
# California & the future of environmental law & policy

# California & the Future of Environmental Law & Policy

*Richard M. Frank* *



## INTRODUCTION

Earlier this year, the U.C. Berkeley School of Law's California Center for Environmental Law & Policy (CCELP) sponsored and hosted a major conference, "California & the Future of Environmental Law & Policy."[1] The purpose of this successful event, which brought together government policymakers, practicing attorneys, scholars and students, was to explore California's leadership role—regionally, nationally and globally—in formulating and implementing effective environmental policy.

The CCELP conference focused on the most critical environmental challenges facing California, the United States and the international community. Panels of experts debated issues of climate change regulatory policy, alternative energy resource development, ocean and coastal issues, necessary linkages between regional land use and transportation policy, water allocation in an era of increasing scarcity, the so-called "Green Chemistry" movement's efforts to reform hazardous waste



* Richard M. Frank is the Executive Director of the California Center for Environmental Law & Policy and a Lecturer in Residence at the University of California, Berkeley, School of Law.

1. California and the Future of Environmental Law and Policy, http://cafuture.wordpress.com/ (last visited July 18, 2008).

policy, and the potential and limitations of litigation as a tool of climate change policy.

Another highlight of the conference was the diverse group of plenary speakers: Peter Gleick, president of the Pacific Institute, who spoke on the role water conservation can play in addressing looming domestic and international water shortages; Jared Huffman, environmental lawyer and advocate-turned-state legislator, who shared his environmental vision and platform; and Nobel Prize winner Stephen Chu, director of the Lawrence Berkeley Laboratory at U.C. Berkeley, who offered his sage commentary on the energy-related challenges facing California and the world.

Several of the stimulating and insightful presentations from this conference are distilled in the articles, authored by conference participants, found in this issue of Ecology Law Currents. I commend them to your attention.

In the same spirit, I offer these introductory comments to summarize my own thoughts—first presented at the conclusion of the CCELP conference[2]—as to how well (or poorly) California has served as national and international leader when it comes to environmental law and policy. The bottom line: in some instances, California has more than lived up to its billing as environmental pioneer and visionary—the envy of the national and international community. In other environmental policy contexts, California gets better marks than the federal government and many of its sister states, but is merely keeping pace with much of the international community. In still others, the State of California has underperformed and, indeed, has much to learn from other states and nations.

## I. KEY SUCCESS STORIES FROM THE GOLDEN STATE

The CCELP conference highlighted several areas in which California has, indeed, adopted environmental and resource management policies of which the state and its residents can be justifiably proud. At or near the top of that list is energy policy. In 1974, the California Legislature adopted the Warren-Alquist State Energy Resources Conservation and Development Act.[3] That ambitious statute created the California Energy Commission and, in the process, fundamentally re-ordered this state's paradigm for developing energy policy.

Thirty-four years later, three aspects of that multifaceted legislation are worthy of particular note. The first is the Warren-Alquist Act's delegation to the Energy Commission of responsibility to forecast state

2. Richard M. Frank, Executive Director, CCELP, Closing Remarks at U.C. Berkeley, School of Law's CCELP Conference: California & the Future of Environmental Law & Policy (April 11, 2008) (webcast available at http://webcast.berkeley.edu/event_details.php?webcastid=23051).

3. CAL. PUB. RES. CODE § 25000 (1974).

and regional energy demand—thus simultaneously divesting the state's private and public utilities of the ability to unilaterally determine where and what kind of energy facilities to build in this state. The second key feature is the Commission's statutory mandate to adopt aggressive energy conservation standards for California buildings and appliances. The third is an ambitious focus, through Commission-sponsored research and development programs, on renewable energy sources.

These three regulatory innovations may seem unremarkable, but, together, they have led to a truly startling achievement. Since the Warren-Alquist Act became law, California's population has increased by approximately 75 percent, to nearly 38 million residents.[4] However, California's per capita electricity consumption has remained level over the same period, as compared to per capita increases of 80% over the same period in the United States as a whole.[5] Remarkable indeed. Even more impressive is the fact that California currently relies on renewable sources of energy for nearly 12% of all electricity production.[6]

The federal government and other states have made only belated attempts to follow California's lead in developing a sound energy policy, and the federal government, in particular, has stumbled badly in the effort. The federal Energy Policy and Conservation Act[7] directs federal regulators to adopt national appliance efficiency standards that are less ambitious than California's. However, both the Clinton and Bush Administrations have failed to promulgate even those standards on a timely basis, forcing states (including California) and environmental groups to file lawsuits to force the federal government to adopt them. Moreover, federal energy policy—research and development initiatives, the federal tax structure, etc.—continues to focus on conventional energy sources rather than alternative and renewable energy resources.

