

Environmental Law Reporter

FEBRUARY 2006
VOLUME 2006 ISSUE NO. 2

2005 ENVIRONMENTAL LEGISLATIVE RECAP— SPECIAL ELECTION FALLOUT

THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

CEQA does not apply to the interior renovation of a historic residence (p. 62)

HAZARDOUS WASTE AND TOXIC SUBSTANCE CONTROL

Plaintiff in a Proposition 65 enforcement action failed to meet its burden of showing that defendants' plumbing products discharged lead into sources of drinking water (p. 66)

LAND USE AND ENVIRONMENTAL PLANNING

The California Supreme Court held that a person who challenges a local agency's fees for building inspections and permits under Gov. Code § 66014 must seek a prospective fee reduction under Gov. Code § 66016, and may not seek a refund of allegedly excess fees under Gov. Code § 66020 (p. 71)

FORESTRY DEVELOPMENT

The Department of Forestry and Fire Protection and the Department of Fish and Game complied with statutory and regulatory requirements in approving a sustained yield plan, state incidental take permit, and a streambed alteration agreement for the headwaters forest project (p. 77)

By

*Gary A. Lucks, JD**

Governor Schwarzenegger came roaring into Sacramento two years ago, promising to deliver a bipartisan, consensus-based environmental agenda. He enjoyed enthusiastic support from the business community and received grudging approval from many environmentalists. Yet despite the fanfare and high expectations, the Governor has thus far not delivered much in the way of environmental policy. Last year, his first full year as Governor, was a “light weight year” [*see* Gary A. Lucks, “2004 Environmental Legislative Recap—A Light Weight Year,” 2004 CELR 479], owing in part to the fact that it was an election year and the new Governor was still finding his footing.

Typically, more far-reaching, provocative legislation becomes law during non-election years. However, the conventional patterns of politics did not play out this year because the off-year was replaced by the governor's special election. With lackluster support for his initiatives, the Governor was loath to take a risk and support controversial environmental policies that would jeopardize his special election initiatives. Consequently, like 2004, a dearth of environmental policies and programs were signed into law in 2005.

In fact, the fall of 2005 represents the fewest number of bills signed by any of the past six California governors including Governor Schwarzenegger. During the past two years in office Governor Schwarzenegger rejected nearly 25 percent of the bills that came across his desk, a rate rivaling that of Governor Davis, who he defeated in the recall election of 2003. Notwithstanding the Governor's proclivity for vetoes and the Capitol's preoccupation with yet another special election, a number of important bills were signed concerning air quality, energy, hazardous materials, non-hazardous solid waste and recycling.

* Gary A. Lucks JD is a Principal at BEYOND COMPLIANCE, LLC in Oakland, California, where he advises clients on multimedia environmental regulatory compliance auditing and sustainability. He is a regular instructor at the University of California (U.C.) Berkeley and U.C. Davis Extension Programs where he teaches courses on environmental law, legislation, auditing, compliance, and sustainability. He currently serves on the California Bar Environmental Legislation Committee and is the West Coast Chair of the Auditing Roundtable. Mr. Lucks has published numerous articles and newsletters addressing environmental legislation and policy. He is the coauthor of a forthcoming book on California Environmental Law. Mr. Lucks recently co-founded a non-profit organization, the Sustainable Earth Initiative (SEI), which is dedicated to helping businesses and government become more sustainable through local actions.

ADMINISTRATIVE LAW AND ENVIRONMENTAL LITIGATION

BRIEFLY NOTED: FOIA Fee Waiver Applied to GIS Files (*Environmental Protection Information Center v. U.S. Forest Service*) 61

THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

Modifications to Interior of House Not Subject to CEQA Requirements (*Martin v. City and County of San Francisco*) 62

AIR QUALITY CONTROL

Regulatory Activity 65

HAZARDOUS WASTE AND TOXIC SUBSTANCE CONTROL

Prop 65 Plaintiff Failed to Meet Burden of Proving Defendants' Products Caused Discharges (*As You Sow v. Conbraco Industries*) 66
Regulatory Activity 70

LAND USE AND ENVIRONMENTAL PLANNING

Developer Challenging Building Permit Fees Not Entitled to Refund (*Barratt American Inc. v. City of Rancho Cucamonga*) 71
Regulatory Activity 77

FORESTRY DEVELOPMENT

Environmental Decisions for Headwaters Forest Agreement Complied with Law (*Environmental Protection Information Center v. California Dept. of Forestry and Fire Protection*) 77
Forest Service Post-burn Project Failed to Comply with NFMA and NEPA (*Ecology Center Inc. v. Austin*) 95

SOLID WASTE MANAGEMENT

County Authorized to Impose Solid Waste Collection Fees on Property Owners (*Casteel v. County of San Joaquin*) 99
Regulatory Activity 102

CUMULATIVE SUBJECT INDEX 102

CUMULATIVE TABLE OF CASES 103

text continued from page 51

Government Restructuring

With significant voter approval last year, the Governor confidently championed a sweeping government reform program designed to streamline the state's balkanized bureaucracy. The California Performance Review (CPR) offered bold strokes to "blow up" the bureaucratic boxes and eliminate 88 boards and commissions, replacing them with 12 super agencies. The restructuring plan would have recast California's environmental bureaucracy by creating a new Environmental Protection Department to replace Cal-EPA. It also would have created a Natural Resources Department to house several agencies ranging from the Department of Fish and Game (DFG) to the Department of Water Resources (DWR). The grand plan was doomed when the Little Hoover Commission found fault while both sides of the aisle gave it a cool reception.

