of alternative sites. And this year, cities and counties are grappling with the implementation of AB 3180, a new law that requires them to monitor developers' compliance with CEQA conditions to make sure that, if mitigation measures are required, they actually will be carried out.

"There's been a substantial trend toward tightening it up, making sure agencies take a really hard look at issues they may have been overlooking before," said Ron Bass, director of planning at Jones & Stokes Associates in Sacramento and president of California Chapter, American Planning Association.

Other CEQA experts agree that the changes will make CEQA stricter, and — in the view of environmentalists — hold the environmental review process more closely to its intended goal of encouraging greater public involvement in decisions that affect the environment. Speaking particularly about the effect of the court rulings, Los Angeles environmental lawyer Carlyle Hall said: "The local agency is having to explain everything it does, and it can't hide behind the fact that something is, in its view, infeasible, or is a quasi-judicial matter. It has to develop a record, affirmatively, and write it down and go out and explain it — so that a judge reviewing it could figure out what they've done, and why they think it's the right thing to do."

It remains to be seen, however, whether "tightening CEQA up" will mean a real change in environmental review or just more paper. In many ways, the law has been a snowstorm of paper since its passage 19 years ago, mainly because it is procedural in nature. Contrary to popular perception, CEQA's primary function is not to improve California's environment directly, but to make sure that decision-makers and the public are fully aware of the environmental consequences of any project — from general plan down to permit approval — undertaken by a government agency.

Thus, CEQA does not absolutely require local officials to deny a project that would harm the environment. Rather, it establishes processes designed to disclose detailed information to the decision-makers and the public about the project's environmental effects, thus generating — or so the idea goes — a robust public debate on the issue.

CEQA's procedural nature has given environmental groups tremendous litigation power — and, therefore, has given the courts an unusual opportunity to shape the law. Perhaps the best-known example came in 1972, when the California Supreme Court broadened the scope of the law immeasurably by ruling that CEQA applied not just to public projects, but to private projects under review by government agencies.

Much of the litigation has revolved around the question of when local agencies must prepare an environmental impact report and what the contents of EIRs must be. As many courts have pointed out, the EIR is the "heart" of CEQA — a broad-ranging document meant to provide lots of information to the public about the environmental effects of a big project.

But because of ever-broadening court directives about what it must contain, the EIR has gotten expensive and time-consuming. The typical EIR costs somewhere into five figures and takes several weeks to prepare; the team of consultants typically includes planners, geologists, biologists, even paleontologists. On large projects, such as the proposed Orange County toll roads, the tab runs into the millions.

Developers have always fought hard in court and also in the legislature — usually unsuccessfully — to prevent more broadening of CEQA's requirements. And local governments are not always pleased with the litigious nature of environmental groups and the close scrutiny of judges, either. "These things go to court and the judge tells us how we're wrong, but they don't tell us how we can be right," said Jeff Harris, environmental coordinator for Santa Barbara County. "It's Kafkaesque."

In fact, CEQA's complicated procedures have tempted both developers and local governments to cut corners in environmental review, in order to avoid dealing with heavy, complicated EIRs. "Virtually every CEQA document could be successfully challenged," said James Harnish, a land-use lawyer and acting environmental coordinator for the City of Sacramento. "If you don't see any potential litigants out there, the temptation is not to put the full effort in, knowing it won't be challenged. It works most of the time."

This, then, is the context in which the somewhat dramatic changes of the past 18 months have taken place. Now here is a rundown on how these changes came about and what effect they are having.

The *Sunstrom* Case And the 'Naked Checklist'

Much of the corner-cutting in CEQA has come in the so-called "initial study" — the first-cut review of possible environmental problems that is used to assess whether an environmental impact report is required. As part of the state CEQA guidelines, the Governor's Office of Planning and Research has prepared a checklist of possible areas of environmental damage — geology, air pollution, damage to plant and animal life, and so on — that government agencies should review in determining whether an EIR must be done. Many cities and counties simply use the OPR checklist in stripped-down form, checking "yes," "no," or "maybe" with no further explanation. The result is often a "mitigated negative declaration," containing many conditions to minimize environmental damage, rather than a full-blown EIR.

This practice is more or less how Mendocino County wound up in court over a proposal to build a private sewage treatment plant for a small development project along the Mendocino Coast. In conducting the initial study, Mendocino County planners checked "no" for 38 of the checklist's 43 questions and provided a boilerplate answer for the other three questions, where environmental problems had been identified. The permit was approved, with a mitigated negative declaration requiring approval from regional air pollution and water quality boards, as well as a plan for sludge disposal.

