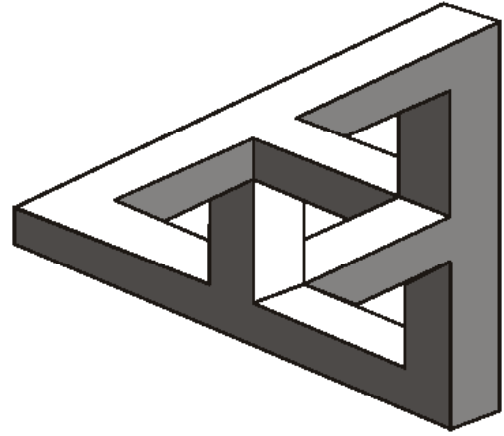


Enviro SOURCE



2005 California Environmental Legislative Year in Review

by Gary A. Lucks JD

.....
: **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 Program 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 published by Solano Press and he is under contract with Matthew Bender/LexisNexis to :
: complete the auditing chapter for the California Environmental Law and Land Use Practice treatise. 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. :
:.....

The California legislature has historically pioneered a great number of groundbreaking environmental laws that have been later adopted in other states and at the federal level. Last year, the legislature had high expectations for a number of far-reaching environmental policies addressing greenhouse gases, diesel emissions, and cleanup of brownfields. However, the 2005 legislative session was dominated by Governor Schwarzenegger's special election resulting in fewer environmental laws than anticipated. Nonetheless, a number of important initiatives were signed into law concerning energy, air quality, hazardous materials and solid waste. Notable developments include bills that address the following issues:

- ▼ **Energy:** Significantly promote solar energy across the state.
- ▼ **Air Quality:** Develop cleaner energy alternatives

to reduce air emissions.

- ▼ **Hazardous Materials:** Restrict certain chemicals in products and address the issues of recycled batteries and toxic seepage from heavy metal pollution.
- ▼ **Cleanup and Brownfields:** Aggressively address the environmental impacts of methamphetamine laboratory activities.
- ▼ **Hazardous Waste:** Prior notice no longer required for "standardized" treatment of waste from minor equipment repairs.
- ▼ **Solid Waste:** Tackle issues relating to waste tires, recycled concrete, rigid plastic packaging containers and the transport and disposal of kitchen grease.
- ▼ **Water Quality:** Expand programs to promote fish passage and protect free-flowing rivers and sensitive habitats.

The following discussion details these legislative items which became effective on January 1, 2006.

◀▶ Energy

(AB 515 Richman, SB1 Murray, AB 1099 Leno, AB 728 McLeod, AB 67 Levine, SB 1037 Kehoe, AB 1576 Nunez)

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 to lease space on the State Water Project (SWP) to install solar panels. AB 515 (Richman) authorizes the Department of Water Resources (DWR) to establish a program allowing the private sector to lease space above or adjacent to the SWP conveyance facilities for the purpose of installing solar photovoltaic panels to generate electricity. Although the Governor's signature bill, SB 1 (Murray), promoting the installation of one Million Solar Roofs to homes and businesses failed, AB 1099 was enacted to foster solar energy in California. AB 1099 (Leno) encourages solar retrofit projects by allowing homeowners to avoid additional property taxes for the costs associated with home improvements.

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% 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.

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. AB 728 (McLeod) extends the obligation of electricity providers to provide net energy metering (NEM) to capture electricity generated by eligible biogas electricity generators (i.e., facilities that generate electricity from methane gas derived from manure). Finally, AB 67 (Levine) extends indefinitely the NEM program for customer-owned fuel cell power generators installed prior to January 1, 2010.

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.

◀▶ Air Quality

(AB 1660 Pavley, AB 1229 Nation, SB 975 Ashburn, SB 467 Lowenthal, SB 76 Committee on Budget and Fiscal Review, AB 1222 Jones)

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. 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. 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% biodiesel fuel and may be used in retrofitted vehicular or off-road diesel engines that are certified by the ARB.

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.

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% reduction in GHG emissions and utilization of at least 33% 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.

Earlier this spring, legislators introduced a considerable number of bills to combat diesel emissions

from locomotives, ports, airports, rail yards, and intermodal 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.

Hazardous Materials

(SB 484 Migden, AB 1081 Matthews, AB 1125 Pavley, AB 1415 Pavley, AB 721 Nunez, AB 403 LaMalfa,)

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 the Department of Health Services (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. 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% 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 from having to include the propane in a hazardous materials business plan (HMBP) inventory requirements for businesses that solely store or use propane on-site to heat the premises.

◀▶ Cleanup and Brownfields

(AB 1078 Keene)

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.

◀▶ Hazardous Waste

(AB 1342 Environmental Safety Committee)

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. AB 1342 extends DTSC authority to enforce post-closure plans via enforcement orders and agreements from 2007 to 2009.

◀▶ Solid Waste

(SB 1106 Committee on Environmental Quality, SB 743 Chesbro, SB 772 Ducheny, AB 574 Wolk, AB 1065 Matthews)

With a number of cities and counties throughout California boasting solid waste diversion rates exceeding 50%, 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.

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% for a single resin type of rigid packaging container.

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. 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.

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.

◀▶ Water Quality

(SB 771 Simitian, AB 495 Montanez, SB 857 Kuehl, SB 365 Ducheny, SB 1110 Committee on Natural Resources and Water)

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 releasing gray water, sewage sludge, and hazardous waste into the state’s marine waters/sanctuaries. 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 Department of Fish and Game (DFG) districts where it is unlawful to construct a facility or object that would obstruct fish passage in a stream. This law also requires Caltrans (the largest owner of fish passage barriers in

California) to prepare an annual report describing the agency's efforts to address and remediate fish passage problems relating to state highway or road structures. Under SB 365 (Ducheny), the State Lands Commission (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 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 side-lined 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.

Looking Ahead

The fall of 2005 represents the fewest number of bills signed by any of the past six California governors including Governor Schwarzenegger. This suggests an increasing gulf between the two branches of government driven, at least in part, by term limits. 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 over one-third of the California electorate approving of his job performance, Governor Schwarzenegger has considerable ground to cover before November 2006.

Endnotes

Some parts of this article were previously published by Lexis Nexis and are reprinted with permission.