Despite the lack of support for the CPR, the Legislature and the Governor focused their attention on a less ambitious set of reform proposals pieced together from the CPR. Assembly Bill (AB) 1317 (Ruskin) was the only successful bill from the reform proposals to become law this year. It establishes the Environmental Laboratory Accreditation Act, which governs the issuance of certificates of accreditation for laboratories performing analyses on environmental samples and raw or processed agricultural products. This law authorizes the Department of Health Services (DHS) to offer two laboratory certifications: (1) the State accreditation and (2) the National Environmental Laboratory Accreditation Program (NELAP). Both accreditations are now considered to be equivalent for regulatory activities. The law empowers DHS to develop regulations to implement this program. More ambitious initiatives to eliminate outdated and collateral programs remain alive as "two-year" bills and will be entertained in 2006. Senate Bill (SB) 354 (Escutia) would require the governor to appoint a Task Force to recommend consolidating the cleanup functions of the Department of Toxic Substances Control (DTSC) and the regional water quality control boards (RWQCBs). AB 1190 (Canciamilla) is the only other remaining two-year bill designed to restructure California's bureaucracy. It would establish a new energy agency

with consolidated authority over the jurisdiction of the California Power Authority, the State Energy Resources and Conservation Development Commission (CEC), and the California Electricity Oversight Board, and the California Public Utilities Commission (CPUC).

Energy

California ratepayers will be facing exorbitant heating costs stemming from reduced natural gas production capacity in the wake of Hurricane Katrina. Even before Katrina annihilated much of the Gulf Coast power infrastructure, the Legislature was preparing for an anticipated energy shortage. As a result, legislators enacted several bills to ensure adequate energy supplies, manage demand and establish cleaner energy to power the state.

Ensuring adequate energy supplies from non-conventional, alternative sources remains a high priority for both the California legislature and Governor Schwarzenegger. A number of bills were enacted to steer the state toward solar and hydrogen energy. Perhaps the most innovative energy initiative approved this year includes a program that promotes solar power by leveraging state assets. AB 515 (Richman) authorizes DWR to establish a program allowing the private sector to lease space above or adjacent to the State Water Project conveyance facilities for the purpose of installing solar photovoltaic panels to generate electricity. The author states that the bill is additionally designed to reduce evaporation from canals and attract investment to California.

Although the Governor's signature bill, SB 1 (Murray), promoting the installation of one Million Solar Roofs to homes and businesses failed, AB 1099 (Leno) was enacted to foster solar energy in California. AB 1099 is designed to encourage home-owners to retrofit their homes with solar technology by extending a property break. This law continues a tax valuation exclusion for costs associated with a new solar energy system through the 2008/09 fiscal year. The exemption encourages solar retrofit projects by allowing home-owners to avoid additional property taxes for the costs associated with home improvements.

EDITORIAL BOARD

James R. Arnold	The Arnold Law Practice San Francisco
Ronald E. Bass	Jones & Stokes Associates Sacramento
Kenneth M. Bogdan	Jones & Stokes Associates Sacramento
Thomas M. Bruen	Law Offices of Thomas M. Bruen Walnut Creek
David E. Cranston	Greeberg, Glusker, Fields, Claman & Machtinger, LLP Los Angeles
Scott W. Gordon	Law Offices of Scott W. Gordon Walnut Creek
Peter M. Greenwald	Attorney At Law Los Angeles
Albert I. Herson	SWCA Environmental Consultants Sacramento
Rachel B. Hooper	Shute, Mihaly & Weinberger San Francisco
Kenneth Manaster	Santa Clara University School of Law Santa Clara
Joel S. Moskowitz	Moskowitz, Brestoff, Winston & Blinderman, LLP Los Angeles
William M. Samoska	Law Offices of William Samoska Los Angeles
David A. Sandino	Department of Water Resources Sacramento
Daniel P. Selmi	Loyola Law School Los Angeles
Edward L. Shaffer	Archer Norris Walnut Creek

AUTHOR/EDITOR

Katherine Hardy, J.D.

MATTHEW BENDER & CO., INC.

Editorial Staff

Michael Bruno, J.D.	Practice Area Director
David Ostrove, J.D.	Practice Area Editor
Christian Tucker	Editor

Copyright © 2006 by Matthew Bender & Co., Inc.

QUESTIONS ABOUT THIS PUBLICATION

For questions about missing issues, new publications, billing, or other customer service problems call our Customer service department at 1-800-833-9844.

