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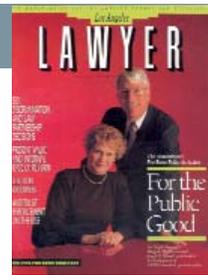
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By Barry Groveman

Environmental Law

The birth and growth of environmental law

It was not too long ago that we were oblivious to the consequences of our daily activities on the environment. How many of us, 25 years ago, were aware that simple day-to-day activities like dry cleaning our clothes or buying the newspaper may have a detrimental effect? Did we know or did we care that millions of tons of toxic chemicals were manufactured, used, and discarded to make metal plating for our eyeglasses, jewelry, and pots and pans? Did we know where our trash was going? If we did know, did we think that we could bury our trash and waste into landfills indefinitely? Were we aware that environmental policy in our region of the world might have adverse consequences in another part of the world and vice versa? Who had ever heard of environmental law?

Today, environmental issues permeate our lives and the way we do business. Environmental lawyers have become well integrated into traditional areas of legal practice that, 25 years ago, functioned without consideration of the environment. Environmental professionals and scientists are engaged in scores of studies and research projects seeking solutions to our environmental problems. Politicians, government officials, and community activists now seize

mental issues has developed along a continuum marked by noteworthy events at the national and local level and increased activism on legislative, regulatory, and judicial fronts.

Few would disagree that a series of widely publicized environmental events and tragedies contributed significantly to public awareness and interest in the environment. In her groundbreaking book, *Silent Spring*, published in 1962, Rachael Carson alerted the public to the dangers of DDT and other pesticides. Carson's book is widely regarded as one of the early consciousness-raising pieces written on the environment, and the widespread support of her views must be considered one of the early turning points that inspired environmentalism. It led directly to the enactment of environmental legislation and the creation of independent governmental agencies to oversee the protection of the environment.¹

During the 1970s, an outbreak of asbestos exposure cases also occupied the headlines. In one of the most important precedents of its kind, a Texas court of appeal affirmed a jury verdict that found the asbestos industry liable under both negligence and strict liability theories for failing to warn users of the known health hazards of asbestos.² The effects of the case were felt throughout the business community and many branches of government, and an entire industry was decimated because of environmental concerns. By 1973, Johns-Manville and Owens-Corning, both leading manufacturers of asbestos, stopped using asbestos in insulation sold in the United States. The U.S. Environmental Protection Agency subsequently banned asbestos insulation in 1975. Eventually, Johns-Manville and numerous other asbestos manufacturers were forced into bankruptcy as thousands of people filed lawsuits seeking damages for asbestos-related injuries.³

In 1978, the public also learned about one of the most notorious hazardous waste sites in America, the Love Canal in upstate New York. The Love Canal was originally built to transport water from the Niagara River. The Hooker Chemical Company bought the canal and, for years, used it as a disposal site for tons of toxic chemicals and hazardous wastes. The site was later sold to a school district in Niagara Falls for use as an elementary school. Ultimately, the New York Department of Health was notified of the buried waste drums and oozing chemicals and declared the Love



these environmental issues and formulate laws and regulations to address our concern for the environment. What can explain the increase in public awareness and advocacy, and the resulting legal, scientific, and regulatory interest? More important, where is environmental law and regulation headed in the next 25 years? Clues to the answers to these questions can be found by examining the past 25 years. In that time, the public's awareness of environ-

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Canal area a threat to human health. The elementary school was closed and residents were evacuated. The Love Canal incident significantly advanced the environmental movement by creating a new breed of community activists, exemplified by leaders such as Lois Gibbs, who refused to be silenced.⁴ The intense media scrutiny of Love Canal also drew the attention of influential politicians to environmental awareness, including the governor of New York and President Jimmy Carter.⁵

Another major environmental disaster occurred over a decade later in 1989, when the supertanker *Exxon Valdez* spilled millions of barrels of crude oil onto the pristine ecosystem in Prince William Sound, Alaska. Not only was it the worst oil spill in the history of the United States, causing irreparable harm to fisheries and hundreds of miles of coastline, it also was the focus of widespread international attention. People and governments were made to understand that, in our new global economy, such a disaster could have happened to any country and in any part of the world. Again, an angry and active public responded by prompting Congress⁶ and coastal states such as California⁷ to pass complex oil spill prevention legislation.

