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Environmental Law Reporter

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HIGHLIGHTS:

THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

A water agency abused its discretion in certifying an EIR for a project that would replace an irrigation canal with a pipeline, because the EIR did not contain a statement indicating the reasons why the agency determined that the resulting reduction in the surface flow of local streams would not be significant (p. ***)

WATER QUALITY CONTROL

The U.S. Supreme Court held that NPDES requirements apply to water that passes through a point source, and not only where a pollutant originates from a point source, but remanded this action for a determination as to whether a canal and a wetland area in the Everglades were distinct water bodies for purposes of requiring an NPDES permit to pump water from one to the other, and whether all waters of the United States are "unitary waters" to which the NPDES requirements do not apply (p. ***)

2004 Environmental Legislative Forecast—Policy-making in the Wake of an Abrupt Transition

*By Gary A. Lucks JD**

Introduction

For the first time in California history, a new administration was installed in the middle of a two-year legislative session. The perfect storm that unseated an incumbent Governor in mid term was born out of an unrelenting budget deficit, which followed in the wake of a destabilizing energy crisis. Despite the passage of Propositions 57 and 58, which refinanced California's debt, the new Governor and the Legislature still confront the daunting fiscal challenge of approving a \$15 billion deficit with a supermajority vote. The Legislature also must navigate the aftermath of an unusual election year with another energy shortage on the horizon.

The shifting political landscape presents a novel dynamic for many members of the Democratically-controlled Legislature who have never worked with a Republican governor. This will prompt new ground rules for the Legislature, which likely will be compelled to abandon its familiar strategies and engage the new administration in upfront negotiations.

This nontraditional transition period is being ushered in by a skeleton crew of the new administration. Thus, unlike in a typical year, policy will be directed more by the Legislature than by the Administration. Nonetheless, the Governor did provide a glimpse of his vision for environmental policy by publishing his Environmental Action Agenda. The Governor's agenda calls for renewable energy, hydrogen highways, higher environmental penalties, more comprehensive enforcement, and prevention of suburban sprawl, among other initiatives. Although the administration is sponsoring only a handful of bills this legislative session, it is leading the effort to reorganize state government from the bottom up.

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Agency Reorganization

Governor Schwarzenegger, in his State-of-the-State speech, emphasized his interest in doing more than rearranging agency deck chairs. The Governor appears to be uninterested in a classic government reorganization; rather, he is standing steadfastly behind a profound restructuring of the government apparatus that will ensure that the government will work better in terms of efficiency and delivering services. In his first State-of-the-State speech, the Governor emphasized his interest in “blowing up the boxes” as part of the California Performance Review.

Led by Billy Hamilton, who designed the Texas Performance Review, the performance review is being handled by one hundred auditors looking for better, cheaper, and more effective ways to run state government.

The Governor’s reorganization rhetoric has caused a stir in the Capitol building as legislators brace for a potentially profound change. Once the Governor finalizes his reorganization plan, each legislative house can approve or disapprove it within sixty days. Like the federal base realignment and closure commission (BRAC) process, this process does not permit negotiation, leaving no legislative opportunity to fine-tune the proposal.

Despite the administration’s leadership in this arena, there are several legislative efforts underway to tinker with the mechanics of California’s agency structure. Assembly member Lowenthal introduced Assembly Bill (AB) 1991—a placeholder bill, known as a “spot bill”—to establish a state-managed licensing authority that would govern permitting for petroleum infrastructure projects. This proposed legislation appears to be modeled after the State Energy Resources and Conservation Development Commission (CEC), which has exclusive authority to issue environmental permits for large power plants and electric transmission lines. Senate Bill (SB) 1479 (Sher) would revamp and resize California’s regional water quality control boards (RWQCBs) by reducing the membership from nine to five. The industrial water use representative is one of the positions slated for elimination.

Regardless of the ultimate structure of California’s agencies, those that remain likely will be underfunded. With fewer staff and other resources, California’s agencies will no longer serve as a backstop against federal efforts to relax environmental programs and enforcement.

Water Quality

The Legislature has its eye on a wide range of water-related policy objectives, ranging from protecting California’s coastal waters and maintaining and improving water quality of inland waters and wetlands, to managing flood risk and protecting the security of drinking water. A great number of bills have been introduced to preserve and enhance the quality and security of water coming from the tap and from other sources, such as bottled water. AB

2342 (Jackson) would require the Office of Environmental Health Hazard Assessment (OEHHA) to consider revising public health goals that support drinking water standards to account for sensitive populations like infants, children, pregnant women, the elderly, and individuals with a history of serious illness. AB 1921 (Canciamilla) would require urban water suppliers to evaluate and describe the reliability of their water supplies and publish this assessment in their urban water management plans. AB 2528 (Lowenthal) would modify procedures governing public water system operators who learn of a drinking water standard (or MCL) exceedance. SB 1589 (Denham) would subject vended water to the California Safe Drinking Water Act and require that vended water meet the maximum contaminant levels for lead and trihalomethanes.

The long list of California's impaired waters approved by the U.S. Environmental Protection Agency (USEPA) last summer makes it apparent that the health of California's water bodies is poor. Two legislative proposals are intended to protect the public from exposures to contaminated inland and coastal waters. AB 2048 (Nakanishi) would require the State Water Resources Control Board (SWRCB) and an appropriate regional water quality control board (RWQCB) to post signs in Sacramento, San Joaquin, and Yolo counties to warn the public of mercury contamination in the Sacramento-San Joaquin River Delta region. AB 1876 (Chan) would establish mandatory microbial testing and monitoring for public beaches (including bay beaches) and would require the posting of multilingual warnings in the event that a standard is exceeded. Other legislation, SB 1552 (Machado), would establish minimum flows as a total maximum daily load (TMDL), thereby authorizing RWQCBs to establish minimum in-stream flows, which may require water rights adjustments by the Department of Water Resources to effectuate. AB 2470 (Harman), another TMDL policy, would require RWQCBs to establish and administer a riparian fencing program to protect sensitive riparian areas from damage caused by nearby grazing of cattle and other livestock.

Citing a number of studies that have documented the decline in the ocean's health, Senator Burton and Assembly member Kehoe submitted a package of legislative proposals intended to protect the ocean within state territorial boundaries. AB 2529 (Kehoe) would require the SWRCB to update the California

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Ocean Plan to protect specified marine protected areas and reserves as beneficial uses. The SWRCB would also be required to develop numeric standards to protect the beneficial uses of these coastal waters. This bill would also establish a program to protect marine managed areas. SB 1319 (Burton), which is intended to improve the effectiveness of state regulatory programs to protect ocean resources, would establish the Ocean Protection Council. The Council would be empowered to coordinate state agency activities that relate to protecting coastal waters and ocean ecosystems. SB 1318 (Burton) would amend Proposition 50 (the Water Security, Clean Drinking Water, Coastal and Beach Protection Act of 2002, which approved the issuance of \$3.44 million in bonds)—the only remaining cash cow in state government—to establish a grant program to support projects to protect the coastal watershed and wetlands. This program would be administered by the Ocean Protection Council, the State Coastal Conservancy, and the Wildlife Conservation Board.

SB 1132 (Brulte) is one of a few bills designed to manage the water quality threat stemming from flooding. This bill would appropriate \$50 million from Proposition 50 funds for grants to counties and local agencies in southern California for flood control programs and other water management projects. SB 1197 (Denham) would appropriate Proposition 50 funds to finance the planning of a water storage facility on the upper San Joaquin River. AB 2141 (Longville) would require DWR to establish an Alluvial Fan Task Force to evaluate alluvial fan floodplains and make recommendations concerning alluvial fan floodplain management. The bill would additionally appropriate \$1 million to carry out the program.

Senator Sher has authored two bills intended to protect and enhance California's wetland resources. SB 1477 (Sher) would require a waste discharge requirements permit for applicants proposing projects that have the potential to adversely impact wetlands. Additionally, this legislation would define beneficial uses to specifically include "floodwater retention," "pollutant removal," and "habitat connectivity." SB 1477 would also require the SWRCB to develop and adopt a program implementing a policy of no net loss of wetlands for isolated, non-navigable waters; wetlands; and special aquatic sites. This bill would also authorize the SWRCB to issue general storm water permits for discharges that could impact

isolated, nonnavigable waters; wetlands; or special aquatic sites. SB 1568 (Sher) would authorize the San Francisco Bay Conservation and Development Commission (BCDC) to revoke a dredge and fill permit. This legislation would also allow an aggrieved party to petition for a writ of mandamus to review a permit revocation or a civil penalty order. Senator Kuehl has weighed in on the wetlands dialogue with SB 1447. This legislation would establish state policy to regulate dredging or filling of wetlands that are not regulated under the Federal Water Pollution Control Act. AB 2690 (Hancock) would authorize state agencies to issue grants to restore and enhance watersheds, streams, or creeks.

Continuing the theme of the last legislative session to regulate waste discharges from large passenger ships, AB 2093 (Nakano) would prohibit large passenger vessels from releasing gray water into marine waters of the state. Similarly, AB 2672 (Simitian) would require the SWRCB to request USEPA authorization allowing the state to prohibit the release of sewage from large passenger vessels into the marine water of the state.

SB 1155 (Machado) responds to criticism surrounding the implementation of the CALFED program by linking water supply with water quality programs. The CALFED programmatic record of decision (ROD) that implements the Bay-Delta program sets forth an integrated framework and implementation schedule with specified milestones governing water quality and water supply activities involving the Bay-Delta. Some items that were scheduled to advance water quality objectives in the first and second years of the program have not yet happened. This legislation responds to the "Napa Agreement," which represents private negotiations that yielded a coordinated operation plan between DWR and the U.S. Bureau of Reclamation to integrate the Central Valley Project and the State Water Project. The agreement calls for increasing pumping of the Sacramento-San Joaquin Delta to up to 8,500 cubic feet per second. SB 1155 is intended to ensure that specified water quality projects take place before increased pumping of Delta water, in order to protect and restore the Delta ecosystem.

SB 1742 (McPherson) would modify various provisions governing oil spill contingency planning, prevention, response, containment, cleanup, and harbor safety plans. The bill clarifies that a "spill" of

42 gallons of oil must be measured over a 24-hour period.

Finally, AB 2725 (Laird) would clarify the definition of an *ex parte* communication for purposes of California Coastal Commission communications involving an enforcement action.

Water Supply

Despite a weakened California economy, the state population is projected to grow from about 35 million today to approximately 60 million by 2040. With increasing water demands in an arid state, the Legislature is entertaining a number of strategic policies to keep the water flowing. These include, among others, seawater desalination, water metering, water transfers, and conservation. To address estimates suggesting that residential landscaping consumes up to 50 percent of urban water use in California, the Legislature has offered two bills to reduce residential water consumption. AB 2717 (Laird) would convene a work group consisting of public and private agencies and associations to evaluate and recommend proposals to improve water use efficiency of urban irrigated landscapes. The work group also would be charged with making recommendations to improve the Model Water Efficient Landscape Ordinance. AB 2298 (Plescia) was introduced to indirectly regulate water consumption by requiring public water systems serving 3,000 or more connections to install water meters. The meters would measure the volume of water delivered to new, residential irrigated landscaped areas and rehabilitated irrigated landscaped areas of 10,000 square feet or more. This legislation would provide consumption data that could ultimately support pricing schemes motivating consumers to conserve. Noting a strong correlation between water metering and lower water consumption, Assembly member Kehoe introduced AB 306. This bill would also require "urban water suppliers" to install water meters on residential and nonagricultural water service for connections established before 1992. Assembly member Kehoe also introduced AB 2470, which would require the California Urban Water Conservation Council to ascertain the degree to which school districts and other public entities have undertaken water conservation initiatives.

SB 1374 (Machado) would modify the criteria governing SWRCB approval of long-term water transfers. Under this bill, a transfer could not be approved unless the SWRCB finds no potential for

specified third-party impacts. Additionally, the legislation would authorize the SWRCB to establish an abbreviated approval process for long-term water transfer applications that are least likely to result in negative impacts to third parties.

SB 1414 (Brulte) serves as a spot bill that declares the Legislature's intent to consolidate local water agencies in southern California.

Hazardous Materials

Traditional "command and control" regulatory programs are designed to minimize residual discharges of chemicals into the air, water, or land from the factory stack or discharge pipe. The California Legislature has begun to rethink this approach as it explores the linkage between chemicals released from industrial and other activities and downstream health effects. Building on SB 189 (Escutia) from last year, Senator Escutia has introduced SB 1446, which would establish an Interagency Office of Environmental Health Tracking in the Division of Environmental and Occupational Disease Control within the Department of Health Services (DHS). This legislation is premised on data suggesting that 75 percent of deaths in California are attributable to chronic diseases and injuries and that a number of these diseases, ranging from cancer to respiratory illness, stem from environmental exposures. The bill would promote an ongoing surveillance system to determine whether there is a correlation between environmental releases or exposures and environmentally related diseases.

Several other bills are designed to evaluate and manage this nexus. SB 1168 (Ortiz) would establish the Healthy Californians Biomonitoring Program within DHS, which would list approximately 200 toxic chemicals (including heavy metals, organics, PCBs, radionuclides, and pesticides) subject to regulation under the program. Modeled after the Childhood Lead Poisoning Prevention Act, this program would be funded by assessing a fee on chemical manufacturers. SB 1247 (Soto) would make legislative findings and declarations regarding the effects of gasoline and diesel emissions from both motor vehicles and non-road engines on public health and the environment. This bill would further declare legislative intent to establish a program to reduce and mitigate the impacts of these emissions.

Consistent with the emerging precautionary principle, AB 1940 (Chan) would place the burden on

manufacturers to develop test methods to determine which chemical breakdown products best serve as biomarkers for exposure. AB 1940 recognizes that we do not know the matrix (air, soil, sediment, sludge, chemical waste, fish, blood, adipose tissue, urine, or breast milk) by which the majority of the 85,000 chemicals in commercial use are transported into biota and humans. Currently, analytical methods to evaluate the transport mechanism by which chemicals enter biota and humans exist for only approximately 30 percent of these chemicals.

AB 2901 (Pavley) would require cell phone retailers in California to establish a system to accept, collect, reuse, and recycle used cell phones. The Integrated Waste Management Board (IWMB) would be required to annually establish statewide used cell phone recycling goals, which would be backed up with a civil penalty structure for violations. Additionally, this legislation would require the Department of Toxic Substances Control (DTSC) to adopt regulations to prohibit a cellular telephone from being sold or offered for sale in California if it is prohibited from being sold or offered for sale in the European Union on and after its date of manufacture due to the presence of heavy metals. In a similar vein, AB 3004 (Pavley) would prohibit the manufacturing, processing, and distribution of road safety flares containing perchlorate. AB 2021 (Chu) would reverse the exemption process established by last year's AB 455 (Chu), which mandated the phase-out of specified heavy metals in packaging by 2006 and established a process for seeking an exemption for packages that have a controlled distribution and reuse.

AB 1917 (Maze) would modify, in limited circumstances, the strict liability scheme for managing anhydrous ammonia. This bill would establish limited immunity from liability for manufacturers, sellers, and users of anhydrous ammonia when the chemical is unlawfully and without permission transferred and the transfer or attempted transfer results in an injury. AB 2040 (La Suer) would require applicants seeking a hazardous materials endorsement to meet federal credentialing and background checks for maritime and land transportation security. SB 1480 (Sher) would require tugboat escorts to assist vessels that carry hazardous materials within state harbors.

Public Health and Proposition 65

Two bills would limit the ability of a plaintiff to bring a Proposition 65 (The Safe Drinking Water and Toxic Enforcement Act of 1986) lawsuit in the public interest. AB 2379 (Campbell) would prohibit a Proposition 65 lawsuit if the defendant was a party to a final judgment in a prior action and the moving party alleges the same violation of the Act that was adjudicated. Similarly, SB 1722 (Ducheny) would prohibit a Proposition 65 suit if the defendant previously entered into a settlement or was a party to a final judgment in another action brought pursuant to Proposition 65.

AB 2297 (Vargas) would require DHS to monitor lead levels in candy sold or distributed in California and establish maximum allowable lead levels for candy. If testing results show that levels of lead exceed the maximum allowable level established for candy, the candy may not be sold or distributed.

AB 2943 (Pavley) would enact the Mercury Pollution Prevention Act of 2004, which would prohibit the offering of products containing mercury for sale or promotional purposes unless DTSC is notified in writing. Allowable levels of mercury would be gradually phased out beginning in 2006; however, fluorescent lamps would be exempt. Manufacturers would be eligible to apply for other exemptions. AB 2943 would also prohibit the sale or distribution of any mercury-added product manufactured after 2006, unless the product and its packing are labeled in accordance with other states that are members of the Interstate Mercury Education and Reduction Clearinghouse.

Hazardous Waste

Currently most of the heavy lifting involving the regulation of hazardous waste is occurring at the regulatory level and is focused largely on universal wastes; however, the Legislature continues to show interest in regulating heavy metals from fluorescent bulbs and computers. SB 1180 (Figueroa) would enact the California Mercury Lamp Recycling Act of 2004, which would require retail purchasers to pay a fluorescent lamp recycling fee that would support grants to fund convenient collection and processing of fluorescent lamps as universal wastes. Additionally, the fee would support the establishment of a recycling incentive grant program and public information programs to address the hazards associated with fluorescent bulbs. AB 2277 (Dymally) introduced legislation that would require the Secretary of

the California Environmental Protection Agency (Cal-EPA) to convene a metallic discards working group to address issues pertaining to the removal of mercury and mercury-containing products from major appliances and vehicles. We can also expect oversight hearings evaluating the recently enacted electronic waste law [Stats. 2003, SB 20 (Sher)], which calls for an advance disposal fee for covered electronic devices (such as computers) that will fund a free collection and recycling program for spent electrical equipment.

Other legislation is directed at closing gaps and clarifying hazardous waste control regulatory requirements. AB 2732 (Dymally) would require wipe rags that come into contact with a hazardous material to be labeled: "Warning: This towel may have been in contact with hazardous materials." AB 2969 (La Malfa) would carve out a hazardous waste treatment exemption for the encapsulation of silver from photo imaging activities. However, a person treating silver through encapsulation would be responsible for ensuring that the silver does not migrate into groundwater or volatilize into the atmosphere.

A series of other bills has been introduced to modify government implementation of several provisions of the hazardous waste control law. SB 1224 (Ortiz) would require an air pollution control or management district to notify local environmental agencies upon discovery of an illegal or potentially hazardous waste disposal or if it proposes an enforcement action. AB 1942 (Lowenthal) would allow the owner or operator of a hazardous waste facility to avoid submitting a renewal application for a treatment, storage, or disposal facility permit until requested to do so by DTSC. The hazardous waste facilities permit would be extended if DTSC does not initiate review of the permit prior to its expiration date. SB 1636 (Battin) would authorize DTSC to evaluate federally imposed land disposal restrictions and related treatment standards as it deems necessary instead of pursuant to a specified date. Finally, AB 2254 (Aghazarian) would expand the types of household hazardous wastes that a local agency can collect to include diesel fuel filters.

Solid Waste

Building on the success of the Integrated Waste Management Act [Stats. 1989, AB 939 (Sher)], the Legislature is interested in expanding the range of waste streams to be captured for recycling and reuse.

AB 2176 (Montanez) would require that the IWMB develop a model ordinance for use by local governments to impose recycling programs at large events such as music festivals or sporting events. This bill would also require large venue applicants seeking land use permits to incorporate waste reduction and recycling practices in their operating plans. AB 2166 (Hancock) would prohibit companies from issuing mass mailings of CDs or DVDs to households for commercial purposes without the recipient's prior consent. However, commercial distribution would be allowed if the sender provides a postage paid return mailing envelope or similar mechanism to allow the recipient to return the CD or DVD. SB 1749 (Karnette) is a spot bill that would declare legislative intent to increase the recycling rate for rigid plastics. AB 2657 (Nunez) would establish a program to make loans and grants available to small businesses to reduce the amount of non-hazardous waste they generate.

In recent years, California and much of the western United States has proven to be a tinderbox for forest fires. AB 2694 (Bogh) would tackle at least one human-caused mode of fires by increasing fines for littering cigarettes, cigars, matches, or other flaming or glowing substances. AB 1362 (Figueroa) would authorize the county hazardous waste element of an Integrated Waste Management Plan to include a program to safely collect, treat, and dispose of biohazardous sharps waste and would authorize a permitted household hazardous waste facility to accept this waste stream.

Storage Tanks

Notwithstanding the deadline to upgrade to state-of-the-art standards or close underground tanks (USTs) in 1998, the Legislature and regulatory agencies continue to heap regulatory requirements on the remaining UST owners and operators. AB 2955 (McCarthy) would require the SWRCB to analyze federal and state statutory and regulatory requirements imposed on USTs since December 31, 1998, and report its findings to the Legislature. The report would be required to evaluate the environmental and public health benefits of vapor-tight requirements and compare these benefits against the implementation costs and costs imposed on the regulated owners and operators.

AB 1906 (Lowenthal) would increase the

petroleum storage fee imposed on owners and operators of USTs to reflect increased costs of cleanup.

Hazardous Substances and Cleanup Programs

When the state budget was last in the black, the Legislature produced a package of bills designed to fund and otherwise expedite the cleanup of brownfields. Since then, hopes of making meaningful progress have been dashed as previously earmarked funds were withdrawn to stanch the flow of red ink. Since then, developers and supporters of the environmental justice movement have lost faith in the prospect of brownfields reform.

No one agrees on what constitutes a brownfield, nor is there consensus on appropriate cleanup standards. The building industry casts brownfields as an issue of environmental justice and implies that legislators who do not support brownfield legislation do not care about infill growth and people of color and of lower means. In contrast, some segments of the environmental community consider partial cleanup of a brownfield site to be unacceptable, even if it means delaying economic revitalization of neglected inner city areas. The Legislature is considering four brownfields bills to once again hasten progress toward cleaning up underutilized inner city properties. SB 493 (Cedillo) represents the broadest brownfields measure thus far because it addresses urban and rural brownfield issues. This bill is authored by a Los Angeles Senator and sponsored by the building industry in an effort to actively clean up brownfields. AB 389 (Montanez) is a controversial bill that addresses prospective purchaser agreements. The environmental justice community is working with developers in support of this legislation to arrive at an acceptable level of residual contamination that is sufficient for promoting infill development. Factions of the environmental community, on the other hand, are in opposition and are holding fast to higher cleanup levels. The bill would, among other things, require Cal-EPA to establish conditions governing when an agency may enter into a prospective purchaser agreement with a bona fide purchaser so that the purchase can be immunized from liability associated with pre-existing contamination.

AB 2884 (Calderon) is designed to immunize RWQCBs who abate contamination resulting from a nonoperating industrial business when the municipality has failed to abate the condition within a

reasonable time. Additionally, this legislation would impose liability on a property owner for reasonable costs incurred to abate the contamination. SB 1690 (Poochigian) would expand the definition of a "lender" considered to be immune from cleanup liability as a potentially responsible party to include special districts that have the power to enforce a district property assessment by a lien.

SB 922 (Soto) would build on a concept established in last year's Stats. 2003, SB 1004 (Soto), which authorized the SWRCB or a RWQCB to compel a party responsible for perchlorate to pay a public water system or private well owner for replacement water. SB 922 would similarly authorize the SWRCB or a RWQCB to issue a cleanup and abatement order that requires a potentially responsible party to pay for replacement water for public water suppliers or private well owners who experience contaminated drinking water supply. The bill would provide for mediation of replacement water claims. SB 1570 (Bowen) would require DTSC to develop regulations to govern standards and procedures to initiate cleanup involving a hazardous substance release associated with an illegal drug operation.

AB 2582 (Lieber) would require the landlord of a residential dwelling unit who has actual knowledge of environmental hazards associated with that dwelling unit to provide written notice to the prospective tenant of those hazards before executing the rental agreement. Failure to abide by this requirement would subject the offending landlord to liability for actual damages resulting from failure to disclose and \$5,000 for a knowing and willful failure to disclose.

Air Quality

Indoor air quality remains high on the Legislature's policy agenda. A 2003 report coauthored by the State Air Resources Board (ARB) and DHS on environmental conditions in classrooms found significant indoor air quality problems ranging from improper ventilation, air pollutants, floor dust contaminants, and mold. Because poor indoor air quality can increase the risk of asthma for students and teachers, and due to the alarming increase in the rate of asthma among the state's children in recent years, Assembly member Pavley introduced AB 2863. This bill would require schools to develop an indoor air quality management plan (IAQMP) designed to achieve compliance with Occupational Safety and Health and

Standards Board standards. Further, this legislation would require school districts to develop a draft IAQMP as a condition to receiving grant money for new construction or modernization of school buildings. School bus diesel emissions are also viewed as a contributor to poor indoor air quality in the classroom. AB 2644 (Oropeza) would codify existing regulations that prohibit idling of buses or vehicles within 100 feet of a school. Additionally, AB 2983 (McCarthy) is an administration-sponsored spot bill that expresses the Legislature's intent to create the Clean School Buses, Healthy Kids Program, which would be administered together with the existing Lower-Emission School Bus Program.

SB 1397 (Escutia) would authorize the South Coast Air Quality Management District to explore a program designed to mitigate air emissions generated from diesel-powered locomotives in the only extreme nonattainment air basin in the country for ozone—the South Coast district. The program would be funded by imposing a mitigation fee on locomotive emissions commensurate with the health and environmental harms resulting from those emissions. Senator McClintock has proposed legislation, SB 1256, which would repeal the Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century. In contrast, SB 1483 (Perata) would submit a ballot initiative seeking bond funds to support a high-speed train system that would indirectly improve air quality by offsetting mobile source emissions.

Stats. 2002, AB 2650 (Lowenthal) required marine terminals to prevent more than 30 minutes of engine idling by trucks waiting to load or unload at a marine terminal. AB 1971 would make minor clarifying changes to truck idling and queuing provisions. AB 2042 (Lowenthal) would require growth at the Ports of Long Beach and Los Angeles to result in a net air pollutant increase of zero. AB 2600 (Oropeza) is intended to offset the costs of reducing oxides of nitrogen (NOx) emissions from locomotives, diesel-powered marine vessels and stationary agricultural engines by transferring \$0.0025 per gallon of diesel fuel sold into the Carl Moyer Memorial Air Quality Standards Attainment Trust Fund. The money would support grants for projects that reduce NOx emissions. In a similar vein, AB 2880 (Pavley) would increase the maximum surcharge allowable for motor vehicles, as requested by an air pollution control district or an air quality management district, from \$4 to \$6. AB 2794 (McCarthy) would allow a tax

credit equal to \$0.05 for each gallon of low-sulfur diesel fuel produced by a small business refiner.

As mentioned above, the Governor's Environmental Action Plan promotes establishment of a hydrogen fuel infrastructure throughout the state by 2010. Assembly member Pavley will lead oversight hearings to evaluate the efficacy of the Governor's Hydrogen Highway proposal. AB 2899 (Horton) also addresses alternative fuels. This bill would specify standards for biodiesel and biodiesel blends, requiring that retailers display a sign stating "Contains up to 20% Biodiesel." AB 2353 (Leslie) would allow for the creation of "Neighborhood Electric Vehicle (NEV) lanes" that allow for low-speed golf cart-like vehicles on the state's local roadways.

Other innovations would promote the use of low emission vehicles. AB 2541 (Frommer) would require the Department of General Services, in consultation with the ARB, to develop and implement a contract incentive program that awards bonuses to firms with low emissions vehicle fleets. AB 2628 (Pavley) is an administration-sponsored bill that would permit vehicles that meet California's advanced technology partial zero-emission vehicle (AT PZEV) standard to use high occupancy vehicle (HOV) lanes or access ramps. These vehicles must meet criteria pollutant emissions standards and must have a fuel efficiency rating of 45 miles per gallon or higher, or they must be gas/electric hybrid vehicles with a fuel economy rating of 45 miles per gallon. This bill would additionally expand this HOV benefit from ultra-low emission vehicles (ULEV) and super-ultra-low emission vehicles (SULEV).

During the last legislative session, the agricultural community was shocked by the erosion of their long-standing exemptions from air quality control standards. Several bills imposed ozone and particulate matter standards on the agricultural industry, particularly within California's Central Valley. AB 2953 (Canciamilla) is designed to soften the burden by authorizing use of the Carl Moyer Memorial Air Quality Standards Attainment Program to support the costs of employing add-on equipment or other engine retrofits as well as new projects necessary to control the recently imposed agricultural emissions requirements. In order to address the challenges and hardships affecting agricultural facilities, AB 2809 (Canciamilla) would require the establishment of a scientific review by the ARB before granting a

permit for a confined animal facility. Legislation from last year [Stats. 2003, SB 705 (Florez)] imposed a phase-out of open field burning and provided incentives for biomass-to-energy projects [Stats. 2003, SB 704 (Florez)]. AB 2077 (Cogdill) is a spot bill apparently intended to address the problems surrounding the use of biomass material and agricultural operators required to reduce open-field burning. SB 1732 (Hollingsworth) would take a softer approach to regulating agricultural impacts and authorize the Secretary of Food and Agriculture to develop a voluntary program to promote environmental quality of dairy facilities and operations.

AB 2847 (Oropeza) would impose a five-cent fee on each gallon of gasoline and diesel fuel to finance, among other things, environmental programs to mitigate mobile source air impacts. In contrast, AB 2304 (Richman) would benefit the oil industry by deleting quarterly reports imposed on refineries. Currently, one required report compares methyl tertiary-butyl ether (MTBE) usage at refineries while another addresses the implementation of renewable energy resources program. Additionally, it would repeal the technology development and financial assistance program for use of methanol fuel. SB 1615 (Denham) would assist newcomers to the state by repealing the obligation to obtain a smog certificate for vehicles previously registered outside of California.

SB 1211 (Ortiz) is perhaps the most controversial bill introduced involving air quality. Under current law, the filing of a criminal complaint is grounds for dismissal of a parallel civil action involving the same offense, except for that portion of the complaint seeking injunctive relief. SB 1211 (Ortiz) would allow the prosecuting agency to continue seeking civil penalties together with the criminal action.

AB 2128 (Jackson) would regulate particulate dust on the domestic and commercial front by requiring the ARB to regulate air emissions from leaf blowers.

Energy

The energy crisis of 2001 continues to cast a long shadow on policy and politics in California. Due in part to his perceived mishandling of the energy crisis, Governor Davis was turned out of office, catapulting Arnold Schwarzenegger into the Governor's office. The new Governor has staked his political fortunes on structural reform of energy policy in California. A group of legislative reformers has joined the game

by introducing over a dozen energy-related bills that would structurally change the regulatory jurisdiction of energy generation and distribution, modify the permitting process, and promote alternative forms of energy.

AB 2967 (La Malfa) is one of several bills that would, among other things, recast the energy regulatory agencies and repeal the California Consumer Power and Conservation Financing Authority, which was charged with developing peak generating capacity. SB 1859 (Bowen) would move the CEC to Cal-EPA and replace the Secretary of the Resources Agency's membership on the commission with the Secretary for Environmental Protection. This legislation would also change state policy, which currently encourages the use of nuclear energy, geothermal resources, and other energy resources.

Several bills would encourage expedited permitting for energy projects. AB 2685 (Oropeza) would create the Energy Independence Board within the Office of Planning and Research (OPR) for the purpose of streamlining regulatory requirements and processes. This new board would be composed of representatives of the ARB, Cal-EPA, Department of Fish and Game (DFG), the IWMB, the Resources Agency, CEC, and SWRQCB. AB 2305 (Richman) is a spot bill that intends to respond to perceived barriers to expanding petroleum infrastructure in California. This bill would require the CEC to recommend to the Legislature a streamlined permitting process to govern petroleum-related infrastructure. AB 2484 (Ridley-Thomas) is another spot bill that would establish an efficient and streamlined system of energy coordination, which would be administered by the CEC.

SB 1776 (Bowen) would reinstate through January 1, 2007, a recently lapsed CEC permitting program that provided expedited review of applications to construct and operate thermal power plants and repowering projects. The expedited permit program [Stats. 2001, SB 28X1 (Sher)] was enacted a few years ago in response to the energy crisis as a way of quickly meeting the energy shortfall facing California. Recent law [Stats. 2002, SB 1269 (Peace)] authorized the CEC to revoke the certification of an energy project that fails to begin construction within 12 months of receiving necessary project approvals. SB 1716 (Ducheny) would repeal this law, thereby allowing an applicant who received all permits

necessary for an energy project to begin construction after a year of receiving finalized permits.

AB 2643 (Canciamilla) would require the CEC to prepare and submit to the Legislature a report evaluating the costs and benefits of locating liquefied natural gas facilities in California. AB 2642 (Canciamilla) would similarly require preparation of a feasibility report, also due to the Legislature, that addresses the costs and benefits of modifying natural gas-fired electric power generating facilities to maximize their efficiency.

The California Legislature recently [Stats. 2002, SB 1078 (Sher)] took a bold step by requiring the state's energy utilities to commit to a Renewable Portfolio Standard, or RPS. The RPS set an ambitious goal that required at least 20 percent of the electricity produced to be generated by alternative sources of energy. Last year, Senator Sher was able to establish a more ambitious RPS. Stats. 2003, SB 183 (Sher) recast the RPS to 17 percent renewables by 2006. SB1478 (Sher) once again is attempting to increase the RPS objective, to 33 percent of the total electricity generated in California per year by 2020. AB 2556 (Maddox) is a spot bill that would declare the Legislature's intent to increase the amount of renewable electricity generated to equal at least 17 percent by 2006. AB 3005 (Calderon) would require the CEC to establish a renewable energy credits trading program. Electricity sellers who fail to meet the RPS would also be required by the CEC to purchase renewable energy credits from eligible renewable energy resources to close the gap. Finally, AB 3005 would require publicly owned electric utilities to establish a RPS under which those utilities would have to ensure that 20 percent of retail sales are procured from eligible renewable energy resources by December 31, 2017. AB 2652 (Bates), another RPS bill, would require utilities to first consider suitable brownfields sites when selecting sites for new power plants, pursuant to RPS obligations.

Other legislative proposals are designed to promote alternative energy through distributed generation. SB 1398 (Morrow) would require the ARB to develop guidelines for use by California's 35 air districts to govern permitting of distributed energy resources projects. This legislation would further change the definition of "cogeneration" to increase the efficiency rating to 60 percent on a high heating

value. AB 1966 (Campbell) is a spot bill that would state the Legislature's intent to provide incentives to promote the use of distributive generation to produce hydrogen. Similarly, AB 2526 (Wolk) is a spot bill that establishes Legislative intent requiring local agencies to encourage installation of solar energy systems, while SB 1706 (Murray)—another spot bill—would promote the use of solar energy systems in new commercial buildings.

AB 2954 (Canciamilla) would require the California Public Utilities Commission (PUC) to consult with the CEC before increasing the rate of return allowed electrical corporations for investing in alternative energy facilities.

Responding to anxiety about the reliability of the distribution system, as highlighted by the major regional power outage experienced in August 2003, SB 1565 (Bowen) would require the CEC to adopt a strategic plan for energy transmission. This plan would identify investments required to ensure reliability of the grid in order to manage the energy load. Additionally, the legislation would promote demand reduction measures, including renewable resources and efficiency. AB 2076 (Dutton) would allow an investment credit for energy generators. Finally, SB 1296 (Soto) is a spot bill declaring the Legislature's intent to encourage investment in bark beetle wood waste as an alternative source of fuel to generate electricity.

Sustainability

The Legislature is expanding its sights beyond alternative energy and is considering innovative permitting programs to promote principles of sustainability in product design, product stewardship, packaging, and green building standards.

Several bills would promote green building standards and energy efficiency. SB 1851 (Bowen) would require all new and existing state public buildings, except for publicly funded schools, to exceed the minimum energy efficiency standards for buildings. These building standards must be adopted if they are feasible and achieve certain cost savings. According to this bill, when existing buildings are to be renovated or remodeled, they must be retrofitted to meet minimum energy standards. AB 2311 (Jackson) would declare legislative intent to fund the retrofitting of buildings to meet green building standards that use environmentally sustainable and energy efficient practices. This legislation would create

a State Green Building Bank that would offer public loan guarantees. SB 1805 (Murray) would require that new residential buildings establish a solar energy system that generates electricity. AB 2924 (Wiggins) would establish programs to fund “zero energy homes” for low-income and first-time home buyers. Finally, SB 1652 (Murray) is another spot bill that would require new residential construction to employ solar energy systems.

AB 2473 (Longville) would require the Legislative Analyst’s office to estimate the costs incurred by local governments in accommodating “auto-oriented” environments in housing developments with at least 150 units.

Based on the “lessons learned” from other states and the USEPA’s Project XL program, the Legislature is considering establishing a voluntary, performance-based permitting pathway known as “Performance Plus Permitting” or “P3.” This program—which may amend SB 945 (Sher)—is designed to achieve performance significantly beyond that required by existing environmental regulatory programs. The program would embrace development projects that achieve an emissions level below that of conventional permitting as well as projects that achieve environmental benefits in areas that are not regulated, such as lower energy, water, or materials usage. The P3 program would consist of two key components: (1) an application/disclosure process based on the California Environmental Quality Act (CEQA), and (2) a Performance Plus Permit that would describe the substantive performance objectives and conditions associated with the four-year permit. The applicant would commit to exceed compliance standards by meeting targeted reductions over time.

The permit could be modeled after an environmental management system (EMS); a CEQA mitigation monitoring and reporting program (MMRP); or perhaps under some circumstances, a pollution prevention plan pursuant to Stats. 1989, SB 14 (Roberti). This latter implementation document would articulate either an EMS, pollution prevention initiatives, or other performance-based milestones that would be undertaken over the next four years to serve as the performance-based permit. In essence, the P3 permit would articulate how the performance-based objectives would be accomplished and would serve as enforceable permit conditions.

For projects that would otherwise be exempt from CEQA, Cal-EPA would establish a list of previously approved permit modifications that were successful. This program would be modeled after the “off-the-shelf” certifications granted for specified air emission controls that some California air districts have implemented.

California Environmental Quality Act

Last session, the Legislature approved a dearth of legislation affecting CEQA. This session, the Legislature is focused on closing some gaps and clarifying aspects of the CEQA framework. As is typical with most legislative sessions involving CEQA, there are some bills that would carve out exemptions for specified categories of activities. SB 1267 (Morrow) would exempt from CEQA aggressive fuel modification activities designed to prevent fire emergencies on state lands. AB 2814 (Simitian) would create another exemption for state or local government activities to protect, restore, or enhance coastal or marine resources. SB 1350 (Morrow) would repeal a prior law directing the Office of Planning and Research (OPR) to change the CEQA Guidelines to categorically exempt from CEQA the use of steam sterilization to treat medical waste. Finally, SB 1334 (Kuehl) would clarify that CEQA applies to timberland conversions, except for the conversion of oak woodlands under the Williamson Act.

AB 2922 (Laird) would require the Secretary of the Resources Agency to report on the effectiveness of representative mitigation measures adopted by state and local agencies. AB 2251 (Lowenthal) would allow a previously certified master environmental impact report (EIR) to be used for a project-specific EIR that is sought five years after the master EIR as long as no substantial changes or new information has emerged since the master EIR was certified. Finally, AB 2902 (Hancock) would modify the obligations of a lead agency that prepares an EIR for long-range development for institutions of higher learning. This legislation would require the lead agency to consult local agencies or special districts to gather feedback on the potential for the project to create adverse long-range impacts to public facilities or services, including housing supply or demand.

Open Space and Land Use

Some argue that suburban sprawl is fueled by the

diversion of property tax revenues from local governments to the state (known as the “ERAF shift”), an unintended consequence of Proposition 13. This has encouraged local governments to chase after development projects and land uses that yield a bounty from sales tax revenues. This phenomenon, known as the fiscalization of land use, has promoted big box stores, shopping malls, and development patterns deemed undesirable by many land-use planners. In a 1995 report entitled *Beyond Sprawl*, the Bank of America concluded that suburban sprawl is not only environmentally unsustainable, but ultimately it is economically unsustainable as well. As a result, local governments are discouraged from engaging in regional cooperation and promoting housing. In an effort to promote more sound land use policies and patterns, Assembly member Steinberg introduced AB 1221. This bill would restructure the way local governments generate revenues by instituting a revenue-neutral exchange of sales tax for property tax. SB 1641 (Alarcon) is a spot bill designed to protect small business owners from the establishment of big box retail stores. This legislation would prohibit local governments from approving land-use permits to big box retailers if a third party independent review demonstrates a significant negative impact on the local business community.

There are several bills designed to promote “SMART growth” principles and a balance between jobs and housing and infill development. SB 1592 (Torlakson) would require cities and counties to adopt or update an infill ordinance or specific plan to identify potential infill sites and appropriate zoning to promote infill development. AB 721 (Matthews) would require local general plans to include urban growth boundaries and polices that encourage growth within the urban limit line. Additionally, this legislation would require OPR to develop a state model zoning ordinance that emphasizes SMART growth principles. AB 2634 (Canciamilla) would require that land use decisions that affect the sphere of influence of cities and counties must be consistent with voter-approved urban limit lines. AB 829 (Salinas) would also promote development within urban growth boundaries. This law would find that regional planning efforts in the San Francisco Bay region must encourage SMART growth objectives through both incentives and penalties. SB 1625 (Hollingsworth) would modify the Inter-Regional Partnership

(IRP) State Pilot Project, which is designed to promote a better jobs-housing balance. The legislation would require OPR to assess the relationship between the cost of complying with CEQA and the challenge of developing an adequate supply of infill housing.

SB 1263 (Torlakson) would require public agencies to approve development projects that are consistent with a specific plan unless such approval would result in an unavoidable significant adverse public health and safety impact. SB 1773 (Committee on Local Government) would authorize the SWRCB to develop site design standards and planning policies to assist local agencies in implementing general plan guidelines to further flood control objectives.

Another collection of bills would promote long-term state and regional planning and promote preservation of open spaces. AB 2808 (Canciamilla) would require that the Governor’s office add to the recently updated State Environmental Goals and Policy Report (SEGPR) a description of a statewide conservation strategy for protecting large tracts of contiguous agricultural land for economic and environmental value. The strategy should focus on preservation of agricultural land outside of city limits and at least 10 years away from development. Local government and non-profit organizations must be consulted during the development of the strategy. AB 2055 (Wolk) would also involve the SEGPR and would require cities and counties to consider the goals and policies of the Report for their own local open-space plans. These local plans are designed to address comprehensive and long-range preservation and conservation of open space land. AB 2064 (Goldberg) is a spot bill that would establish the Legislature’s intent to build on a Schwarzenegger initiative to enact legislation that promotes active recreation and urban parks.

AB 2673 (Simitian) would require cities and counties to articulate how property granted by the United States government should be used and managed. Further, this bill would require certification that the land will be utilized in accordance with state environmental laws. SB 1462 (Kuehl) would create the Southern California Military Greenway Commission, comprised of Los Angeles, Ventura, Kern, and Kings Counties, to promote and administer the acquisition of voluntary private and public conservation easements. The commission would also review proposed land uses that may affect military flight paths.

Assembly member Laird introduced two bills (AB 2722 and AB 1502) that would appropriate bond money from Propositions 40 and 50 to fund the Natural Heritage Preservation Tax Credit Program. This program would promote and encourage donations of land for open space and wetlands to state or local government or designated nonprofit organizations.

Natural Resources

Building on the momentum of the last legislative session, and partly in response to the catastrophic fires experienced last fall, the Legislature has introduced a number of bills addressing California's forest resources. AB 2694 (Bogh) would increase fines (in some instances by ten fold) for discarding cigarettes, cigars, matches, or any "flaming or glowing substance." AB 2381 (La Suer) and AB 2420 (La Malfa) would create an exemption to submitting a timber harvesting plan for cutting and removal of trees to reduce the threat of wildfire. SB 1482 (Sher) would harmonize civil penalties for willful violations of the Z'Berg-Nejedly Forest Practice Act of 1973 to ensure that willful violations within "special treatment areas" under the Wild and Scenic Rivers Act are subject to similar penalties. AB 2762 (Keene) would delete Christmas trees from the definition of "timberland" and would establish two types of timber harvesting plans: one for "conservation timber management plans" and the other for "planning watershed timber harvesting plans."

SB 1648 (Chesbro) would redefine "forest land" from land with a timber emphasis to "lands primarily suited to growing forest species that occur naturally in the state." The bill would also redefine "management" from maximum sustainable yield, while giving consideration to values relating to recreation, watershed, wildlife, range and forage, fisheries, and aesthetic enjoyment, to "using a state forest for demonstration and scientifically designed studies regarding forest resource management; maintenance and restoration of forestland resources; education; recreation; and public enjoyment." This law would additionally authorize the sale of minimally processed products and raw materials. Finally, the bill would permit, as opposed to require, the state to sell lands that are not suited to growing forest products or necessary for forest management.

The Legislature has introduced several bills intended to link together land conservancies on a

regional basis and focus on watershed restoration. AB 2155 (Kehoe) would allow the State Coastal Conservancy to undertake projects and award grants to facilitate environmental education and to encourage economic development that is compatible with the reservation and restoration of coastal and watershed resources. AB 1788 (Leslie) would establish the Sierra Nevada Conservancy within the Resources Agency to acquire and manage public lands within the Sierra Nevada region. This conservancy would be empowered to award grants and make loans to public agencies and non-profit and tribal organizations. This bill would also allocate \$30 million from Proposition 50 to allow the Resources Agency to acquire land and water resources.

AB 2097 (Oropeza) would extend through fiscal year 2005-2006 the availability of tax credits for property contributions to protect natural resources.

Last session, a package of bills was approved to implement the quantification settlement agreement that set in motion California's effort to wean itself from over-consumption of its share of Colorado River water. Stats. 2003, SB 317 (Kuehl) was one of several bills designed to effectuate the negotiated agreement between the federal Department of Interior and the state. It specifically called for studying how to restore the Salton Sea ecosystem. SB 1214 (Kuehl) would recast provisions of the Salton Sea study and consider strategies that include salinity control, habitat creation, restoration of shoreline elevations, and surface area configurations.

Endangered Species

SB 1215 (Morrow) would make DFG the only agency designated to expend funds from the Cigarette and Tobacco Products Surtax Fund for programs to protect and enhance fish, waterfowl, and wildlife habitats. AB 1567 (Sher) would require DFG to adopt regulations to develop and implement natural community conservation plans.

AB 2631 (Laird) would establish an Invasive Species Council empowered to advise the governor and state agencies on how to control, manage, and eradicate invasive species. The Council would directly manage nonnative and invasive species issues and would be authorized to classify nonnative and invasive species and to develop permitting programs to effectuate its mission. SB 1207 (Hollingsworth) would prohibit the importation of specified

endangered animals including polar bear, porpoise, cheetah, jaguar, zebra, kangaroo, and lynx. AB 2915 (Firebaugh) would modify criminal provisions involving importation and possession of the dead body of specified animals with the intent to sell. Instead it would be unlawful to engage in actions that would violate the California or federal Endangered Species Acts (ESA), the Wild Free-Roaming Horses and Burros Act, the Marine Mammal Protection Act, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora. AB 1805 (Levine) and SB 1512 (Aanestad) are spot bills involving salmon. The former would ban the sale of farm-raised salmon in California, while the latter would establish an incidental take permit process for the Coho salmon after it is listed as an endangered species under the California ESA. AB 2146 (Leno) would permit the taking of Dungeness crab for commercial purposes and would require DFG to adopt a Dungeness crab fishery management plan.

AB 2140 (Runner) would increase the fine for selling, harming, taking, or otherwise possessing a desert tortoise from a minimum of \$1,000 to not more than \$2,000. This bill would also increase the fines for unlawfully harvesting California Desert Native Plants.

AB 2280 (Cogdill) would allocate revenues generated from the issuance of sport fishing licenses to support the Hatcheries and Fish Planting Facilities program within DFG.

Looking Ahead

The California Legislature is searching to find its footing as it adjusts to a new Assembly Speaker and a media-savvy Governor who has never held elective office. The new administration includes a collection of new and returning faces from the business-friendly Wilson administration, along with the new Cal-EPA secretary, who is known as a seasoned and respected environmental advocate. The Schwarzenegger administration will continue gathering steam as it fills additional political posts and refines its policy agenda. As a result, next year we can expect the administration to be better equipped to promote its vision. Because the year after next will be another election year—with more politicking and less legislating—the administration's window of opportunity will be most likely 2004-2005.

When this unusual election year concludes next

fall, several old guard environmental champions in the Senate—Senators Byron Sher, John Burton, John Vasconcellos, and Dede Alpert—will retire. It remains to be seen who will step forward to fill their shoes and carry their collective agendas against the backdrop of an as yet undefined Republican administration.

ADMINISTRATIVE LAW AND ENVIRONMENTAL LITIGATION

Regulatory Activity

Final Regulations

The following regulatory action has been filed with the Secretary of State. Actions generally become effective 30 days after filing; emergency regulations are effective on filing and other exceptions may apply. For effective dates and other information, contact the agency or obtain a copy of the regulation from the Secretary of State, Archives, 1020 O St., Sacramento, CA 95814, (916) 653-7715. Current regulations are also available online at www.calregs.com.

Environmental Justice Small Grants Program—Procedures. Filed 4/1/04; adopts 27 Cal. Code Reg. §§ 10050-10056. Information: Diane Trujillo, (916) 327-7780.