For editorial questions, call Christian Tucker at 1-800-424-0651, ext. 3505 or email at ronald.c.tucker@lexisnexis.com or David Ostrove, J.D., at 1-800-424-0651, ext. 3324 or email at David.Ostrove@lexisnexis.com

CALIFORNIA ENVIRONMENTAL LAW REPORTER (USPS 008-116, ISSN 1061-365X)
Is published semi-monthly for \$562 per year by Matthew Bender & Co. Inc., 1275 Broadway,
Albany, NY 12204-2694. Periodicals postage is paid at Albany, NY and at additional mailing
offices. POSTMASTER: Send address changes to CALIFORNIA ENVIRONMENTAL LAW
REPORTER, 136 Carlin Rd. Conklin, NY 13748-1531.

The Legislature entertained several bills during the first part of the 2005/2006 legislative session to expand the California Renewables Portfolio Standard (RPS) Program [Stats. 2002, SB 1078 (Sher)]. Under the current program, investor-owned utilities (IOUs) are required to ensure that at least 20 percent of the electricity they generate by 2017 is derived from alternative forms of energy such as solar or wind power. The more ambitious legislation designed to boost the amount of alternative energy targets was either vetoed or failed passage from both houses. AB 200 (Leslie) is the only RPS bill that became law this year. It modifies the manner in which two IOUs serving populations both in California and in adjacent states must meet the state's RPS. This law allows IOUs serving fewer than 60,000 customers in California that also serve customers in another state to count their out-of-state renewable resources toward their RPS compliance requirements. The bill effectively includes Sierra Pacific Power (which serves most of northern Nevada and a small part of CA around Lake Tahoe) and PacificCorp (which serves Oregon and Del Norte and Siskiyou counties in Northern California).

Promoting "distributed energy" remains an essential part of California's energy future. The Legislature has placed great emphasis on encouraging ratepayers to invest in distributed energy sources like cogeneration and solar panels. With distributed energy, ratepayers become self-sufficient electricity generators at their homes and businesses and send their excess wattage back to the energy grid. If distributed energy projects are to succeed, local or remote energy generators must be able to readily return the excess energy to the electricity transmission and distribution grid. The Legislature is focused on promoting more localized, distributed energy to supplement the relatively few, large power plants that distribute energy over long distances. SB 816 (Kehoe) is one of a handful of bills that expands the reach of net energy metering (NEM) to account for the quantity of energy generated at smaller sources that is added to the transmission and distribution system. This law expands the obligation of San Diego Gas and Electric (SDG&E) to offer NEM to allow more of its customers to participate in sending energy to the electricity grid. Under current law, electricity service providers are required to offer NEM on a first come, first served basis until use by

eligible customers exceeds .5 percent of the provider's total customer peak demands. SDG&E is the only energy provider approaching the .5 percent cap and AB 816 was enacted to require SDG&E to continue offering NEM to its ratepayers.

AB 728 (McLeod) extends the obligation of electricity providers to provide NEM to capture electricity generated by eligible biogas electricity generators (i.e., facilities that generate electricity from methane gas derived from manure). This law is designed to expand the scope of a previously established pilot program to include larger generation units. Eligible biogas digester generators now include up to three digesters with electrical generating capacity of between one and 10 megawatts. Participation in the program is premised on biogas digester facilities installing the best available control technology (BACT). Finally, AB 67 (Levine) extends indefinitely the NEM program for customer-owned fuel cell power generators installed prior to January 1, 2010. AB 67 also addresses the Legislature's interest in managing electricity structural issues and electricity rates. This law is designed to assist the Legislature in understanding the costs associated with deregulation proposals as well as the additional costs accruing from new programs. AB 67 accomplishes this by providing transparency in the elements that comprise electricity rates for IOUs. Specifically, this law requires the president of the CPUC to report the costs of programs and activities conducted by electrical or gas corporations annually.

AB 1723 (La Malfa) was enacted in response to the proliferation of community choice aggregation programs where ratepayers choose their electricity source. This law is intended to assist the CEC in its energy forecasting function to ensure that the forecast accurately accounts for the electricity lost to community choice aggregation. This law is designed to offer a third-party opinion of the projected energy demand by identifying the number of customers for whom IOUs should procure resources. It requires every entity that serves or plans to serve electricity to retail customers to file with the CEC a prediction of the amount of its forecasted load that may be lost or added to (1) a community choice aggregator, (2) an existing local publicly owned electric utility, or (3) a newly formed local publicly owned electric utility. The entity must also file a forecast of the load that will be served by an electric service provider.

The Independent System Operator (ISO) requires energy providers to have adequate generating capacity to meet the peak power demand—otherwise known as “resource adequacy” and the RPS. The ISO requires that resource adequacy be no less than 115 percent of the projected energy demand at any given time. AB 380 (Nunez) was enacted to ensure that “load-serving entities” (i.e., specified electrical corporations, electric service providers, or community choice aggregators) also meet the resource adequacy requirements. Where the load-serving entities do not meet their resource adequacy requirements, the IOU customers would be paying more for energy because the IOUs would have to purchase more expensive, “last minute” energy. AB 380 requires the CPUC, in conjunction with the ISO, to establish, implement and enforce resource adequacy requirements for all load-serving entities.

Other legislation was enacted to promote energy demand reduction. SB 1037 (Kehoe) requires electrical and municipal utilities (and the CPUC) to first acquire all available cost-effective, reliable, and feasible energy efficiency and demand reduction resources promoting energy efficiency measures before procuring conventional energy. Local publicly owned utilities must report their investment in energy efficiency to their customers and to the CEC each year.

