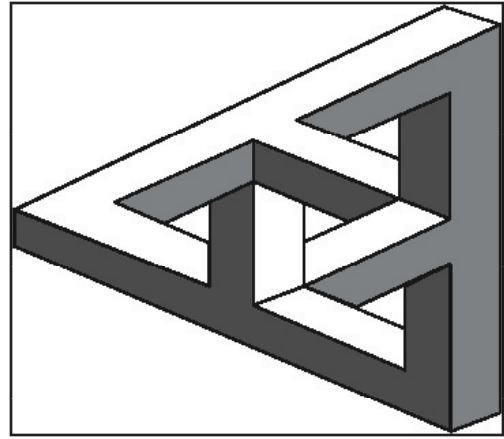


Enviro SOURCE



2004 California Environmental Year in Review

by Gary A. Lucks, JD

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With talk of the Environmental Protection Agency (EPA) and Congress relaxing environmental standards and enforcement, there is increasing attention placed on states to serve as a backstop to protect the environment. California's legislature has shown no sign of relinquishing its place at the forefront of stronger environmental protections, and has responded to the Bush administration's weakening of air quality laws by expanding programs to replace or retrofit diesel-powered trucks and equipment. California's unprecedented gubernatorial recall, unrelenting budget deficit, and looming energy shortage have resulted in a challenging legislative session for the Legislature and the Schwarzenegger administration.

Arriving in the Governor's office in mid-term, the new administration has an environmental agenda that, among other things, promises to promote renewable energy, manage suburban sprawl, and increase environmental penalties. Although there have been rumblings about the "hydrogen highway" and incentives for hybrid vehicles, on the whole, the Governor's environmental agenda took a back seat this session. The Legislature filled the void by serving up scores of bills—most of which failed. The new Governor finished his first year in office

signing a number of environmental bills into law, but offering few clues about his environmental policy. He vetoed all of the bills addressing environment, health, and consumer protection that were targeted by the California Chamber of Commerce as "job killers."

Nonetheless, key legislation was approved, protecting California's coast, the Bay-Delta ecosystem, and water quality and water supply at publicly owned treatment works. Other bills were approved regulating E-wastes from cell phones, requiring background checks for hazardous materials transporters, and modifying hazardous waste standards for treated wood waste, lead-based paint debris, and fuel filters. The Governor approved legislation imposing recycling standards on large venues like sports arenas, and softened enforcement on underground storage tanks (USTs). Compromise legislation governing immunity for cleanup of brownfields also became law. Finally, more permanent funding is now available to fund grants and loans to promote cleaner air emissions.

Notable developments include bills that address the following issues:

- ▼ **Water Quality:** Protect California's coast, wetland ecosystems, and water quality and water

supply at publicly owned treatment works.

- ▼ **Hazardous Waste:** Regulate E-wastes from cell phones and require modified hazardous waste standards for treated wood waste, lead-based paint debris, and fuel filters.
- ▼ **Hazardous Materials:** Require background checks for hazardous materials transporters.
- ▼ **Refuse:** Impose recycling standards on large venues like sports arenas.
- ▼ **Underground Tanks:** Allow for relaxed enforcement on underground storage tanks.
- ▼ **Brownfields:** Create immunity for cleanup of brownfields.
- ▼ **Air Quality:** Fund grants and loans to promote cleaner air emissions.

The following discussion details these legislative items.

◀▶ **Water Quality**

(SB 1319 Burton, AB 2342 Jackson)

Water quality policies were front and center as the Legislature tackled a broad range of issues involving protecting California’s oceans, beaches, and the water quality in the Bay-Delta ecosystem. Other legislation broke a decades-long stalemate by requiring installation of water meters and establishing other conservation measures. Still other laws were enacted modifying release reporting obligations and drinking water standards.

