***ENVIRONMENTAL DEFENSE CENTER * ENVIRONMENT CALIFORNIA ***
***PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS ***
***THE OTTER PROJECT * GET OIL OUT! * LOS PADRES SIERRA CLUB ***
***CARPINTERIA VALLEY ASSOCIATION ***
***CITIZENS PLANNING ASSOCIATION OF SANTA BARBARA COUNTY ***
***SANTA BARBARA COUNTY ACTION NETWORK ***
JIM RYERSON ENVIRONMENTAL FOUNDATION

July 30, 2010

Hon. Christine Kehoe, Chair
Senate Appropriations Committee
California State Capitol, Room 2206
Sacramento, CA 95814

Re: <u>AB 2503: California Marine Life Legacy Act (Rigs-to-Reefs) - OPPOSE</u>

Dear Chair Kehoe and Committee Members:

The undersigned groups urge you to oppose AB 2503, the California Marine Life Legacy Act. AB 2503 would change existing law, which requires complete removal of offshore platforms, and instead allow oil platforms to be abandoned at sea. Many of our organizations opposed prior attempts to create a rigs-to-reefs program in the state. Despite the passage of time, we remain concerned about the lack of information, potential environmental and safety impacts, and economic and legal liability for the state.

Although the bill has been amended to address some of our earlier concerns, we remain opposed to the bill due to the need for more scientific analysis and further evaluation of the safety, management and economic ramifications of a state-sponsored rigs-to-reefs program. Further analysis is required to address these concerns. Fortunately, no platforms are ready for decommissioning, so the state has time to wait until complete information is available.

The Bill is Premature; Information is Lacking

Information regarding environmental impacts, navigational and safety hazards, and cost of state management and liability is still lacking. Section 1 of the bill references the recently released report produced by the Ocean Science Trust (OST) entitled "Evaluating Alternatives for Decommissioning California's Offshore Oil and Gas Platforms," and states that it is the intent of the Legislature that this report shall be taken into account when evaluating a proposal to convert an oil platform into an artificial reef.

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The Legislature should strike any reference to the OST report because it is incomplete, misleading, incorrect, and has not been subject to public or peer review. Despite significant financial contribution by the state, the report failed to address concerns that had been raised by the public and agencies, and leaves many critical unanswered questions. The report itself acknowledges that several essential "data gaps" remain, including but not limited to the following:

- Evaluating the overall effect platform communities have on the regional ecosystem and regional populations of fish.
- Determining habitat value and biological productivity at individual platforms.
- Analyzing the effect on fish assemblages of partially removing platform structures.
- Assessing the impact of allowing fishing at the platforms, as may be required under federal law.
- Analyzing the pollution effects caused by leaving contaminated shell and debris mounds in the ocean.
- Analyzing how a rigs-to-reefs program will affect proposals for new oil and gas development (by reducing costs and liabilities).
- Determining applicant costs of permitting and decommissioning.
- Determining state costs of management, monitoring, maintenance, enforcement, and liability insurance.
- Determining consistency of a rigs-to-reef plan with the state's existing artificial reef program.

In addition, the report completely misstates federal and state laws that would apply to a rigs-to-reefs program, and fails to disclose the state's potential liabilities. The extensive scope and nature of the data gaps warrants further consideration and analysis before any changes are made to state law.

Fortunately, there is no time pressure to deal with this issue, as the bill itself notes that the 23 platforms in federal waters are not expected to be ready for decommissioning until sometime between 2015 and 2030. [Fish and Game Code §6425(b)] The law should not be changed until further information and analysis are available.

There is no Scientific Consensus that Oil Platforms function as Fish Habitat

On November 8, 2000, the Select Scientific Advisory Committee on Decommissioning University of California for the University of California Marine Council issued a report in response to rigs-to-reefs legislation ("Ecological Issues Related to Decommissioning of California's Offshore Production Platforms"). The report concluded that **"there is no clear evidence of biological benefit (in the sense of enhancement of regional stocks) of the platforms in their present configuration. Thus, in light of the lack of strong evidence of benefit and the relatively small contribution of platforms on reef habitat in the region, <u>evaluation of</u>**

decommissioning alternatives in our opinion should not be based on the assumption that platforms currently enhance marine resources." (Emphasis added.)

The bill finds that the new Decommissioning Report and other studies indicate that the partial removal option can result in net environmental benefits and substantial cost savings compared to full removal of an oil platform facility. [Fish and Game Code §6425(d)] However, as noted above, the new Report does not adequately address the environmental issues associated with a rigs-to-reefs program, and critical information and analysis are still lacking. As noted in the Report, only a few platforms have been studied, and there has been no evaluation of the overall effect platform communities have on the regional ecosystem and regional populations of fish. In fact, only 8 of the 27 individual platforms (approximately 30%) have adequate data for modeling biological productivity. Furthermore, the Decommissioning Report relied on only two studies that examine a total of three platforms to make the general claim that juvenile rockfish are larger and have higher densities on platforms than on natural reefs. This generalization is improper and cannot be applied to other platforms that have not been studied. Accordingly, this finding should be deleted from the bill.

Although the bill includes criteria for evaluating the environmental benefit of converting a platform to an artificial reef, there are many remaining concerns. For example, the bill does not require an evaluation as to whether a platform or facility is a source or a sink for fish populations regionally, or whether the facilities may serve to attract fish away from productive natural reefs.[1]

Nor is there any specific requirement to evaluate the pollution created by leaving platforms and their associated debris in place. Such debris mounds contain contaminants and may be toxic to the marine environment.[2]

Another concern we have is that the criteria will not be developed until an application is submitted. At that time, it may be too late to effectively incorporate criteria into the decision-making process. For one, the lead agency under state law will have only 30 days to determine whether the application is complete. If the criteria are not developed in time, the application may not include all the necessary information. In addition, the strict timelines of both the California Environmental Quality Act (CEQA) and the Permit Streamlining Act will apply and may preclude the opportunity for the Council to develop criteria.

The Criteria for Conversion must include compliance with CEQA

Although the bill provides that a proposed project to convert an offshore oil platform or production facility into an artificial reef is subject to the CEQA and the timelines set forth therein [Fish and Game Code §§6426(d), 6427.3(a)(1)], the bill does

[1] Carr, et al., *Artificial Reefs: The Importance of Comparisons with Natural Reefs*, Fisheries, vol. 22, no. 4, April 1997.
[2] California State Lands Commission Shell Mounds Environmental Review.

not list CEQA among the laws that apply to a decision to approve a conversion proposal. CEQA contains substantive as well as procedural mandates that must apply to any project involving conversion of an offshore oil platform into an artificial reef. Fish and Game Code §6427(a) must therefore include CEQA.