The Legislature also expressed its desire to overhaul the state’s aging, less-efficient electric generating facilities with newer, cleaner-burning plants. AB 1576 (Nunez) establishes an incentive program to encourage IOUs to replace or repower up to 23 power plants in California with renewable energy resources. Specifically, this law requires the CPUC to allow IOUs to recover costs incurred to replace or repower existing power plants.

Air Quality

With skyrocketing fuel prices and worldwide petroleum reserves in decline, the Legislature was busy exploring ways to boost both cleaner energy alternatives to conventional transportation fuels and cleaner burning engines. As gasoline prices rise and SUV sales plummet, the demand for fuel-efficient hybrid vehicles has increased dramatically in recent months. Assembly member Pavley, who recently pioneered groundbreaking greenhouse gas (GHG) policy [*see* Stats. 2002 AB 1493 (Pavley)], enacted legislation intended to increase the demand for hybrid and

alternatively powered vehicles. AB 1660 (Pavley) establishes the California Energy Efficient Vehicle Group Purchase Program, which is designed to expand the market demand for hybrid and alternative fuel vehicles in order to reduce air pollution. This new law establishes an energy efficient vehicle purchase program designed to encourage the purchase of energy-efficient vehicles by local and state agencies. This first-in-the-nation statewide government group-purchasing program requires the California Department of General Services (DGS) to negotiate contracts for purchasing energy-efficient vehicles such as hybrids and alternative fueled vehicles. Representing approximately 4,000 state and local government agencies, the DGS will have enormous leverage with Detroit and Japan in negotiating volume discounts and favorable costs. Other legislation is designed to help consumers make informed choices when purchasing passenger cars and light-duty trucks. AB 1229 (Nation) requires the State Air Resources Board (ARB) to require manufacturers to affix to all new passenger cars and light-duty trucks decals displaying air emissions and GHG information.

SB 975 (Ashburn) allows public agencies, regulated utilities, and owners or operators of solid waste collection vehicles to use a specified blend of biodiesel fuel. The biodiesel fuel must consist of a blend of not more than 20 percent biodiesel fuel and may be used in retrofitted vehicular or off-road diesel engines that are certified by the ARB. The legislation defines biodiesel as “a fuel comprised of mono-alkyl esters of long chain fatty acids derived from vegetable oils or animal fats, designated B100, and meeting the requirements of the American Society for Testing and Materials (ASTM).” Biodiesel blend is a mix of biodiesel fuel meeting the ASTM (American Society for Testing and Materials) D-6751 with ARB diesel fuel, designated BXX, where XX represents the volume percentage of biodiesel fuel in the blend.

To further promote innovative approaches to reducing air emissions, SB 467 (Lowenthal) expanded the authority of the Carl Moyer Memorial Air Quality Standards Attainment Program. The Moyer program offers grants to support projects that reduce the products of incomplete combustion. SB 467 requires the ARB to broaden the reach of the program to non-road, zero-emission technologies. As a result, millions of dollars of grant money will be available to replace or offset the costs of cleaner technologies for: (1) electric or fuel-cell powered fork lifts; (2) airport

ground support equipment; and (3) scrubbers and varnishers.

Building on his desire to promote hydrogen as a cleaner source of fuel, the Governor signed SB 76 (Committee on Budget and Fiscal Review). This legislation is intended to achieve by 2010 a 30 percent reduction in GHG emissions and utilization of at least 33 percent of new renewable resources to produce hydrogen fuel for vehicles. This new law requires the Department of Food and Agriculture and the ARB to establish specifications for hydrogen fuels for internal combustion engines and fuel cells. Despite limited General Funds, this law earmarks \$6.5 million to the ARB to establish three demonstration hydrogen fueling stations using renewable energy (e.g., solar) to produce and dispense hydrogen. In addition, to demonstrate the viability and functionality of hydrogen as a transportation fuel, the funds also support a state program to lease up to twelve hydrogen-powered vehicles and two hydrogen internal combustion engine vehicles such as shuttle buses for use in university or airport shuttles. Other legislation is intended to ease the transition to clean-burning alternative fuels. AB 1007 (Pavley) requires the CEC in partnership with ARB to develop and adopt a state plan to increase the use of alternative transportation fuels by June 30, 2007.

The Brookings Institute recently completed a study concluding that Fresno, California has the dubious distinction of having the highest concentration of extremely poor residents living in isolated neighborhoods. The report found that approximately 40 percent of Fresno residents live below the federal poverty level. The western portion of Fresno County is inhabited by primarily low-income and underserved residents who may be exposed to diesel air emission spikes during the harvest season, particulate dust, and pesticides. AB 841 (Arambula) is an environmental justice bill that sets in motion the first step toward potentially managing the health risk to these residents. It requires the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD) to install at least one particulate monitor for airborne fine particles. This bill is intended to better characterize population exposure to particulate matter less than 2.5 microns in diameter. To the extent that air emission monitoring data validates the presence of elevated levels of fine particulate matter, this could compel the SJVUAPCD to develop more stringent rules for particulate matter.

