

Inside This Issue

AIR QUALITY

- The Air Resources Board is set to adopt a new rule that will impose strict emission controls on over 26,000 stationary diesel engines throughout the state (p. 2).
- A settlement of a lawsuit filed by environmental groups against U.S. EPA will require EPA to rewrite its guidance to operators of agricultural irrigation pumps on complying with the Title V program, and will require those operators to reconsider whether emissions from those pumps require a Title V permit (p. 3).
- The San Joaquin Valley air district is beginning work on a new rule that will require real estate developers to mitigate increased emissions caused by vehicles drawn to their developments or pay an in lieu fee (p. 3).
- The Air Resources Board has proposed the state's first designation of non-attainment areas for small particulates (PM2.5) (p. 5).

LEGISLATION

- The state Senate has reluctantly agreed to cap the fee assessed on pesticide manufacturers at 21 mills/dollar—an amount that fails to fully fund the Department of Pesticide Regulation's core regulatory programs (p. 6).
- Governor Davis has signed legislation imposing new requirements on agricultural air pollution sources and establishing a California New Source Review program aimed at getting around recent EPA changes in the federal program (p. 6).

ENERGY

- Governor Davis and the Association of California Water Agencies are objecting to a provision that would limit suits against manufacturers of MTBE and to various other provisions of pending federal energy legislation (p. 7).

SPECIAL REPORT

- Our Special Report is a look by a brownfields expert at the convergence and inherent conflicts between the state's redevelopment process and its brownfields process for converting abandoned or underused sites (p. 8).

ENDANGERED SPECIES

- The U.S. Fish and Wildlife Service has issued a final rule dropping the Sacramento splittail from the list of threatened species under the Endangered Species Act (p. 13).

WATER QUALITY

- The State Water Board's Executive Officer has sent a letter to California's Congressional delegation urging them to oppose proposed legislation that she contends would allow the dumping of partially treated sewage into state "no discharge" zones (p. 13).



California Environmental Insider

- OEHHA has finalized Public Health Goals for eleven chemicals when found in drinking water (p. 14).
- Governor Davis has appointed a new member to the Central Valley regional water board (p. 14).

HAZARDOUS MATERIALS

- The Department of Toxic Substances Control has issued a set of protocols to be used by local and state agencies in investigating closed solid waste sites where burning of waste took place (p. 14).

PESTICIDES

- The Department of Pesticide Regulation has issued new rules governing the application of the fungicide methyl bromide (p. 15).
- DPR has provided County Agricultural Commissioners with a new guidance on how to validly adopt local regulations applicable to pesticide applications (p. 16).

ENFORCEMENT

- Union Oil has been fined by U.S. EPA for failing to file reports under the Toxic Release Inventory program (p. 16).

ARB Ready to Adopt New Control Measures for Stationary Diesel Engines

On November 13, the Air Resources Board will consider adoption of a new statewide Air Toxic Control Measure (ATCM) aimed at controlling emissions from new and existing stationary diesel engines. The new measure is expected to affect approximately 26,000 engines throughout the state.

How The Measure Was Developed

The new measure is being adopted under the Board's Air Toxics Control program (AB 1807). The ARB designated diesel particulates as a toxic air contaminant (TAC) under the program in 1988. In September 2000, the Board adopted a "risk reduction plan" to carry out all feasible reductions of diesel particulates (CEI Special Report July 31, 2000). This measure is one of several that the ARB committed to develop as part of that plan. Several additional measures are on the drawing board, including ATCMs to reduce emissions from residential and commercial solid waste collection vehicles, fuel cargo delivery trucks, transport refrigeration units, and portable engines. Work on each of these measures has already begun.

Initially the staff planned to divide this measure into two separate ATCMs: one covering existing engines and one covering new ones. However, the final version combines the two. Work started on the stationary engine controls in February of 2001 with an initial workshop. Since that time there have been several additional workshops each of which considered revised drafts of the measures with the last such workshop taking place on August 26 (CEI August 15, 2003).

Coverage of the ATCM

The staff is proposing an ATCM that will limit emissions of diesel particulates from new and existing stationary diesel-fueled combustion-ignition engines. Unlike diesel engines used in on- and off-road applications, these engines are currently not required to

meet state or federal engine certification standards.

The staff expects the new rule to cover about 26,300 engines. About 19,700 of these engines (75% of the total) are used in emergency standby operations. The remaining 6,600 engines are considered prime engines and are responsible for about 90% of the emissions from this category of sources. Examples of prime stationary engines are those used in agricultural irrigation pumps, on compressors, on cranes, and on rock crushers.

Requirements of the ATCM

- Owners/operators of existing engines of greater than 50 horsepower (50 hp) will be required to submit information to their local air district describing the fuel use, hours of operation, and other attributes of their engines. This information will be due by July 1, 2005.

- Sellers of engines to be used in agricultural operations (i.e., pumps) or sellers of engines with a rated horsepower of 50 hp or less are required to submit to the ARB information identifying the types and number of these engines sold during the preceding year by January 1, 2006, initially, and annually thereafter.

- By January 1, 2005, all engines greater than 50 hp will be required to use ARB diesel or a "clean" alternative. Clean alternative fuels include ARB diesel/CNG dual fuel systems and alternative diesel fuels that have met the requirements of the ARB's verification procedure.

