

Memorandum 97-6

Environmental Law Consolidation: Organization of Study

BACKGROUND

The Legislature revised the Commission's calendar of topics during the 1996 legislative session to add the following study:

Whether the laws within various codes relating to environmental quality and natural resources should be reorganized in order to simplify and consolidate relevant statutes, resolve inconsistencies between the statutes, and eliminate obsolete and unnecessarily duplicative statutes.
1996 Cal. Stat. res. ch. 38.

The idea for this project originated in discussions between environmental lawyers and Senator Lockyer's office concerning how the Legislature might help business cope with the confusing mass of environmental statutes. The concept is a nonsubstantive reorganization that would bring the statutes together in a logical and accessible way. Senator Lockyer's office has indicated that this project should receive some priority.

This memorandum suggests to the Commission a manner of proceeding on the study.

A FEW PRELIMINARY STAFF OBSERVATIONS

The most striking aspect of this project, to the staff, is its magnitude. The volume of environmental statutory material in California is immense. Its boundaries are also indistinct and potentially unlimited. Are drinking water standards, for example, to be categorized as environmental?

There are at least two compilations of California "environmental" statutes available commercially — Professor Brian Gray of Hastings Law School edits a 1,700-page volume for West Publishing Company, and Professor John Dwyer of Boalt Hall edits a 2,000-page volume for Bancroft-Whitney Company.

Another significant aspect of this project, from the staff's perspective, is that it is fraught with political consequences. Nearly every environmental statute affects many interests — the person or entity compelled to comply with the statute, the segment of the public intended to be protected or benefited by the statute, the governmental or other entity responsible for enforcement of the statute. Each of these interests is suspicious of the others, and of any change in the status quo. Even a nonsubstantive project such as this — a straightforward statutory consolidation — is certain to cause concern: either that changes are secretly being made, or that simple statutory renumbering will cause problems in terms of learning new numbers, reprinting forms, etc.

A concern about a project of this type is that it could be seized upon by persons opposed to environmental reform as an argument against any further change. "The Law Revision Commission, after a careful and lengthy study, has recommended a new Environmental Code. We should not tinker with it further."

In fact, there are currently projects pending to do real environmental law reform. This could include treating various aspects of pollution control and conservation together in a unified way, centralizing enforcement efforts, centralizing permitting, etc. It is not clear how far these efforts will get because of the political ramifications, not least of which is bureaucratic turf protection.

The staff is also concerned that the Commission could sink a lot of resources into a statutory reorganization, only to have the whole effort made obsolete by a real reform project. However, that appears unlikely at this point. In fact, a statutory reorganization may be the only feasible statutory improvement. A well-done statute could also lay the groundwork for true reform in the future.

The staff has spoken with a number of environmental law experts concerning this project. The general attitude appears to be that it will be a lot of work, that more significant reform is needed, but that it is a worthwhile step in the right direction.

OTHER REFORM EFFORTS

There are a number of environmental statute reform efforts at both the state and federal levels that the staff has become aware of. Most of these efforts seek true substantive unification of the environmental statutes. The only successful efforts that we are aware of, however, are statutory reorganizations of the sort contemplated by the current Commission project.

Federal Projects

All the federal projects we are aware of are aimed at a true unification of environmental statutes. They are also quite limited in scope, applying only to statutes within the jurisdiction of the Environmental Protection Agency. These efforts include:

(1) A Draft Environmental Protection Act, 1988. This draft was prepared by Terry Davies of Resources for the Future in Washington, DC. It establishes a benchmark referred to by later unification efforts.

(2) Enterprise for the Environment, a policy forum chaired by William Ruckelshaus and managed by the Center for Strategic & International Studies in Washington, DC. Their target date for production of a significant environmental unification proposal is April 1997.

(3) EPA has its own Statutory Integration Project, headed by David Ziegele. They are currently collecting ideas and information, but are waiting for the Enterprise for the Environment report before they give this any priority.

State Projects

(1) Michigan. The most significant statutory consolidation effort we are aware of is Michigan's. That project was quite similar to the one contemplated here — a nonsubstantive reorganization. It was done by a special commission — the Michigan Natural Resources Management and Environmental Code Commission. The project took somewhat over a year of full-time work by the commission, and was enacted without serious challenge in 1994. The volume of statutory material is less than 20% of California's, though.

(2) New Jersey. The New Jersey Law Revision Commission has activated an environmental statutes project in cooperation with the New Jersey Department of Environmental Protection. They issued their first tentative report in October 1996, relating to statutes affecting tidelands.

(3) Other states. We have reviewed the statutes of other states and have identified twenty-some-odd that appear to have some consolidation of environmental statutes. We have not yet made a determination of how extensive these consolidations may be, but they should provide us useful models on effective ways to organize the statutes.

California Projects

(1) Unified Environmental Statute Commission. This is a blue-ribbon commission established by Governor Wilson and run by Cal/EPA. The commission has just issued its report (February 1997). The report is aimed at true unification, including coordination of enforcement efforts, model ordinances, consolidated permitting, focus on pollution prevention, etc. The report does not recommend any specific legislation, but suggests that much can be achieved through regulatory, rather than statutory, reform.