This skimpy environmental review up-front led to problems later on. As it turned out, the Regional Water Quality Control Board found hydrological problems. The county then required the applicant, Harold K. Miller, to submit drainage studies. Miller than proposed a drainage solution and the Board of Supervisors approved the project.

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The county's environmental review did not hold up in court. In an important ruling handed down last June, the First District Court of Appeal took Mendocino County to task. "The initial study ... displayed only a token observance of regulatory requirements," wrote Justice William A. Newsome in *Sunstrom v. County of Mendocino*, 248 Cal.Rptr. 352. "In the case of several questions marked 'no,' evidence clearly disclosed that the project would disturb existing conditions, e.g., change present drainage characteristics and alter local plant conditions."

But the appellate court didn't stop there. The justices also chastised county planners for the way they handled the subsequent hydrological problem — in particular, conditioning the project's approval based on mitigation measures yet to be determined by a consulting hydrologist. "The requirement that the applicant adopt mitigation measures recommended in a future study is in direct conflict with the guidelines implementing CEQA," Newsome wrote. He later added: "By deferring environmental assessment to a future date, the conditions run counter to that policy of CEQA which requires environmental review at the earliest feasible stage of the planning process."

The appellate court's ruling on both these issues — the checklist and the approval contingent on a later study — have dramatically affected the way government agencies handle environmental review.

As for the checklist, no longer may a junior planner simply run down the list, checking "no." Now, at least a brief explanation is required for every answer. On large projects, the initial study now may cost thousands of dollars and requiring the hiring of specialists. "We probably take three times as much time to process each negative declaration," said Sacramento's Harnish.

CEQA's ardent supporters say the *Sunstrom* changes give environmentalists a fighting chance to get a full airing of the environmental issues in a development project. "It moves away from the trend that seemed to require project opponents to hire their own experts as the only way to force an EIR," said James Moose, a Sacramento environmental lawyer and co-author of *A Guide to the California Environmental Quality Act*. Predictably, some cities and their environmental consultants say the Sunstrom decision requires unnecessary detail.

"Let's say you've got a site that is an urban infill site," said Thomas Smith, a principal with Michael Brandman Associates in Santa Ana. "Say it has an urban use that's being torn done and redone, and you look at the biological impacts. Obviously, there aren't any biological impacts. But now we've got to write a few sentences."

The appellate court's ruling about future studies is also affecting the way CEQA is applied throughout the state. At the Coastal Commission, for example, such contingent approvals were commonplace; once the studies were in, the project went back to Executive Director Peter Douglas, not the commissioners, for final review. Now, any coastal project with such a contingent approval must return to the commission for final review. "What I think *Sunstrom* did," said Coastal Commission General Counsel Ralph Faust, "was clarify the extent to which the courts wanted decisions such as this to be made by the decision-maker with knowledge in hand."

Alternative Sites After *Goleta* and *Laurel Heights*

It is not clear sailing for developers and planners once they get past the initial study, however. Recent court cases have also beefed up the requirements of an environmental impact report — in particular, the analysis of alternatives.

The alternatives analysis is one of those considerations that environmental consultants sometimes call the "back-of-the-book" items — meaning it has not always received serious consideration. Typically, discussing alternatives has meant only offering scaled-down versions of the proposed project (including a "no-project" alternative) for consideration. Alternative sites have usually not been considered, because private landowners typically own only one site.

But in the case of a proposed beachfront Hyatt Hotel in Goleta, a Court of Appeal ruled that Santa Barbara County should have discussed alternative sites for the hotel — even though Hyatt owned no other property. (*CP&DR*, February 1988.) "Serving the public interest at minimal environmental expense is the goal of CEQA," the appellate court declared in *Citizens of Goleta Valley v. Board of Supervisors*, 197 Cal.App.3d 1167. "Ownership of the land used and the identity of the developer are factors of lesser significance." The court also ruled that Hyatt can't reject a scaled-down version of the project on the basis of "economic infeasibility" without revealing detailed financial information about the project's cost and projected profitability.

The Goleta case shocked many government agencies and developers when it was handed down in January of 1988, but late last year alternatives requirements were tightened even more when the state Supreme Court weighed in on CEQA for the first time. In *Laurel Heights Improvement Association v. Regents of the University of California*, 47 Cal.3d 376, the high court ruled that the EIR for a proposed new laboratory at the University of California, San Francisco, was inadequate, partly because it did not include a detailed analysis of alternative sites. (*CP&DR*, February 1989.)