- New and existing engines will have to meet the following emission standards and operating requirements. These are stated in terms of Best Available Control Technology (BACT) applied by the applicable local air district.

- For new engines of 50 hp or less, the emission standard is the same one applicable to off-road engines contained in 13 California Code of Regulations section 2423.

- For new engines greater than 50 hp used in emergency standby applications (e.g. emergency generators and fire pumps) and operated no more than 100 hours annually, the particulate limit is 0.01 grams/brakehorsepower



Editor in Chief
Roger W. Pearson

California Environmental Insider (ISSN 0895-2299) is published twice monthly by M. Lee Smith Publishers LLC. The annual subscription price is \$487. CEI covers environmental regulatory matters affecting California.

Administrative & Subscription Office

Communications concerning subscription matters should be directed to:

M. Lee Smith Publishers LLC

5201 Virginia Way

Post Office Box 4094

Brentwood, TN 37024-5094

Phone (800) 274-6774

FAX (615) 373-5183

Editorial Office

Communications concerning editorial matters should be directed to:

California Environmental Insider

Post Office Box 7296

Berkeley, CA 94707-0296

Phone: (510) 524-1704

FAX (510) 524-7420

e-mail: RWPearson@aol.com

www.ceitoday.com

California Environmental Publications and California Environmental Insider are not engaged in rendering legal services. If legal advice is needed, the services of a professional should be sought.

Copyright 2003 M. Lee Smith Publishers LLC. Reproduction in any form prohibited without the express permission of M. Lee Smith Publishers. Contact our Administrative Office for further information.

per hour (g/bhp-hr); for those emergency standby engines operated 50 hours or less annually the limit is 0.15 g/bhp-hr.

- For new prime engines greater than 50 hp the limit is 0.01 g/bhp-hr.

- For new agricultural engines the limit is 0.15 g/bhp-hr.

- For in-use (existing) engines of 50 hp or less there is no limit.

- For in-use prime engines of 50 hp or greater the limit is 0.01 g/bhp-hr or an 85% reduction from base levels. For those prime engines that are not off-road certified the limit is a 30% reduction from baseline levels and 0.01 g/bhp-hr by 2011.

- For in-use emergency standby engines there are five different emission limits that vary depending on the hours of annual operation and the purpose of the engine.

- The staff is not currently proposing emission limits nor annual operating hour restrictions for agricultural in-use engines.

- New prime and agricultural engines must meet the required emission standard by January 1, 2005. The compliance deadlines for standby engines and existing engines vary depending on the age of the engine and the number of engines owned by a single operator. Generally, complete compliance is required by January 1, 2009 except for those engines not certified to off-road standards which have until 2011 to comply.

- There are seventeen categories of full or partial exemptions from ATCM requirements. These are generally small categories of engines that the staff has concluded will have minimal impacts.

Air Toxics Hot Spots Act

The staff is currently developing amendments to the Toxics Hot Spots Act regulations to address diesel engines. These amendments will align the Hot Spots regulations with the new ATCM requirements to avoid duplicate regulation. Staff expects to bring this measure to the Board for its consideration during its December meeting.

Economic Impacts

The staff estimates that the cost for California businesses to comply with this measure will total \$47 million. It expects that this cost will fall almost entirely on those who operate prime engines. Operators of emergency standby engines are expected to reduce their annual hours of operations in order to avoid expensive controls.

Implementation

Although adopted by the ARB, implementation of ATCMs like this one is carried out by the local air districts. The districts must adopt a rule that is at least as stringent as the ATCM. The staff plans to work with the local districts in developing their rules.

Date of Meeting and Availability of Staff Report

The ARB hearing to consider this ATCM will take place during the two day November 13-14 meeting of the Board to be held at Cal/EPA Headquarters at 1001 I Street in Sacramento. The precise time will be announced 10 days before the scheduled meeting. A copy of the proposed ATCM along with an accompanying staff report can be found on the Board's website at: www.arb.ca.gov/diesel/diesel.htm or by calling the Board's Public Information Office at (916) 322-2990.

Lawsuit Settlement Requires Ag Diesel Engine Operators to Recalculate Emissions for Title V Purposes

U.S. EPA has announced that it has settled a lawsuit filed by three environmental groups earlier this year over EPA's guidance to operators of diesel engines powering irrigation pumps in California. The settlement will require the operators to recalculate the emissions from their engines based on the potential emissions of those engines. The operators will then have until November 13 to refile applications for Title V permits based on those recalculated emissions.

The lawsuit was filed directly with the Ninth Circuit Court of Appeals

last May after EPA issued instructions to pump operators on how to determine whether emissions from their equipment triggered the Title V threshold (CEI May 29, 2003). The EPA instructions asked the operators to estimate their own "actual" emissions in order to determine whether they needed a Title V permit. The three environmental groups contended in their suit that allowing operators to guess the volume of their own emissions was illegal under the federal Title V program. Instead, said the petitioners, EPA was required to have the farmers calculate the "potential-to-emit" of their engines. The lawsuit accused the federal agency of regulating with a "wink and a nod." As an indication of the inadequacy of the EPA instructions, the environmental groups note that only 18 applications for Title V permits had been filed by the May 18 deadline, far less than what was expected.