The Governor signed into law two bills intended to restore and protect marine and coastal water quality. This signature legislation protecting the ocean ecosystem is based on a series of reports highlighting the dire condition of California’s coastal and ocean habitats, Senate Bill (SB) 1319 (Burton) establishes the California Ocean Protection Act which creates a cabinet-level Ocean Protection Council. This Council brings together the Secretaries of the Resources Agency and Cal/EPA along with the Chair of the State Lands Commission (SLC) and is empowered to protect coastal waters and ocean ecosystems. SB 1319 also establishes the California Ocean Protection Trust Fund and authorizes funding for activities related to coastal and ocean resources. Funding is available to:

- 1) eliminate or reduce threats to coastal and ocean ecosystems, habitats, and species;
- 2) foster sustainable fisheries;
- 3) improve coastal water quality;
- 4) allow for increased public access to oceans and coastal resources;
- 5) improve management, conservation, and protection

of coastal waters and ocean ecosystems; and

- 6) provide monitoring and scientific data to improve conservation and protection of ocean resources.

In the past few years, the California legislature enacted legislation (Stats. 2000, AB 2872 [Shelley] and Stats. 1999, SB 25 [Escutia]) to lower action levels in order to protect the health of sensitive populations. AB 2342 (Jackson) requires the Office of Environmental Health Hazard Assessment (OEHHA) to consider revising public health goals that support drinking water standards to account for sensitive populations, including infants, children, pregnant women, the elderly, and individuals with a history of serious illness.

◀▶ **Hazardous Materials**

(AB 1369 Pavley, AB 901 Jackson, SB 50 Sher, AB 2901 Pavley, AB 2587 Chan, AB 2040 LaSuer)

The Legislature continues to shine the policy light on heavy metals, which have been shown to reside in dangerous concentrations within our collective body burden. Mercury, a neurotoxin, has received much attention in recent years with legislation to prohibit or manage its use as a universal waste. AB 1369 (Pavley) builds on recent policies designed to phase out the sale and use of mercury thermometers and novelty items that contain mercury. This law prohibits, with some exceptions, the sale of mercury-added thermostats used to control room temperatures beginning on January 1, 2006. With safer alternatives, such as digital thermostats, consumers will have options to meet their needs.

Two bills, AB 901 and SB 50, modify the recently established electronic (“E”) waste take-back program—the Electronic Waste Recycling Act of 2003 (otherwise known as SB 20 [Sher]). The act established a product stewardship program for covered electronic devices (known as CEDs, which include computer monitors, cathode ray tubes, flat panel screens, or other similar video display devices) and set forth a number of requirements governing the collection of fees to support and implement this manufacturer take-back program. The first bill—AB 901—changes the date by which retailers are required to begin collecting the E-waste recycling fee in California. This fee must now be collected beginning November 1, 2004, instead of July 1, 2004, which was required by the original legislation.

The second bill, SB 50 offered by Senator Sher, clarified a number of the SB 20 provisions. The new

legislation expands on the original law and requires the Department of Toxic Substances Control (DTSC) to adopt regulations that determine whether a discarded electronic device is presumed to be a hazardous waste. Retailers must be notified that CEDs that are presumed to be hazardous wastes when discarded are subject to the act and must also pay specified fees by January 1, 2005. SB 50 clarifies the definition of CED to also include a video display device that is an “electronic device” that may include a liquid crystal display (LCD), gas plasma, digital light processor, or other image projection technology. SB 50 also requires manufacturers of CEDs to notify their retailers whether a device meets the definition of a “CED” for purposes of collecting fees beginning April 1, 2005, and annually thereafter. SB 50 also makes refurbished CEDs for sale in California subject to the act. Finally, SB 50 clarifies the standards for exporting CED waste or other CEDs to other states or foreign countries. Be aware that DTSC will be revising its fact sheet on SB 20 in light of the changes described above.

AB 2901 (Pavley) establishes a similar manufacturer take-back program for another category of E-wastes by establishing the Cell Phone Recycling Act of 2004. This law requires cell phone retailers to establish, by July 1, 2006, a system to collect, reuse, and recycle cell phones. Retailers must make information available to consumers about cell phone recycling opportunities and California agencies that purchase or lease cell phones must require bidders to certify compliance with the provisions described above.

