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CONTAMINATED PROPERTIES

Owner of Property Liable for Cleanup Costs Under Polanco Act

The Fourth District Court of Appeal has issued a rare opinion construing the authority of redevelopment agencies to recover cleanup costs from responsible parties under the Polanco Redevelopment Act. Specifically, the court held that a redevelopment agency could recover its costs of cleaning up property from the property's owner, even though the agency fails to prepare a cleanup plan that is "not inconsistent with the National Contingency Plan."

The court's decision has particular importance at this time due to a couple of recent actions by the state Legislature. Governor Davis has recently signed SB 1684 (Polanco), which eliminates a previously existing sunset date on the cost recovery provisions of the Polanco Act. Last year, the Governor signed SB 32 (Escutia), which gave local agencies other than redevelopment agencies the authority to initiate cleanups and recover costs from responsible parties. According to the bill's author, the cost recovery actions in SB 32 are modeled after those in the Polanco Act (CEI Special Report November 15, 2001).

San Diego Attorney Richard Opper told CEI that he believes that the decision, combined with SB 1684, should result in more cities addressing brownfield development in their communities using the Polanco Act. Opper, of the Foley Lardner law firm, represented the City of San Diego, the plaintiff in the lawsuit leading to this decision.

Factual Background of Case

The case involves property located in downtown San Diego owned by the Salvation Army. The City of San Diego Redevelopment Agency targeted that property as part of an area scheduled for redevelopment. After an environmental consultant identified a

possible underground tank on the Army's property, the Agency sent a notice to the Army requesting that it submit a proposed remedial action plan for the property pursuant to the provisions of the Polanco Act. The Army failed to respond to that notice. The Agency subsequently prepared a master workplan for the property that was approved by the County Environmental Health Department, which was acting as the oversight agency for cleanup of the area under delegation from Cal/EPA. Meanwhile, the Army went ahead and removed the tank and cleaned up some soil impacted by the tank leak. The Environmental Health Department then sent the Army a "no further action" letter related to the tank removal and cleanup. The Agency subsequently filed an eminent domain action against the Army that included a cause of action seeking cost recovery for environmental costs under the Polanco Act.

Subsequent to the tank cleanup lead contamination was discovered in burn ash on the property. The Agency prepared an amended master work plan, approved by the Environmental Health Department, that covered removal and disposal of the lead contaminated soil. It did not give the Army any further notice or opportunity to prepare a remedial action plan for this phase of the cleanup. The Army and the Agency then settled the eminent domain action filed earlier by the Agency, but reserved the environmental cost recovery issue for trial. After the trial, the trial court judge issued an order deducting the cost of the Agency's environmental work, including removal of the lead contaminated soil, from the compensation that the Army was otherwise entitled to under the Eminent Domain action. The Army appealed this portion of the judgment.

The Appellate Court Opinion

The Army argued that the Agency failed to show that its excavation and removal of the lead contaminated soil was "not inconsistent with the National Contingency Plan" (NCP). That requirement is imposed on parties seeking cost recovery from "responsible parties" under federal law pursuant to section 107(a)(4)(A) of CERCLA [42 USC section 9607(a)(4)(A)]. The Army



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contended that this requirement was incorporated into the Polanco Act by Health and Safety Code section 33459.4(c), which specifies that the "scope and standard of liability for cost recovery under this section shall be the scope and standard of liability under [CERCLA]..."

The Appellate Court rejected this argument ruling that consistency with the NCP is not an element of cost recovery under the Polanco Act. The Court noted that the Act does not limit a redevelopment agency's rights to those available under CERCLA. Instead, it notes that the Act authorizes an agency to take any action that it determines is necessary to remediate a hazardous materials release, and that is consistent with "other state and federal laws." The Court construed the reference to CERCLA liability under section 33459.4(c), as referring only to who is liable as a responsible party in a cost recovery action.

The Court also rejected an argument that NCP consistency is brought into the Polanco Act by Health and Safety Code section 33459.1. That section provides that a redevelopment agency should evaluate a remedial action plan submitted by a responsible party based on the provisions of the NCP. The Appellate Court stated that it was not willing to interpret the mention of the NCP in one portion of the Act as effectively incorporating NCP compliance as a condition to cost recovery.

The Court then ruled that even if it was to decide that NCP compliance is an element of an agency's cost recovery claim, the Agency in this instance has met that requirement. The Army argued that the Agency excavated and disposed of the lead contaminated soil only because of "state waste handling requirements" and did not do an independent risk assessment to determine whether leaving the soil in place would actually create a health or environmental risk. The Court, citing evidence in the record, finds that the Agency did do an adequate investigation. It also rejects the Army's contention that the Agency improp-

erly removed soil that was above background levels but below the action levels set in its own master plan. The Court noted that the Agency properly justified this removal on the need to protect onsite workers. All of these actions are consistent with provisions of the NCP.

The Court also rejected the Army's argument that the Agency failed to give it the opportunity to develop its own remediation plan for the lead contamination. Under the Polanco Act, a redevelopment agency is required to give a responsible party a 60-day notice of its option of taking over the work itself. The Court noted that the Army had been given this notice initially when only the underground tank contamination was suspected, and that the Act does not require a new notice for contamination subsequently discovered as part of the same investigation.

The Court also rejected the Army's contention that it could not properly be classified as a responsible party as a current owner of the property, because the Agency had taken possession of the property prior to the time that the lead soil contamination remediation was undertaken. The Court cited federal decisions holding that responsible party determination occurs at the time a lawsuit is filed under CERCLA. It also noted that the Agency did not actually obtain fee title to the property, until after the final judgment in the action, which occurred after the cleanup was complete.

Finally, the Court rejected the Army's attempt to recover its own attorneys fees as an element of its eminent domain award pointing out that the Army failed to make this claim prior to settling the eminent domain portion of the action.

Redevelopment Agency of the City of San Diego v. Salvation Army, 2002 DJDAR 12950, #D038835 (October 21, 2002).

State Board Working on Composting Permit

The State Water Resources Control Board has announced it is planning to adopt statewide Waste Discharge Requirements (permit requirements) for discharges from greenwaste composting. The new requirements will cover composting operations handling more than 500 cubic yards of waste. The statewide requirements will replace waivers now in place in seven of the state's nine regional boards. All of these waivers expire at the end of the year. After reviewing the individual regional board waivers, the State Board staff has concluded that it is appropriate to establish uniformity by adopting statewide permit requirements.

The State Board will convert conditions contained in the current waivers into waste discharge requirements. Any discharger beginning or continuing greenwaste composting will be required to submit a Report of Waste Discharge to its local regional board committing to operate its facility in compliance with the performance and prescriptive standards contained in the statewide permit.

The State Board's WDRs are not yet prepared. The Board staff is establishing an "interested parties" list for those interested in reviewing draft proposals as they are generated. Interested parties can get on this list by e-mailing their name, address, phone, and e-mail to Carolyn Brookshire at brookshc@cwpc.swrcb.ca.gov. Interested individuals who provide an e-mail address will get the materials electronically sooner than those who elect to receive them by mail. Further information can be obtained by calling Ms. Brookshire at (916) 341-5860.

State Board to Retain Operator Certification Program

The State Water Board has backed off a proposal to have the wastewater

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Operator Certification

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operator certification program transferred from Board administration to a private entity. The Board's Executive Director Celeste Cantu floated the idea in an October 18 letter to wastewater treatment facilities. Like all state agencies, the Board is struggling to cut personnel in order to meet the Governor's budgetary goals (see Special Report this issue). By eliminating the program and moving its staff into what now are vacant positions, the Board could partially alleviate the pressure on it to eliminate those vacant positions. In her letter suggesting the move, Cantu cited the Board's deteriorating financial position as a motivation.

The suggestion received a tepid response from those who received it. They questioned the alleged financial motivation behind the move noting that the Board has the authority to raise fees to put the program on a firm financial footing.

In a second letter on November 1, Cantu retracted the earlier proposal, and announced that the program would continue under the aegis of the Board. All previously submitted applications for certification and renewal will now be processed, and individuals may submit additional applications for certification or for the upcoming April 5, 2003 examination. The Board has posted additional information about the program on its website at: www.swrcb.ca.gov.

Santa Ana RWQCB Adopts MS4 Permit for Riverside County

On October 25, the Santa Ana Regional Water Quality Control Board adopted a municipal stormwater (MS4) permit for those cities and portions of Riverside County within its jurisdiction. Like other MS4 permits adopted by regional boards throughout the state, the new permit will require the permittees (the cities and the County) to develop measures to control runoff from new or significant redevelopment of a certain category and size.

The new permit (Order No. R8-2002-0011; NPDES Permit No. CAS 618033) lists as co-permittees Riverside County, and those cities within the County that are within the jurisdiction of the regional board. Generally, this covers the northwestern portion of the County. The cities covered are Beaumont, Calimesa, Canyon Lake, Corona, Hemet, Lake Elsinore, Moreno Valley, Murietta, Norco, Perris, Riverside, and San Jacinto. The new permit is a renewal of the most recent permit for the County and the covered cities which was adopted in 1996.

The permit requires the permittees individually or in a group to undertake a number of actions aimed at stopping polluted stormwater runoff from getting into stormwater sewers throughout the covered area. Many of these requirements were in the previous permit, although they have been expanded in this one. For example, the permit requires the permittees as a condition for issuing a land use permit to ensure that where applicable the entity seeking the permit registers under the State Board's general industrial and construction stormwater permits.

The permittees will also be required to "effectively prohibit" the discharge of non-stormwater into municipal sewers, including discharges from public agencies, unless such a discharge is authorized by another permit. Certain minor discharges are exempted from this requirement, such as air conditioning condensate, discharges from landscape irrigation, discharges from potable line flushing, etc. Even these discharges may be regulated, if the regional board determines an individual discharge constitutes a significant source of pollution.

New Development Controls

As has been the case with all these recently renewed MS4 permits, the major new regulatory initiative is the requirement that the permittees control runoff from new development or significant redevelopment falling into specific categories. The categories include:

- Residential developments of 10 units or more
- Industrial and commercial development covering 100,000 square feet or more
- Automotive repair shops
- Restaurants occupying 5,000 square feet or more
- Hillside development of more than 10,000 square feet of impervious surface
- Developments of 2,500 square feet or more that are proximate to waters supporting sensitive plant and fish habitat
- Parking lots of 5,000 square feet or more of impervious surface.

Each of the definitions is fleshed out in some detail in the permit.

As was the case with permits for northern Orange County and western San Bernardino County issued earlier by this region, the city permittees do not have to immediately develop controls that meet a specific infiltration standard. Instead, they are given until January 1, 2005 to submit approvable Water Quality Management Plans (WQMPs) containing Best Management Practices (BMPs) to limit runoff from these developments. However, if they fail to meet the January 1, 2005 requirement for WQMP approval, they must immediately begin enforcing BMPs that meet a performance standard based on controlling a numerical percentage of runoff. These can either be volume-based or flow-based BMPs.

The new permit, along with supporting documentation, can be found on the regional board's website at: www.swrcb.ca.gov/rwqcb8.html.

S.F. Regional Board to Consider Three Municipal Stormwater Permits

On December 18, the San Francisco Bay Regional Water Quality Control Board will consider municipal (MS4) permits for Alameda, Contra Costa, and San Mateo counties, and the cities within them. All three of the permits will have new controls on new



development and significant redevelopment. The Alameda permit is being reissued as part of the normal renewal process. However, the other two permits are being amended almost two years before they would otherwise expire, leading to accusations that the Board is succumbing to pressure from Santa Clara County.

The regional board adopted its first MS4 permit for Santa Clara County and its cities in October of last year (CEI October 31, 2001). That permit has since been appealed to the State Board where it is pending, along with permits appealed by various Southern California municipalities. As part of its appeal, Santa Clara suggested the need to make the new requirements on development uniform throughout the area. This apparently led to the decision of the regional board staff to impose these controls on Contra Costa and San Mateo counties by permit amendment before the time those permits would otherwise expire in July 2004.

The development controls in the reissued Alameda permit and the amended versions for the other two counties are based on similar provision contained in the Santa Clara permit. These impose the requirements on larger developments (greater than 5,000 square feet) within 18 months, and smaller developments within three years. In addition to new residential and commercial development the controls will apply to significant redevelopment and to roadways of a specified size.

Developments subject to the new rules will have to select Best Management Practices that entrain storm water in accordance with specified performance standards.

The three permits were originally supposed to be considered by the regional board at its November 20 meeting, but consideration was postponed due, in part, to the number of comments received. In addition to the usual complaints by municipalities and development interests, Board staff has received complaints by Mosquito Abatement Districts throughout the area. The mosquito control people

are concerned that at least some developers will have to rely on catch ponds to meet the new performance standards, and that the standing water in these ponds could result in an increased mosquito problem.

The staff expects to issue the final staff reports on the three permits by the first week in December. The reports will eventually be added to the Board's website at www.swrcb.ca.gov/rwqcb2/. under the December 20 meeting agenda.

CVRWQCB Hot Spots Pesticide Plan May Spur Lawsuits

The Central Valley Regional Water Quality Control Board is set to adopt a Hot Spots Cleanup Plan for Pesticides at its December meeting. The plan, a response to a judge's order, breaks no new regulatory ground and relies on TMDLs which the regional board has previously committed to complete. Environmental groups, who brought the suit leading to the Plan, complain that the Plan lacks any mandated measures. They are threatening to go back to the judge who issued the order, and ask for further relief.

The Plan being considered by the regional board is being adopted under the Bay Protection and Toxic Hot Spots Cleanup Program (BPTCP). The document was drafted in response to an order last October by Sacramento Superior Court Judge Lloyd Connelly, who ruled that the regional board had failed to adopt required cleanup plans for "hot spots" it had identified under the BPTCP.

As we reported in June (CEI June 28, 2002), the new regional board plan is aimed at controlling pesticide runoff from three sources:

- Diazinon in orchard dormant spray
- Diazinon and chlorpyrifos in urban stormwater
- Chlorpyrifos in irrigation return flow.

Contamination from these pesticides was identified as hot spots by the regional board several years ago. However, the Board elected to treat the

contamination using other regulatory mechanisms, primarily the TMDL program and the urban stormwater control program. Waters within the Sacramento/San Joaquin Delta have been designated as "impaired" under section 303(d) of the Clean Water Act triggering TMDL requirements.

The Plan being adopted by the Board in December does contain schedules for completion of the various measures being relied upon. These include completion of new water quality objectives for the Delta for diazinon, by August of next year, and adoption of a TMDL by August of 2004; establishment of an urban creek TMDL by 2005, followed by possible Basin Plan amendments in 2007 and renewed stormwater permits in 2008; and a TMDL and related water quality objectives for chlorpyrifos coming from irrigation return flow by August 2004.

The environmental groups question whether this agreement to do what had already been planned under other board programs complies with Judge Connelly's order. They complain that the Plan lacks any enforceable mandates to agriculture and will drag efforts to reduce pesticide runoff over an unacceptable length of time.

The regional board's two-day December meeting will take place on December 5-6 at regional board headquarters, 3443 Routier Road, Ste. A in Sacramento, beginning at 9 a.m. The exact placement of this item on the regional board schedule can be determined by visiting the agenda for that meeting, which will be posted on the Board's website at: www.swrcb.ca.gov/rwqcb5/. Further information can be obtained by calling Michelle McGraw at (916) 255-0744.



Special Report **Election 2002**

The 2002 election was a low turnout affair, particularly in California, which posted one of its poorest turnouts ever. Poor turnouts usually favor Republicans and this election was no exception. It was correctly trumpeted as a major victory for the Republicans and particularly President Bush on the national level. Even in California, where Democrats now hold all statewide offices for the first time in decades, the Republicans still did better than expected picking up seats in both the Senate and Assembly.

What does all this mean? In this Special Report, we will take a brief look at the results both nationally and in California, and will discuss their implications for the immediate future of environmental legislation and policy.

The National Election

Republicans picked up 4 seats in the House of Representatives and they now hold a 227 to 206 margin. They captured the Senate and hold a 51-47 margin (with one independent), pending the results of a runoff race in Louisiana. Some environmental groups fear the worst predicting Republicans will use the combination of their control of both houses and the Presidency to make major changes in environmental laws. However, the Republicans had larger majorities in both houses after their mid-term triumph in 1994. At that time they tried unsuccessfully to make major changes in several environmental laws. The threat of a veto by then President Clinton deterred some of these efforts. However, most of the more radical provisions never got out of Congress due in large part to the moderating influence of GOP moderates.

It is true that the parties have become even more polarized since 1994. Nevertheless, GOP moderates, largely in the Northeast, face the voters again in 2004 and as was the case in 1994 do not want to explain votes for legisla-

tion that is considered aggressively anti-environment. Thus it is unlikely that there will be major rewrites of any of the major environmental statutes. Also, because of Senate rules requiring 60 votes to cut off the right to a filibuster, Democrats can effectively thwart any legislation from getting through, so long as they stick together—a task actually made easier by their status as a minority.

There could, however, be subtle changes in other legislation that will upset environmental groups but that is unlikely to attract much public attention. A good example is the recent vote on the Homeland Security bill. Prior to the vote, the League of Conservation Voters lobbied Senators to amend the House version of the bill to eliminate provisions that the League complained will restrict public access to information voluntarily submitted by businesses related to “critical infrastructure.” The environmental groups fear that businesses will use this provision to report breakdowns in processes causing pollution to the Department of Homeland Security, and then prohibit the Department from releasing the information to citizen groups. Despite the complaints of the League and other environmental groups the legislation passed with the security provision intact.

Environmental groups also expect the GOP majority to include riders to major appropriation and other technically non-environmental bills that withhold funds from government environmental programs, create procedural hurdles for citizens suits, and generally nibble away at environmental protection and remedies without overtly changing substantive laws.

Legislation of Particular Interest to California

The new Congress is likely to deal with a number of environmental issues of importance to California when it reconvenes in January.

- **CALFED.** Despite the joint federal/state commitment when the CALFED ROD was adopted in 2000, most of the actions authorized by it remain unfunded. What funding there has been has largely come from bond measures passed by California voters. The federal government, despite a promise to be an equal partner, has committed only about 1/10 of the money authorized so far.

Senator Diane Feinstein carried a bill through Congress that would have authorized \$2.4 billion in federal funding for the program. The bill was opposed by other western states, because of their fear that it would leave no money for their own programs. Despite reducing the bill’s authorization to \$800 million, Senator Feinstein was unable to get a financial commitment from Congress.

At the last minute prior to adjournment the Senate did pass legislation sponsored by Feinstein that authorized the federal government to continue participation in CALFED as part of a new agency established under state law. However, the bill contains no money. The two sentence bill also approves all CALFED projects funded over the next three years. However, it does not specify which projects these are leaving it up to the Bush Administration to fill in the blanks, if they get filled in at all. Even this modest effort still must be approved by the House before it adjourns. Although another effort may be made in the new Congress for a comprehensive CALFED bill, the chance of getting much money out of an Administration increasingly concerned about spending is questionable.

- **Wilderness Areas.** Earlier this year, California’s other Senator, Barbara Boxer, introduced legislation that would designate 2.5 million acres of federally owned properties as wilderness (CEI June 14, 2002). The designation would ban or severely restrict use of the property to offroad ve-



hicles, mining, timber operations, and grazing. The property in question is scattered throughout the state. The bill's supporters are encouraged by a bill recently approved by Congress designating as wilderness some 55,000 acres of rugged coastal mountains in the Big Sur area. The bill is currently on President Bush's desk. This is a portion of the property that Boxer's bill included. However, the remoteness of the Big Sur area means that there is less opposition to designating wilderness in that area. That is not likely to be the case with a large portion of the remainder of the area covered by Boxer's bill, particularly those portions in Southern California. Boxer's effort faces an uphill climb in the new Congress.

• Military Exemptions from Environmental Laws. Earlier this year, the Defense Department promoted legislation under the guise of national security that would have exempted the military when doing training operations from having to comply with a host of environmental laws, including the Endangered Species Act, the Clean Air Act, and the Clean Water Act. The Pentagon complained that these acts were severely hampering the military in its preparation for possible combat in Iraq and elsewhere. Creation of the exemptions which would have a huge impact in California, affecting training in Camp Pendleton and other military reservations.

Prior to adjournment, the Senate passed a small piece of this request granting the military a broad exemption from the 1918 Migratory Bird Treaty Act. That Act protects 850 species of birds from adverse impacts from federal agency operations. The exemption is interim and requires the military to avoid unnecessary harming of migratory birds. It was also criticized as highly inadequate by military supporters in Congress, and as subject to continued lawsuits by environmental groups. Nevertheless, it represents the first step in what is likely to be an increased push for the exemptions in the new Congress.

The Power of Oversight

The loss of Senate control to the Republicans is probably the biggest blow to environmental interests. This is not so much a function of future legislative successes or lack thereof, but of the inability of the Democrats to set the agenda in the Senate. The Republicans now will take over key Committee chairmanships. The Committee chairs schedule hearings, and can effectively use their authority to make sure that subjects distasteful to the majority party are not subject to Senate oversight. This can make it easier for the Administration to make regulatory changes in interpreting key environmental statutes without having to defend those changes during Senate hearings (see below).

Two key Committee chairmanships are passing to Senators who have not endeared themselves to environmental interests. Senator James Inhofe (R-Oklahoma) is taking over the chairmanship of the Committee on Environment and Public Works replacing Senator Jim Jeffords (I-Vermont). Inhofe has a 0% rating from the League of Conservation Voters, while his predecessor Jeffords had a 76% rating. Inhofe has consistently pushed the interests of the oil and gas industry—a major economic force in his state. An organization called the "Clean Air Trust" has been circulating a document entitled "Quotations from Chairman Jim" containing past remarks attributed to Inhofe. These include comparing former EPA Administrator Carol Browner to "Tokyo Rose" and describing EPA as a "Gestapo Bureaucracy."

In particular, Inhofe has strongly opposed EPA's recently enacted plan to mandate cleaner diesel fuel and diesel trucks, and has argued for major rewrites to the Endangered Species Act. He is also on record as strongly supporting the Bush Administration's efforts to amend the New Source provisions of the Clean Air Act. Upon taking over the Chairmanship, Inhofe indicated he would push to apply "cost benefit standards and sound science" to environmental rulemaking. This was a major effort pushed unsuccessfully by the

Republicans when they held their majorities in 1994.

The other major Committee change will be the accession of Senator Pete Domenici (R-New Mexico) to the chairmanship of the Energy and Natural Resources Committee replacing fellow New Mexico Democrat Jeff Bingaman. Domenici is considered somewhat of a moderate among what is otherwise a very conservative group of GOP Senators from the South and Southwest. However, he has a 8% rating from the League of Conservation Voters compared to Bingaman's 64%.

Domenici will preside over hearings for the Administration's Energy bill, including the proposal to drill in the Arctic National Wildlife Refuge (ANWR). Domenici is on record as indicating that drilling in ANWR "has to be looked at."

Regulatory Changes

The real action on federal environmental programs will probably occur through the regulatory process instead of through legislation. The Bush Administration is taking full advantage of the ability of the Executive to promote policy through the federal government's vast regulatory apparatus. As we were going to press, the Administration announced a major relaxation of rules governing New Source Review under the federal Clean Air Act [see related story elsewhere in this issue]. Expected to be released shortly is the Administration's revision of the Clinton Administration's TMDL rule.

Also, environmental groups suggest that the Administration has demonstrated its pro-business bias by emphasizing voluntary compliance rather than enforcement. The Environmental Integrity Project has published a recent study comparing enforcement during the first full year of the Bush Administration (fiscal year 2001-2002) to the three years immediately preceding it. The group's analysis, which focused only on EPA proposed penalty assessments filed in federal courts, concluded that the amount of money recovered was

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about half of the average for the previous three years. The group also notes that the Administration has proposed cutting EPA's enforcement staff by about 270 positions.

The Election in California

The Democrats captured all of the state offices for the first time in five decades. They also retained control of both houses of the Legislature. However, their majority was reduced by two seats in the Assembly and by one in the Senate. This gives the Democrats a 49-31 advantage in the Assembly and a 25-15 edge in the Senate.

In the Assembly, the Democrats lost the 26th Assembly District in the San Joaquin Valley where Republican Greg Aghazanian picked up a seat being abandoned by Democrat Dennis Cardoza, who moved up to take former Congressman Gary Condit's seat. In the 78th District in the San Diego area Republican Shirley Horton took over a seat formerly occupied by Democratic Assemblyman Howard Wayne, a termed out legislator who has been a strong environmentalist ally.

Ms. Horton's win was one of three open seats where Republicans defeated Democratic candidates who were strongly supported by environmental groups. The other two Republican successes were in the 80th District also in the San Diego area where the winner was Bonnie Garcia and in the 15th District in Contra Costa County where the winner was Guy Houston. These latter two races involved districts where the outgoing Assembly member was a Republican.

Despite the loss of two Democratic seats, environmentalists believe that the Assembly actually might be more friendly to environmental legislation. They cite victories by five Democratic newcomers who they contend are more pro-environment than their "business Democrat" predecessors. These include Mark Ridley-Thomas replacing Rod Wright in the 48th District in Los Angeles; Gene Mullin re-

placing Lou Papan in the 19th District on the San Francisco Peninsula; Nicole Parra replacing Dean Florez in the 30th District in the San Joaquin Valley; Lloyd Levine replacing former Assembly Speaker Robert Hertzberg in the 40th District in western Los Angeles; and Sally Lieber replacing Elaine Alquist in the 22nd District in the San Jose area.

The Democrats one loss in the Senate took place in the 18th Senate District where former Assemblman Roy Ashburn moved up to take a District formerly represented by long time Ventura legislator Jack O'Connell. Ashburn benefitted from redistricting which made the District much more pro-Republican. In fact, no one ran against Ashburn.

In Congress, the redistricting plan worked out by the state Legislature accomplished its essential purpose of protecting incumbents. The Democrats netted one extra seat—a new seat that was created to reflect California's population growth. That seat (District 39) was won by Democrat Linda Sanchez, who joins her sister Loretta Sanchez from the 47th District to form the only sister act in Congress.

Of existing seats, only one represented a real contest—the 18th District seat where incumbent Democrat Gary Condit of Chandra Levy fame was dumped in the primary by his former protégé Dennis Cardoza. Despite a campaign against Cardoza by Condit's children, he still beat former Republican state Senator Dick Monteith to hold the seat for the Democrats. The Congressional lineup after the election is now 33 Democrats and 20 Republicans.

State Propositions

There were two propositions on the state ballot that were environmentally oriented. One of these, Proposition 50 the \$3.4 billion water bond measure passed handily by a 55.4% to 44.6% margin. The other, Proposition 51 that would have redirected gas tax money into a number of specific transportation oriented projects lost just as handily by a 58.6% to 41.4% margin.

The passage of Proposition 50 will provide much needed money for both CALFED and the still pending transfer of water from Imperial County to San Diego (CEI October 16, 2002). Proposition 51 was doomed by extensive criticism of its sponsor, the Sacramento based Planning and Conservation League and PCL's Executive Director Gerald Meral, for obtaining contributions for the Proposition from businesses who would benefit from its passage (CEI October 16, 2002). Shortly after the election Meral announced his resignation from the PCL Executive Director position. It appears the resignation was long planned and had nothing to do with Prop. 51. Meral and his wife are moving to Inverness in Marin County, and Meral will continue to work with PCL's non-political arm, the Planning and Conservation League Foundation.

Local Propositions

Three local propositions that attracted some notoriety met different fates.

- In San Francisco voters passed Measure A that authorizes \$1.6 billion in bonds for San Francisco's share of a planned \$3.6 billion upgrade of the Hetch Hetchy project. Hetch Hetchy supplies all of San Francisco's water and a good portion of the water for communities on the S.F. Peninsula who will pay for the balance of the project. The measure passed in environmentalist oriented San Francisco, despite opposition from environmental groups who fear it will encourage further growth and who were angry over a lack of any mention in the measure of a study of removing decades old O'Shaughnessy Dam on the Tuolumne and restoring the splendor of Hetch Hetchy Valley (CEI Special Report October 31, 2002).
- Voters in the City of Folsom approved Measure P, which repeals a plan adopted by the City to retrofit 6,000 older homes with water meters. The owners of the properties, who put the measure on the ballot, contend that they were pledged unmetered supplies of water when the City purchased 22,000 acre feet of 1851 era water rights in the early

1970s. In addition to placing meters on the houses, the City's now defeated measure would have applied a surcharge to heavy water users.

The passage of Proposition P came in the face of threats by the U.S. Bureau of Reclamation to cut off water its supplies to the City if the Proposition passed. The water in question is supplied by the Bureau's Central Valley Project through the San Juan Water District. Supporters of Proposition P claim the Bureau is bluffing and the City does not need the CVP water absent further growth. After the election, the Bureau said that it would go ahead with the cutoff. The San Juan District would initiate the cutoff by reducing supplies to the older, unmetered part of the City leaving an amount sufficient only for basic health and safety needs. The cutoff affects about 23% of the City's overall water supply. Observers expect a court battle if the cutoff proceeds.

- In Nevada County voters defeated Measure D, which would have required the County to reimburse property owners for any loss of property value caused by a government regulation that restricts a property's use or utility. The measure was modeled after Oregon's Measure 7, approved in November 2000. The legality of that measure is still being sorted out. The measure was put on the ballot by property rights advocates, and was being closely watched in California and elsewhere. Opponents contended that the measure was retaliation by old guard conservatives who have lost control of the County Board of Supervisors to slow growth advocates. Opponents also claimed that the Measure would hamstring County government. The organization promoting the Measure was allegedly associated with the property rights Wise Use movement.

The Coming Catastrophe in Sacramento

It will be a grim year in Sacramento. Legislative Analyst Elizabeth Hill estimates that the state faces a \$6.1 billion deficit for this fiscal year (2002-2003), which will grow to a cumulative deficit of \$21.1 billion by the

time the next budget is due in June (fiscal year 2003-2004) absent changes in existing programs. Hill believes the deficit may be even higher, a view apparently shared by the Governor's office which is talking about a deficit of as high as \$25 billion next year. While Hill assumes the economy will pick up this year, she still expects ongoing deficits for the next few years of up to \$16 billion.

The primary cause is a dramatic decline in revenue from stock market capital gains from \$17 billion in 2000-2001 to \$6 billion in 2002-2003. This year the state Legislature papered over the issue with a series of temporary fixes. That option has been exhausted and the Governor and the Legislature are going to have to come up with some combination of painful cuts and/or equally painful revenue "enhancements." The magnitude of the deficit can be seen by the fact that total state revenues this year are roughly \$75 billion.

Governor Davis has called the lame duck Legislature back in session and expects to present it with proposals to trim about \$5 billion off of this year's deficit. The Governor's office says that there will be no tax increases as part of this proposal. However, it is not clear whether that means there will be no fee increases. The Governor has supposedly asked each state agency to propose cuts in their existing programs of up to 20%. Whatever the Governor does in December, the ongoing problem will require further revisions for next year's budget. Republicans have been adamant so far about not increasing taxes, and because tax increases require a 2/3 vote the Republicans can block such increases. The GOP's extra 2 seats in the Assembly and one seat in the Senate makes it more difficult for the Governor to come up with a budget proposal that includes tax increases.

However fee hikes, as long as they assessed on those covered by existing regulatory programs, do not require a 2/3 vote. Some of the state's various environmental and operating programs still draw heavily on general fund moneys. Environmental groups

will be pushing to have the regulated community fully pay for these programs through fee hikes. Most vulnerable to hikes will be wastewater dischargers. The Legislature last year adopted fee hikes on dischargers as part of the budget process. However, even with these hikes the regional water board's Waste Discharge Requirement (permit) program still relies on general fund monies. Legislation that would have increased fees even more (AB 2938) did not make it out of the Legislature. This year it might, and could very well include increased fees on confined animal facilities that were excised from last year's fee rises. Other fees that may be raised include those supporting various air programs and the Department of Pesticide Regulation's mill tax.

Finally, major speculation centers on whether the fact that the Governor does not have to face voters again will embolden him to team up with Democratic majorities in the two houses to pass some of the bolder proposals that have been on the wish list of environmental groups but have been blocked so far by the Governor's need to raise campaign funds from business interests. Shortly before the election, Davis told reporters that he would not repeat his frenetic fund raising efforts of the first term that led to charges that he was running a "pay to play" government. This comment drew hearty skepticism from Sacramento observers who believe that Davis still harbors Presidential ambitions, despite his miserable approval standings with Californians.

Even if Davis ceases wooing business, he is not likely to sign any legislation that requires new expenditures. However, he could still sign bills like last year's proposal to establish a new regulatory program to control disposal of electronic wastes, so long as it is paid for entirely by up front deposits on the manufacturers' products. Other legislation that might tempt a "green" Governor would be legislation that would impose even greater obligations on developers to ensure that they have water available for their projects and legislation that

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would restrict disposal of low-level radioactive wastes (vetoed this year by the Governor).

AIR QUALITY

EPA Releases Major Revisions to Federal New Source Review

As we were going to press, U.S. EPA announced its long awaited proposals for giving businesses more flexibility to make equipment upgrades and do maintenance under the federal New Source Review rule. The proposals have been expected for some time, and generally track those previewed earlier this year by the agency (CEI August 15, 2002).

The proposals include a provision exempting changes from NSR provided that a facility continues to operate within a plantwide emission cap, a provision under which a company can make a change deemed to be environmentally beneficial by providing a notice rather than obtaining a full permit, a provision that will allow companies to install best available technology and then avoid further upgrades until the improvements are obsolete, and a provision allowing companies greater flexibility to establish a baseline for calculating whether a proposed change results in an emission increase. The agency stopped short of providing a detailed definition of what maintenance actions trigger NSR review—a failing that disappointed many in industry.

Although the changes were expected, they still brought howls of outrage from environmentalists and Democratic politicians, as well as front page stories in most of the nation's newspapers. The Administration contends that these changes will encourage companies to invest in modern equipment and therefore result in a net overall environmental benefit. The Administration's critics disagree viewing the proposal as a payoff for contributions to the GOP from industrial companies, and suspecting that the

rule was purposely held until after the November election. A coalition of Attorney Generals from Northeastern states, expected to be most impacted by the changes, has threatened to sue EPA over them.

CEI will cover the new rules in detail in our next issue (December 19), including a discussion of their likely impact in California. In the meantime those interested in reviewing the 600 plus pages of the new rule can locate it on EPA's website at: www.epa.gov/nsr.

Settlement Starts Clock on Implementation of EPA's New Ozone Standard

Environmental groups and the U.S. Environmental Protection Agency have entered into a court supervised consent decree that will require the federal agency to begin enforcing EPA's now five-year old eight-hour ozone attainment standard. In California, this will cause most of the state to fall out-of-attainment of the federal standard triggering a new round of local air district attainment plans that will include new controls.

U.S. EPA adopted the 8-hour standard in 1997 during the Clinton Administration, despite heavy opposition from business interests (CEI Special Reports, December 15, 1996 and May 31, 1997). The new standard was immediately challenged by these interests who won an initial victory when the U.S. Appeals Court for the District of Columbia invalidated the standard. That decision was reversed by the U.S. Supreme Court last year (CEI February 28, 2001). The case was returned to the Appeals Court, which earlier this year eliminated the final obstacles to implementation of the standard.

Environmental groups, believing that the Bush Administration was stalling on implementing the standard, threatened to sue the agency earlier this year. This settlement, which was lodged in the D.C. District Court, along with a contemporaneous complaint, requires EPA to designate non-attainment areas by April 15, 2004.

What Happens After Designation?

According to a March 2000 staff report by the Air Resources Board, the designation of non-attainment areas triggers three Clean Air Act programs.

- State Implementation Plans (SIPs). Each non-attainment area is required to develop a SIP describing how and when it will achieve the standard. States have up to three years to complete this task, meaning that 8-hour SIPs will be due in 2007.

- New Source Review. Areas that have been designated as non-attainment will have to start implementing federal New Source Review requirements. These require installation of Lowest Achievable Emission Rate (LAER) (the federal BACT equivalent), as well as the requirement that new sources obtain offsets. The ARB notes that this will largely impact those areas of the state that are in attainment with EPA's one-hour standard (see below), since non-attainment areas already have federal NSR in place.

- Transportation Conformity. Non-attainment areas will have to verify that their transportation plans "conform" to the SIP, so that they don't interfere with the region's efforts to attain the standard. This requirement goes into effect immediately upon designation, meaning that areas currently in attainment will have to meet the requirement even though they have no currently approved SIP. According to the ARB, EPA and the Federal Highway Administration are currently working on a guidance to specify how conformity will be handled absent SIPs.

One of the unresolved issues is how different parts of the state will be regulated under the Clean Air Act based on different projected attainment dates. Under the 1-hour scheme, the Clean Air Act required EPA to classify areas depending on the time away from attainment. The Act imposed progressively greater planning and control requirements on areas based on these classifications. Because almost all of the dates on which these classifications are based have expired, EPA initially proposed a new classification scheme. However, the Supreme Court said that EPA in implementing



the 8-hour standard must use the classification scheme outlined in the Act. It instructed the Court to develop a "reasonable interpretation" of how the classification scheme under the Act will apply to implementation of the new standard. Presumably, EPA will propose a solution that will utilize the gradually escalating sanctions under the current scheme (e.g. transportation cutoffs, increased offsets and controls, etc) but in a new time framework.

What Areas Are Subject to the New Standard?

In March of 2000, the Air Resources Board submitted to EPA its "recommended area designations" for the new standard. Although EPA is not bound by the ARB's determination, there is no reason to believe that it won't accept these designations. The ARB proposed designating 16 separate geographical areas of the state as out-of-attainment based on recent monitoring. These include the following areas.

Areas Currently Out-of-Attainment of the One-Hour Standard

- The South Coast Air Basin. This includes those areas currently under the jurisdiction of the South Coast Air Quality Management District. (with the exception of the Coachella Valley, see below).
- San Joaquin Valley. This includes areas under the jurisdiction of the San Joaquin Valley Unified Air Pollution Control District.
- Eastern Kern County. That portion of the County under the jurisdiction of the Kern County APCD.
- The Sacramento Region. Consists of Sacramento, Yolo, Eastern Solano, and the western portions of El Dorado and Placer counties, under the jurisdiction of various districts.
- San Francisco Bay Area. Those areas under the jurisdiction of the Bay Area AQMD.
- Ventura County.
- Western Mojave Desert (Central San Bernardino County).
- Antelope Valley (Northeastern Los Angeles County).

- Coachella Valley (Central Riverside County).
- San Diego County. The County was non-attainment when the ARB submitted this proposed designation. It has been recently designated as in-attainment of the one-hour standard (CEI October 15, 2002).
- Imperial County.

Areas Not Currently Designated as Nonattainment

- Shasta County
- Tehama County
- Western Nevada County
- Central Mountain Counties (includes Amador and Calaveras Counties)
- Southern Mountain Counties (includes Tuolumne and Mariposa Counties)

Unclassifiable Area

The ARB determined that the following areas lack sufficient monitoring data to determine whether they are in attainment of the new standard. These areas may end up being designated depending on the information EPA has at the time of designation.

- Indian Wells Valley in northwestern Kern County
- Eastern Riverside and Eastern San Bernardino Counties (the easternmost desert portion of the counties).

Attainment Areas

The ARB found the following areas to be in attainment of the 8-hour standard

- Northeast Plateau Air Basin (includes Siskiyou, Modoc, and Lassen Counties)
- North Coast Air Basin (includes Del Norte, Humboldt, Trinity, Mendocino, and Northern Sonoma Counties)
- Glenn County
- Butte County
- Lake County
- Colusa County
- Sutter County
- Yuba County
- Northern Mountain Counties (in-

cludes Plumas and Sierra Counties)

- Eastern Nevada County (the portion east of the crest of the Sierras)
- Eastern Placer County (the portion located in the Lake Tahoe Air Basin)
- Eastern El Dorado County (the portion located in the Lake Tahoe Air Basin)
- North Central Coast Air Basin (includes Monterey, San Benito, and Santa Cruz Counties)
- Great Basin Valleys Air Basin (includes Alpine, Mono, and Inyo Counties)
- San Luis Obispo County
- Santa Barbara County
- Northern Channel Islands

EPA and SCAQMD Disagree on Impacts of RECLAIM

Nine years ago the South Coast Air Quality Management District introduced the country's first major attempt at replacing traditional command and control regulations with a market-based emissions trading. The District's RECLAIM program promised to reduce nitrogen oxide (NOx) emissions in the South Coast air basin by an equal or greater amount as would have occurred under command and control. U.S. EPA Region IX has now issued a 123-page evaluation of the program which concludes that it has fallen far short of this goal. The District has responded by defending the program and accusing EPA of relying on interviews with stakeholders who sometimes had their own axes to grind, and of misrepresenting what was intended to be accomplished by the program.

RECLAIM is what is commonly described as a "cap and trade" program. Under RECLAIM, the 300 plus largest sources of NOx emissions in the South Coast Basin have been given gradually declining allocations of NOx since the program's commencement. The sources could choose to comply with each year's "cap" either by installing emission controls, or by purchasing emission reduction credits from other RECLAIM facilities who had reduced

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EPA RECLAIM Report

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emissions beyond the amount necessary to stay within their caps. The theory was such a program would allow sources to choose the path of compliance that was the most cost-effective. Either a source would determine that it was cheaper to install the controls, or that it was cheaper to purchase credits. The designers of RECLAIM assumed that enough facilities would over-control to create sufficient excess emission reductions to provide the required Reclaim Trading Credits (RTCs) necessary to satisfy those who chose not to install controls.

The origin of the EPA study was a sharp increase in the cost of RTCs during 2000-2001. Region IX decided to study the origin of this increase in order to "better understand what caused the price increase and what it might mean for the future of RECLAIM and other incentive based programs."

As EPA began examining the program to answer this question, it concluded that there were "fundamental areas of the program" that should be studied. EPA staff then reviewed materials on the background of RECLAIM, its implementation, and the SCAQMD's own evaluations of the program's performance. It also conducted interviews with 20 individuals representing industry, environmental groups, regulatory agencies, and RTC brokers. The resulting report contains numerous conclusions about what has happened with RECLAIM and recommendations on how the program can be improved.

The SCAQMD, given an opportunity to respond to the draft report, blisters both the report's conclusion and its methodology. "At this time, we do not believe the findings and recommendations in this draft report can be relied upon for considering improvements in the RECLAIM program or as a meaningful set of 'lessons learned' observations for any other programs because the draft report lacks objectivity and adequate sup-

porting data."

RECLAIM versus Command and Control

The primary conclusion of the Region IX study is that both the rate of control installation and the actual emission reductions under RECLAIM were considerably less than those predicted and that would have occurred if the District had stuck with a command and control system. EPA bases this conclusion primarily on projections contained in the CEQA documentation for RECLAIM when it was adopted in 1993. EPA notes the document projected that actual emission reductions under RECLAIM from 1994 to 2000 would total 65%. It also projected emission reductions under the "command and control" alternative at 72% per year. In actuality, says EPA, the NOx emission reductions over the period amounted to only 19%.

EPA believes that the primary cause of this failure to meet expectations were "excessively high" initial allocations to RECLAIM sources. These initial caps were "roughly 40-60% above actual emissions during the first two years [of the program] (1994-1995)." As a result of this over-allocation, RECLAIM sources had no incentive to either install controls or purchase RTCs during the first several years of the program.

SCAQMD responds by first noting that EPA confuses actual emissions with potential emissions. The 65% (11% per year) projected reduction under RECLAIM was based on a reduction of the allocation cap ("potential-to-emit"), not on a reduction of actual emissions. The program has met this goal with approximately 90% of all RECLAIM facilities meeting their cap targets every year. The SCAQMD complains that it is "unrealistic" to try to determine what would have happened under command-and-control because the District Governing Board may not have adopted all of the measures projected in the District's attainment plan at the time.

The SCAQMD also takes issue with EPA's initial over-allocation scenario. The District points out that each

facility's initial cap was based on its highest year of production during the period from 1989-1992. At the time RECLAIM was adopted, California was just coming out of a withering recession, and the District (and industry stakeholders) felt that "it would be inappropriate to cap emissions at recessionary levels." Although the District does not say so, the Region IX report cites conclusions by some of the stakeholders interviewed for the study that allocations to permit growth were necessary for many industrial facilities to accept the program.

The Cause of the 2000-2001 Price Spikes

This was the question that caused EPA to undertake its evaluation in the first place. The price of RTCs was \$154/ton in 1996 and \$1,827/ton by 1999. However, during the summer of 2000 the cost jumped to a staggering \$45,609/ton. EPA concludes that there were three factors that combined to create the sudden spike. The first of these is the jump in demand for credits by power plants caused by the energy crisis. Because the electric companies could essentially sell power at any price they wanted they had every incentive to bid up the cost of credits in order to operate old equipment with high emissions.

While this problem has been widely reported, the other two cited by EPA have not. One of these involves the activation of the so-called "cross-over" point. That was the point that occurred in 1999 when for the first time the aggregate total of allocated emissions was less than actual emissions. This required many companies for the first time to be faced with either having to install controls or purchase RTCs. The resulting surge in demand helped drive the RTC prices up.

The third factor is related. Because companies with their high initial allocations did not have to worry about putting on controls during the first years, the number of companies that over-controlled was less than anticipated, and thus less RTCs were available when the crunch came. The SCAQMD does not necessarily



dispute this. It does note that it moved to try to alleviate the spike by taking the power companies out of the RECLAIM market. At that point, says the SCAQMD, the market stabilized and is now acting like it should.

Other Conclusions and Comments

The report contains many other conclusions and a slew of recommendations.

- Based on its interviews, EPA concluded that the stakeholders (presumably the industry stakeholders) lacked sufficient cost information to participate effectively in the RECLAIM market. Contrary to the predictions of the program's designers, few of the participants invested in controls sufficient to generate credits. Also, even though industry participants were told by the SCAQMD of the upcoming "cross-over" few of them were ready for it when it did happen.

- The report notes that environmental groups and industry remain divided on whether or not stationary sources should be able to use mobile source credits in lieu of emission controls as part of a trading program. The environmental groups argue that it is hard to monitor these mobile source reductions and that they raise environmental justice issues. Industry believes that they play an important role, and the SCAQMD agrees noting that EPA has now approved some of the District's mobile source credit rules after refusing to act on them for a number of years.

- The District questions the sample size used by EPA to justify its conclusions regarding industry performance in response to RECLAIM incentives. The District notes that EPA interviewed only 8 sources identified as "industry" stakeholders, and that four of these were either attorneys, consultants, or trade association representatives. Thus, it is basing its conclusions about industry behavior on four out of 335 RECLAIM facilities.

- EPA makes a number of recommendations designed to make market information more readily transparent, to enable the District to get a better fix on how industry plans to respond

in RECLAIM. The District agrees with some of these recommendations and disagrees with others. It does agree, for example, that it possibly should have required compliance plans from participating facilities so that it would have had a better idea early in the program of the shortfall in credits caused by the lack of new controls.

Availability of Report

The EPA report, along with the District's response, can be found on EPA Region IX's website: www.epa.gov/09.

ARB Workshop on ZEV Regulations

The staff of the Air Resources Board has scheduled a two-day workshop on December 5 and 6 to discuss proposed changes to the Board's Zero-Emission Vehicle (ZEV) regulations. Although the changes were not available at press time, the workshop notice indicates that the staff intends to tackle two issues with the regulatory changes: (1) the effect of litigation launched against the most recent ZEV changes by the auto industry; and (2) current conditions and trends in zero and near-zero emissions technology. The staff has taken the unusual step of scheduling a two-day workshop in order to accommodate what it expects to be "considerable public interest" in what the Board is going to do.

The litigation response will deal with a recent decision by a federal District Court judge in Fresno that enjoined the District from enforcing changes to its ZEV regulations made in 2001 (CEI July 15, 2002). That ruling invalidated the most recent changes (and arguably similar changes made in 1999) which were designed to provide auto makers with additional flexibility to meet the ZEV requirements by allowing them to certify partial-ZEV vehicles. The Board could remove the flexibility by reverting to the original, rigid formula whereby auto makers were required to introduce a specified percentage of ZEV (electric) vehicles with no options. However, that is unlikely, as indicated by the second issue. Although

most observers believe the Board will continue to have some ZEV requirement, the "trends" in clean vehicle development are away from pure electric vehicles and toward some form of hybrid or other ultra-low emission vehicles. Changes to the Board's regulations could be designed to acknowledge this, as well as solving the problem caused by the judge's decision.

The workshop will take place at Cal/EPA headquarters, beginning on December 5 at 9 a.m. Sessions on each day are expected to last all day. The Board will post materials prior to the workshop on its website at: www.arb.ca.gov/msprog/zevprog/2003hearing/2003hearing.htm. Further information can be obtained by calling Thomas Evashenk at (916) 445-8811.

ARB to Hold Workshop on Implementation of Vehicular Greenhouse Gas Bill

Earlier this year, Governor Davis signed controversial legislation requiring the Air Resources Board to adopt regulations reducing greenhouse gas emissions from vehicles. The legislation, AB 1493 (Pavley), requires the Board to adopt the regulations by January 1, 2005 and to make them applicable to model year 2009 and later vehicles (CEI July 15, 2002). The Board expects to actually adopt the regulations during the fall of 2004.

The staff will hold its first workshop on the implementation of the regulations on December 3. The purpose of the workshop is to receive comments on a staff proposal for the creation of a greenhouse gas inventory for vehicles that can be used to support development of the regulations. The staff will discuss the scope of the inventory, pollutants to be included, status of the current emission inventory development, and the proposed timeline for the inventory process. The workshop will take place on Tuesday December 3 from 1 to 5 p.m. at Cal/EPA headquarters, 1001 I Street in Sacramento. The Board has established a listserv for parties interested

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ARB Greenhouse Gases

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in development of the AB 1493 regulations at www.arb.ca.gov/listserv/gcc/gcc.htm. For further information about the workshop call Jon Taylor at (916) 445-8699.

PROPOSITION 65

A.G. Intervenes in Settlement Between Hotels and Plaintiff Group

The Attorney General's office is citing its authority under new legislation to vigorously object to proposed settlements between a Prop. 65 plaintiff group and several hotel chains. The settlements were submitted in a coordinated proceeding dealing with hundreds of Proposition 65 claims of second hand smoke exposure filed against hotel chains. However, the A.G.'s office contends that these settlements go far beyond dealing with second hand smoke claims and instead attempt to let the hotel chains off of the hook for "every imaginable chemical exposure that might occur on their premises."

The proposed settlements were filed in three cases that are part of the coordinated proceeding. The plaintiff in all three instances is the Consumer Defense Group represented by Irvine Attorney Anthony Graham. This group is one of two groups that has made a career out of suing hotels under Proposition 65 for failing to warn their customers of second hand smoke exposure. Second hand smoke is a Proposition 65 listed carcinogen. A second group, Consumer Advocacy Group, represented by well known Prop. 65 plaintiff's lawyer Reuben Yeroushalmi, has actually filed considerably more of the second hand smoke cases. The hotel industry has vigorously objected to these suits in the past contending that the two groups are picking on both small and large hotel operators and extracting nuisance settlements out of them in return for dismissal of the law suits.

Yeroushalmi's organization, however, is not part of the challenged settlements and, in fact, has vigorously disagreed with them.

The settlements apparently represent an effort by the hotel industry to resolve these cases once and for all by coming up with a settlement format that hotels throughout the state can sign on to. In opposing the settlements, Deputy Attorney General Edward G. Weil notes that the suits covered by these settlements had their genesis in a series of 60-day notices that the A.G.'s office began receiving last May that were "unlike any previously received by the Attorney General." Weil notes that the ten-page notices were not limited to second hand tobacco smoke but instead listed 13 different categories of exposure, including such broad categories as "office and art supplies and equipment" and "retail sales." The resulting lawsuits and settlements then purport to exempt the defendant hotel chains from all present and future Proposition 65 liability associated with any of the exposures covered in the notice.

Weil's conclusion is that the hotel defendants "[f]rustrated with protracted litigation concerning environmental tobacco smoke....now propose to permanently 'solve' their Proposition 65 problems by posting vague and generic warning signs and claiming these signs constitute the 'clear and reasonable warning' required by Proposition 65, not only for tobacco smoke but for every imaginable chemical exposure that might occur on their premises."

In detailing what is wrong with the settlement, Weil cites last year's adoption of SB 471 (Sher), which requires Prop. 65 plaintiffs to support 60-day notices with "Certificates of Merit" outlining the evidence supporting their claims, and authorizes the Attorney General to provide a court with its views on whether the settlement meets certain standards set forth in the legislation. The Attorney General also cites settlement guidelines proposed by his office under the aegis of SB 471, even though these guidelines are not yet finalized (CEI March

14 and August 15, 2002).

Among the specific flaws in the settlements raised by the A.G. are the following.

- The proposed warnings fail to meet the requirement that they are "reasonably likely to be seen, read, and understood" by those to whom they are aimed, and are not reasonably associated with the source and location of the exposure. Under the settlement, a hotel would post a warning stating only that "[t]his facility contains chemicals known to the State of California to cause cancer and birth defects and other reproductive harm. Further information on specific chemicals is provided at the registration desk." Weil says that the warnings are unlikely to alert hotel patrons as to what type of exposure they are facing, and that telling them that information is available "at the registration desk" is not legally adequate. He also faults the warnings for failing to identify the products to which they refer.

- The sixty-day notices are so vague that they do not provide the plaintiffs with sufficient information on which to resolve all of the claims covered by the notice. Weill notes that if this notice had been served by Yeroushalmi's Consumer Advocacy Group, the defendants would be "outraged" and would seek to have the subsequent suit dismissed.

- The settlement requires the hotel defendants to pay specified amounts of money to Consumer Defense Group in lieu of civil penalties. Attorney Graham has characterized these payments as "consideration for the waiver by CDG of its right to litigate." Weill faults these payments as contrary to the A.G.'s proposed settlement guidelines which require a "nexus" between the payments and the activities funded.

- Weill also faults the settlement for failing to justify the attorneys fees being paid to Graham, which are set at \$350 per hour. Weill does concede that proper documentation might demonstrate that these fees are appropriate, although so far it hasn't been provided.



In conclusion, Weill asserts the Attorney General remains willing to work with "all concerned" in resolving these claims, the litigation of which has been "long, difficult, and expensive." However, in this instance, "the settlements proposed here are contrary to the law, and if approved would set a standard that would eliminate the informative, useful warning the public sought in adopting Proposition 65."

Consumer Defense Group and the McKenzie Group v. La Quinta Inns, Inc. et al., Judicial Council Coordination Proceeding #4182 (Los Angeles Superior Court, November 21, 2002).

Cholesterol Fighting Statins May Be Reviewed As a Group

The panel which evaluates potential carcinogens for addition to the Proposition 65 list has agreed to consider evaluation of a group of cholesterol lowering drugs as a whole at the request of an attorney for the manufacturer of one of the drugs. The Carcinogen Identification Committee (CIC) will consider whether to evaluate the six drugs as a class at its December 17 meeting.

The unusual request was submitted by an attorney for pharmaceutical giant Merck & Co., which manufactures the popular drug Lovastatin. Lovastatin is one of six "statin" drugs that have been approved by the FDA for lowering cholesterol. All of the drugs have been implicated in research studies in the production of tumors in animals. OEHHA has been studying the six as a group. However, under the agency's "random selection" process, Lovastatin was selected for immediate evaluation and was designated as a "high priority" candidate for consideration by the CIC.

Facing the possibility of an imminent addition of his client's drug to the Prop. 65 carcinogen list, Merck Attorney Gary Roberts of Los Angeles sent a letter to OEHHA requesting evaluation of the six statins as a whole. Roberts emphasized that Merck is not conceding that Lovastatin should be listed. However, he told OEHHA Director Joan Denton that designating

Lovastatin alone would cause statin users to "misinterpret California's action as a signal lovastatin presents a unique risk of cancer not presented by the other statins." Roberts pointed to FDA's treatment of the group as a whole for labeling purposes.

OEHHA's regulations establishing its random selection prioritization process contain a provision allowing the agency to abbreviate the process "under exceptional circumstances [in order] to respond to specific public health needs." Citing this exception, Denton took Robert's request to the Chair of the CIC, Dr. Thomas Mack. Mack agreed to consider Robert's request at the December 17 meeting. This does not mean that the six chemicals, including Lovastatin, will be considered for listing at the meeting, only that the CIC will consider whether to recommend their evaluation as a group.

In addition to Lovastatin, the other six drugs are:

- Simvastatin
- Pravastatin sodium
- Fluvastatin sodium
- Atrovastatin calcium
- Cerivastatin sodium

The CIC meeting will take place on December 17 at Cal/EPA Headquarters in Sacramento, beginning at 10 a.m. In addition to considering the group evaluation of the statins, the CIC will also consider the addition of "Phenelzine and its acid salts" to the Prop. 65 carcinogen list (CEI September 30, 2002) and the removal of "Sodium saccharin" from the list (CEI October 31, 2002). Information on all three of these proposals can be found on the agency's website at: www.oehha.ca.gov.

OEHHA Looking at Alternative Risk Levels for Acrylamide in Fried Foods

The Office of Environmental Health Hazard Assessment (OEHHA) will consider adopting "alternative risk levels" to deal with the hot button topic of the presence of acrylamide in fried foods, particularly fast foods. In

September, a Prop. 65 plaintiff group the Council for Education and Research on Toxics (CERT) filed suit against McDonald's and Burger King alleging that french fries served by the hamburger chains contain acrylamide in amounts that are well over the "safe harbor" exposure levels for the chemical established by OEHHA. The lawsuits have caused a split in the Prop. 65 plaintiffs bar with some plaintiffs attorneys concerned that taking on the two large companies over such a ubiquitous product will reflect adversely on Proposition 65 as a whole (CEI September 30, 2002).

Acrylamide was added to the Proposition 65 list in 1990 based on studies showing it as a potential carcinogen in industrial exposures. In April, a study by the Swedish National Food Administration revealed high levels of the chemical in various high carbohydrate foods cooked at high temperatures, including french fries, potato chips, crackers, and bread. CERT jumped on this study and sent out 60-day notices to the fast food chains shortly after the study was announced. The Attorney General's office then took the unusual step of sending letters to CERT's lawyers questioning the validity of the "certificate of merit" supplied by CERT in support of its notices, and suggesting that any lawsuit would not be in the "public interest." The A.G. also cited a partial exemption in the Prop. 65 regulations allowing alternative risk levels of a chemical when food is cooked to avoid contamination. In July, Burger King attorney Michelle Corash sent a letter to OEHHA requesting that the agency establish a higher risk level for acrylamide in cooked foods utilizing the exception in OEHHA's regulations.

OEHHA Director Joan Denton finally responded to the Corash letter on October 15. Denton's letter cites continuing turmoil on the scientific front regarding the validity and implications of the Swedish study. She notes that the U.S. Food and Drug Administration has scheduled a meeting of its advisory committee on natural

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Acrylamide

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toxicants in foods to discuss the acrylamide issue sometime in December. Because of “the pace of scientific, legal, and regulatory developments” Denton concludes that OEHHA is unable to reach any definitive conclusion on possible alternative risk levels for acrylamide in cooked foods. However, she committed that by the end of the year OEHHA will announce “appropriate regulatory steps” to bring greater clarification to the issue. She expects the agency to take “regulatory action” early next year.

Meanwhile, attorneys for both McDonald’s and Burger King have requested a stay of the lawsuit until OEHHA completes its rulemaking. That request is scheduled to be considered by the Los Angeles Superior Court on December 9.

ENDANGERED SPECIES

FWS Releases Draft Economic Analysis on Vernal Pool Species

In September the U.S. Fish and Wildlife Service proposed designating 1.7 million acres located in 36 California counties as critical habitat for four species of vernal pool fairy shrimp and eleven vernal pool plants (CEI September 30, 2002). The Service has now released a draft economic analysis containing its estimate of the economic impact on Californians of the proposed designation. These days the economic analysis is almost as significant as the critical habitat proposal itself, because most of the recent litigation over critical habitat designations has been based on allegedly inadequate economic analyses (CEI July 15, 2002).

The analysis finds that over the next 20 years, the proposed habitat could force private landowners and public agencies to absorb between \$5.4 million and \$11.9 million in administrative costs, and up to \$122.9 million in project modification costs. On the

other side of the balance the report finds that designating critical habitat could yield regional and local economic benefits “which are difficult to quantify.”

In order to give interested parties time to review the draft analysis, the Service is extending the deadline for comments on the proposed critical habitat designation from November 25—the original closing date—until December 23. The draft analysis can be downloaded from the Service’s Sacramento office website at: <http://sacramento.fws.gov>. It can also be ordered from the Sacramento office at (916) 414-6600.

Suit Filed to Force Action on Green Sturgeon

Environmental groups still outraged over the Department of the Interior’s failure to release sufficient water to maintain coho salmon population on the Klamath River may have found another species to force such releases. The groups have filed a lawsuit against the National Marine Fisheries Service arguing that the agency has failed to decide whether or not to propose the listing of the green sturgeon (*Acipenser medirostris*) under the federal Endangered Species Act.

The three groups filing the lawsuit—the Environmental Protection Information Center (EPIC), the Center for Biological Diversity (CBD), and the Oregon Natural Resources Council—formally petitioned the NMFS in June of 2001 to protect the sturgeon under ESA. NMFS made the required 90-day finding in December of 2001 that a listing might be warranted. Under ESA, the agency was supposed to decide by June 12 of this year whether or not to propose a listing of the sturgeon based on a 12-month status review of the evidence. This lawsuit is an attempt to force that action. An NMFS spokesman was quoted in the Associated Press as indicating that the status review is complete and the required rule making will be published in the Federal Register within six weeks.

The green sturgeon is one of the world’s most ancient species and is

considered a living contemporary of the dinosaurs. The fish live up to 70 years and weigh up to 350 pounds. The three environmental groups contend that dams, water diversions, pollution, and over-fishing have reduced the sturgeon to only three remaining populations in the Klamath-Trinity River, the Sacramento River, and the Rogue River in southern Oregon. The range of the fish has been reduced by 88% over the last four decades. The groups suggest that the Trinity-Klamath population probably represents the “center of the universe for green sturgeon.”

NMFS Decides Not to List Rockfish

The National Marine Fisheries Service has decided that it will not list the rockfish Bocaccio (*Sebastes paucispinis*) under the federal Endangered Species Act. The fish was the subject of a listing petition filed by three environmental groups in January 2001. It is found off of the California coast south of Cape Mendocino.

NMFS initially found that the groups’ petition contained sufficient information to conclude that a listing might be warranted. However, after undertaking the required 12-month “status review” NMFS concluded that although stocks of the fish are low, it does not warrant protection at this time. The Service will continue to monitor the status of the species, and it remains on the Service’s candidate list for possible future listing.

One of the factors that led to the NMFS decision is the current restriction on takings of rockfish now in effect off of the California coast. The Bocaccio is one of the nine species of fish protected under this action, and thus is not currently in danger from over fishing. A copy of NMFS’ 23 page status review of the Bocaccio can be found on its website at www.nmfs.noaa.gov.