Under the settlement, EPA will now take the following actions:

- It will withdraw the guidance it issued in May that relied on the source's own estimate of its actual levels of emissions;

- It will issue a new guidance within 30 days that "better explains a facility's 'potential-to-emit' in the context of diesel engines used as agricultural pumps."

- It will require applicants to reapply for Title V permits by November 13, 2003 using the new guidance.

The three groups who brought the lawsuit are the Sierra Club, Association of Irrigated Residents (AIR), and Our Children's Earth. The three groups were represented by Earthjustice in their suit.

San Joaquin Valley UAPCD Begins Work on Indirect Source Rule

The staff of the San Joaquin Valley Unified Air Pollution Control District will hold a series of "scoping" meetings in October to discuss what is sure to be a controversial

continued on next page

rulemaking—two new rules that will impose mitigation requirements or fees on so-called “indirect sources” of pollution. Indirect sources are essentially new commercial and real estate developments whose construction increases vehicular travel and therefore adds “indirectly” to the Valley’s air quality problems. Although the concept of indirect source regulation is not new, the SJVUAPCD would be the first major California air district to have a rule specifically aimed at such sources.

The District committed to development of an indirect source rule as part of its recently adopted attainment plan for large particulates (PM10) (CEI June 30, 2003). The District also expects the rule to be included in any new ozone attainment plan that the District is required to prepare as part of its anticipated voluntary reclassification as an “extreme” ozone nonattainment area.

Indirect Source Rules in Other Areas

Although none of the state’s largest districts have indirect source rules, several smaller districts have variations on an indirect source program.

- Mendocino County AQMD Rule 1-200 requires indirect sources to obtain an authority to construct (permit) prior to starting construction. The rule is tied into the CEQA process for real estate developments.
- The Great Basin UAPCD’s Rule 216 also requires a permit for indirect sources. Another rule, Rule 301, then imposes a fee on a permittee based on the size of the project and its number of parking places.
- The Colusa County APCD’s Rule 4.8 assesses fees on indirect sources based on their size.
- Placer County APCD has a policy requiring assessment of a proposed project’s emissions as part of the District’s CEQA review process. Those projects generating emissions above a certain threshold must either mitigate those emissions or pay a mitiga-

tion fee.

- Shasta County AQMD’s Rule 3.16 allows the District to place reasonable conditions on any indirect source. The District currently uses the rule to mitigate the impact of new residential dirt roads by requiring paving or the paying of a fee.

The District staff also cites the presence of transportation impact fee programs imposed by a number of municipalities within the Valley. These include the cities of Bakersfield, Lathrop, and Visalia, along with several others. The San Joaquin Council of Governments is in the process of developing regional transport impact fees.

What the District Has in Mind

The District’s new indirect source program will consist of two new rules. **Rule 9510 Indirect Source Review** will contain the basic regulatory language for the program. This rule will require all development projects to calculate the additional emissions that they generate through the attraction of vehicular traffic. Emissions will be estimated by applying the Urban Emissions Model (URBEMIS), which has been utilized by other districts and local governments in estimating emissions from development projects. Rule 9510 will give developers the option of mitigating emissions on-site through project design and location, and will give developers a credit for the installation of infrastructure and equipment at the project site that will reduce emissions.

Alternatively, a developer may pay a mitigation fee that will be assessed under the second rule, **Rule 3180 Indirect Source Mitigation Fee**. Although the staff report contains no estimate of the amount of any such fee, it notes that the 2003 PM10 Plan estimated that emission reductions have a cost-effectiveness of \$4,500 per ton of PM10 reduced and \$9,000 per ton of NOx reduced.

The staff is still undecided on how the program will actually be administered. It is looking at four different options:

- **District Permit Program.** Under this option developers would obtain a permit from the District. The District would require permit applicants to estimate emissions using URBEMIS and require mitigation measures or the alternative fee as part of the permit process.

- **City/County Review.** Under this option, the city or county (whoever is the land use permitting agency) would supervise the URBEMIS analysis, and would impose the mitigation conditions or would collect the mitigation fee. In the latter case the fee would be remitted to the District.

- **District Review.** Under this option, the District would require the developer to provide the documents necessary to perform the URBEMIS analysis. The District would then calculate the fee based on emissions and would provide any credits for specific mitigation measures included in the project. The city/county would then verify that the mitigation measures have been implemented and collect and remit any fees.

- **Simple Fee.** This option would allow the city/county to charge a fee based on certain criteria, such as the size or number of units. Under this option the city/county would collect the fee.

Use of Fees

Any mitigation fees collected would be used by the District to reduce emissions through funding of programs such as the purchase of low-emission school buses, diesel engine retrofits, agricultural water pumping engine replacements, and miscellaneous other mobile source retrofit or replacement programs.

Scoping Meetings

Three scoping meetings will be held to collect information from interested parties.

- October 7 at 1:30 p.m. at the District’s Modesto regional office;
- October 8 at 1:30 p.m. at District headquarters in Fresno;
- October 9 at 1:30 p.m. at the District’s Bakersfield regional office.

In each case, interested parties at the



other two locations can participate via teleconference.

Copies of the preliminary staff report on the proposal can be found on the District's website at: www.valleyair.org.