Decommissioned Platforms could be Converted to Magnets for Fishing

In the Gulf of Mexico, platforms are generally removed from their drilling location, and components are added to pre-designated artificial reef sites. These sites become magnets for fishing because of their known locations, and in fact are intended to serve as fishing sites. The same thing is likely to occur offshore California. The decommissioning platforms will be known as artificial reef sites and attract fishers. This occurrence will obviate any potential sheltering benefit provided by the platforms. Although the bill provides that DFG may require a buffer zone around a decommissioned platform in which fishing or removal of marine life is restricted or prohibited [Fish and Game Code §6427.3(a)(2)], the Decommissioning Report states that it may not be legally feasible for the state to protect such areas from fishing due to conflicts with federal laws and regulations.[3] For example, the National Fishing Enhancement Act requires access and utilization of artificial reefs by recreational and commercial fishermen.

The Apportionment of Cost Savings Favors the Platform Owner/Operator

The bill requires an applicant to pay 50% of its cost savings to the state. [Fish and Game Code §6427.3(b)] Current law requires platform owners and operators to pay 100% of the cost of decommissioning. We see no reason why that requirement should change. If the owner or operator seeks to avoid its decommissioning obligations, the savings should be paid to the state. Requiring full payment of the cost savings would also help ensure that costs of maintenance, management, monitoring and liability can be covered while still providing other financial benefit to the state.

The Bill Creates a Potential Conflict of Interest for the State Agencies

Prior to the June 21 amendment, the bill created a clear conflict of interest for DFG, which was required to both determine whether an application to convert a platform or facility to an artificial reef should be approved, *and* receive funding to implement the programs set forth in PRC §71552. The amended bill requires the Ocean Protection Council to determine whether a conversion of a platform to an artificial reef provides a net environmental benefit. [Fish and Game Code §§6427(b), 6428] However, to the extent the OPC may receive or allocate funding from this program, the Council would still have a conflict of interest.

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[3] See discussion regarding required compliance with the Magnuson-Stevens Fishery Conservation and Management Act, National Fishing Enhancement Act, and regulations of the Pacific Fisheries Management Council. (Decommissioning Report, pp. xxi, 174-175.)

The Bill Binds the Future Discretion of DFG

The bill states that DFG "shall" approve an application to convert a platform to an artificial reef if certain criteria are met. [Fish and Game Code §6427.3(a)(5)] This requirement interferes with the discretion of the agency to evaluate a host of legal and regulatory implications, as well as to exercise its full discretion under CEQA.

Liability to the State Remains a Concern

Federal law requires the state to assume title and liability for platforms that are decommissioned at sea.[4] Despite language in the bill that attempts to require the applicant to indemnify the state [Fish and Game Code §§6427(e), 6427.3(a)(3)], 6427.5(b)] the Legislative Counsel of California has found that similar attempts in prior legislation may be ineffective at protecting the State from liability.[5] In particular, the Counsel found that indemnification would not apply if the state (1) acts negligently, or fails to perform an act it has agreed to perform, (2) knowingly violates a condition of its federal permit (e.g. fails to adequately maintain the site in a safe manner), or (3) has actual or constructive knowledge of a dangerous condition and fails to protect against the condition. Section 6427.3(a)(3) provides that the state shall be indemnified even in the event of active negligence, which is contrary to existing law.[6]

This fact is especially troubling given the history of decommissioning platforms offshore California. For example, when Chevron was required to decommission the 4H platforms offshore Summerland, massive debris mounds were left on the seafloor and several commercial fishermen filed claims for snagging gear and equipment. This safety concern was enhanced when Chevron's attempts to mark the sites with buoys were a total failure.[7] There are currently no buoys or navigational marking delineating the area and these debris mounds continue to be a safety hazard for fisherman. If the state is similarly unable to maintain the decommissioned sites in a safe manner, the state may face liability.

Restrict the Future Use of Platform or Facility

The bill indicates that this law does not promote, encourage or facilitate offshore oil extraction, exploration, and development. [Fish and Game Code §6429.2(b)(4)] And yet, by leaving rigs in place the cost savings provided through this bill could incentivize new or expanded offshore drilling. In addition, there is nothing in the bill to prevent a site from being used in the future for offshore oil production activities.

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[4] 30 CFR § 250.1730.
[5] See June 18, 2001 Legislative Counsel of California Opinion to Senator Jack O'Connell regarding Decommissioned Oil Platforms (SB 1) - #14137, attached hereto.
[6] *Id.*
[7] See "4H Shell Mound Buoy Record," May 30, 2001.

Conclusion

Despite the effort to address concerns raised during previous attempts to establish a state rigs-to-reefs program, many critical questions remain. Fortunately, no platforms will be ready for decommissioning for several years. We urge the Legislature to refrain from changing existing law without first analyzing all of the potential implications and responding to concerns that have been raised repeatedly over the years.

Thank you for your consideration of these comments.

Sincerely,

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Environmental Defense Center

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Pacific Coast Federation of Fishermen's Associations

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Atts: Legislative Counsel of California Opinion to Senator Jack O'Connell regarding Decommissioned Oil Platforms (SB 1) - #14137, June 18, 2001

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BION M. GREGORY

June 18, 2001

Honorable Jack O'Connell
5035 State Capitol

DECOMMISSIONED OIL PLATFORMS (S.B. 1) - #14137

Dear Senator O'Connell:

QUESTION NO. 1

Would the state be subject to potential civil liability as a result of the enactment of Senate Bill No. 1 of the 2001-02 Regular Session, as amended May 16, 2001?

OPINION AND ANALYSIS NO. 1

Senate Bill No. 1 of the 2001-02 Regular Session, as amended May 16, 2001 (hereafter S.B. 1), if enacted, among other things, would authorize the Department of Fish and Game (hereafter the department) to approve the conversion of an offshore oil platform or production facility into an artificial reef if, among other things, the owner or operator of the offshore oil platform or production facility provides sufficient funds to the department for the purpose of ensuring that the owner or operator of the oil platform or production facility indemnifies the state against any and all liability that may result, including defending the state against any claims against the department for any actions the department undertakes pursuant to Article 2.5 (commencing with Section 6426) of Chapter 5 of Part 1 of Division 6 of the Fish and Game Code, as proposed to be added by S.B. 1[1] (proposed subpara. (D), para. (1), subd. (f), Sec. 6427, F.& G.C.).