Earlier this spring, legislators introduced a considerable number of bills to combat diesel emissions from locomotives, ports, airports, rail yards, and inter-modal sites throughout the state. Diesel exhaust was recently listed as a toxic air contaminant by the ARB and contributes to California's particulate matter non-attainment problem. Thus far, only one bill designed to curtail diesel emissions from locomotives passed. AB1222 (Jones) represents a nascent step toward regulating locomotives by requiring the ARB to establish a pilot program to determine emissions from locomotives using wayside remote sensing devices. This legislation is designed to validate the accuracy and reliability of remote sensing devices to measure particulate matter.

Land Use

Despite the recent thaw in the escalating real estate boom, the availability and affordability of housing continues to be out of reach for many Californians. A series of bills was enacted to address California's critical shortage of affordable housing and to promote increased land use density. These bills are but a down payment of many more to likely follow. SB 575 (Torlakson) requires a city or county to exceed its regional housing need for very low, low and moderate income housing before it may reject an affordable housing project. In an effort to encourage affordable housing while minimizing permitting delays, AB 1233 (Jones) requires that local governments include regional housing need numbers with specified information. They must include the jurisdiction's share of the regional housing need in the current planning period and any unmet share of housing need from the previous planning period. Any portion left remaining from the previous year must be rezoned within the first year of the new planning period.

SB 326 (Dunn) was enacted to allow "attached housing developments" (e.g., duplexes, triplexes and fourplexes) to avoid conditional use permits if a specified percentage of housing units are available as affordable units for very low, lower and moderate-income households. SB 435 (Hollingsworth) changes the density bonus law and allows developers to enjoy density bonuses and incentives for their commitment to low-income housing. This law clarifies the percentage of affordable units necessary to receive density bonuses. This law also extends the density bonus eligibility for construction of mobile home

parks, moderate income community apartments, and stock cooperatives.

California Environmental Quality Act

This year, the development and environmental communities had high expectations to achieve reforms to the California Environmental Quality Act (CEQA). The environmental community promoted more streamlined environmental review for projects furthering affordable housing, Smart Growth principles, and renewable energy. The development community was hoping for measures to reduce the scope and focus environmental review of CEQA documents. Except for some procedural clarification and a modest CEQA exemption, the Legislature delivered very little to satisfy either interest group. SB 648 (Margett) clarified the provisions governing a dispute between two agencies vying to become the lead agency. This law clarifies what constitutes a “dispute” when the Office of Planning and Research (OPR) is called upon to designate a lead agency for a project involving two or more public agencies. Prior to this new law, two or more potential lead agencies could resolve their dispute by appealing to the OPR. However, even when the two agencies accepted the OPR decision regarding lead agency status, third parties could intervene and challenge the decision. SB 648 eliminates third party challenges to a lead agency dispute. The bill also modified time frames governing public review of CEQA documents. It allows the public review period and the state agency review period to begin and end at the same time. Finally, if a CEQA document is deemed complete, the State Clearinghouse (within OPR) must distribute the document to state agencies within three days after receipt.

The only other CEQA bill of note was AB 1170 (Canciamilla) which carved out a conditional exemption to CEQA. This law allows the Bay Area Rapid Transit (BART) organization to avoid CEQA for a seismic retrofitting project provided that BART: (1) conducts three workshops to ensure public awareness; (2) complies with applicable environmental, health and safety laws; (3) ensures that standard construction practices are met; (4) requires its contractors to comply with specified construction controls to minimize particulate matter air emissions; and (5) uses equipment powered by emulsified diesel fuel, electricity, natural gas, or ultra-low sulfur diesel (where feasible).

Hazardous Materials

The Legislature crafted an ambitious agenda with legislation ranging from restricting certain chemicals in products to establishing a program to monitor the presence of chemicals in people. The Legislature has focused attention on the potential link between the 200-plus synthetic chemicals found in breast milk and the upstream chemical sources that may be responsible for causing this “body burden.” The most controversial bills designed to link chemical byproducts found within the “body burden” to upstream manufacturing were vetoed. Other legislation was fashioned to promote a legislative agenda premised on the “precautionary principle,” where the burden falls on the manufacturer to demonstrate the chemicals they introduce into commerce are not harmful.

SB 484 (Migden) enacts the California Safe Cosmetics Act of 2005. This legislation represents a baby step toward closing the toxicological data gaps in the thousands of chemicals found in cosmetics and personal care products. It is intended to protect workers who work in beauty salons and nail salons from chemical exposures. This law requires cosmetic manufacturers to provide the Division of Environmental and Occupational Disease Control (within DHS) with a complete and accurate list of its cosmetic products that contain any ingredient considered carcinogenic. If DHS determines that an ingredient is potentially toxic, it must refer its results to the California Department of Industrial Relations (the Division of Occupational Safety and Health). That agency would be required to develop occupational health standards designed to protect the health of employees exposed to the hazard. Additionally, it authorizes the Division of Environmental and Occupational Disease Control to determine whether certain cosmetics have been adequately substantiated for safety. If determined to be unsafe for the indicated use, the agency must refer its findings to the Attorney General and the federal Food and Drug Administration for possible enforcement. Finally, AB 1081 (Matthews) increases civil and criminal penalties for food manufacturers and food warehouses that violate the Food Drug and Cosmetic Act. Criminal penalties for the unlawful removal, sale, or disposal of an embargoed food, drug, device or cosmetic are \$10,000 while civil penalties for most violations of the Act are now up to \$1,000 per day.