There are other emerging environmental concerns of potential significance we do not yet fully understand. For example, scientists have recently discovered trace amounts of prescription drugs in our water supply. No new water is created on our planet; nature has been recycling the same water for billions of years. We drink the same water that the dinosaurs drank. After passing through our bodies and those of livestock, this resource has been tainted with chemicals including antibiotics, hormones, nicotine, and caffeine. Although only a few parts per billion or trillion of these drugs are found in our water, the health risks of prolonged consumption are only beginning to be studied.

Studies have linked genetic defects in fish and alligators to the presence of minute amounts of synthetic female hormones in our water. In one study, a Canadian scientist exposed aquarium fish for 100 days to synthetic female hormone ethinylestradiol at levels as low as one part per trillion. The male fish had complete sex reversal.⁸ It appears that natural processes and low-tech sewage treatment do not completely remove the drugs that humans and animals excrete. Therefore, it is possible that we can be consuming these drugs for centuries to come and that a new generation of environmental lawyers will tackle this issue in the future.

Los Angeles County has had its share of notable environmental issues. Among the more gruesome events in the early 1980s was the discovery of illegal transportation

and disposal of human body parts and surgical remains. The incident most widely covered by the news media involved a truck that was dripping human blood onto the freeway. It was later confirmed that the truck was illegally hauling hospital waste for disposal at an unauthorized location. Subsequent related investigations revealed that hospitals and doctors were not properly following regulations that required the incineration of infectious human waste. The public's response to these discoveries was outrage. Remedial action was immediately taken to curb these oversights. Several major hospitals in the Los Angeles area were prosecuted and forced to discontinue illegal practices.

In the late 1990s, the public also learned of the Belmont Learning Center controversy. The Los Angeles Unified School District approved the construction of Belmont to relieve chronic school overcrowding in mostly poor and disadvantaged minority neighborhoods of Los Angeles. Belmont was to be the most expensive and largest high school in the country. The chosen site was an abandoned oil field that leaked gases, including methane and hydrogen sulfide.

After much public debate and concern voiced by city officials, parents, and teachers, the Board of Education stopped the project in 1999. Over \$100 million dollars was spent on the project, and it may require significant additional public funds to complete construction. In the aftermath of Belmont and other similar cases, the state legislature enacted some of the toughest laws to date regulating the location and construction of schools.⁹ The California Education Code now obliges school districts to place site evaluations for new schools under the oversight of the Department of Toxic Substance Control. These environmental standards are intended to ensure that school districts make wise decisions when building schools and to protect young school children against exposure to environmental conditions that, not long ago, were commonly not considered or evaluated.

Regulatory Agencies

The rise in public awareness of environmental issues has stimulated the growth of regulatory agencies. Twenty-five years ago, many of today's environmental regulatory agencies either did not exist or were without adequate resources. For example, the Department of Toxic Substance Control had fewer than a dozen employees to enforce its regulations statewide. Its lack of resources during the 1980s made it difficult to keep pace with a barrage of new legislation aimed at managing newly emerging hazardous waste sites. The Department of Toxic Substance Control, like other environmental oversight

agencies in California at the time, also lacked specialists and experts who could focus on specific areas of concern such as the disposal, storage, and transportation of hazardous wastes. The Department of Toxic Substance Control was further hampered by an inability to enforce these regulations.¹⁰

Without the necessary resources or expertise to pursue complex environmental litigation, enforcement of environmental regulations was uncommon. For example, the first criminal cases under the state hazardous waste control law were not filed until 1979, when the Los Angeles city attorney began a crackdown on violations within the city of Los Angeles. In the first case, *People v. Hope Plastics*,¹¹ an owner of a small plastics company in North Hollywood was caught by police burying solvents along a railroad right-of-way in the middle of a North Hollywood community. The owner was charged with violating Health and Safety Code Section 25189 (knowing disposal of hazardous waste at an unauthorized location). The owner pled guilty and was fined \$10,000, the largest fine of its kind at that time. Hope Plastics received so much news coverage that officials of the company received threats from residents in the community.