Coastal Governors Endorse Global Warming Steps

Governor Davis and the governors of Oregon and Washington have announced a coordinated strategy to reduce emissions of gases contributing to global warming. This regional strategy is explicitly intended as an antidote to what the three believe is the federal government's failure to take action to limit global warming.

The simultaneous announcement was made by Governor Davis, Governor Theodore Kulongoski of Oregon and Governor Gary Locke of Washington. The three governors said that they will direct their staffs to work together to provide them with recommendations in the following five areas.

- Use of the states' combined purchasing power to obtain fuel-efficient vehicles and low-rolling resistance tires. For example, the states are working on a uniform specification for the purchase of hybrid vehicles. The California Legislature has passed legislation that will require the state's General Services division to purchase fuel efficient vehicles for the state fleet (SB 552-Burton). Governor Davis is expected to sign that bill.
- Reduce emissions from diesel fuel in transportation through reductions in the use of diesel generators of ships in west coast ports and in the use of diesel powered trucks by creating a system of emission-free truck stops along the Interstate 5 corridor all the way from Mexico to Canada.
- Remove barriers to and encourage the development of renewable electricity generation resources and technologies.
- Develop uniform efficiency standards with the potential to reduce greenhouse gas emissions. The staffs of the three states will specifically work together to deal with federal

limitations on upgrades of appliance efficiency standards, which may include waivers from those limitations.

- Develop consistent and coordinated greenhouse gas emission inventories, protocols for standard reporting, and accounting methods for greenhouse gas emissions, and collaborate on improved scientific tools to more precisely measure the impact of climate change.

In announcing the pact, the three governors emphasized that they would prefer to see action on the national level but decided to act when none was forthcoming. "Obviously, an initiative from Washington D.C. along the lines of what we are doing would be welcome, but in its absence the states have to act," said Davis.

California has already taken a significant step to go after greenhouse gas emissions by adopting legislation last year requiring the Air Resources Board to establish limits on such emissions from automobiles to become effective with model year 2009 vehicles (CEI July 15, 2002).

ARB to Designate Nonattainment Areas for Small Particulates

Last year, in order to carry out state legislation, the Air Resources Board adopted the state's first ambient air quality standard for small particulates (PM2.5) (CEI May 15, 2002). The ARB staff has now proposed designating much of the state as out-of-attainment of that standard. Although the designation is not expected to have any immediate regulatory impact, it could establish a basis for controls at a later date.

Each year the ARB staff reviews ambient air quality throughout the state to determine which areas should be classified as attainment, non-attainment, or unclassified for each of the state's conventional air pollutants. Because the new PM2.5 standard only recently went into effect, this year's classifications are the first time the staff has had to look at the smaller particulates. The staff's initially proposed classifications for PM2.5 are as follows (classifications are made based

on the state's "air basins"):

Non-Attainment Areas

- Mojave Desert (includes Central San Bernardino County)
- Mountain Counties (Plumas County)
- Sacramento Valley (Butte, Sacramento, Sutter, and Yuba counties; and the portion of Placer County within the air basin)
- Salton Sea (Imperial County)
- San Diego (entire air basin)
- San Francisco Bay Area (entire air basin)
- San Joaquin Valley (entire air basin)
- South Coast (entire air basin including San Clemente and Santa Catalina islands)

Attainment Areas

- Lake County (entire air basin)

Unclassified Areas

(these are areas where there is insufficient data to make a classification)

- Great Basin Valleys (entire air basin)
- Lake Tahoe (entire air basin)
- Mojave Desert (remainder that is not designated as non-attainment above; consists of portions of Kern County, Los Angeles County, and Riverside County)
- Mountain Counties (portion not designated above; includes Amador, Calaveras, Mariposa, Nevada, Sierra, and Tuolumne counties and portions of El Dorado and Placer counties)
- North Central Coast (entire air basin)
- North Coast (entire air basin)
- Northeast Plateau (entire air basin)
- Sacramento Valley (portion not designated above; consists of Colusa, Glenn, Shasta, Tehama, Yolo, and portion of Solano counties).
- Salton Sea (remainder not designated above; consists of portion of Riverside County)
- South Central Coast (includes San Luis Obispo and Santa Barbara counties including San Miguel, Santa Barbara, Santa Cruz, and Santa Rosa is-

continued on next page

Particulates

continued from previous page

lands).

Regulatory Impact

There is no requirement under the state act that air districts prepare attainment plans for areas of particulate non-attainment. Thus, there is no regulatory impact from these designations—at least for the time being. The state standard of 12 micrograms/cubic meter (measured as an annual arithmetic mean) is more stringent than the recently adopted federal standard of 15 micrograms/cubic meter. Designations for the federal standard have yet to be made.

Other Proposed Changes

Although the 2002 changes in the particulate standard lowered the annual PM10 standard from 30 micrograms to 20 micrograms, the staff has determined that there need be no changes in current designations for the state PM10 standard.

The staff is proposing some minor reclassifications of areas for purposes of the state ozone, carbon monoxide, and sulfates standards.

Workshop

A workshop on the proposed designations will take place on October 15 from 10 a.m. to 12 p.m. at the ARB Monitoring and Laboratory Division, 1927 13th Street in Sacramento. A copy of the workshop notice and explanation of the changes can be found on the ARB's website at: www.arb.ca.gov.

LEGISLATION

Legislation Leaves Pesticide Mill Assessment at 21 Mills

In the closing minutes of this year's session, the State Senate reluctantly agreed to acquiesce to the Assembly's commitment to keep the assessment on pesticide sales at 21 mills per dollar (\$0.021). The result leaves it up to next year's legislative session to deal with a lack of funding for the Department of Pesticide Regulation that

could end up eliminating much of the state's core pesticide programs.

Going into this year's legislative session, the assessment was 17.5 mills per dollar with a significant portion of DPR's budget and that of County Agricultural Commissioners (CACs) (who administer pesticide permitting on a local level) being covered by the state general fund. Governor Davis proposed raising the assessment to 27 mills/dollar, which would generate sufficient funds to support the Department's core programs without the need of general fund support.

When the budget bill emerged from the Senate, the assessment was set at the Governor's proposed 27 mills with a 45 mill assessment on "restricted" pesticides. These pesticides require permits from the CACs prior to their application. The extra money was designed to support this local permitting process.

When the bill got to the Assembly, some Republican legislators from the Central Valley insisted that the assessment be pegged at 21 mills. In order to get those legislators to provide the necessary votes to pass the budget, Assembly Speaker Herb Wesson agreed to this limitation. The Assembly changes then went back to the Senate for its concurrence.

DPR strongly urged the Senate to reject the Assembly budget version and peg the assessment at 27 mills. It was supported in this position by the California Farm Bureau and other major agricultural organizations who fear that the elimination of DPR programs might create uncertainty among the public about the quality of California produce. The 21 mill assessment, on the other hand, was supported by pesticide manufacturers and some smaller agricultural producers. The Senate, despite the DPR and agricultural association pleas, had little choice but to accept the Assembly change. The final bill (SB 1049) raises the assessment to 21 mills/dollar, makes a one-time appropriation of \$5 million to keep DPR operations running, requires DPR to use the balance of its \$6 million reserve, and increases registration and licensing

fees to help support those programs.

A bitterly disappointed DPR issued a "fact sheet" after the passage of SB 1049 outlining the problems that will recur next year, unless the assessment is raised or the Department is able to continue using general fund money. DPR projects an \$8.2 million deficit for fiscal year 2004-2005 resulting in the following:

- Elimination of the registration program, including section 18 and 24(c) emergency requests;
- Termination of the school integrated pest management program;
- Elimination of pesticide applicator and advisor licensing;
- Elimination of endangered species protection programs;
- Elimination of DPR environmental monitoring programs for air and water.

In addition to the DPR losses, the Department projects substantial cuts in CAC permitting, enforcement, and worker protection programs due to shortfalls in county general funds. The Department also notes that the reduction in monitoring will impact pesticide TMDLs being prepared by the Central Valley regional board that are dependent on monitoring data provided by DPR.

All of this means that the Department's funding problems will once again be an issue during next year's session.

Davis Signs Ag Exemption and New Source Legislation

Governor Davis has wasted little time in signing six bills that together will significantly strengthen the authority of local air districts to control sources of air pollution. Each of the six bills is discussed in detail in our last issue (CEI September 17, 2003).

Five of the bills (SB 700, SB 704, SB 705, SB 708, and SB 709) were authored by Fresno Senator Dean Florez, and are aimed at agricultural sources and sources in the San Joaquin Valley. The most significant of these, SB 700, would eliminate the exemption from local district permitting for

agricultural sources, and would require local districts to adopt new controls on specified agricultural sources. The other four bills are aimed at providing incentives for biomass facilities using ag waste (SB 704), phasing out agricultural waste burning in the San Joaquin Valley (SB 705), raising fines on repeat violators of vehicular smog limits (SB 708), and providing new regulatory authority to the San Joaquin Valley UAPCD (SB 709).

The sixth bill, SB 288 (Sher) attempts to circumvent U.S. EPA's recent actions creating greater exemptions from the requirements of the federal New Source Review rule. The bill does this by creating a California-specific new source rule that prevents local air districts from modifying their existing rules, except under limited situations.

ENERGY

California Critics Rap Portions of Federal Energy Legislation

The Bush Administration's proposed energy legislation is currently in a conference committee to resolve differences between House and Senate versions of the legislation. Governor Davis has sent a letter to the chairman and ranking minority members of the House and Senate energy committees laying out California's opposition to several provisions contained in one or the other of the versions of the legislation. A separate letter has been sent by the Association of California Water Agencies (ACWA) complaining about a partial waiver of liability against producers of MTBE. Although it is questionable whether California has any influence in Washington D.C. these days, it does have considerable experience to provide to the rest of the country on the foibles of energy legislation.

The Governor and ACWA are both agitated about the proposed MTBE liability waiver. The waiver, contained in the House version of the legislation (HR 6), would provide producers of MTBE with immunity from lawsuits contending that MTBE is an inherently defective product. The legislation appears to be aimed directly

at California. Last year, in a case involving South Lake Tahoe, a San Francisco Superior Court jury determined that MTBE was a defective product under California tort law (CEI April 30, 2002). The jury's finding caused MTBE producers to settle with the plaintiffs in the case for a payment of more than \$50 million. Both Governor Davis and ACWA complain that California, which has numerous drinking water wells contaminated with MTBE, should not have its hands bound as far as fashioning a state court remedy.