The unanimous, 79-page opinion, written by Justice David Eagleson, was a strongly worded reaffirmation that CEQA's basic goal is informing the public, and the EIR — with its detailed discussion of effects, mitigation measures, and alternatives — must serve this goal.

"The Regents apparently believed that, because they and UCSF were already fully informed as to the alleged infeasibility of alternatives, there was no need to discuss them in the EIR," Eagleson wrote. However, he added, "The Regents miss the critical point that the public must be equally informed. Without meaningful analysis of alternatives, neither the courts nor the public can fulfill their proper roles in the CEQA process."

The initial reaction to the two cases was panic. "I had one client city, I can't mention the name, that said, We want to include 15 alternative sites to make sure we're covered," said Jones & Stokes' Bass. "We said, that's not what the court said. If you look at a couple in a reasonable level of detail, you're gonna be okay."

Nevertheless, there is considerable uncertainty about alternative sites — especially on private projects, where the question of which sites are available remains a lingering issue. "It shows you the difficulty of applying CEQA to the land-use process, where the initiative comes from private property owners," said CEQA expert Daniel J. Selmi, a professor at Loyola Law School in Los Angeles.

For this reason, the most immediate impact is likely to be on public projects, which the Supreme Court has made clear must deal extensively with alternate sites that may be less environmentally damaging.

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SPECIAL REPORT

Federal Laws Cast Larger Shadow Over Development Projects

The California Environmental Quality Act may be getting tougher — but for some developers, it's not half as hard to handle as federal environmental laws.

Both the Clean Water Act and the Endangered Species Act give the federal government powerful entree into local land-use regulation. Under Section 404 of the Clean Water Act, wetlands may not be filled without a permit from the U.S. Army Corps of Engineers; the Environmental Protection Agency also has veto power over such permits. Similarly, the natural habitat of an endangered species may not be eliminated without the permission of the Fish & Wildlife Service.

These laws have been on the books for years, but recently they have become far more important, for two reasons. First, raw land in California is so rare that developers must turn to wetlands and remote habitats. And second, environmentalists have gotten much more active in forcing federal agencies into action — partly as a result of information revealed under the California Environmental Quality Act.

Here, then, is a rundown of the current situation on both the laws and how they are affecting development projects in California.

Federal Wetlands Laws And the *Bersani* Case

Historically, wetlands permits were not a big problem because ey came under the jurisdiction of the Corps, an engineering-riented agency. Recently, however, the EPA, which has co-jurisdiction with the Army Corps, has gotten more aggressive.

"EPA is now *the* primary player," said Lindell Marsh, of Siemon, Larsen & Marsh in Newport Beach, a prominent Southern California environmental lawyer.

In fact, in a recent court case reminiscent of the *Goleta Valley* case in California, the agency won a battle to stop a Massachusetts shopping mall from being constructed in a wetland.

In *Bersani v. Robichaud*, 850 F.Rptr. 36, the Second U.S. Circuit Court of Appeals ruled that because the shopping-mall developer could have purchased a different, non-wetlands site, EPA's denial of the permit was justified. The question of whether the availability of alternative sites should be considered by EPA in denying the permit was never in doubt. The legal arguments revolved around the timing. In the *Bersani* case, a non-wetlands site was available when the Pyramid Cos. began looking for land — but by the time Pyramid applied for permit on the wetlands site it chose, the non-wetlands site had been tied up by a competitor.

EPA argued that its decision should be based on availability of alternatives at the time the developer entered the market (the so-called "market entry approach"), while Pyramid argued that the decision should be based on availability of alternatives at the time of the permit application. The Second Circuit sided with EPA and, in March, the U.S. Supreme Court let the decision stand.

Even tougher wetlands regulation may be in the offing. Last year, the National Wetlands Policy Forum, a broad coalition of interests including agricultural and business representatives, called for "sweeping new policies" on wetlands. And earlier this year President Bush announced plans to establish a wetlands interagency task force. The National Wetlands Policy Forum was created by the onservation Foundation, whose president, William Reilly, now erves as Bush's EPA administrator. And State Sen. Gary K. Hart, D-Santa Barbara, has introduced a bill (SB 1500) that would prohibit new wetlands development along the California coast.