AB 2587 (Chan) modifies groundbreaking legislation that passed last year (Stats. 2003, AB 302 [Chan]), which prohibits manufacturing, processing, or distributing brominated flame retardant (BFR) products containing pentaBDE or octaBDE. AB 2587 advances the phase-out schedule from January 1, 2008, to June 1, 2006.

The California Legislature closed some regulatory gaps in the management and transportation of hazardous products and hazardous wastes. AB 2040 (LaSuer) harmonizes California law with federal standards by requiring applicants seeking a hazardous materials endorsement or renewal endorsement to meet federal credentials and background checks with the United States Transportation Security Administration for maritime and land transportation security. AB 2040 (LaSuer) requires that truck drivers who transport hazardous materials submit fingerprints and undergo background checks. Previous California law required background checks for applicants seeking to treat,

store, or dispose of hazardous wastes (Stats. 2002, SB 489 [Romero]). Prior California law only required generators of hazardous waste and operators responsible for loading that waste to validate that the transporters possessed the appropriate endorsements (Stats. 2002, 1257 [Murray]).

Hazardous Waste

(AB 2877 Aghazarian, AB 1353 Matthews, AB 2254 Aghazarian)

The Legislature entertained legislation to relax the cradle-to-grave requirements of the Hazardous Waste Control Law for specified categories of hazardous waste. Standards were softened for spent fuel filters, lead-based paint debris (other than just wood debris), and treated wood waste.

AB 2877 (Aghazarian) authorizes DTSC to additionally regulate “lead-based paint debris,” which includes items other than wood, such as wallboard and metal items such as piping. AB 1353 (Matthews) requires that treated wood waste must be disposed of in a Class I hazardous waste landfill or a composite-lined portion of a municipal solid waste landfill unit (*i.e.*, Class III). Those landfills accepting the treated waste wood must meet specified handling requirements, which among other things prevent scavenging. This legislation also requires that DTSC adopt regulations, by January 1, 2007, establishing management standards for treated wood waste as an alternative to hazardous waste management. This law exempts generators of treated waste wood from having to meet hazardous waste management requirements until promulgation of the alternative management regulations referenced above as long as generators meet specified conditions. Generators must, among other things, manage the waste to prevent scavenging, segregate the wood waste from other wastes, not store it for more than 90 days (beginning July 1, 2005) and protect it from storm water run-on/run-off.

AB 2254 (Aghazarian) allows fuel filters to be managed pursuant to the relaxed hazardous waste standards enjoyed by generators of used oil filters as long as they meet specified conditions. Fuel oil filters must be stored in containers designed to prevent ignition of the gasoline or diesel fuel in the filter and must meet state and local fire codes. In addition, fuel filter containers must be labeled “used oil and gasoline filters.” Spent fuel filters must meet federal Department of Transportation (DOT) labeling and transportation requirements as well.

◀ Solid Waste

(AB 2176 Montanez, SB 1749 Karnette, AB 2277 Dymally)

With much of the challenging policy making completed on recycling programs, the Legislature looked beyond conventional recycling activities and directed its attention to large arenas. Other legislation addressed manufacturers who claim that their plastic bags are biodegradable or compostable.

AB 2176 (Montanez) builds on the success of the Integrated Waste Management Act (Stats. 1989, AB 939 [Sher]) and regulates nonhazardous wastes generated at large venues such as concerts and sporting events. AB 2176 requires the California Integrated Waste Management Board (CIWMB) to provide a model ordinance to facilitate solid waste reduction, reuse, and recycling programs at large venues and events. The ordinance must be developed by April 1, 2005. The CIWMB must collect and evaluate local government data regarding large venues and large events and provide recommendations to the Legislature to assist with improved waste diversion. When issuing permits to operators of large venues and events, cities and counties must provide information on programs to reduce, reuse, and recycle solid waste materials generated at large venues and events. Finally, AB 2176 prohibits cities and counties from issuing building permits for development projects unless the developer can demonstrate there are adequate areas to collect and load recyclables.