Unfortunately for California, the MTBE liability waiver appears to be bound together with another provision in the draft legislation that the state strongly favors. This provision would exempt California from the federal requirement for oxygenated gasoline. Instead, the bill would provide for a national ethanol mandate for refiners. This mandate could be met by individual refiners by blending ethanol into their gasoline near its Midwestern sources. This would free California refiners from adding ethanol. California refiners believe that they can meet California's strict clean gas formulation standards without the use of an oxygenate.

Governor Davis would like to see Congress adopt both the national ethanol mandate and eliminate the MTBE liability waiver. He specifically rejects a compromise suggested by some in Congress that would have California accept the MTBE liability waiver in exchange for elimination of the oxygenate requirement.

Other Provisions

Davis' letter relates the state's position on several other issues before the House-Senate conferees.

- **Reliability.** The Governor supports provisions in both versions of the legislation that would strengthen reliability requirements for energy transmission facilities. Citing the recent blackout on the East Coast, Davis contends that the new standards need to be mandatory and must be accompanied by a mechanism to enforce them. "Without real penalties and an effective entity to enforce them, all

the rules in the world will not ensure a stable electricity system."

- **Market Design.** Davis suggests that the final legislation should delay implementation of FERC's proposed "Standard Market Design" (SMD). Davis repeats the concern of other state executives that FERC is attempting with this proposal to usurp state regulatory authorities.

- **Energy Transmission.** Davis opposes any effort that would mandate participation in Regional Transportation Organizations (RTOs). Again this appears to be primarily a states' rights issue. The proposal to force states into RTOs is the "cornerstone" of FERC's proposal, says Davis, and does not allow for regional differences.

- **Federal Preemption.** The House version of the legislation would allow the federal government to preempt state decisions related to transmission and would grant the Department of Energy (DOE) national eminent domain authority to site transmission lines over state objections. These provisions were apparently prompted by the East Coast blackout. Davis contends that the concern is misplaced in the West. He states that "no western state has ever denied a permit for an interstate transmission line." Instead of the preemption provisions, Davis would like to see incentives for transmission investment.

- **Inventory of Coastal Resources.** This is yet another permutation of California's ongoing battle with the federal government over offshore drilling. The provision of concern in the legislation would require the Department of the Interior to inventory potential offshore energy resources throughout the country, including resources in those areas like California that are currently subject to drilling moratoriums. California officials are concerned that the results of the inventory could be used by Congress to override the long-standing moratorium in the name of energy security. Davis' letter also expresses concern that the inventory process itself would be done using seismic surveys, sediment sampling, and other technologies that would damage sea life.



Redeveloping Brownfields Redevelopment

by Richard G. Opper

Richard G. Opper is a founding partner of the law firm of Opper & Varco LLP, in San Diego, California (www.envirolawyer.com). Prior to starting his firm he was a partner in some nationally prominent firms, where he headed those firms' environmental practice groups on the west coast. Mr. Opper's practice emphasizes representing private interests and public entities in various brownfield redevelopment matters. Mr. Opper received his undergraduate degree from the University of California, Santa Cruz, his law degree from the University of California, Los Angeles (in 1976), and a Master's in Public Administration from the Kennedy School at Harvard University.

California has long been noted as a difficult environment for brownfield projects. Laws easing the process of redeveloping these tough properties have not fared well in the Legislature, perhaps because there is such antipathy to development in general, combined with a vigorous and skeptical environmental community. The difficult battles over Senator Escutia's efforts to enact SB 32 (giving cities the power to compel clean-ups) is evidence of the dilemma.

At the same time, the "smart growth" caucus has directed that legislative goals and priorities for California include preservation of our dwindling open spaces and redevelopment of urbanized areas. The state's goal of favoring municipal redevelopment as part of its "smart growth" strategy, and its historic reluctance to help this process by changing its role from "regulator" to "partner," have been grinding away at each other like the meeting of tectonic plates. Can California find true happiness in redevelopment, or is this a new "fault line" for controversy? The success of these projects depends partly on the state reinventing itself from its traditional role of enforcer to one of facilitator.

In this article we look at both roles.

Redevelopment 101

Urban blight presents a new kind of environmental challenge. The command and control programs that we have developed over the last quarter century were most effective when confronting discrete and significant environmental threats. Gearing up the government is an expensive undertaking. Putting this effort forward to control risks that actively threaten a community is reasonable.

This level of governmental response, though, was never intended to deal with some of the subtle environmental impacts that are pervasive throughout the urban environment and often pose challenges to a redevelopment project. Most of these projects are focused on urban land that lies unused, or underused, obsolescent and blighted. Redevelopment of this land further confounds the marketplace because the owners are sometimes uninterested - frequently because of fear of the unknown environmental costs of making the land suitable for some new and productive purpose. The risk to the community from the land in its warehoused state is sometimes minimal and wouldn't rise to a level requiring a regulatory response.

But redevelopment of this property frequently involves the hazardous waste laws simply because almost any human activity leaves impacts on the world around it, and our ability to measure these impacts has grown finer and finer. It's hard to find soils in an urban setting that don't contain enough micrograms of lead to be considered a hazardous waste.

Because the state considers it an important public purpose to eliminate blight and help redevelopment, the Legislature created the Community

Redevelopment Law (Health and Safety Code, sections 33000 et seq.), which authorizes local government to organize redevelopment agencies as separate legal entities that have the power to identify areas of urban blight and adopt plans to eliminate it through redevelopment. These agencies commonly have the government's power to acquire land by eminent domain when the land is in one of these plans, or project areas. These agencies are authorized to transfer the land they acquire to other private entities for developments that are intended to fight urban blight.

Agencies can fund these acquisitions using a technique called tax increment financing, in which a portion of the higher property taxes paid by the owners of the now improved parcels is put to use paying off bonds for financing more projects.

Historically, agencies were skittish about acquiring contaminated parcels because of all the additional problems this posed for projects, many of which were laboring under the most marginal of economic analyses, or pro formas, and were already challenged to become sustainable and successful new developments. Because the cost and time to "cure" the problem was usually unknown at the outset, the extent of this unknown liability was as frightening to an agency as it would be to any potential new developer (or current owner) of the property. This situation led to paralysis and some of the most blighted urban land continued to resist redevelopment. This result undermines the state's smart growth policies, its environmental justice policies and its economic development policies. Fiat brownfields. In 1989 the Legislature acted on a bill by Assemblyman Richard Polanco to do something about it.



The Polanco Redevelopment Act

The Polanco Act (Health & Safety Code sections 33459 et seq.) was originally enacted about fourteen years ago because the City of San Diego's leadership received the electrifying news that a property acquired by the Redevelopment Agency for the City had become part of a regional groundwater investigation. The redevelopment agency had acquired the land in order to redevelop an old gas station corner into downtown housing, and was "record owner" temporarily before turning the land over to a developer. The local water board identified the agency as a "discharger" on a Clean up and Abatement Order because of its temporary ownership of the corner. As a result, the City's agency, along with about half a dozen others who owned old tank sites across a swath of downtown, were going to have to take on an investigation of regional tank leaks that proved to be lengthy and expensive. City leaders went to Sacramento and sounded the alarm.

The Legislature, sympathetic to protecting the public from these costs, gave redevelopment agencies special powers to undertake their own investigations and clean-ups. The Polanco Act provides that a redevelopment agency can demand that owners (and other responsible parties) propose and carry out a remedial plan for property within a project area. If the demand is ignored, the agency can investigate or mitigate the property and recover its costs, plus legal fees and interest. An agency has these powers whether or not it owns the property, as long as the property is within a project area. In addition, an agency has the power to obtain an order from Superior Court, to compel a responsible party to take on a clean-up itself.

There are, of course, a whole host of legal and practical constraints on taking these actions, but if a clean-up is completed with proper oversight, the agency and its successors (and their lenders) get a state-law based immunity for the environmental conditions at the project.

The restrictions imposed on an agency using the Act are primarily those that limit an agency's power to act in other contexts. There are a variety of procedural steps that must be taken before an agency can adopt a plan and create a redevelopment project area, including a CEQA analysis and a lengthy public review and approval process. Once this process is complete and a plan is adopted, an agency is often (but not always) conferred with the power of eminent domain within the project area. This authority is among the most powerful aspects of municipal government and is limited to those purposes for which it is intended. If it is abused, litigation can lie to contest whether property is really blighted and whether the governmental action is serving its purpose.

Recent cases have changed our understanding of when "public purpose" may lie, when it may not, and how one challenges it. (See, 99 Cents Only Stores vs. Lancaster Redevelopment Agency, (2003) 60 Fed. Appx. 123, 2003 WL 932421 (9th Cir.(Cal.)). Agencies can use their Polanco Act powers to investigate and evaluate properties within a project area, but before taking any remedial action they must notify the property owner or other responsible party and provide a 60 day period to respond with a plan of action for a clean up, or an agreement to work cooperatively with the agency to that end.

Familiar with the Act and its advantages, the City of San Diego used it regularly from its inception. However, its use outside of San Diego in its initial years was not as frequent. Now the number of agencies using it is growing steadily. A recent survey by the California Redevelopment Association showed that about 60 of the state's almost 350 redevelopment agencies were actually using (or had used) the Act. Not long ago that figure was lower than 20. It is likely that the Act wasn't used much at first for several reasons. First, the agencies' earliest experiences in court were sometimes unfavorable, and there was little case law interpreting the Act. Another constraining circumstance

is the Act itself - it doesn't lend itself to last minute use (although it is possible), because proper employment of Polanco takes some forethought and planning, for which there was little guidance. Now the courts are filling in many of the gaps. Judicial interpretations of the Act have been supportive of brownfield redevelopment. It is significant that the Polanco Act powers can only be invoked by a redevelopment agency, but can only be implemented through coordination with a state agency. These projects require a local and state partnership to accomplish the Legislature's expressed intent: to help agencies get these tough projects done by holding responsible parties liable for the clean up costs.

CERCLA Amendments - a Side Step?