S.B. 1 would also establish the California Endowment for Marine Preservation in order to create a permanent source of funding for projects that will conserve, protect, restore, and enhance the open coastal marine resources of the state (proposed subd. (a), Sec. 30981,

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[1] Hereafter Article 2.5.

P.R.C.). No employee of the California Endowment for Marine Preservation would be an employee of the State of California (proposed Sec. 30983, P.R.C.).

S.B. 1 would require the first-appointed members of the Board of Directors of the California Endowment for Marine Preservation to serve as incorporators of the endowment and to take the necessary actions to establish the endowment pursuant to the Nonprofit Public Benefit Corporation Law (Pt. 2 (commencing with Sec. 5110), Div. 2, Title 1, Corp. C.) once a majority of the board is appointed (proposed Sec. 30980, P.R.C.). S.B. 1 would prohibit the endowment from being incorporated until one offshore oil platform or production facility has been permitted as an artificial reef, all necessary applicable government permits have been received by an owner or operator of the oil platform or production facility, and the department has received approval from the appropriate federal agencies for a permit for an artificial reef for the decommissioned offshore oil platform or production facility (proposed Sec. 30980.5, P.R.C.).

S.B. 1 would require the owner or operator of an offshore oil platform or production facility to apportion a specified percentage of any cost savings resulting from converting the platform or production facility into an artificial reef, rather than removing the facility, as follows: 20 percent to the California Marine Resources Trust Fund, as proposed to be created by the bill, 75 percent to the California Endowment for Marine Preservation, and 5 percent to the county board of supervisors of the county immediately adjacent to the location of the facility (proposed Sec. 6429.3, F.& G.C.).

S.B. 1 would require the department to take title to a decommissioned offshore oil platform or production facility if an agreement is reached that will ensure that the cost savings identified and approved by the department are deposited according to the bill, the requirements of the bill are met, the owner or operator has received all applicable government permits, the artificial reef conversion operation is completed, and the state is indemnified from any liability that may result from approving the conversion of an offshore oil platform or production facility as an artificial reef or any liability that may result from the ownership of the reef (proposed Sec. 6427.5, F.& G.C.).

S.B. 1 would declare that nothing in Division 20.6 (commencing with Section 30960) of the Public Resources Code, as proposed to be added by S.B. 1 (hereafter Division 20.6), which would establish the California Endowment for Marine Preservation, may be construed, among other things, to alter any existing law that establishes liability for damages arising with respect to artificial reefs or reef materials, including damages from components of decommissioned oil facilities (proposed para. (6), subd. (a), Sec. 30971, P.R.C.). Further, paragraph (2) of subdivision (a) of Section 30971 of the Public Resources Code, as proposed to be added by S.B. 1, would declare that nothing in Division 20.6 may be construed to establish any new liability on the part of the state. S.B. 1 is silent as to the imposition of liability with respect to Article 2.5. Thus, liability under the Fish and Game Code provisions and the Public Resources Code provisions, as added by S.B. 1, would be based on existing law.

One issue that may arise is whether civil liability may result from navigational accidents, snagging of fishing gear, and long-term corrosion or pollution.

As discussed above, S.B. 1 would prohibit the incorporation of the California Endowment for Marine Preservation until, among other things, the department has received approval from the appropriate federal agencies for a permit for an artificial reef for the decommissioned offshore oil platform or production facility (proposed Sec. 30980.5, P.R.C.).

In this connection, the federal National Fishing Enhancement Act of 1984 (33 U.S.C.A. Sec. 2101 and following; hereafter the federal act) requires each permit for an artificial reef[2] issued by the Secretary of the Army[3] (see 33 U.S.C.A. Sec. 2104) to specify "the terms and conditions for the construction, operation, maintenance, monitoring, and managing the use of the artificial reef as are necessary for compliance with all applicable provisions of law and as are necessary to ensure the protection of the environment and human safety and property" (33 U.S.C.A. Sec. 2104(b)(1)).

The federal act immunizes from liability every person to whom a permit is issued in accordance with the federal act, and any insurer of that person, for damages caused by activities required to be undertaken under any terms and conditions of the permit, if the permittee is in compliance with those terms and conditions (33 U.S.C.A. Sec. 2104(c)(1)). The federal act imposes liability upon each person to whom a permit is issued in accordance with the federal act, and any insurer of that person, to the extent determined under applicable law, for damages to which the federal act immunity does not apply (33 U.S.C.A. Sec. 2104(c)(2)). Moreover, the federal act imposes a civil penalty, not to exceed $10,000 for each violation, upon any person who, after notice and an opportunity for a hearing, is found to have violated any provision of a permit issued in accordance with the federal act (33 U.S.C.A. Sec. 2104(e)).

The federal act prohibits the secretary from issuing a permit to a person unless that person demonstrates to the secretary the financial ability to assume liability for all damages that may arise with respect to an artificial reef and for which the permittee may be liable (33 U.S.C.A. Sec. 2104(c)(3)).

The federal act also states that nothing in that act creates any liability on the part of the United States (33 U.S.C.A. Sec. 2104(d)).

Thus, the federal act immunizes the United States against liability and subjects persons to whom a permit is issued to liability, including civil liability under the act, when the terms and conditions of the permit are not satisfied.

"Person" is not defined for purposes of the federal act. However, in related federal statutes, "person" is defined to include governmental entities, including states (see, for example, 33 U.S.C.A. Sec. 1402(e) and Sec. 1502(14)). Pursuant to the rule of statutory

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[2] "Artificial reef," for purposes of the federal act, means "a structure which is constructed or placed in waters covered under this chapter [the federal act] for the purpose of enhancing fishery resources and commercial and recreational fishing opportunities" (33 U.S.C.A. Sec. 2105(1)).

[3] Hereafter the secretary.

construction that a phrase or expression may be interpreted in accordance with its use in other related statutes (*Frediani* v. *Ota* (1963) 215 Cal.App.2d 127, 133), we think that "person," for purposes of the federal act, would be construed by a court considering the matter to include agencies of the state.