SB 1749 (Karnette) prohibits the sale of plastic bags labeled as “biodegradable,” “compostable,” or “degradable” unless the plastic meets the American Society for Testing and Materials (ASTM) standards for the term used on the label. AB 2277 (Dymally) prohibits removing materials that require special handling from major appliances unless by a certified appliance recycler. “Major appliances” are defined to include washing machines, clothes dryers, hot water heaters, refrigerators, stoves, furnaces, and air conditioners, among other appliances. Only certified appliance recyclers can transport, deliver, or sell discarded major appliances to a scrap recycling facility.

◀ Storage Tanks

(AB 2955 McCarthy, AB 1068 Liu)

Since the expiration of the 1998 federal deadline to upgrade or close USTs, owners and operators of USTs have been besieged with rules calling for additional performance standards. These recent programs include, among other requirements, installation of continuous vapor tight controls and monitoring on new tanks and

under dispenser standards for tanks located within 1,000 feet of a public water supply well. AB 2955 (McCarthy) offers UST owners and operators relief from civil penalties for failure to comply with the UST upgrades. UST owners and operators will enjoy a six-month reprieve from penalties beginning September 21 and ending approximately March 19, 2005; however, they must still meet the terms of any notice to comply. AB 2955 also requires the State Water Resources Control Board (SWRCB) to provide grants from the Petroleum Underground Storage Tank Financing Account to small businesses to buy testing and leak detection equipment, and to meet interstitial space standards and integrity testing requirements. Grants of up to \$15,000 can be offered to each applicant. AB 1068 (Liu) extends the sunset date of the Underground Storage Tank Cleanup Fund to January 1, 2011. This fund currently reimburses UST owners and operators for the costs of cleaning up unauthorized releases and provides funds and loans to service stations and other UST owners and operators to upgrade their USTs (for repair, replacement, upgrade, or removal of petroleum USTs).

◀ Hazardous Substances and Cleanup Programs

(AB 389 Montanez, SB 805 Escutia)

Thousands of contaminated properties located within urban centers throughout California have been either abandoned or remain underutilized. Developers and the environmental justice community have teamed up to promote infill growth and brownfield reform that would expedite cleanup of these properties. AB 389 (Montanez) enacts the California Land Reuse and Revitalization Act of 2004. This law extends immunity from liability for response costs or damage claims under common law and statutory schemes for innocent landowners, bona fide purchasers, and contiguous property owners. An owner qualifies for immunity by meeting the standards of a “qualifying property owner” (QPO) and by entering into an agency agreement addressing performance of a property site assessment. In addition, an agency can require a QPO to develop and implement a response plan to remediate the site. This law also builds upon recent legislation (Stats. 2002, AB 2436 [Frommer]), which required Cal/EPA, IWMB, the SWRCB, and each Regional Water Quality Control Board (RWQCB) to post restrictive covenants on their respective websites and the Cal/EPA website. AB 389 requires that the following agencies include information on

brownfields and other cleanup sites through a single web site portal: Cal/EPA, DTSC, SWRCB, and the RWQCBs.

SB 805 (Escutia) modifies legislation from 2001 (Stats. 2001, SB 32 [Escutia]) that established the California Land Environmental Restoration and Reuse Act (CLERRA). SB 32 authorized municipalities to order cleanup or undertake investigation and cleanup of abandoned and underutilized brownfield sites under five acres. SB 805 now includes sites larger than five acres of contiguous property under the same ownership if the site is an “infill site” and a “qualified urban site” (which includes residential, commercial, public institutional, transit, or transportation passenger facilities).

Air Quality

(AB 2628 Pavley, AB 923 Firebaugh, AB 1394 Levine)

Except for a number of bills addressing mobile sources, such as vehicle scrappage, closing a smog check loophole, and establishing long-term funding to reduce diesel exhaust, the Legislature approved little legislation addressing air quality pertaining to industrial stationary sources.