Wetlands Mitigation in California

Under federal law, developers do not have to leave all wetlands undisturbed. Rather, if they dredge and fill the wetlands, they must replace them acre-for-acre. (Developers may also rehabilitate a poorly functioning wetland to fulfill the requirement.) This has led to some remarkably long-distance trades. The Port of Los Angeles, for example, restored a lagoon in Carlsbad as part of a recent tradeoff, and the Ports of L.A. and Long Beach are looking for other sites in San Diego County (and the L.A. area) to offset a 2,300-acre expansion.

Perhaps the two best-known wetlands cases involve Ballona Creek in Los Angeles and Bolsa Chica in Huntington Beach. The Ballona Creek wetlands issue has hampered Summa Corp.'s attempt to develop the huge Playa Vista project near the Los Angeles International Airport, the last large undeveloped parcel of land near the ocean in L.A. The dispute remains locked in litigation, though the ports are looking at Ballona as a possible location to build up so-called "offset credits."

At Bolsa Chica, Signal Landmark Co. had planned to build a marina. Bolsa Chica is also locked in litigation, but at the instigation of Orange County Supervisor Harriett Weider, all sides have been participating in a negotiation exercise called the Bolsa Chica Planning Coalition. At last report, the group had tentatively agreed to revamp the development into a residential subdivision, with most construction on a mesa above the ocean, so that no navigable entrance from the ocean would be created. The lawsuit continues, however.

The Endangered Species Act And the Kangaroo Rat

Western Riverside County is one of the fastest-growing areas anywhere in the country, with boom cities like Moreno Valley quickly popping up out of the grasslands. But it may not stay that way for long unless developers, environmentalists, and local officials can figure out what to do with the Stephens' Kangaroo Rat.

The tale of the "K-rat," as it is sometimes known, is another good example of federal law — this time the Endangered Species Act — affected local land-use planning. The K-rat is a rodent on the federal endangered species list that roams across a vast area of grasslands in western Riverside. An endangered species may be not be removed from its property, nor may its habitat be affected, without a "Section 10-A" permit from the U.S. Fish & Wildlife Service.

For developers in rapidly growing areas like Moreno Valley, Perris, and Lake Elsinore, that's bad news. So representatives of the county, several cities, developers, and environmentalists have been trying to work out a solution. They've tentatively agreed on a habitat conservation plan to be funded by a kind of mitigation "bank."

The Riverside County K-rat solution could be a good example if it works. A 17,000-acre preserve would be carved out of a much larger study area (presently about 100,000 acres). To pay for acquisition of the land, developers would pay a fee of $1,950 per acre developed into a fund — essentially a mitigation bank. With the cost of land rising every day due to speculation, however, even that fee wouldn't cover the whole cost of the land; state and federal grants will have to be obtained to create the whole preserve. The entire program would be wrapped up under a Fish & Wildlife 10-A permit.

SPECIAL REPORT

Courts, Legislature Set Stricter Standards for CEQA

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The Passage of AB 3180 And Mitigation Monitoring

All the review in the world will not protect the environment unless "mitigation measures" — those conditions placed on development to lessen their environmental effect — are actually carried out. So last year the legislature enacted AB 3180, sponsored by Assembly Local Government Chairman Dominic Cortese, D-San Jose. The new law requires local governments to establish a program to monitor the mitigation measures they require of developers.

Considering the lobbying power of the building industry in Sacramento, AB 3180 breezed through the legislature rather easily last year — perhaps because of the mounting evidence that a lack of monitoring was undermining CEQA's effectiveness.

"We heard a lot of horror stories before the bill was introduced and as the bill was going through we heard a lot more," said Randy Pestor, consultant to the Assembly Local Government Committee.

Perhaps the most prominent horror story came from Folsom, where group of developers led by prominent Sacramento builder Angelo Tsokopoulos tore out more than 3,000 mature oak trees on a 450-acre tract slated for housing, even though they had agreed to keep them.

But there was other evidence. A study by the University of California, Davis, revealed that only 27% of the state's cities always make site visits to monitor mitigation measures. (For counties the figure was 54%.) The same study revealed that more than half of all local agencies never even receive a follow-up letter from developers regarding mitigation measures, though in this case the cities did better than the counties. Other surveys have found widespread lack of compliance with requirements for conservation easements and ride-sharing programs.

Like the recent court cases, however, the new law has many planning departments scrambling. Some are calling on building inspectors and zoning administrators to add environmental monitoring to their duties. Many have asked their regular EIR consultants to fold mitigation monitoring programs into their other work; this has led to concern that AB 3180 might become just another paper requirement, under which cities have a monitoring plan on the shelf but not in the field.