In the decade that followed, the Los Angeles city attorney and the Los Angeles County district attorney developed specialized divisions to prosecute violators of the Hazardous Waste Control Act. The Los Angeles Toxic Waste Strike Force was formed in the early 1980s and contributed significantly to cracking down on violators.¹² Many of these cases led to jail sentences for top executives who were found to have violated environmental laws. The first executive to receive a jail sentence for an environmental crime in California was the president of a local Culligan Water franchise in Hollywood.¹³ The progress made in these cases led to many more successful prosecutions.¹⁴

Other regulatory agencies that experienced major growth in the 1980s and 1990s include the Air Pollution Control Districts and the Regional Water Quality Control Boards. Like the Department of Toxic Substance Control, these agencies previously had limited resources, lacked focus, and generally did not pursue complex enforcement strategies. These agencies were not effective in enforcing environmental laws and served more like ombudsmen mediating between interest groups and stakeholders.

In the 1990s the effectiveness of these agencies dramatically increased. They began to form cooperative agreements to coordinate a response to emergency incidents and enforcement needs, including the management of hazardous wastes, air emissions, and contaminated water. Legislation also permit-

ted local fire departments to become engaged in the regulation of underground storage tanks. Hazardous materials units at fire and police departments were also established to deal with emergency responses on highways, streets, and in industrial buildings.

Today the Department of Toxic Substance Control, the Air Quality Management Districts, Regional Water Quality Control Boards, and other environmental agencies such as the State Department of Fish and Game are considerably more powerful than in the recent past. In addition to a more focused and effective enforcement of regulations, staffs of all of the agencies have grown significantly. For example, the Department of Toxic Substance Control, which had less than 15 employees 25 years ago, currently has over 1,000 employees in nine offices across the state. Today, many district attorneys have environmental crimes divisions staffed with several deputy district attorneys and investigators who concentrate on enforcing environmental laws.¹⁵

Increasing judicial and legislative awareness of environmental concerns also mirrored the increase in awareness by the public. One of the defining environmental law cases of the past 25 years is *United States v. Reserve Mining*.¹⁶ In that case, the Eighth Circuit Court of Appeal stayed an injunction to close down a mining facility issued by the district court after it determined that continued operations would threaten the health of thousands of people. The appellate court held that equity requires "balancing the health and environmental demands of society at large against the economic well-being of those parties and local communities immediately affected." The court then balanced the economic impact of displacing 3,000 employees and their families against protection of the public against unknown, but likely, health hazards and found that a less drastic remedy was appropriate. The court also noted that "there are neither heroes nor villains among the present participants in this lawsuit" and encouraged parties to reach a settlement.

An important U.S. Supreme Court ruling has been used very effectively to charge corporate entities with environmental violations. *United States v. Park*¹⁷ defined the doctrine of corporate officer criminal liability. In that case, the president of a national food chain company had been convicted, along with the corporation, of violating the Federal Food, Drug, and Cosmetic Act. The Supreme Court affirmed the conviction, holding that an officer of a corporation can personally be held responsible for violations committed by the company. Going even further, the Court held that a responsible corporate official could be held criminally liable for an omission or failure to act to remedy a violation. The Court

concluded that federal law imposed the "highest standard of foresight and vigilance" upon corporate officers in preventing violations.

These and other court decisions and the enactment of key legislation, driven by public awareness and the political process, also has contributed to the expansion of the practice of environmental law. For example, the National Environmental Policy Act was passed by Congress in 1969 and became law in January 1970.¹⁸ NEPA requires the federal government to consider all significant impacts that an agency action will have on the environment and to inform the public of those impacts. Following the federal government's steps, California developed its own version of NEPA when it passed the California Environmental Quality Act in 1970.¹⁹ Similar to its federal counterpart, CEQA was designed to require public agencies to document, evaluate, and consider the impact of their decisions on the environment. CEQA is now one of the most far-reaching laws in California and has become one of the primary statutes affecting land development and construction projects throughout California.