The State of California, by contrast, is currently taking aggressive steps to build its energy future around renewable energy sources. One example is SB 1368,[8] legislation that limits the ability of California utilities to import power from other jurisdictions that is generated from

4. The population of California in 1974 is estimated to be 21,174,000; for 2007 the estimate is 37,771,000. *See* CALIFORNIA DEPARTMENT OF FINANCE, DEMOGRAPHIC RESEARCH UNIT, REVISED RACE / ETHNIC POPULATION ESTIMATES: COMPONENTS OF CHANGE FOR CALIFORNIA COUNTIES, JULY 1970 TO JULY 1990 and E-7 CALIFORNIA POPULATION ESTIMATES, WITH COMPONENTS OF CHANGE AND CRUDE RATES, JULY 1, 1900-2007, *available at:* http://www.dof.ca.gov/HTML/DEMOGRAP/ReportsPapers/ReportsPapers.php - projections. (last visited July 18, 2008).

5. CALIFORNIA AIR RESOURCES BOARD, *CLIMATE CHANGE DRAFT SCOPING PLAN*, ES-5 (2008), http://www.arb.ca.gov/cc/scopingplan/document/draftscopingplan.htm.

6. As of 2007, California generated 11.8percent of its electricity through renewables, and another 11.7percent through large hydroelectric projects. *See* THE CALIFORNIA ENERGY COMMISSION, *ENERGY ALMANAC,* http://energyalmanac.ca.gov/overview/energy_sources.html (last visited July 18, 2008).

7. 42 U.S.C. § 6201 (2006).

8. 2006 Cal. Stat., ch. 598 (codified at Cal. Pub. Util. Code §§8340-8341).

power plants emitting substantial amounts of greenhouse gases. Another is the partnership between state regulators and the academic community to develop a Low Carbon Fuel Standard[9]—an essential component of California's efforts to reduce aggregate greenhouse gas emission levels in the coming years.

Which leads to the second area in which California is unquestionably leading national and international environmental policy: climate change. California's Global Warming Solutions Act, more commonly known as AB 32,[10] is an extraordinarily simple but important piece of environmental legislation. It sets ambitious targets for lowered greenhouse gas emission levels in California—reducing those levels by 20%, to 1990 emissions levels, by the year 2020. (A related Executive Order issued by Governor Schwarzenegger goes even further, mandating an aggregate 80% reduction in greenhouse gas emission levels by 2050.)[11]

At the CCELP conference, California Resources Agency Deputy Secretary for Climate Change and Energy, Tony Brunello, translated these legal obligations into more specific and quantifiable terms: to meet AB 32 and related legal mandates California must reduce aggregate greenhouse gas emissions by 173 million metric tons by 2020, and an additional 341 million metric tons by 2050.[12] Put simply, this is single the most daunting legal and political challenge currently facing California, its political leadership and the state's regulated community.

California's Legislature and Governor have delegated principal responsibility for achieving these ambitious climate change goals to the state's Air Resources Board. CARB, as the Board is more colloquially known, is an environmental leader and pioneer in its own right, having served as perhaps the planet's most highly-regarded air pollution regulator for the past four decades. But CARB's commitment and expertise will be sorely tested in the coming months and years: the rulemaking process required to implement AB 32 and reach the greenhouse gas reduction levels noted above promises to be the most complex in California's regulatory history. It will significantly affect virtually every sector of California's diverse economy, and will require unprecedented levels of intergovernmental cooperation with other local, state and federal agencies in order to succeed.

---

9. *See generally* The California Energy Commission, Low Carbon Fuel Standard, http://www.energy.ca.gov/low_carbon_fuel_standard/ (last visited July 18, 2008).

10. 2006 Cal. Stat., ch. 488 (codified at Cal. Health & Safety Code §§38500-38599).

11. Exec. Order No. S-3-05, (June 1, 2005), *available at* http://gov.ca.gov/executive-order/1861/.

12. Tony Brunello, Deputy Secretary for Climate Change and Energy, California Resources Agency, Address at U.C. Berkeley, School of Law's CCELP Conference: California & the Future of Environmental Law & Policy (April 11, 2008) (webcast available at http://webcast.berkeley.edu/event_details.php?webcastid=23047).

The initial signals from CARB—and the California state government as a whole—are nonetheless encouraging. Federal officials in both the Congress and executive branch continue to dither over whether and how to adopt a federal climate change policy, and after some initial, encouraging steps in formulating international climate change initiatives, efforts to implement the Kyoto Protocol have foundered. At the same time, California moves steadily forward. California's political leadership seems to be approaching the multifaceted challenges of climate change with a sense of purpose and focus that is quite stunning. National and international governments will, hopefully, learn and benefit from California's example.