With less than five percent of rechargeable

batteries recycled each year, over 75 percent of the cadmium wastes found in landfills comes from heavy metal seepage from nickel cadmium batteries. AB 1125 (Pavley) enacts the Rechargeable Battery Recycling Act of 2006 to address the toxic seepage from heavy metal pollution by requiring retailers of rechargeable batteries to establish a system to accept rechargeable batteries for reuse, recycling or proper disposal by July 1, 2006. The Legislature continues its preoccupation with heavy metal—mercury. The neurotoxin contamination in the San Francisco Bay has fouled the waters resulting in the fish being unsuitable for eating and requiring several varieties of fish to display a Proposition 65 warning due to the risk of reproductive toxicity. The Legislature responded with two bills in the past few years banning the sale of mercury thermometers and thermostats. AB 1415 (Pavley) expands this trend by prohibiting the sale or distribution of other mercury-added relays and switches for promotional purposes by July 1, 2006. In addition, this law prohibits the sale or distribution of a mercury diostat (i.e., a mercury switch that controls a gas valve in an oven or gas range) for promotional purposes by January 1, 2008.

AB 721 (Nunez) responds to the increasing challenges faced by metal plating facilities to meet ever increasing environmental and health and safety standards. The largest concentration of metal plating facilities in the country is in the Los Angeles area. This law requires the Business, Transportation and Housing Agency to develop a loan guarantee program for chrome plating facilities in order to assist in purchasing high performance environmental control equipment and technologies to encourage voluntary improvement going beyond environmental compliance.

During the last session, the Legislature was amenable to relaxing certain procedural hazardous waste provisions. This year, the Legislature was willing to do the same for hazardous material management. AB 403 (La Malfa) carved out a narrow exemption for hazardous materials business plan (HMBP) inventory requirements for businesses that solely store or use propane on-site to heat its premises from having to include the propane in its HMBP. The bill allows for Certified Unified Program Agencies (CUPAs) to require these businesses to include the propane in their HMBP if the CUPA can justify why the business should have to include it. In addition, AB 403

removes a sunset date (of January 2006) allowing for expedited handling of minor violations (e.g., violations not warranting a penalty; like a “fix-it” ticket allowing 30 days to correct before further enforcement). AB 575 (Wolk) amends the Electronic Waste Recycling Act of 2003 [Stats. 2003 SB 20 (Sher)] to provide additional flexibility for electronic leasing companies in the collection of the e-waste recycling fee. Under the prior law, businesses and consumers who purchased computer monitors and other “covered electronic devices” were required to pay an “advanced recovery fee” to defray the costs of disposing of the device at the end of its useful life. These fees are collected by the retailer at the time of purchase. If a business wanted to lease the equipment, the financing entity was obligated to collect the recovery fee from the business leasing the equipment; however, the vendor was prohibited from paying the DTSC directly. AB 575 streamlines the process by enabling the best suited party, the vendor, to both calculate and directly pay fees in commercial leasing transactions.

Cleanup and Brownfields

The methamphetamine epidemic has not only wrecked individuals and families; it has left a trail of environmental contamination. Some estimates posit that for every one pound of “meth,” five pounds of toxic waste is left behind in the homes and buildings used to manufacture the drug. States that have established cleanup guidelines recommend eliminating all absorbent materials—carpet, padding and drapes—and all accumulated dust and powder from the chemicals used in the cooking process. Clean up costs range from \$5,000 to over \$100,000 for meth-contaminated homes or apartments. Assembly member Rick Keene was successful with AB 1078, which addresses the environmental impacts of meth laboratory activities. AB 1078 creates the Methamphetamine Contaminated Property Cleanup Act of 2005 which establishes procedures governing the cleanup of contaminated property resulting from laboratories. This law requires DTSC to establish and adopt uniform standards for the remediation of meth-contaminated properties. Notified property owners must immediately vacate the affected unit and engage a methamphetamine laboratory site remediation firm to remediate the building within 90 days of submitting a preliminary site assessment describing the nature and extent of contamination and a recommended clean up plan. Until the property owner

receives notice from the local health officer indicating that the property does not require cleanup, the owner must notify prospective buyers and tenants of the contamination. Where the property owner fails to initiate or complete a proper cleanup, local government officials may optionally remediate the property or seek a court order to compel the property owner to clean the property. DTSC must conduct two public workshops to discuss any actions needed to further implement the act.

Despite high ambitions to energize brownfields cleanups, the only bill enacted this year was SB 471 (Escutia)—a “cleanup” bill. SB 471 modifies the California Land Environmental Restoration and Re-use Act (CLERRA) which authorizes local agencies to compel preliminary endangerment assessments to “property” owners. The law defined “property” to exclude a site that has one or more full-time equivalent employees on an annual basis. SB 471 deletes this exclusion because it served as a barrier to the cleanup of brownfield sites.