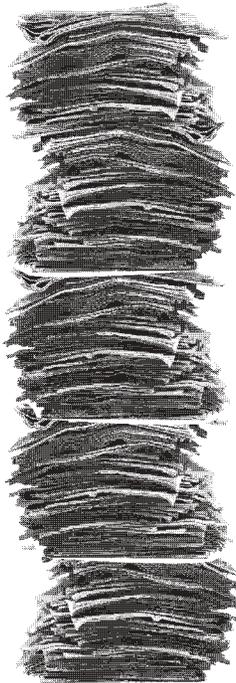
Federal and state environmental laws have continued, including the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),²⁰ the Reserve Conservation and Recovery Act (RCRA),²¹ the

Clean Air Act, the Clean Water Act, the Toxic Substance Control Act, the Emergency Planning and Community Right-to-Know Act, and California Proposition 65. These laws, often controversial at first, are now an integral part of the way we live and do business.

Environmental law issues today, probably more so than any other substantive areas of law, arise conceptually and in practice throughout almost every field of the law. Environmental practitioners routinely work side by side with experts in real estate, wills, trusts and estates, corporate law, securities law, patent law, contracts law, education law, and international law.

In the new millennium, we observe continuing public awareness of our environment. Even Hollywood is displaying environmental colors, with *Erin Brockovich* grossing over \$125 million and making hexavalent chromium part of the public vocabulary. This awareness, along with legislation and regulatory response that has taken place over the last 25 years, will likely support a steady growth of environmental law for years to come.

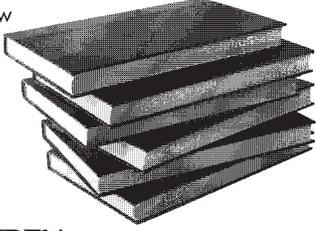
We are still dry cleaning clothes and buying newspapers. We are still using toxic chemicals to make our eyeglasses, jewelry, and pots and pans. Our appetite for landfills has not ceased. Our domestic environmental policy probably has even a greater impact today



Results!

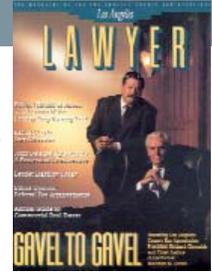
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on the world ecosystem. Although it appears that much has changed over the last 25 years, our thirst and need for environmental consciousness has not been diminished. If anything, need for environmental awareness has only grown. ■

¹ See http://www.abc.net.au/science/sweek/inspire_2000/carson/carson.htm.

² See *Borel v. Fireboard Paper Prods. Corp.*, 493 F. 2d 1076 (5th Cir. 1973).

³ Barry Castleman, *The Question of Asbestos in the United States of America* (1998), at http://www.btinternet.com/~ibas/bc_asbestos_usa.htm. See also B. CASTLEMAN, *ASBESTOS: MEDICAL AND LEGAL ASPECTS* (4th ed. 1996).

⁴ See a biography of Lois Gibbs at <http://www.chej.org/loisgibbs.html>.

⁵ See President Jimmy Carter's speech addressing the Love Canal waste site and related documents at <http://ublib.buffalo.edu/libraries/projects/lovecanal/>.

⁶ See Oil Pollution Act of 1990, 33 U.S.C.A. §§2701 *et seq.*

⁷ See Lempert-Keene-Seastrand Oil Spill Prevention and Response Act., GOV'T CODE §§8670 *et seq.*

⁸ "Ethinylestradiol is used in birth-control and estrogen replacement pills—medications people take every day. It has been found in sewage water in the United Kingdom, Germany, Canada and the United States at fish-feminizing concentrations....Something similar was happening to alligators in Florida." Teri Sforza, *Prescription for Worry*, ORANGE COUNTY REGISTER, Sept. 9, 2001, at N10.

⁹ See, e.g., EDUC. CODE §§17210 *et seq.*

¹⁰ Although severely limited in resources, the Department of Toxic Substance Control remained the lead agency for investigating and referring matters to state and local prosecutors for enforcement.

¹¹ See *People v. Hope Plastics*, L.A. Mun. Ct. No. 62814 (1979) (James Natoli, J.).

¹² Established by the Los Angeles city attorney in 1981, the Los Angeles Toxic Waste Strike Force was expanded countywide by the Los Angeles County district attorney in 1983. This multiagency effort included the Fire Department, the Police Department, the Sheriff's Department, the Department of Public Works, the Bureau of Sanitation, and, later, the Federal Bureau of Investigation. Their mission was to identify environmental violators and assemble criminal prosecutions, which were often complex.