As discussed above, S.B. 1 contemplates receipt by the department of approval from the appropriate federal agencies for a permit for an artificial reef for a decommissioned offshore oil platform or production facility (proposed Sec. 30980.5, P.R.C.). Thus, as applied to S.B. 1, the federal act would immunize the department, as a permittee, and any insurer of the department, from liability for damages caused by activities required to be undertaken under any terms and conditions of the permit, if the department is in compliance with those terms and conditions. The federal act would subject the department to a civil penalty if the department is found to have violated any provision of a permit issued in accordance with the federal act. The federal act also would subject the department, and its insurer, to liability for damages to the extent determined under applicable law if the department is not in compliance with those terms and conditions.

We do not think that the civil penalty imposed by the federal act constitutes the exclusive remedy available to a plaintiff. On this point, nothing in the act makes the civil penalty the exclusive remedy (compare 12 U.S.C.A. Sec. 3417(d) and 29 U.S.C.A. Sec. 2104(b); see *United States* v. *Frazin* (9th Cir. 1986) 780 F.2d 1461, 1466, cert. den. 93 L.Ed.2d 84) and the federal act expressly contemplates a remedy "to the extent determined under applicable law" (33 U.S.C.A. Sec. 2104(c)(2)).

Thus, in our view, liability may arise for actions taken outside the scope of the conduct required by the terms and conditions of the permit.

Given that the federal act absolves the United States of liability and that a plaintiff would seek a remedy against the department under the state-operated program, we think the most pertinent body of law in this case is the body of state law commonly referred to as the California Tort Claims Act[4] (Div. 3.6 (commencing with Sec. 810), Title 1, Gov. C.[5]; hereafter the act), which provides for claims and actions against public entities and public employees.

Except as otherwise provided by statute, a public employee of a public entity is liable for an injury caused by his or her act or omission to the same extent as a private person (Sec. 820). A public entity is liable for an injury proximately caused by an act or omission of an employee of the public entity within the scope of his or her employment if the act or omission would give rise to a cause of action against that employee (subd. (a), Sec. 815.2).

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[4] The act was not given a short title by the Legislature, but commonly has been referred to as the Tort Claims Act or the California Tort Claims Act (see, for example, *Wilson* v. *San Francisco Redevelopment Agency* (1977) 19 Cal.3d 555, 557).

[5] All subsequent section references are to the Government Code, unless otherwise indicated.

However, that liability would arise only if the action of the employee would have created a cause of action against the employee, notwithstanding the act (subd. (a), Sec. 815.2). The act further provides that, where a public employee is granted immunity by statute, the public entity is also immune (subd. (b), Sec. 815.2).

A public employee is not liable for any injury resulting from the exercise of discretion vested in the employee, regardless of whether that discretion is abused (Sec. 820.2). Discretionary activity is that activity related to basic policy decisions; for example, planning, as opposed to the operational level of decisionmaking (*Ramos* v. *County of Madera* (1971) 4 Cal.3d 685, 693).

Thus, a public entity is liable in tort only to the extent declared by statute (*Williams* v. *State of California* (1976) 62 Cal.App.3d 960, 966), which liability is subject to certain statutory immunities and exceptions.

Under the act, liability may be imposed upon public entities, including the state, for injuries occasioned by, among other reasons, the dangerous condition of public property. The statutory elements to be fulfilled for a cause of action against a public entity for dangerous conditions on its property are set forth in Section 835, which reads as follows:

> "835. Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
>
> "(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
>
> "(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." (Emphasis added.)

Section 830 defines the terms used in Section 835 as follows:

> "830. As used in this chapter:
>
> "(a) 'Dangerous condition' means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.
>
> "(b) 'Protect against' includes repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, or warning of a dangerous condition.
>
> "(c) 'Property of a public entity' and 'public property' mean real or personal property owned or controlled by the public entity, but do not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity."

Thus, Section 835 imposes liability upon a public entity for damages for injuries caused by a dangerous condition of its property under certain circumstances unless a statute confers immunity.

On the issue of immunity, Sections 831.2 and 831.6 read, respectively, as follows:

> "831.2. Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach." (Emphasis added.)
>
> "831.6. Neither the State nor an employee of the State is liable under this chapter for any injury caused by a condition of the unimproved and unoccupied portions of:
>
> "(a) The ungranted tidelands and submerged lands, and the beds of navigable rivers, streams, lakes, bays, estuaries, inlets and straits, owned by the State.
>
> "(b) The unsold portions of the 16th and 36th sections of school lands, the unsold portions of the 500,000 acres granted to the State for school purposes, and the unsold portions of the listed lands selected of the United States in lieu of the 16th and 36th sections and losses to the school grant." (Emphasis added.)

Thus, Section 831.2 grants absolute immunity for natural conditions of any unimproved public property and, in a similar manner, Section 831.6 grants absolute immunity for unimproved and unoccupied portions of certain state lands, including submerged lands.

Generally, the absolute governmental immunity conferred by these sections "promote[s] the public use of such public property in its natural condition without shackling the governmental entity [with] 'the burden and expense of putting such property in a safe condition and the expense of defending claims for injuries [which] would probably cause many public entities to close such areas to public use'" (*Keyes* v. *Santa Clara Valley Water Dist.* (1982) 128 Cal.App.3d 882, 889; citation omitted). Further, " 'it is not unreasonable to expect persons who voluntarily use unimproved public property in its natural condition to assume the risk of injuries arising therefrom as a part of the price to be paid for benefits received'" (*Milligan* v. *City of Laguna Beach* (1983) 34 Cal.3d 829, 833; citations omitted).

An issue that arises under both Section 831.2 and Section 831.6, then, is the characterization of "unimproved" property. As applied to the facts here, the precise issue is whether an area in which an offshore oil platform or production facility has been converted into an artificial reef would be considered "unimproved" property within the meaning of Sections 831.2 and 831.6, thereby conferring absolute immunity on the state for injuries sustained due to the dangerous condition of the property.

In *Keyes* v. *Santa Clara Valley Water Dist.*, supra, the court addressed the issue of the characterization of "unimproved property" as follows:

"The California tort claims act in general, and section 831.2 in particular, fail to either define or establish 'a precise standard for determining when, as the result of developmental activity, public property in its natural state ceases to be "unimproved."' [Citation omitted.]

* * *

"Case precedent establishes that at least 'some form of physical change in the condition of the property at the location of the injury, which justifies the conclusion that the public entity is responsible for reasonable risk management in that area' [citation omitted] is required" (Id., at pp. 887-888).