California is exercising a leadership role in at least one other related, and more controversial, context: using litigation as a tool of climate change policy. California officials—led by the state's Attorney General, but including Governor Schwarzenegger and CARB—have achieved some notable courtroom victories recently. In some cases, such as the U.S. Supreme Court's groundbreaking decision in *Massachusetts v. EPA*,[13] California has partnered with other states and private environmental organizations to force a reluctant federal bureaucracy to take seriously its responsibility to address climate change under existing federal law.[14] In other instances, California has successfully defended its own statutory and regulatory efforts to regulate sources of greenhouse gases against industry legal challenges that it lacks the authority to do so.[15]

To be sure, California's efforts to advance climate change policy through litigation have not been uniformly successful. For example, the California Attorney General's efforts to apply the law of public nuisance to limit private sector emissions of greenhouse gases have to date met a negative reception from the judiciary.[16] And one can certainly argue that litigation is at best a clumsy tool to promote policy interests of any variety.[17] Nevertheless, the better argument seems to be that state officials have had significant success in recent years both in bringing and defending climate change litigation—and that these litigation successes have advanced California's legal and political objectives in this critically important subject area.

---

13. Massachusetts v. EPA, 127 S.Ct. 1438 (2007).

14. *See also* Ctr. for Biological Diversity v. Nat'l Highway Traffic & Safety Admin., 508 F.3d 508 (9th Cir. 2007).

15. *See, e.g.*, Cent. Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F. Supp. 2d 1151 (E.D. Cal. 2007); Green Mt. Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295 (D. Vt. 2007).

16. *See, e.g.*, People v. Gen. Motors Corp., No. C06-05755 MJJ., 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007), *appeal pending*.

17. *See, e.g.*, Theodore J. Boutrous, Jr. and Dominic Lanza, *Global Warming Tort Litigation: The Real Public Nuisance*. 35 ECOLOGY L. CURRENTS 80 (2008), http://www.boalt.org/elq/index.php.

## II. CALIFORNIA AS NATIONAL LEADER, INTERNATIONAL FOLLOWER

The CCELP conference highlighted at least two environmental policy areas in which California, while perhaps ahead of many other states and the federal government, has much to learn from the international community.

The first concerns water supply, allocation and use. Keynote speaker Peter Gleick, who has spent a distinguished career studying these issues, pointed out that, in comparison with many regions of the globe, California is a water-rich jurisdiction, and, compared to the arid conditions affecting much of the world, California's water challenges are manageable and surmountable.[18]

In California, a harbinger of the state's water future is currently being played out in the Sacramento-San Joaquin Delta. A source of fresh water for 23 million California residents and much of the state's agricultural production, the Delta is an ecosystem and water delivery system in severe crisis. The current demands on that region will be exacerbated by the effects of climate change: rising sea level and decreasing snowpack in the Sierra Nevada watershed that drains into the Delta estuary. Unless the state's political leaders can fashion a viable political and environmental solution to the myriad ills that have befallen the Delta, the heart of California's water delivery system will be at ever-increasing risk.

Water conservation is unquestionably the first and best part of the solution to California's looming water crisis. The state, its political leadership and its residents can learn a great deal from other regions of the globe—particularly Europe and the Middle East—as to how they can embrace aggressive water conservation measures without sacrificing economic or aesthetic objectives.[19]

A second area in which California can—and has—learned much from other nations is hazardous waste management and disposal. For too long, California policy, like that of the U.S. in general, has focused on the "back end" of the technological cycle. By contrast, relatively little attention has been paid to regulating the chemicals utilized in our industrial processes before they wind up in disposal sites, sewers, etc. While state and federal regulators have for the past two decades focused on cleaning up hazardous waste sites, the question of whether toxic

18. Peter Gleick, Executive Director, Pacific Institute, Keynote Address at U.C. Berkeley, School of Law's CCELP Conference: California & the Future of Environmental Law & Policy (April 10, 2008) (webcast available at http://webcast.berkeley.edu/event_details.php?webcastid=23059); *see also* Peter Gleick, *Can California's Water Problems Be Solved?*, 35 ECOLOGY L. CURRENTS 72 (2008), http://www.boalt.org/elq/index.php.

19. Peter Gleick, Executive Director, Pacific Institute, Keynote Address at U.C. Berkeley, School of Law's CCELP Conference: California & the Future of Environmental Law & Policy (April 10, 2008) (webcast available at http://webcast.berkeley.edu/event_details.php?webcastid=23059).

materials are necessary and appropriate as part of the manufacturing process is one that has been largely overlooked.

Other nations, especially those in the European Union, have embraced a more thoughtful and proactive approach: the design, manufacture and use of chemicals, processes and products that are safer for human health and the environment. Known as the "Green Chemistry" movement, this philosophy of focusing regulatory policy on the front end of the manufacturing cycle is being adopted by California regulators. The state's Department of Toxic Substances Control, with the strong support of the Governor's Office, is taking the lead in making Green Chemistry a cornerstone principle of California hazardous waste policy. And while California is largely mimicking the E.U. community in doing so, Green Chemistry may be yet another context in which California serves as a catalyst for similar reforms at the national level.