¹³ See *People v. Culligan Deionized Water Serv.*, L.A. Mun. Ct. No. 31232629 (1981) (John Ladner, J.).

¹⁴ See, e.g., *People v. Magnum Res.*, L.A. Mun. Ct. No. 31244507 (1981) (John Ladner, J.); *People v. Precision/Plessee Specialty Metals, Inc.*, L.A. Mun. Ct. No. 31271386 (1993).

¹⁵ The growth of environmental crimes units within district attorneys' offices around the state can be attributed to legislation that provides these offices with up to 50% of fines assessed in the cases they bring. Many of these laws were enacted in an attempt to create a more even enforcement of laws across the state by encouraging smaller counties to invest in these efforts.

¹⁶ *United States v. Reserve Mining*, 498 F. 2d 1073 (1974).

¹⁷ *United States v. Park*, 421 U.S. 658 (1975).

¹⁸ National Environmental Policy Act, 42 U.S.C. §§4321 *et seq.*

¹⁹ California Environmental Quality Act, PUB. RES. CODE §§21000 *et seq.*

²⁰ Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§9601 *et seq.*

²¹ Reserve Conservation and Recovery Act, 42 U.S.C. §§6901 *et seq.*

By Commissioner Robert A. Schnider

Family Law

The increasing involvement of the California Legislature

Choosing the most important development in family law in the last 25 years made me think of my friend Jon. When he and I discuss a topic that can evoke a perception different from its reality, we often say it reminds us of a young Don Drysdale—a pitcher for the Los Angeles Dodgers who was, in the words of Dodgers announcer Vin Scully, all elbows and knees. Drysdale in his youth tended to confuse batters about the location of the pitch because of his flailing body parts. Family law in the last 25 years has been packed with young Don Drysdals. Two good examples are the cases of *Marvin v. Marvin*¹ and *In re Marriage of Vomacka*.²

In the *Marvin* case, the court gave unmarried cohabitants the right to enforce contractual agreements (both express and implied) regarding property they acquired while together. In the wake of the decision, agreements for spousal support became a tantalizing possibility. The word "palimony" entered the lexicon, Marvin Mitchelson (the attorney for the "pal") appeared on covers of national news magazines and on television talk shows, and sample cohabitation agreements were passed around in gentlemen's clubs. Amid predictions that the nature of relationships between men and women were in for a fundamental sea change, courts braced for an onslaught of *Marvin* cases. While some cohabitation cases were filed and continue to appear on the court dockets, the flood never came. *Marvin* cases remain a small part of our legal landscape, marriage survives as an institution, no major extension of the *Marvin* theory has occurred, and *Marvin's* overall impact on family law has been slight. *Marvin* looked like an overpowering fastball coming right for the judiciary's head but turned out instead to be a soft curve.

In the *Vomacka* case, the court of appeal told family law lawyers that language used for years to terminate a party's right to spousal support was, in fact, insufficient for that purpose. Family law practitioners believed that simply placing a termination date in an agreement would prohibit extensions of support beyond that date. According to *Vomacka*, however, an agreement had to expressly and immediately terminate the court's jurisdiction to extend the termination date. This meant that agreements carefully negotiated to put an ending date on a support obligation really did not accomplish their goal, and payors (mostly husbands) were going to be very angry when they learned that the deals they had paid for did not carry the benefit they assumed they had gained.

Much gnashing of teeth and wringing of hands followed this ruling. The mantra in family law firms and departments throughout the state was, "Call your malpractice carrier and get them ready for the red ink to flow." But again, there was no flood of requests to reopen spousal support cases long thought dead, no outraged payors storming the offices of their lawyers, and no insurance companies falling into bankruptcy from the weight of malpractice claims.

Clearly my choice of the most important event in family law in the last 25 years required me to avoid being led down false trails or toward dead ends. But if deciding what to avoid became manageable, with care, selecting the one development was a formidable task. An informal survey of experienced judicial officers made the task no eas-

Robert A. Schnider is a Los Angeles Superior Court commissioner. He has served on the Family Law Advisory Committee to the Judicial Council and as chair of the Family Law Committee of the California Judges Association. He received the Los Angeles County Bar Association's Outstanding Jurist Award in 2000.