Hazardous Waste

The hazardous waste regulatory field remained relatively quiescent this term with the Governor signing only two bills of significance. AB 1342 (Environmental Safety Committee) allows “standardized” treatment, storage and disposal (TSD) facilities that manage California-only, non-RCRA hazardous wastes to notify DTSC of minor equipment repairs (e.g., leaking valves, controls, and pumps) without prior notice. Prior notice is not required as long as DTSC is later notified within seven days by certified mail and the equipment repair qualifies as a “Class 1” permit modification. Additionally, this law harmonizes state law with federal provisions governing TSD facilities. AB 1342 extends DTSC authority to enforce post-closure plans via enforcement orders and agreements from 2007 to 2009. SB 71 (Committee on Budget and Fiscal Review) authorizes the civil, criminal, and administrative penalties obtained from CUPA enforcement activities to support CUPA programs in counties where DTSC is designated as a CUPA.

Solid Waste

With a number of cities and counties throughout California boasting solid waste diversion rates exceeding 50 percent, there is a growing need to find a home for these waste streams. SB 1106 (Committee

on Environmental Quality) indirectly promotes markets for these post-consumer content materials by consolidating within the Public Resources Code previously balkanized programs addressing required recycling goals and reporting requirements. This legislation merges duplicative and conflicting provisions of the Buy Recycled Campaign.

SB 743 (Chesbro) makes technical changes to recycling provisions governing rigid plastic packaging containers. It redefines “recycling rate” for rigid plastic packaging containers under the California Integrated Waste Management Act to include the proportion of a single resin type of a rigid plastic packaging container that is recycled in a single calendar year. It also modifies the criteria for rigid plastic packaging containers to include a recycling rate of 45 percent for a single resin type of rigid packaging container. Finally, the bill establishes an additional compliance option under the existing rigid plastic packaging container and eliminates fines for false claims made by a container manufacturer.

SB 772 (Ducheny) broadens provisions under the California Tire Recycling Act. That Act requires the Integrated Waste Management Board (IWMB) to adopt a five year plan establishing goals and priorities for waste tires in California. SB 772 requires the plan to focus on waste tire activities near the California/Mexico border where waste tire piles accumulate. The plan must provide for (1) bilingual training programs to assist Mexican waste/used tire haulers; (2) environmental education training; (3) development of a waste tire abatement plan; and (4) tracking legal and illegal waste and used tire flow across the border. AB 1249 (Blakeslee) shifts the primary authority to develop and enforce fire prevention for large waste tire facilities from the IWMB to the State Fire Marshal. AB 574 (Wolk) is designed to promote the use of recycled concrete, which consumes considerably less energy and produces lower volumes of greenhouse gases than virgin concrete. In order to minimize liability for CalTrans and the DGS, this law requires that agencies request and approve the purchase of recycled concrete but forbids its use unless specifically requested by Caltrans. The law also clarifies that “recycled concrete” means reclaimed concrete material used in concrete mixtures in accordance with the “Greenbook Standard Specifications for Public Works” 2003 edition (or the most current revision of those requirements).

AB 1065 (Matthews) is intended to reduce blockages of public sewer systems and to prevent improper and illegal transportation and disposal of kitchen grease that is principally derived from food preparation, processing, or waste. This law regulates those who transport kitchen grease by requiring transporters to be insured for a minimum of \$1 million for one vehicle and \$2 million for two or more vehicles. AB 1065 additionally authorizes the California Department of Food and Agriculture to establish a tracking method for inedible kitchen grease.

Water Quality

Over the past few years, the Legislature has been fashioning policy to protect California's maritime environment. Last year, a cabinet level position was established to protect ocean ecosystems and coastal waters [see Stats. 2004 SB 1319 (Burton)]. Additionally, several bills were enacted to limit discharges from cruise ships and other large passenger ships. SB 771 (Simitian) expands on those provisions and additionally applies those restrictions to oceangoing ships. Specifically, oceangoing ships are prohibited from onboard incineration within three miles of the coast and from releasing gray water, sewage sludge and hazardous waste into the state's marine waters/sanctuaries. Additionally, this law requires the owner or operator of an oceangoing ship to provide information to the State Lands Commission (SLC) upon departure relating to its equipment to pump sewage, gray and black water discharge, and the ship's expected ports of call. Other legislation regulates non-tank vessels in marine waters. Prior to AB 752 (Karnette), non-tank vessels could not enter California's marine waters unless the owner or operator of the vessel demonstrated the ability to pay at least \$3 million to cover spill damages. This law authorizes the Oil Spill Prevention and Response Administrator to impose a lower standard for specific vessels indefinitely.

AB 495 (Montanez) makes clarifying changes to the law [Stats. 1999, AB 1104 (Migden)] establishing mandatory \$3,000 penalties for "serious" water quality violations. This law redefines "effluent limitation" to mean a numeric restriction or numerically expressed narrative restriction "that may be discharged from an authorized location."