## III. CALIFORNIA AS ENVIRONMENTAL LAGGARD

Just as CCELP's conference showcased numerous areas in which California has pioneered environmental law and policy, the conference also revealed some areas in which California's efforts to date have been desultory and largely ineffective.

One example of the latter involves oceans policy. California has done an impressive job of protecting the state's 1100-mile coastline—at least with respect to coastal terrestrial resources. The credit for that goes largely to the California Coastal Act[20] and the regulatory efforts of the California Coastal Commission over the past 36 years.

Far less successful have been state efforts to preserve the ocean resources themselves. One panel at the CCELP conference focused on the increasing threats to our oceans—over-fishing and ocean pollution among them. Our ocean resources perhaps most graphically illustrate the limits of state-based environmental policy initiatives: the ocean ecosystem requires national and international policymaking to effectuate long-term, comprehensive solutions to the multiple ills that confront it.

A related failure involves California's inability to protect and preserve its terrestrial and marine flora and fauna. Both the CCELP conference's oceans panel and the above-described panel focusing on the Sacramento-San Joaquin Delta showcased the repeated failures of state—and federal—regulators to protect threatened and endangered species. There is little to suggest that California's state Endangered Species Act[21] has been any more successful at protecting at-risk species than has its federal counterpart. With their focus on single-species regulatory responses, neither the state nor federal Endangered Species

20. CAL. PUB. RES. CODE § 30000 (Deering 2008).
21. CAL. FISH & GAME CODE § 2050 (Deering 2008).

Acts have been particularly successful in preserving habitats and preventing overall species declines. The recent ecological, legal and political crises surrounding the Delta smelt and several salmon species bear stark witness to that fact.[22]

Yet another illustration of California's environmental failures to date involves the intersection of state land use and transportation policy. For far too long, state transportation policy has been pursued without reference to California land use objectives (and vice-versa). The result of this policy disconnect has been a half-century of development patterns that consume more of California's landscape, ignore infill opportunities and facilitate urban—and suburban—sprawl.

Such uninformed and atomistic decision-making could perhaps be tolerated when California's population was smaller, energy supplies were greater, prices were lower, and the multifaceted threats associated with climate change were not looming. But all of those factors have conspired to place the intersection of land use and transportation policy at the forefront of California's current environmental challenges. To date, efforts by California policymakers to address and link those policies have been disappointing. In significant part, this political gridlock is due to the fact that California land use policy has traditionally been the province of local government, while transportation policy has primarily been formulated at the state and federal levels.

One additional, relevant fact: 38% of California's greenhouse gas emissions are currently generated by the state's transportation sector.[23] As a panel discussion on California land use and transportation policy at the CCELP conference graphically revealed, much of the transportation sector's greenhouse gas emissions are inextricably tied to—and mandated by—existing land use and commuting patterns. Until California's political leadership can effectively link transportation and land use policy, a vital fraction of the state's greenhouse gas emissions will not be reduced by any meaningful degree.

## CONCLUSION

CCELP's conference successfully showcased the many successes that California can claim in leading environmental policy at the regional, national and international levels. It also highlighted some policy areas where the Golden State has more in common with other nations than it does with our own federal government. Finally, the conference exposed a

22. *See, e.g.*, Natural Res. Def. Council v. Kempthorne, 506 F. Supp. 2d 322 (2007) (invalidating, on federal Endangered Species Act grounds, U.S. Fish & Wildlife Service's regulatory plan to operate Central Valley Project and concurrently address harm to Delta smelt caused by project).

23. CALIFORNIA AIR RESOURCES BOARD, CLIMATE CHANGE DRAFT SCOPING PLAN 7 (2008), http://www.arb.ca.gov/cc/scopingplan/document/draftscopingplan.htm.

few areas in which California has provided precious little policy and political leadership, and has a great distance to go in fashioning effective environmental law and policy.

As I indicated in the conference's concluding remarks, there is one important reason why I remain optimistic about California's environmental future, and its continuing ability to play a leadership role vis-à-vis the national and international community. That reason is personified by the intellect, energy and commitment embodied in California's environmental leaders.

On the façade of the Library and Courts Building in Sacramento are inscribed the words, "Give me men to match my mountains." In a similar vein, California's residents and environment are the beneficiaries of a most able group of environmental lawyers, policymakers, scientists and scholars. CCELP's "California & the Future of Environmental Law & Policy" conference showcased their considerable vision and talent. The fact that such an accomplished group is willing and able to provide environmental leadership and direction gives this writer confidence that they will be equal to the many pressing environmental challenges facing the nation-state that is modern California.