In certain circumstances, human-altered conditions have been found to be natural conditions within the meaning of the act and have not altered the "unimproved" nature of the property. For example, in *Tessier v. City of Newport Beach* (1990) 219 Cal.App.3d 310, the plaintiff was injured when he walked into the ocean, dove into a wave, and struck his head on a concealed sandbar (Id., at p. 312). The plaintiff offered evidence outlining the history of the development of the harbor and its beaches, asserting that the accident site was no longer a natural condition (Ibid.). The trial court found that the harbor was made navigable through dredging, the construction of jetties, and the diversion of the flow of a river, and that large amounts of sand, mud, gravel, and rock were deposited on the ocean beaches, creating a much wider beach with a steep foreshore (Ibid.). The plaintiff contended that the accident site "was so altered by man-made changes as to remove it from being a natural condition and that ... the man-made changes were the primary cause or substantial factor in creating the condition that caused the accident" (Id., at pp. 312-313).

The appellate court affirmed the denial of the plaintiff's claim for damages, stating as follows:

"It is now generally settled that human-altered conditions, especially those that have existed for some years, which merely duplicate models common to nature are still 'natural conditions' as a matter of law for the purposes of Government Code section 831.2" (Id., at p. 314, citations omitted).

Thus, an argument could be made that an area in which an offshore oil platform or production facility has been converted into an artificial reef, and that, over time, produces conditions similar to those found in nature in the form of an artificial reef "merely duplicate[s] models common to nature" and does not alter the "natural" or "unimproved" nature of the property.

In our view, however, an area in which an offshore oil platform or production facility has been converted into an artificial reef would not be deemed to be "natural" or "unimproved" for purposes of the act. On this point, in the cases that have determined that the nature of certain public property is "natural" or "unimproved" despite human alteration, there was no artificial structure at the location where the injury occurred (see, for example, *Tessier v. City of Newport Beach*, supra, at p. 315; *Morin v. County of Los Angeles* (1989) 215 Cal.App.3d 184, 189). If the case concerned an artificial structure at all, the structure, which

was not the site of the accident, caused an alteration in existing natural conditions (for example, the shape of the ocean floor) and did not itself constitute an unnatural condition that was the cause of the injury.

By way of contrast, we turn to *Buchanan* v. *City of Newport Beach* (1975) 50 Cal.App.3d 221, concerning a plaintiff who was injured while surfing (Id., at p. 224). The evidence showed that the accident site had been "created by the construction of a jetty, dredging sand from the channel of the harbor entrance adjacent to the jetty, and depositing the dredged sand on what had been submerged sand spits, raising the beach level ... and causing a steep slope from the shoreline into the water" (Ibid.). In reversing a judgment of nonsuit, the appellate court found it a triable issue of fact as to whether the steep slope was the product of an improvement of property by governmental agencies (Id., at pp. 226-227). The court stated that there was evidence supporting a conclusion that the condition that caused plaintiff's injury was the product of an improvement of property by governmental agencies, was man-made, and was not a natural condition (Ibid.). Subsequent cases have distinguished *Buchanan* v. *City of Newport Beach*, supra, however, on the basis of the physical alteration at the accident site, which raised the beach level (*Morin* v. *County of Los Angeles*, supra, at p. 190).

Based on the foregoing, because an abandoned offshore oil platform or production facility is an artificial structure, we conclude that it would be held to create a condition unnatural to the property and not found to merely cause an alteration in an otherwise existing natural condition. Thus, it is our opinion that the immunity from liability conferred by Sections 831.2 and 831.6 would not apply because the presence of an artificial reef of the type contemplated by the conversion of an oil platform or production facility into an artificial reef would render the property unnatural or improved within the meaning of the act.[6]

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[6] Although we were not asked to consider specifically the potential liability for injury sustained as a result of hazardous recreational activities, Section 831.7 provides that no public entity and no public employee is liable to any person who participates in a hazardous recreational activity, including any person who assists the participant, or to any spectator who knew or reasonably should have known that the hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk, or having the ability to do so failed to leave, for any damage or injury to property or persons arising out of that hazardous recreational activity (subd. (a), Sec. 831.7). "Hazardous recreational activity," for this purpose, means a recreational activity conducted on property of a public entity that creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury to a participant or spectator (subd. (b), Sec. 831.7). "Hazardous recreational activity," for this purpose, also includes any form of diving into water from other than a diving board or diving platform, or at any place or from any structure where diving is prohibited and reasonable warning thereof has been given (subd. (b), Sec. 831.7).

If the absolute immunities conferred by Sections 831.2 and 831.6 do not apply, the state would be liable for an injury caused by the dangerous condition of its property only if the injury or accident was caused by an act or omission of the state, the act or omission was not the result of a discretionary action by the state, and the act or omission is not subject to any other immunity provision. Thus, whether the state would be liable for an injury would depend on the facts and circumstances of the particular situation.

As discussed previously, Section 835 sets forth the conditions under which a public entity would be liable for injury caused by a dangerous condition of its property. Pursuant to Section 835, the plaintiff must establish that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury that was incurred, and that either (a) a negligent or wrongful act or omission of an employee of the public entity within the scope of his or her employment created the dangerous condition; or (b) the public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

The question of whether in any particular case the injury was the result of a reasonably foreseeable risk is a question of fact to be determined by the trier of fact (*Swaner* v. *City of Santa Monica* (1984) 150 Cal.App.3d 789, 811).

However, even if the risk of injury was foreseeable, in order for there to be liability the dangerous condition must have existed because of a negligent or wrongful act or omission of an employee of the state acting within the scope of his or her employment or the state must have had actual or constructive notice of the dangerous condition a sufficient time prior to the injury to have protected against the injury (Sec. 835). Again, whether either of these contingencies existed would be a factual determination.

Finally, even if the state would otherwise be liable under Section 835 for injuries caused by the dangerous condition of its property because it had actual or constructive notice of the existence of that condition, the state would not be liable if it took reasonable action to protect against the risk of injury created by the condition or if its failure to take protective action was reasonable (subd. (b), Sec. 835.4). "'Protect against' includes repairing, remedying, or correcting a dangerous condition, providing safeguards against a dangerous condition, or warning of a dangerous condition" (subd. (b), Sec. 830).

The reasonableness of the action or inaction of the state would be determined by taking into consideration the time and opportunity it had to take action, and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury or accident against the practicability and cost of protecting against the risk of injury (Sec. 835.4).

Based on the foregoing, the liability of the state for an injury caused by the maintenance or operation of an artificial reef as contemplated by S.B. 1 would depend upon whether the trier of fact would find that the risk of the injury was reasonably foreseeable, whether the state had actual or constructive notice of the dangerous condition of the facility a sufficient time prior to the injury to have avoided it or have warned of it, and whether the

state's actions after that notice were reasonable. Thus, in any particular case, whether the state could be held liable for that injury is based upon a factual determination.

As discussed above, S.B. 1 would authorize the department to approve the conversion of an offshore oil platform or production facility into an artificial reef only if, among other things, the owner or operator of the platform or facility provides sufficient funds to the department for the purpose of indemnifying the state against any and all liability that may result, including defending the state against any claims against the department for any actions the department undertakes pursuant to Article 2.5 (proposed subpara. (D), para. (1), subd. (f), Sec. 6427, F.& G.C.). In that connection, S.B. 1 would require the department to consult with the Attorney General and would authorize the department to consider a variety of mechanisms, including an agreement to indemnify the state, an insurance policy, a cash settlement, or any other mechanism which ensures that the state can defend itself against any liability claims against the department for any actions the department undertakes pursuant to Article 2.5 and pay any resulting judgments (Ibid.).

Unlike an exculpatory clause in an agreement, wherein one party attempts to exculpate itself from its negligence by exacting a waiver of liability (see Sec. 1668, Civ. C.), indemnity is the obligation of one party to make good a loss or damage another party has incurred (*Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628; *County of San Joaquin v. Stockton Swim Club* (1974) 42 Cal.App.3d 968, 972-973). Similarly, an insurance policy, a cash settlement, or any other mechanism that ensures that the state can defend itself against any liability claims and pay any resulting judgment would not exculpate the department under S.B. 1. Indemnity agreements generally are not invalid as violating public policy because an agreement to indemnify a person who may be responsible for an act is additional assurance that the loss will be compensated (*Lemat Corp. v. American Basketball Assn.* (1975) 51 Cal.App.3d 267, 278).

Thus, S.B. 1 would not absolve the department of liability; it would require the owner or operator of an offshore oil platform or production facility to provide sufficient funds to the department to ensure that the department will be compensated for any loss it incurs in connection with any liability that may result from the enactment of S.B. 1.

Accordingly, it is our opinion that, as a result of the enactment of Senate Bill No. 1 of the 2001-02 Regular Session, as amended May 16, 2001, under the National Fishing Enhancement Act of 1984 (33 U.S.C.A. Sec. 2101 and following), the state would be subject to a civil penalty if it is found to have violated any provision of a permit for an artificial reef issued in accordance with that act. Moreover, under that federal act, the state would be subject to civil liability for damages caused by activities not encompassed by the federal grant of immunity, namely, when the terms and conditions of the permit issued under the federal act are not satisfied and, to the extent determined under applicable law, as to damages arising from activities outside the scope of the conduct required by the terms and conditions of the permit. Further, it is our opinion that civil liability would be assessed generally pursuant to the California Tort Claims Act (Div. 3.6 (commencing with Sec. 810), Title 1, Gov. C.), as discussed above, and that the immunities conferred by Sections 831.2 and 831.6 of the Government Code would not apply. Finally, S.B. 1 would require the owner or operator of

the offshore oil platform or production facility to provide sufficient funds to the Department of Fish and Game to indemnify the state against any and all liability that may be incurred as a result of departmental approval of the conversion of an oil platform or production facility into an artificial reef.

QUESTION NO. 2

If S.B. 1 is enacted, would an indemnification provision in a contract, insurance policy, or bond cover losses incurred by the state if the state fails to comply with a federal permit or fails to adequately remedy a "dangerous condition" of which it has actual or constructive knowledge?

OPINION AND ANALYSIS NO. 2

As discussed in Opinion and Analysis No. 1, S.B. 1 would require the department to take title to a decommissioned offshore oil platform or production facility if, among other things, the owner or operator of the offshore oil platform or production facility has received all applicable government permits and has indemnified the state against any liability that may result from approving the conversion of the platform or facility into an artificial reef and any liability that may result from ownership of the reef (proposed Sec. 6427.5, F.& G.C.). S.B. 1 would also require the department to receive approval from the appropriate federal agencies for a permit for an artificial reef for the platform or facility (proposed Sec. 30980.5, P.R.C.).

"[W]hether an indemnity agreement covers a given case turns primarily on contractual interpretation, and it is the intent of the parties as expressed in the agreement that should control" (*Rossmoor Sanitation, Inc. v. Pylon, Inc.*, supra, at p. 633).

The effectiveness and scope of an indemnity provision depend in part on its specific wording. There are various types of indemnity agreements. "An indemnity agreement may provide for indemnification against an indemnitee's own negligence, but such an agreement must be clear and explicit and is strictly construed against the indemnitee" (*Rooz v. Kimmel* (1997) 55 Cal.App.4th 573, 583). On the other hand, if the indemnification provision is silent as to the issue of an indemnitee's negligence, it is referred to as a "general" indemnity clause (Ibid.). A general indemnity clause may protect the indemnitee against its own passive, but not active, negligence (*MacDonald & Kruse, Inc. v. San Jose Steel Co.* (1972) 29 Cal.App.3d 413, 422). The active versus passive distinction is not wholly dispositive; rather, "the enforceability of an indemnity agreement shall primarily turn upon a reasonable interpretation of the intent of the parties" (*Rooz v. Kimmel*, supra, at p. 584, citation omitted). However, the general rule that an actively negligent tortfeasor cannot recover under a general indemnity provision is one tool to be used to ascertain the intent of the parties (Id., at p. 585).

The distinction between active and passive negligence was discussed in *Rossmoor Sanitation, Inc. v. Pylon, Inc.*, supra, at pages 629-630, in the context of indemnity for construction contracts, as follows:

"Passive negligence is found in mere nonfeasance, such as the failure to discover a dangerous condition or to perform a duty imposed by law [citations omitted]. Active negligence, on the other hand, is found if an indemnitee has personally participated in an affirmative act of negligence, was connected with negligent acts or omissions by knowledge or acquiescence, or has failed to perform a precise duty which the indemnitee had agreed to perform [citations omitted]. 'The crux of the inquiry is to determine whether there is participation in some manner by the person seeking indemnity in the conduct or omission which caused the injury beyond the mere failure to perform a duty imposed upon him by law [citations omitted].'