Two bills are designed to protect free flowing rivers and sensitive habitats. With anadromous fish

populations suffering precipitous declines, SB 857 (Kuehl) expands a program to promote fish passage in streams. This law enlarges the list of DFG districts where it is unlawful to construct a facility or object that would obstruct fish passage in a stream. Furthermore, SB 857 adds 15 districts in southern California where threatened or endangered migratory fish species are found. Finally, this law requires Caltrans to prepare an annual report describing the agency's efforts to address and remediate fish passage problems relating to state highway or road structures. Caltrans, which owns over 200,000 culverts, is the largest owner of fish passage barriers in California. Under SB 365 (Ducheny), the SLC is charged with protecting California's public trust lands in tidal zones. SB 365 expands SLC's authority to approve exchanges of land subject to the "public trust." This legislation overturns a recent appeals court decision, *California Earth Corps v. California State Lands Commission* [(2005) 128 adv. Cal. App. 4th 756, 27 Cal. Rptr. 3d 476, 2005 CELR 242 (review granted and dismissed)], which held that the SLC acted beyond its authority in agreeing to exchange three acres of Long Beach tidelands for 10 acres along the Los Angeles River. This new law is designed to allow land exchanges, currently on hold, to continue in San Diego Bay, the Colorado River, the San Joaquin River, the Kings River, the American River, the Sacramento River, and the San Francisco Bay Area. These sidelined exchanges are intended to enhance waterfront and near shore development for public trust purposes or that preserve, enhance, or create wetlands, riparian, habitat or open space.

SB 1110 (Committee on Natural Resources and Water) lengthens to three years the statute of limitations for bringing a civil action for a violation of a streambed alteration agreement.

Natural Resources and Wildlife

Only one bill of significance addressing natural resources became law during this legislative session. AB 1296 (Hancock) enacts the San Francisco Bay Water Trail Act, which is intended to establish a water trail suitable for a safe and enjoyable boating experience on and near the San Francisco Bay. The law establishes a trail that comprises a series of launch and land sites for human-powered and beachable watercraft. The act is designed to promote and guide safe water access by paddlers and others in a manner that does not degrade natural resources.

Looking Ahead

Peter Detwiler, a seasoned legislative committee consultant in the Capitol, recently published a retrospective study of policy-making in California over the past three decades. That review reveals a notable increase in vetoed legislation and a significant drop in the number of bills enrolled for signature. Typically, 1,500 bills were signed in a given year during the 1970s and 1980s; this year only 729 bills were approved. This suggests an increasing gulf between the two branches of government driven, at least in part, by term limits. With little time to master complex policy matters before terming out, legislators have distanced themselves from more challenging policy issues, deferring them to the initiative process.

The Governor has actively used the initiative process as a tool to bypass the Legislature to transcend the increasing political divide between his office and the Democratic legislative majority. His preoccupation with the special election and its ballot initiatives resulted in a humbling defeat and contributed to another lackluster yield of environmental legislation and policy this year.

Whether the Governor has reached the nadir or just a new low in his nascent political career may well hinge on his ability to reach across the partisan divide and build bridges with the Legislature. With one year left in his truncated term, the considerably weakened Governor must finish the biennial session without the ballot initiative trump card. This leaves him with little choice but to reach across the aisle and search for common ground with an emboldened Democratically controlled Legislature. Perhaps with signs of an improving state economy and rising tax revenues, the celebrity Governor can regain his political footing. With just under one-third of the California electorate approving of his job performance, Governor Schwarzenegger has considerable ground to cover before November 2006.

ADMINISTRATIVE LAW AND ENVIRONMENTAL LITIGATION

Cases

BRIEFLY NOTED: FOIA Fee Waiver Applied to GIS Files

Environmental Protection Information Center v. U.S. Forest Service

No. 04-15512, 9th Cir.

12/20/05 Daily J. D.A.R. 14573, 2005 U.S. App. LEXIS 28033

December 19, 2005

Plaintiffs sent four letters to the Forest Service requesting information about timber sales. In each letter, plaintiffs asserted they were eligible for a waiver of normal FOIA fees under 5 U.S.C. § 552(a)(4)(A)(iii) (fees shall be waived or reduced if disclosure is in the public interest and is not primarily in the commercial interest of the requester). Each letter included a request for Forest Service GIS files. GIS is a computer system capable of assembling, storing, manipulating, and displaying geographically referenced information. The Forest Service refused to release the GIS data unless plaintiffs paid a fee. Plaintiffs brought this action in part challenging the denial of the fee waiver. The district court granted summary judgment for defendants, holding that 7 U.S.C. § 1387, which allows the Secretary of Agriculture to set fees for GIS data, satisfies an exception to the FOIA fee waiver provision as “a statute specifically providing for setting the level of fees for particular types of records” [5 U.S.C. § 552(a)(4)(A)(vi)].

Plaintiffs appealed and the Ninth Circuit reversed. The court found that the Office of Management and Budget—the agency responsible for promulgating FOIA guidelines—has clarified that only statutes setting mandatory fees, rather than statutes setting discretionary ones, meet the FOIA exception, citing the OMB “Fee Schedule and Guidelines” [52 Fed. Reg. 10017]. The court stated that while section 1387 allows the Secretary to charge fees for furnishing reproductions of GIS data, it is not mandatory. The court noted that section 1387 provides in part, “This section shall not affect the power of the Secretary to make other disposition of such or similar materials under any other provisions of existing law.” The court stated that this language gave the Secretary the discretion to make other disposition of the materials,