Pestor warns against this kind of implementation. "If we don't go back and monitor some of these mitigation measures as AB 3180 requires, there's likely to be more stringent requirements placed on cities, because the environmental effects of projects are not being mitigated," he said.

Yet this is not as easy as it sounds for many local governments, which are much better at processing and approving things than keeping track of them afterwards. "If the mitigation of an air-quality problem is a transportation-demand management ordinance, with ride-sharing and things like that, how do you actually ensure it's being done?" asked Mark Winogrond, director of community development in West Hollywood. "Cities are notorious for having difficulty continuously monitoring anything."

Nevertheless, some agencies have managed to put together mitigation monitoring programs that set sterling examples. One that came about before the passage of AB 3180 involved the $300-million expansion of Orange County's John Wayne Airport. The expansion project had been mired in litigation over the possible runoff of sediment into Upper Newport Bay. Monitoring of environmental mitigation looked to be one way to get it moving.

"What we said to the county was," Look, this thing has been in litigation for years. If you want to keep it out of court, you're going to have to go the extra mile'," said Tom Smith of Michael Brandman Associates, which handles the monitoring program. One example: "When people were designing the grading program, we looked at all the engineering designs and made sure they put sediment traps in certain areas, sandbags placed to make sure the runoff stayed at the airport." The bill for Brandman's monitoring: $750,000 over five years.

As for Folsom, outrage over the destruction of the oak trees has already led to a higher level of concern. The project's developers had to go through the approval process all over again, pay a $100,000 penalty, and replace the trees on a two-for-one basis. Said environmental planner Peter Holton: "We are going to be retaining someone to go out and keep abreast of the construction that's going on out there."

The Governor's Office of Planning and Research has published a booklet called "Tracking CEQA Mitigation Measures Under AB 3180," which includes a review of the law, sample forms for administering it, and several case studies of mitigation monitoring programs, including the Folsom and the John Wayne Airport mitigation programs. More information is available by calling (916) 445-4831.

NATIONAL BRIEFS

A proposal to **build a $200 million baseball stadium in New Jersey** has been made by one of the state's biggest developers, Hartz Mountain Industries.

Hartz Mountain has offered to build the stadium along the New Jersey Turnpike in Secaucus, then sell it to the New Jersey Sports and Exposition Authority for $190 million, no matter how much it costs to build. The developer would then lease back a portion of the stadium site to build a 3-million-square-foot office complex. Paul Amico, who has been mayor of Secaucus for 26 years, opposes the plan.

In 1987, New Jersey voters defeated a bond issue that would have permitted construction of a baseball stadium at the Meadowlands Sports Complex, a few miles west of the Hartz Mountain site.

Meanwhile, a survey by the International City Management Assoc. has found a **construction boom in minor-league baseball stadiums**.

A survey of 88 minor-league baseball towns found that 60% have engaged in significant stadium renovation in the '80s, while more stadiums have been built in the last five years than at any time since the 1940s.

A Chicago developer has **swapped an inland industrial site for a choice lakefront property**, relocating the factory from the lakefront and even building a $2-million addition.

For his investment and swap, developer William Harris Smith reportedly plans to build 30 duplexes, costing in the range of $500,000, on the lakefront property.

Counties, State Clash Over Review of Tanner Waste Plans

Continued from page 1

The Tanner law was the brainchild of Assemblywoman Sally Tanner, a Democrat from the San Gabriel Valley. The law declares the disposal of hazardous waste to be an issue of statewide concern, more or less declaring that a NIMBY (Not In My Back Yard) approach should not be permitted. But the law also strikes a precarious balance between the state's interest in siting these facilities and local governments' desire to maintain control over them. County plans must be reviewed by DHS. Subsequently, new hazardous-waste facilities must conform with the adopted plan. However, a local denial may be appealed to the governor.

The "fair share" idea was hatched by the County Supervisors Association of California, partly because rural counties feared that the Tanner law would be used to force them into accepting facilities they didn't want. CSAC lobbyist Victor Pottorf said the "fair share" policy is completely consistent with the Tanner law, which, he claims, simply requires that every county take responsibility for the hazardous waste it produces. "The basic premise is a county should not be forced into taking facilities that go beyond what is necessary, as far as what is being generated within that county," Pottorf said.