(2) Assembly Committee on Environmental Safety and Toxic Materials. The committee introduced a spot bill in 1996, AB 3477: "It is the intent of the Legislature, by the enactment of this act, to establish a single unified code of environmental protection statutes, which would replace existing environmental protection statutes in the various codes, that would be administered by a single environmental protection agency." The purpose of this bill was to serve as a catalyst for the committee staff to develop a consensus in favor of a truly unified environmental statute.

METHOD OF PROCEEDING

The staff can see only two realistic ways of proceeding on this project. We could do a study of whether such a project is really worthwhile, given the substantial resources it will require and the disruption it will cause. Or we could jump in and start producing drafts.

The first approach — a study of a study — would be accomplished by a questionnaire to people in the field. We did just this before entering the Family Code project, and the favorable responses we received gave us confidence that the expenditure of resources was worthwhile.

The second approach — let's get going — is preferred by the staff. We have enough of a sense from talking to people in the field that reaction to this project will be mixed but overall favorable. The Legislature has asked us to give it a priority. We currently have the resources to get it underway, and Senator Kopp is seeking a budget augmentation for us that would make it quite feasible.

The staff would start with a manageable portion, e.g., drafting an Environmental Code structure plus one division of the new code (relating, e.g., to solid waste). If that can be enacted, we will then have in place a Code structure, and can gradually fill it in as we complete work on different divisions. On the

other hand, if it fails enactment, we will know that the goal of a consolidated statute is not achievable, and we can abort the project without expending further resources on it.

The staff recommends the following approach:

- Develop a mission statement for this project that makes clear its organizational and nonsubstantive purpose.
- Widely publicize the project and develop an extensive mailing list for review and comment.
- Enlist expert academic consultants committed to advise the Commission and staff on the structure for the code, taking into account also other state and national models that may exist.
- Obtain the cooperation of the state bureaucracy, perhaps through the Governor's Office.
- Establish an advisory committee of practitioners from all segments of environmental practice, including legislative staff, to react to concepts and review drafts.
- Follow the normal Commission practice of consideration of drafts at public meetings, followed by issuance of tentative recommendations for comment and printing of final recommendations to the Governor and Legislature.
- Build up the Environmental Code through a series of enactments over the course of several legislative sessions.

A few details of this proposal are elaborated below.

Mission Statement

The staff believes it is essential to the success of this project, both for allaying concerns and for enlisting help, to have a clear statement of the intent and scope of the project. The staff envisions something along the following lines:

ENVIRONMENTAL LAW REORGANIZATION

The Legislature has directed the California Law Revision Commission to propose a reorganization of California's environmental quality and natural resources statutes. See 1996 Cal. Stat. res. ch. 38. This is a nonsubstantive project. Its purpose is to simplify and consolidate existing statutes by bringing them together in an organized way that will make them more usable and accessible. The Commission may also propose to eliminate obsolete and unnecessarily duplicative statutes, and may suggest ways to resolve inconsistencies between statutes.

The project will take the form of a series of reports on subject matter areas covering the entire range of California environmental statutes. The Commission anticipates development of a complete code over several years by enactment of a series of subject matter statutes. Work on this project will commence during 1997 and will be executed on a priority basis.

The Commission seeks the involvement of interested persons in this project. All Commission decisions will be made at public meetings, and recommendations will be made to the Governor and Legislature only after interested persons have had an opportunity to review and comment on the proposals, and the Commission has considered the comments.

For further information, please contact the Commission at:

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Academic Consultants

We are in the fortunate position of having at least two California law professors who are familiar with the wide range of California environmental statutes, being editors of commercial compilations of the statutes. The West compilation edited by Professor Brian Gray of Hastings Law School is organized by code. The Bancroft-Whitney compilation edited by Professor John Dwyer of Boalt Hall is organized by subject matter. Their fields of expertise are likewise complementary, Professor Gray being particularly knowledgeable concerning natural resources aspects of environmental law, and Professor Dwyer being particularly knowledgeable concerning pollution control aspects of environmental law.

The staff has spoken with both professors, and both are willing to work with us, and with each other, on a consultation basis. The staff contemplates that they will help us develop an outline or blueprint for the new code, and indicate which statutes might be appropriately be located in which divisions. They would also make themselves available to the Commission and staff to give us guidance on an ongoing basis. The staff suggests engaging both professors as consultants, and covering their travel expenses (plus \$100 per diem) for attending meetings and

hearings at our request. We would also provide each a \$1,000 honorarium for the substantial amount of original work they will need to do in helping us develop the basic structure of the new code.

The staff thinks it will also be useful to engage other academic consultants who may be willing to review and comment on drafts and attend meetings, with the same kind of minimal compensation scheme. The staff is pursuing a few leads to academics who may be knowledgeable and interested in helping. If the Commission is agreeable and funds are available, the staff will execute these contracts.

Advisory Committee

It may be difficult to get affected parties to focus on a nonsubstantive project such as this up front. For this reason, the staff thinks it would be useful to name an advisory committee of knowledgeable persons who have committed themselves to give us feedback on an ongoing basis. We contemplate the feedback to take various forms, including alerting us to land mines, suggesting areas for consolidation, identifying obsolete statutes, reacting to drafts, and suggesting appropriate persons who should be sent drafts for review. The staff would seek to get people on the advisory committee from all different perspectives, including regulators, private sector representatives, environmental groups, and legislative staff members.

We anticipate that the advisory committee could meet on occasion, but probably would also be able to help us either by teleconference or by mail. The cost of funding the advisory committee would be modest, but we would benefit substantially from having it.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary