Environmental Law

AS THE COUNTRY'S POLITICAL MAELSTROM GRINDS FEDERAL POLICY MAKING TO A HALT, states are increasingly taking matters into their own hands, and California's long tradition as a bellwether for environmental statutes is gaining even greater significance. Pioneering arenas to watch include implementation of AB 32, which is set to begin in January 2012 and will regulate greenhouse gases through a cap-and-trade program. Also, the Department of Toxic Substance Control continues to negotiate a new plan for regulating chemicals in consumer products through the state's Green Chemistry Initiative.

Our panel of experts discusses these issues as well as Proposition 65 and new TCE regulations. They are Trent Norris and Karen Nardi of Arnold & Porter; Rick Coffin of Barg Coffin Lewis & Trapp; Sally Magnani from the California Attorney General's Office; Thomas Donnelly of Jones Day; and Jad Davis of Kutak Rock. The roundtable was moderated by *California Lawyer* and reported by Krishanna DeRita of Barkley Court Reporters.

EXECUTIVE SUMMARY

MODERATOR: What are some of the emerging issues around California's Green Chemistry Initiative and implementation of AB 1879?

NORRIS: We haven't had a major change in federal environmental law in two decades, and some of that is due to gridlock in Washington, which is unlikely to be resolved any time soon. For a long time there's been talk about reforming the Toxic Substances Control Reform Act (TSCA, 15 U.S.C. §§ 2601–2692), but in the absence of that, states have taken up the charge. But here in California, the Green Chemistry Initiative is currently on hold.

COFFIN: The scope of the green chemistry regulations remains uncertain. Before they were pulled last year, the regulations addressed three kinds of products: children's, household cleaning, and personal care. Will they remain limited in scope or expand? A big concern for the Department of Toxic Substances Control (DTSC) is the lack of personnel available to adopt a wide-ranging regulatory regimen that requires a lot of evaluation of alternatives. They are struggling to limit the scope of the initial regulations to see if they work.

NORRIS: My clients immediately ask about the state's green chemistry program, "Can they do this?" And the answer is yes. There's a historic doctrine of state regulation of environmental and food safety and safety in toxics, and to the extent that it's not preempted by federal law, the states can do this. But the the thought of having to understand what's happening in all 50 states is driving a number of my clients crazy. Will that result in an upwelling of support for a federal law that addresses all these issues? That's a well-worn path in environmental regulation.

MAGNANI: In the abstract, a unified federal policy to address chemicals in consumer products might be considered the most advantageous way to go, but there really are no credible proposals with any chance of near-term enactment on the horizon. Existing federal statutes, including the TSCA, simply can't do the job, and California has had to step in to fill the void. When the green chemistry regulations are officially adopted by the DTSC, the state will have the most comprehensive state-level program in the country, which will help deal with the problem holistically and will avoid the issues that are created by "ban-of-the-year" legislation. Since 2002, more than 50 bills have been introduced to deal with chemical-specific bans or restrictions in various products.

DONNELLY: Is there authority for banning products that contain "chemicals of concern" if you cannot establish a "safer" alternative? Doesn't that violate the dormant commerce clause?

NORRIS: We may see litigation in that area. It's a doctrine that to some extent has fallen into desuetude. But it may be revived here because of the burden on a business trying to compete in interstate commerce in all 50 states. A huge burden arises from having to make a different product for California. There is some case law having to do with the labeling of electrical products that upheld the power of even the tiny state of Vermont to regulate products within its borders even if that would make them different from products sold in the rest

of the country. (*Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001).) It's hard to see California coming out differently.

NARDI: There are a number of stakeholders in the current political scene in the U.S. who are active opponents of government environmental regulations who are concerned about the impact of these regulations on the economy. There is widespread recognition that the TSCA has not been effective, but there are several reform proposals pending before Congress that would reenergize and change the statute.

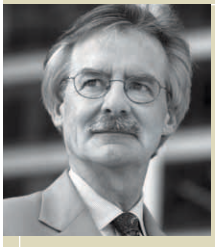
NORRIS: My European clients are particularly astonished that in the U.S. we are devolving to a state regulatory structure in these areas. In Europe, nations with cultures and histories as different as Lithuania and Spain are harmonizing their environmental regulations for the purpose of a common market. We have the opposite trend here.

DAVIS: Since the Green Chemistry Initiative has not been enacted yet regulators are currently taking stakeholder and industry input. The initiative deals with products sold in California and not just manufactured in California, which would greatly expand the scope of any enacted statute. It is also a novel approach to design as opposed to the end use. They look at it and say, "Let's try to use these chemicals because they are green chemicals."

So how could the Legislature or regulatory agencies incentivize businesses to really get involved and have their best design team consider green chemicals? We can talk until we are blue in the face about potential exposure to liability being X, Y, Z, but if the Legislature and regulatory agencies will consider offering some sort of immunity to businesses, such as, "We are so sound on our current science that these products will not affect human health or our environment that we are willing to offer immunity."

Of course environmental groups and public agencies will scream about companies getting a hall pass and we all know that is not true. Simply because immunity is being offered does not prevent litigation or liability. For example, district attorneys have absolute prosecutorial immunity and yet they get sued and verdicts come down against them. Similarly, police officers have qualified immunities, but they are still exposed to liability. It would be interesting to see some sort of debate or creative thinking on the part of the legislators and regulators to offer immunities to businesses because such an offer may motivate businesses financially to really look and pay attention to the Green Chemistry Initiative.

MAGNANI: DTSC is responsible for implementing the legislation



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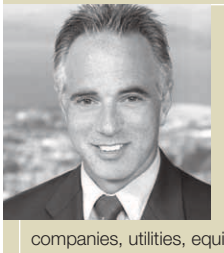

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that has been passed by the California Legislature. The green chemistry legislation directs DTSC to look at human health and environmental effects from a number of different end points, so it is necessarily very broad. A key feature of the program will require manufacturers of products containing "chemicals of concern" to assess alternatives to those chemicals in order to avoid the problem of replacing a known harmful chemical with a chemical with unknown effects that could be equally harmful or worse. The program will be plowing new ground.

NARDI: How is California going to consider all these alternatives in a time frame that works for businesses? Look at the speed of R&D in almost any contemporary industry. Technology companies are inventing things that in three or six months will replace their own product lines. Tracking products with the "chemicals of concern" through a regulatory review process could be very slow. I wonder whether these listed products will ever emerge from regulatory review in time for people to make, sell, and change at the speed at which we've all become accustomed?

Nations with cultures and histories as different as Lithuania and Spain are harmonizing their environmental regulations for the purpose of a common market. We have the opposite trend here.

—TRENT NORRIS

NORRIS: Even if the regulatory agency could make the determinations in a timely manner, they probably don't need to be looking to ban products. Requiring manufacturers to indicate that the "chemical of concern" is in the product would accomplish much of the same objective. There are lots of products that we know have risks, and we don't ban them because they are useful. If the state takes the extreme step of banning products, there will be litigation for decades.

NARDI: In fairness to the green chemistry program as outlined by DTSC in its proposed regulations, disclosure is one of the options the state can consider. Accurate consumer information could be a very interesting strategy to empower people to make their own choices.

NORRIS: If you talk to the R&D people in a sophisticated company, or look to their outside consultants, the answer is always: The federal regulatory agency thinks this is perfectly safe. The Canadians think this is perfectly safe. Why do we need to spend time on this? And the answer is really one of perceived safety. You can end up with a chemical that has acquired a bad reputation simply by repetition. Bisphenol-A is a very good example. Companies will move out of that chemical as quickly as they can, if they can. And those that are not able to move out of it easily will be stuck having the battle, but it's on a relatively unlevel playing field at that point.

MAGNANI: Taking a comprehensive regulatory approach to this problem will prevent situations where companies have to move out of specific chemicals and then move into another chemical that essentially is untested, and the health effects may be even worse than the chemicals the company discontinued using.

NORRIS: Or it may not just be health effects. It may be a decline in product safety and product quality that's related to just shifting away from something that works.

MODERATOR: How will the EPA's recent risk assessment of the chemical compound trichloroethylene (TCE) impact your practices?

COFFIN: The Integrated Risk Information System (IRIS) database maintained by EPA was last updated for TCE in 1989, and this is the first update since then. There has been a huge amount of toxicological work done on TCE in the past decade, and an equal amount of controversy about whether it would result in ratcheting down the standards for TCE. Ultimately, the IRIS update just published ratcheted down the standards. Groundwater clean-ups underway likely will not be significantly impacted because they are already cleaning up treated water to a non-detect standard in most instances. The time to reach cleanup standards in groundwater may increase. Also, the new standards will impact public drinking water purveyors because the ratcheted down IRIS standard means that a revised drinking water standard for TCE is going to follow relatively quickly. The information that was published on IRIS would translate to a tap water number less than a part per billion. A lot of public water purveyors may find they have a problem.

DONNELLY: One of the bases for EPA's reduced risk assessment was concern about inhalation exposure and specifically vapor intrusion for TCE. Rick [Coffin], do you think EPA or the State will revisit potential vapor intrusion at closed sites with residual TCE remaining in ground water?

COFFIN: Every site that goes through a five-year review, which is required under federal and state law, will have to address vapor intrusion and consider the revised standards. Karen [Nardi] and I are working on a superfund site in Silicon Valley right now and implementing one of the first Record of Decision amendments to a large-scale vapor intrusion remedy arising from vapor intrusion concerns from groundwater.

NARDI: All superfund sites had baseline public health evaluations done when the original cleanup plans were approved and these studies all looked at vapor intrusion pathways. But EPA Region 9 has now stepped out and started asking all the Silicon Valley super-

fund sites to look at vapor intrusion in every building overlying a groundwater plume—whether they are on-site at the business where the chemical spills occurred or a half mile down the road off-site under a residential neighborhood. This process—which has been initiated without published scientific guidance—has created a lot of consternation with building occupants and sometimes unnecessarily so. The default "safe" levels that EPA is applying are very stringent. In some cases, they are 176,000 times more stringent than the OSHA employee workplace standard. And by that I mean a worker could stand in front of a machine and be exposed to, for example, TCE, in an industrial activity and his or her permissible exposure would be 176,000 times greater than what EPA wants to regulate the indoor air exposure if the chemicals seep up in the cracks in the building and comes from groundwater contamination.

DONNELLY: What will happen at brownfields where agencies have given covenants not to sue and releases to developers, who then build homes and shopping centers over known, residual TCE plumes using the then-current science?

COFFIN: It's particularly troublesome where there's shallow groundwater. In Silicon Valley first-encountered groundwater is ten feet deep, so vapor intrusion is a more significant issue.

DAVIS: The IRIS risk assessment's change of the designation for TCE from "highly likely to cause cancer" to "carcinogenic" really raises my eyebrows from a toxic tort standpoint. In the Orange County basin, the groundwater can range from five to ten feet, so there are sites without much unsaturated soil. Whereas, the Inland Empire unsaturated zone can be 200 feet, so in that area vapor intrusion may not be much of a problem.

Setting the toxic tort issues aside, this new assessment of TCE will likely cause issues at the more than 700 superfund sites. Whatever the Maximum Contaminant Level (MCL) is set at, the engineers at each one of those sites will have to look at it from all angles—from vapor to soil to groundwater—and figure out the remediation system issues, if any, unless there is a consent decree or some sort of a release. And those are just the superfund sites alone—that does not include Department of Defense sites or Regional Water Board sites.

NARDI: For the superfund site in Mountain View, it is estimated that the responsible parties will spend more than $20 million to investigate and mitigate vapors. Is this an appropriate expenditure relative to the risks?

COFFIN: That problem is exacerbated by the science's ability to measure things it couldn't previously measure. If it costs you "X" to reduce your contamination by 90 percent, it then costs "5X" to further significantly reduce that contamination. Should we spend this money on schools or health programs? It really is a societal question.

Toxicology done from a public policy perspective should build in conservative assumptions at every point that they are making the assessment, but the process results in such conservative numbers that it often is somewhat unrealistic for decision making.

DAVIS: Parties may spend billions on superfund clean-ups, and lo and behold the MCL for TCE gets reduced and then those parties say, "Great. I have to go back in my wallet and pay for another remediation system that may or may not have any scientific validity." One of my clients in the early 1980s pulled permits from a city and 25 years later, the same city that issued those permits sued my client and the city's only evidence against my client are what? The permits.

NORRIS: Politicians would like the science to resolve the issue, but the science only takes you so far and then you've got to make the policy decision. These days they tend to be made at the lowest possible level of government, and the result is not always as broad thinking.

MAGNANI: It's important to separate the science from the policy. We are learning more about the hazards of certain chemicals, which is certainly a good thing from the public health perspective. The question of where you draw the policy line, that's a completely different issue. But having processes that allow advances in science to be presented and addressed publicly just leads to better transparency regarding the basis for the policy decisions that are made.

MODERATOR: What new developments around Proposition 65 claims (Cal. Health & Safety Code §§ 25249.5-25250.25) are you watching?

DONNELLY: Preemption comes up in Prop 65 cases when there's a request for a warning and the defendants argue that the warning is preempted by federal law. The hypothetical I'll pose is if you face a threatened suit as counsel for notice recipients, would you consider filing suit in federal court to enjoin the environmental group from proceeding with a claim that you believe is preempted by federal law? If you decide to go into federal court, do you need to name the Attorney General and the Director of OEHHA as defendants? If the Attorney General says that she has no interest in suing your clients under Prop 65, would the federal court still have jurisdiction?

The U.S. Supreme Court, in *Shaw v. Delta Airlines, Inc.* (463 U.S. 85 (1983)), held that federal courts have jurisdiction to enjoin state officials from enforcing preempted state laws. There's a case in the Ninth Circuit however, which holds that the *Shaw* doctrine does not extend to injunctive relief suits brought against private parties. (See *Calif. Shock Trauma Air Rescue v. State Comp. Ins. Fund* (636 F.3d 538 (9th Cir. 2011).) So then the question becomes: Is an environmental group that sues under Prop 65 truly a private party?

We would argue even if the Attorney General disclaims any interest in suing your clients under Prop 65, you could still bring suit in federal court to enjoin both the AG and the private group from proceeding with preempted claims because the private group will sue and stands in the shoes of the State. Judge Ishii in the Eastern District of California recently rejected this very argument, however,

in a case our office handled (*Loyd's Aviation, Inc. v. Ctr. for Envtl. Health*, 2011 WL 4971866 (E.D. Cal.)(order granting motions to dismiss October 19, 2011). Judge Ishii dismissed the claims against the Attorney General on ripeness grounds, and as to the private party on grounds of lack of subject matter jurisdiction.

NORRIS: A more general question is: Do you think there's a greater or lesser chance that a federal court will preempt Prop 65 than a state court? Because there's plenty of precedent in state court for state courts agreeing that Prop 65 is preempted by federal law, the *Dowhal* case being the leading example. (*Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal. 4th 910 (2004).)

MAGNANI: The courts strongly presume against preemption especially with respect to Proposition 65, which is a public health and safety statute. Prop 65 has been preempted in narrow and unusual circumstances on a case-by-case basis. In a situation where the Attorney General, as the public enforcer, is not bringing a Prop 65 suit, to seek a federal court order preventing the chief law enforcement officer of the state of California from enforcing the law just creates additional problems that are not going to help resolve the Prop 65 litigation. Where defendants seek a preliminary injunction against the Attorney General, even though the Attorney General has said that she or he is not planning to file suit, there is no likelihood of irreparable injury and there is no basis for a preliminary injunction.

DONNELLY: It's an interesting set of questions that lawyers who practice under Prop 65 may want to consider and answer. Does it make sense to go into federal court? It means that you will have to sue the Attorney General.

NARDI: Why would courts entertain suits if the state of California has made a policy decision that they are not concerned about the exposure to require the warning? Why would we empower individual groups to have this flood of litigation where the government fails to act?

NORRIS: This was coming on the heels of Watergate when people felt they couldn't trust the government to protect them. If you talk to the proponents of Prop 65, one of its cores is that you allow citizens to sue even where the state will not. But it's created an industry of people who bring these suits, some seeking clearly legitimate environmental goals, others pretty clearly seeking nothing but money —and then a spectrum in between.

COFFIN: Is anybody at the table aware of a preemption case involving discharge? The only jurisprudence I have seen always involves warnings and whether or not the warning is inconsistent with the federal labeling statute, but it would be interesting to see how it plays out in the context of a discharge case.

DONNELLY: All the preemption decisions are warning cases.

NORRIS: The tuna case (*People v. Tri-Union Seafoods, LLC*, 171 Cal. App. 4th 1549 (2009)) is a good example where the trial court said, "This is clearly preempted. There's a conflict between putting a warning on a can of tuna fish saying this contains a chemical known to cause birth defects when the FDA has a particular warning they like to provide to the existing population." The Court of Appeal scoffed at that and held its nose while upholding the ultimate judgment, which is based on a scientific determination that the trial court judge had made.

In the chicken case (*Physicians Comm. for Responsible Med. v. McDonald's Corp.*, 187 Cal. App. 4th 554 (2010)) an animal rights group sought a warning on chicken because when you grill it you create a chemical that is on the Prop 65 list. You get it whenever you cook any type of meat, and yet obviously you need to cook chicken in order to kill any salmonella. The Court of Appeal said this is not preempted because some kinds of warnings might not conflict with federal efforts to encourage thorough cooking of chicken. Interestingly, the Attorney General's position was that no warning is necessary as a scientific matter; therefore, the court need not reach the preemption issue. But in defendants' view, preemption would have been a clean and efficient way to resolving the case.

MAGNANI: With respect to products regulated by the FDA, the primary preemption issue is whether the Proposition 65 warning is going to serve the same purpose as the FDA warning, meaning whether the Proposition 65 warning conflicts with a federal requirement or interferes with the purposes of federal law. This is rarely the case since the Prop 65 warning provides truthful information to the consumer.

NARDI: Has anyone done a study of the Prop 65 efficacy? As a citizen, there's such broad exposure to these warnings, that people often disregard them.

MAGNANI: I'm not aware of any efficacy studies, but perhaps the biggest success of Prop 65 is all the warnings that you never see because the products get reformulated as a result of the impending need for a warning. Some would say that is the better way to measure efficacy of the statute.

DONNELLY: We are finding that food clients are more willing to provide warnings. Five years ago a food client would never do that. The feedback I'm getting from clients is it looks like the warning is not hurting their sales.

COFFIN: An inherent problem with Prop 65 is the nature of the Safe Harbor warning, which doesn't give you any information.

DONNELLY: All it needs to say is this product contains a chemical known to the state of California to cause cancer and birth defects. You are not required to identify the chemical, not required to say how much of it is in the product. That's the generic warning.

COFFIN: The Prop. 65 standard is based on exposure and not content. As a result, when clients ask, "What do I need to do to comply

with Prop 65?" I can't tell them because in order to make that determination, the client has to spend a hundred thousand dollars on an exposure analysis. Second, litigation is the only enforcement mechanism for Prop. 65, and the defendants are required to spend a huge amount of money in defense with a burden of proof already against them. Instead, most defendants settle the cases as quickly as possible to avoid transaction costs whether or not there is a legitimate exposure issue.

MAGNANI: There are some limited areas under the statute where the attorney general has authority to promulgate regulations with respect to reviewing cases before they are filed and reviewing and commenting on settlements, but the issues you are raising stem from the statutory requirements and what the voters approved. They cannot be changed absent a two-thirds vote of the legislature that serves the purpose of the statute.

NORRIS: There's nothing stopping OEHHA from saying a half microgram of lead means 300 parts per million in vinyl cords, or 200 parts per million in lunch boxes. Every other regulatory jurisdiction in the world including the European Union sets standards that are content-based that a manufacturer can apply. California does that through litigation, and you end up with 12 or 15 consent judgments approved by a court of law.

MAGNANI: In passing the statute, the voters placed the burden on the company that is using the chemical and creating the exposure, not on the state to expend the resources to develop the standards.

NORRIS: That's true, but there's no reason why the state can't establish a standard that cuts off litigation. It has just chosen not to.

MODERATOR: What are the latest developments around California's regulation of greenhouse gas emissions under AB 32?

DONNELLY: Cap and trade is here, and is a key component of California's efforts to reduce greenhouse gas emissions to 1990 levels by 2020. Companies falling within certain categories that emit 25,000 metric tons per year or more of carbon dioxide equivalent, as well as importers of electricity, must have "compliance instruments"—which include emission allowances and offset credits—by January 2013. By the end of the first compliance period in December 2014, these companies must surrender compliance instruments that equal their greenhouse gas emissions over that time period. The California Air Resources Board (CARB) will give out some allowances for free and auction the rest at a price cap of $10 per metric ton in 2012 (this price cap will increase 5 percent per year thereafter, plus an inflation adjustment). A company can also buy offset credits, but only up to 8 percent of the compliance obligation, and the offset credits must comply with one of just four protocols approved by CARB. Cap and trade will have a substantial direct impact on every major business in California.

COFFIN: Eighty-five percent of California industry will have to comply, but some sectors of the industry won't be added until the second compliance phase. The significant action now is about setting the benchmarks for caps for various industries. In some circumstances there will be unintended consequences from setting caps. For example, clients with long-term contracts with buyers cannot pass on any of the cost of compliance to their customers.

MODERATOR: Of the 92 percent, how much will the state give to companies free of charge?

COFFIN: In the first instance a significant part will be allowances free of charge. Although the refining industry believes the rules have changed, requiring them to buy more allowances than they thought initially. They interpret this as a $2 billion tax.

Another unintended consequence is that California originally thought it would initiate this program and that there would also be a federal program. But there is no equivalent federal program. What does this do in California when across the border in Nevada they don't have to be involved in this process?

MAGNANI: There is no doubt that the CARB is doing groundbreaking work. Regarding potential unintended consequences, the program includes an adaptive management component, requiring the agency to gather, review, and analyze data as cap and trade is implemented so that it can make necessary modifications. In particular, adaptive management will look at any unanticipated effects on localized emissions, such as air pollution "hot spots." This might be of particular interest to the communities adjacent to sources of air pollution.

NORRIS: This is yet another example of state regulation in the face of federal inaction. If I were a company CEO and could hire only one lobbyist outside of Washington, DC, I would send that person to Sacramento. ■