"Whether conduct constitutes active or passive negligence depends upon the circumstances of a given case and is ordinarily a question for the trier of fact; active negligence may be determined as a matter of law, however, when the evidence is so clear and undisputed that reasonable persons could not disagree [citations omitted].

"Passive negligence has been found or assumed from the failure to discover a defective condition created by others [citations omitted], failure to exercise a right to inspect certain work and specify changes [citations omitted], and failure to exercise a supervisory right to order removal of defective material [citations omitted]. Active negligence has been found in digging a hole which later caused an injury [citations omitted], knowingly supplying a scaffold which did not meet the requirements of a safety order [citations omitted], creating a perilous condition that resulted in an explosion [citations omitted], and failing to install safety nets in violation of a contract [citations omitted]."

The applicability of an indemnity agreement is also restricted by Section 2773 of the Civil Code, which reads as follows:

"2773. An agreement to indemnify a person against an act thereafter to be done, is void, if the act be known by such person at the time of doing it to be unlawful."

Thus, an indemnity agreement may not cover a future wrongful act, if it is known by the person acting to be unlawful. In this case, violation of a permit issued pursuant to the federal act is not a crime, but may subject a person to a civil penalty (33 U.S.C.A. Sec. 2104(e)). The purpose of Section 2773 of the Civil Code is to prevent the encouragement of illegal acts, and Section 2773 requires actual knowledge, as opposed to constructive knowledge, that the act is unlawful (*Lemat Corp. v. American Basketball Ass'n*, supra, at p. 279). An indemnity agreement against a future knowing violation of an injunction is unlawful and void (Id., at p. 280).

With regard to whether a violation of a permit issued pursuant to the federal act would be unlawful, Section 1667 of the Civil Code provides as follows:

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"1667. That is not lawful which is;

"1. Contrary to an express provision of law;

"2. Contrary to the policy of express law, though not expressly prohibited;

or,

"3. Otherwise contrary to good morals."

Moreover, statutory terms should be construed in accordance with the usual, ordinary import of the language employed, in harmony with the overall legislative scheme (*IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 98). The dictionary definition of "unlawful" is "not lawful: contrary to or prohibited by law: not authorized or justified by law; not permitted or warranted by law" and "acting contrary to or in defiance of the law: disobeying or disregarding the law" (Webster's Third New International Dictionary (1986 ed.), at p. 2502). Black's Law Dictionary, 7th ed. (1999), at page 1536, defines "unlawful" as "not authorized by law; illegal" and "criminally punishable," and defines "unlawful act" as "conduct that is not authorized by law; a violation of a civil or criminal law."

A permit issued pursuant to the federal act is not a law. However, in our view, violation of such a permit is unlawful because the consequence of the violation is the imposition of a civil penalty pursuant to the federal act (33 U.S.C.A. Sec. 2104(e)); violation of the permit is prohibited by, or contrary to, the federal act.

Thus, we conclude that whether an indemnity provision in a contract, insurance policy, or bond would cover losses incurred by the state if the state fails to comply with a federal permit would depend on the language of the indemnity provision and the intent of the parties as expressed in the agreement, as interpreted in accordance with the principles discussed above. Moreover, while an indemnity provision would be void as to a future knowing violation of a permit issued pursuant to the federal act, an indemnity provision may cover losses incurred by the state as a result of a future violation of such a permit if the state did not have actual knowledge at the time of the violation that the act was unlawful.

We turn now to the issue of whether an indemnification provision in a contract, insurance policy, or bond would cover losses incurred by the state if the state fails to adequately remedy a "dangerous condition" of which it has actual or constructive notice.

The effectiveness of a particular indemnity provision would depend upon the intent of the parties pursuant to the agreement, as discussed above. If the particular agreement includes a general indemnity clause, it would be a factual determination in each case to determine whether the state was passively negligent, allowing indemnification, or actively negligent, disallowing indemnification. Whether the indemnity agreement would cover losses incurred by the state on this basis would thus depend upon the intent of the parties as expressed in the agreement, the specifics of the indemnification provisions, and the factual circumstances.

QUESTION NO. 3

If S.B. 1 is enacted, would the fact that commercial fishermen have filed claims for accidents and snagged gear with regard to a particular offshore oil platform or production facility abandonment site constitute "constructive notice" that other offshore oil platform or production facility sites that are not completely cleaned up create "dangerous conditions" and that injury is "reasonably foreseeable"?

OPINION NO. 3

If S.B. 1 is enacted, the fact that commercial fishermen have filed claims for accidents and snagged gear with regard to a particular offshore oil platform or production facility abandonment site may, under appropriate facts, constitute constructive notice that other similar offshore oil platform or production facility sites that are not completely cleaned up may create a dangerous condition and that injury of this type by these users is reasonably foreseeable.

ANALYSIS NO. 3

As stated previously, a public entity may be liable for injury caused by a dangerous condition of its property pursuant to subdivision (b) of Section 835 if the plaintiff establishes, among other things, that the public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Section 835.2 defines actual and constructive notice for purposes of the act. Section 835.2 reads as follows:

> "835.2. (a) A public entity had actual notice of a dangerous condition within the meaning of subdivision (b) of Section 835 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character.
>
> "(b) A public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character. On the issue of due care, admissible evidence includes but is not limited to evidence as to:
>
> "(1) Whether the existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate (considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the

public property and for uses that the public entity actually knew others were making of the public property or adjacent property.

"(2) Whether the public entity maintained and operated such an inspection system with due care and did not discover the condition."

A public entity has actual notice of a dangerous condition if it had actual notice of the existence of the condition and knew or should have known of its dangerous character (subd. (a), Sec. 835.2). A public entity has constructive notice of a dangerous condition if a plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character (subd. (b), Sec. 835.2).

The offshore oil platforms or production facilities are located off of California's coast in waters of varying depths. The decommissioning of an offshore oil platform or production facility in very deep water generally would involve different factors than a project located closer to the shore. However, while each decommissioning project is unique, there are certain general conclusions we can draw relating to offshore oil platforms and production facilities that are similarly situated, with respect to the distance from shore, type of construction, and other physical factors.