But officials at DHS's Toxic Substances Control Division see it differently. First, they argue that many types of hazardous waste are produced in small quantities around the state and must be disposed of in central locations. And second, they say that the "fair share" provisions will endanger California's chances of getting federal Superfund money. To qualify for Superfund money, California must prepare a "capacity assurance plan," which lays out how California will provide the capacity to dispose of all its hazardous waste. The capacity assurance plan will be submitted to the Environmental Protection Agency in November.

In response, CSAC's Pottorf argues that counties could strike agreements with each other as needed, so that waste could be moved from county to county even if the fair-share plans are in place. "After you make that first (fair-share) policy, if there is a need regionally for a larger facility, you can use intercounty agreements," Pottorf said.

The Kern County plan was the only plan in the state submitted to DHS before the original deadline, which was Oct. 1 of last year. The plan was an amended version of the hazardous waste element contained in the county's general plan. In addition to the fair-share policy, the Kern County plan required the builders of a disposal facility to buy a buffer of one mile in each direction.

The Kern situation was further complicated by a controversial proposal for a hazardous-waste landfill that would use "deep-well injection" technology. Under this technology, hazardous waste is injected into oil wells that are no longer in use. TSD Systems has proposed a deep-well injection facility in Blackwells Corners, about halfway between Bakersfield and Paso Robles.

Last June, however, Kern County voters passed an initiative prohibiting any deep-well injection projects in the county. County officials subsequently included the ban in the county Tanner plan. DHS also cited the deep-well injection ban as one of the reasons the Kern plan was rejected. (The county is also locked in litigation with TSD Systems over the project.)

Now Kern officials are in the process of revising the plan — but not the concepts. "We are not changing the policies in the plan," said Ted James of the county planning department. "We are adding non-substantive justifications and clarifications to the policies that are part of the plan. ... We've basically come up with a technical appendix."

CSAC is not optimistic that the "fair share" idea will fly. Asked what chance he had of turning the Department of Health Services around on the concept, Pottorf said: "Absolutely zero." He indicated that CSAC may seek a favorable interpretation of the Tanner bill in court if there is a wholesale rejection of county plans.

Meanwhile, the Assembly Environmental Safety and Toxic Materials Committee, which Tanner chairs, has voted down AB 340, introduced by Assemblyman Trice Harvey, R-Bakersfield. The bill would have prohibited appeals of hazardous-waste denials in any county that already accepts 200% of the waste it produces.

But Tanner herself is staying out of the fray for now. "The stance of the counties generally is not, in our perception, as unified as it appears to be," said Arnold Peters, Tanner's committee consultant. "It remains to be seen whether we will get a uniform rejection of all county plans. ... We've taken the stance that it's not proper for us to choose up sides, and we have to wait and see what happens."

Contacts: Ted James, Kern County Planning Department, (805) 861-2615.
Bob Borzelleri, DHS Toxic Substances Control Division, (916) 322-0476.
Arnold Peters, Assembly Toxics Committee, (916) 445-0991.

BRIEFS

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The agencies are considering the idea of replacing Nossaman Guthner, which has billed $1.5 million in 2 1/2 years of work, with staff attorneys. The Orange County Register recently reported that, in the first six months of this fiscal year, Nossaman Guthner used almost all of the agencies' annual legal budget.

Sixties activists object to a plan by the University of California, Berkeley, to **build a dormitory on the site of People's Park.**

UC bought the property in 1967 and razed rooming houses, anticipating dorm construction in the '70s. It was slated to serve as a playing field in the interim. But Berkeley's students and activists unilaterally created a park, touching off a confrontation that eventually led Gov. Ronald Reagan to call out the National Guard.

Nowadays, officials claim People's Park is a hazard because of crime and drug deals. A UC spokesman said the there is room to build a 250-room dorm and still commemorate the site of the park.

The water district in **Goleta has agreed to provide ample water to several property owners** as part of a settlement of a lawsuit.

The plaintiffs in the lawsuit happened to own the land on top of the underground water basin used by water-poor Goleta, near Santa Barbara. They originally filed suit 17 years ago, claiming that the Goleta Water District's restrictions on new water use by all property owners should not apply to them. The district won at the trial court level but an appellate court ruled in favor of the landowners in 1985 and remanded the case to trial court.

The water district board agreed to the lawsuit after being advised by its lawyer, Wayne Lemieux, that the property owners probably would have won a damages settlement of at least $30 million.

ROUNDUP: San Jose's convention center, the largest construct project in the city's history, is open for business....Meanwhile, officials in **Anaheim choose a site near Anaheim Stadium** for an indoor sports arena...