Recognizing that hybrid vehicles use half the fuel consumed by conventional vehicles, the Governor gained national attention by approving AB 2628 (Pavley). The program introduced by this bill allows fuel-efficient, single occupant vehicles to use high occupancy vehicle (HOV) lanes. This administration-sponsored bill applies to vehicles that meet the following standards: ultra low-emission vehicles (ULEV) (*i.e.*, hybrid vehicles), advanced technology partial zero-emission vehicles (AT PZEV) that achieve 45 miles per gallon or more; and federal inherently low-emission vehicles (ILEV).

Two other bills expanded the scope of the 1998 Carl Moyer Program, which, among other things, provides funding for projects to replace diesel engines with cleaner fuels. AB 923 (Firebaugh) was a bipartisan effort that provides permanent, stable funding sources to an expanded Moyer Program. By increasing fees on vehicles and tires, the program is projected to collect approximately \$80 million annually. This legislation further expands the Moyer Program from funding projects to reduce oxides of nitrogen (NOx) emissions in diesel trucks, school, buses and agricultural pumps to include those that reduce particulate matter (PM) and reactive organic gases (ROG). AB 1394 (Levine) also supports projects that reduce PM and NOx,

specifically by granting funds to support heavy-duty fleet modernization projects that reduce NOx or PM. Funds will support the replacement of older engine technologies with vehicles that have more stringent emissions controls or the provision of equivalent emissions reduction through the purchase of new very low or zero-emission vehicles.

Energy

(AB 1684 Leno, AB 2473 Wolk, SB 1565 Bowen)

Hopes were dashed for the 2004 legislative session, which was poised to be a banner year for solar legislation, when a bill designed to add solar panels to one million new California homes by 2017 failed to make it to the Governor’s desk. Another important energy bill was vetoed that would have required utilities to generate at least 20 percent of their power using alternative sources of energy by 2010, instead of 2017.

AB 1684 (Leno) requires the California Energy Commission (CEC) and the California Public Utilities Commission (CPUC) to administer a self-generation incentive program for combustion-operated fossil fuel distributed generation projects. This law promotes projects that meet specified NOx emissions limits. Distributed generation projects that operate solely on waste gas need not meet the NOx emissions standard, nor must projects that demonstrate that they will produce an onsite net air quality emissions benefit.

AB 2473 (Wolk) updates the Solar Rights Act, which was originally enacted a quarter century ago. The act preempts local land use law and requires that municipalities permit installation of solar energy systems by right. Cities and counties must administratively approve land use applications to install solar systems by issuing building permits or other nondiscretionary permits. AB 2473 limits local decisions to those that impose reasonable restrictions on solar energy systems. Local officials may issue conditional use permits if they can demonstrate that the solar project will adversely impact public health and safety. Finally, this legislation prohibits cities and counties from denying conditional use permits unless they issue a finding, supported by substantial evidence, that the solar devices would have specific adverse health and safety impacts and that feasible mitigation measures are unavailable to address these impacts.

SB 1565 (Bowen) is California’s response to the August 2003 national blackout that stretched from New York City into the Midwest and Canada. This regional

outage highlighted the vulnerability of the nation's electrical transmission and distribution system. SB 1565 requires that the CEC adopt a strategic plan for energy transmission, which must identify investments to ensure reliability of the power grid in order to manage the energy load. The plan must promote demand reduction measures including renewable resources and efficiency.

Looking Ahead

With the tumult of the election year and the gubernatorial transition behind him, Governor Schwarzenegger has a one-year window of opportunity to make his environmental policy a reality. The Governor's staff is now in place, improving the likelihood that we will see a determined effort to tackle the three Es: environment, economy, and energy. Many of the bills that missed out on the Governor's signature last session will likely re-emerge in the same or similar form during 2005. With the prospect of further environmental rollbacks during a second Bush term, there will be increased pressure on the Democrat-controlled Legislature to push back.

Having recently elevated the talented, green-leaning Terry Tamminen from his post as Cal/EPA Secretary to a more prominent position as Cabinet Secretary, the Governor signaled his interest in raising the importance of the environment in his administration. As a result, we can expect the Governor to vigorously advance his Environmental Action Agenda.

May the heavy lifting begin.

Endnotes

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