In general, the state has knowledge of the existence and location of the offshore oil platform decommissioning sites (see Committee Report of the Senate Fiscal Committee on S.B. 1, as amended May 16, 2001, at p. 3 ("There are 29 offshore oil platforms along the California coastline, two of which are on artificial islands")). S.B. 1 would require the state to take title to a decommissioned offshore oil platform or production facility (proposed Sec. 6427.5, F.& G.C.). Thus, the state has notice of the existence of the decommissioned offshore oil platforms or production facilities.

*The fact that commercial fishermen have filed claims for accidents or snagged gear with regard to a particular abandonment site, if true, may show that the state knew or should have known of the dangerous condition of that site. Previous accidents may constitute actual notice of a dangerous condition (see *Warden v. City of Los Angeles* (1975) 13 Cal.3d 297 (hereafter *Warden*)). In *Warden*, a sailboat from San Francisco struck a city-owned submerged sewer pipe in Santa Monica Bay (Id., at pp. 298-299). The court found that the city was aware of the dangerous condition because, prior to the accident at issue in the case, three small boats had struck the sewer pipe (Id., at pp. 299-300). While the city had mentioned the previous accidents to the Coast Guard, which had jurisdiction over the area, the city did not formally request a marking system (Id., at pp. 299, 301). The court found that the city was liable for damages because it failed to request permission from the Coast Guard to install visible and audible aids to warn mariners of the hazard (Id., at pp. 300-301).

By parallel reasoning, we conclude that claims filed for accidents or snagged gear at abandonment sites may constitute constructive notice at other abandonment sites that have a similar dangerous condition. The state may incur liability at a given site if a plaintiff can establish that the condition had existed for such a period of time and was of such an obvious character that the state, in the exercise of due care, should have discovered the condition and

its dangerous character (subd. (b), Sec. 835.2). Thus, if a plaintiff can prove that the state, in the exercise of due care, should have discovered that there was a dangerous condition at a site based on information regarding accidents that occurred at sites having similar conditions, then in our view a plaintiff may be able to prove constructive notice for purposes of liability under Section 835.

Turning to whether or not an accident or snagged gear is reasonably foreseeable, to determine the liability of a public entity for a dangerous condition of its property, among other things, a plaintiff must prove that the dangerous condition created a reasonably foreseeable risk of the kind of injury that was incurred (Sec. 835). The trier of fact would determine whether, under the particular circumstances, an accident or snagged gear is reasonably foreseeable under Section 835. In our view, as discussed above, evidence from other sites may show that accidents and snagged gear are the kinds of injuries that are reasonably foreseeable at a decommissioned offshore oil platform or production facility site.

Therefore, it is our opinion that, if S.B. 1 is enacted, the fact that commercial fishermen have filed claims for accidents and snagged gear pertaining to a particular abandonment site, if true, may, under appropriate facts, constitute constructive notice that similar offshore oil platform or production facility sites that are not completely cleaned up may create a dangerous condition and that injury of this type by these users is reasonably foreseeable.

QUESTION NO. 4

If S.B. 1 is enacted, would the fact that the State Lands Commission directed an offshore oil platform or production facility abandonment site to be marked with warning devices, which proved to be unsuccessful due to sea conditions, provide constructive notice that decommissioned sites cannot be adequately marked and thus are inherently dangerous?

OPINION AND ANALYSIS NO. 4

You have informed us that buoys and radar were used in one abandonment site to alert those in the area of the debris, but that this proved to be unsuccessful because of the sea conditions. You have also informed us that, because marking the site was not successful, boats that historically frequented the area were equipped with global positioning system receivers to indicate the debris areas electronically, and that this warning system did not alert boats that did not historically frequent the area and were not so equipped.

As stated previously, a public entity may be liable for injury caused by a dangerous condition of its property pursuant to subdivision (b) of Section 835 if the plaintiff establishes, among other things, that the public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition. "Protect against" is defined, in subdivision (b) of Section 830, to include warning of a dangerous condition.

As also discussed above, constructive notice is defined in subdivision (b) of Section 835.2. A public entity has constructive notice of a dangerous condition if a plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character (subd. (b), Sec. 835.2). Paragraph (1) of subdivision (b) of Section 835.2 provides that admissible evidence of due care includes evidence as to "[w]hether the existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate . . . to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property." Additionally, admissible evidence includes whether the public entity maintained and operated an inspection system with due care and did not discover the condition (para. (2), subd. (b), Sec. 835.2). Thus, under the act, the concept of constructive notice concerns a public entity's notice of a dangerous condition of public property.

As an affirmative defense to the duty to warn, a public entity can assert that the failure to warn is reasonable under Section 835.4. Section 835.4 reads as follows:

> "835.4. (a) A public entity is not liable under subdivision (a) of Section 835 for injury caused by a condition of its property if the public entity establishes that the act or omission that created the condition was reasonable. The reasonableness of the act or omission that created the condition shall be determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or of protecting against the risk of injury.
>
> "(b) A public entity is not liable under subdivision (b) of Section 835 for injury caused by a dangerous condition of its property if the public entity establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable. The reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury." (Emphasis added.)

*

As to whether the failure to warn would be reasonable under subdivision (b) of Section 835.4, a trier of fact would make the determination, based upon the facts presented (*Swaner v. City of Santa Monica*, supra, at pp. 810-811). A trier of fact would assess the reasonableness of the failure of a public entity to place warning devices or otherwise protect against the risk of injury, or the failure of warning devices or other measures, by taking into consideration the time and opportunity the public entity had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to

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the risk of injury against the practicability and cost of protecting against the risk of the injury (subd. (b), Sec. 853.4). In a factual situation where the state has done all that it reasonably can to warn of a dangerous condition, a trier of fact may conclude that Section 835.4 provides immunity.

Whether or not an abandonment site can be adequately marked relates to whether the state can escape liability under Section 835.4, and does not relate to whether property is in a dangerous condition (see subd. (a), Sec. 830). Under the act, the plaintiff must establish that the property was in a dangerous condition at the time of the injury, and that the state had actual or constructive notice of the dangerous condition (Sec. 835). Constructive notice as to whether the property can be adequately marked is irrelevant to the determination of whether a public entity has constructive notice of a dangerous condition pursuant to Section 835.2. However, in our view, information regarding the effectiveness of specified warning methods under similar conditions elsewhere is one factor that would bear upon the issue of whether, for purposes of the liability defense set forth in Section 835.4, the response of the state to protect against the risk of injury from a dangerous condition of property was reasonable.

Very truly yours,

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JTH/LAW:kab

Two copies to Honorable Deirdre Alpert,
pursuant to Joint Rule 34.