Ironically, this legislative purpose was recently undercut as a result of its linkage to the federal act from which the "scope and standard" of liability for Polanco is drawn - that granddaddy of all hazardous substance liability laws - Superfund, or CERCLA. A longtime stalemate over the reauthorization of Superfund had stymied any CERCLA reform in Congress for years. However, brownfield redevelopment (plus the peculiar political circumstances of the post 9/11 period) provided the fulcrum for change. Acknowledging that the web of CERCLA liability had made properties difficult to market, Congress tried to solve the problem by cutting holes in the web. New liability limitations were enacted, providing for a clearer path (and presumably greater numbers) of "innocent landowners," "bona fide prospective purchasers," and other "escapees" of CERCLA's reign of terror.

Congress' decision to provide this new "escape clause" from CERCLA liability has placed new limits on redevelopment agencies in California. It is fair to question, and too early to say, whether Congress' approach at "solving" the problem of brownfields will be successful. A re-

continued on next page

Brownfields

continued from previous page

cent critical article in the UCLA Journal of Environmental Law and Policy takes issue with the policy choice and its likely outcomes [see, Kettles, 21 UCLA J. Env'tl. L. & Pol'y 1]. It is clear, though, that these new federally defined categories will start to impact what redevelopment agencies can attempt. Some fear that limiting the ability of redevelopment agencies to hold responsible parties liable (or limiting the group of those defined to be "responsible parties" – particularly when they are the landowners) for clean-ups will lead to more costs being shifted to the public sector – and that means, inevitably, that fewer of these projects will get done.

The Evolving State/Municipal Relationship

Despite this legislative equivocation, the past few years have seen more and more cities embrace the Polanco Act. Development pressure and widespread urban blight have required cities to find creative ways to keep redevelopment projects alive – even in the face of contamination. Sadly, we are also learning that contamination isn't limited to industrial sites – almost anywhere people have worked for long periods of time requires an assessment of environmental conditions.

When these projects are facilitated by redevelopment agencies, using Polanco, the projects require state oversight even when local agencies are used. In order for a local agency, or CUPA ("Certified Uniform Program Agency"), to be used for oversight under the Act, the authority must be delegated by the state's "Site Designation Committee." Currently, anybody (including a redevelopment agency) using this process has to agree to become a "responsible party." This troubles many public agencies, and some are seeking legislative reform. For three legislative sessions in a row, the California Redevelopment Association has supported this legislative reform, but it has yet to find expres-

sion in a bill. Cal-EPA expressed an initial willingness to support such legislation, but time alone will tell whether it can be achieved, and it is not on the active agenda of the state at the moment.

This willingness of the state to act in ways supportive of the local government entities that are taking on these projects is evidence of a growing and symbiotic relationship. The state supported the repeal of the "sunset" provision in the Act in 2002, and is now considering other ways that it can become a facilitator, as that relationship is far more constructive than the traditional regulatory model. But there are other challenges.

As local government becomes more proactive, different stakeholders increasingly bring their differing agendas to the process. When an agency and a responsible party, often a property owner, are at loggerheads, it is often the role of the state (or local) oversight agency to act as arbiter. Tension between the conflicting interests of the agency (needing a satisfactory clean-up) and the responsible party (desiring to minimize costs) is not unusual. Although the parties often turn to the state or local agency to make the final "call" about clean-up requirements, traditionally the only process for doing this is found in that lumbering regulatory quagmire known as the National Contingency Plan, or "NCP," discussed later in this article.

Suffice it to say this regulatory approach is ill-suited to redevelopment projects. However, many members of the redevelopment community embrace the state's potentially constructive role as arbiter and would support the development of clearer guidelines for this process. It ought to be possible to provide a neutral forum for a property owner or other responsible party that wants to propose alternative clean-up plans, as long as the statutory constraints (that alternative plans still have to be consistent with getting the project done safely and on time, and end-use decisions are still within the purview of the local redevelopment agency) are re-

spected. This is, in a way, a new role for the regulators and they are uncomfortable with it, even if only for lack of any clear guidance.

The "New Deal"

Another important milestone in the state/municipal brownfield relationship is before us. Years of discussions between the California Redevelopment Association and the Department of Toxic Substance Control's management, and increasing experience with these state/municipal partnering issues, are leading us towards new and more practical solutions. Usually, one of two agencies speaks for the "state" in these clean-ups, the state's nine regional water boards or DTSC. Generally, if the environmental condition doesn't involve a threat to water, DTSC calls the shots. However, many public agencies were wholly unwilling to sign up to DTSC's historic "Voluntary Cleanup Agreement", or VCA, because of its implications about becoming a responsible party.

The legal commitment of the VCA, premised on Chapter 6.8 of the Health and Safety Code, left many questions unanswered about the potential scope of a "volunteer's" responsibility. Up to now, agencies, like almost all others, were given no other option for environmental oversight. However, DTSC has recently proposed a new "Environmental Oversight Agreement", or EOA, to be used with redevelopment agencies. While the details (as of the time of this writing) are still being negotiated, the idea behind DTSC's proposal is to both reassure redevelopment agencies that they don't become "responsible parties" merely because they enter into an oversight agreement, and to reassert that flexible procedures should be used to help assure project success. This is widely viewed as a great step in the direction of encouraging agencies to take on these projects.

DTSC management has candidly observed that the department has learned some interesting lessons from running the "schools program" – mandated since the Belmont Learning Center debacle. In that brownfield



disaster, millions of dollars were invested without appropriate regulatory oversight in an area with unusual environmental conditions - and the school district still can't use the property. Reaction to the mistake resulted in a new statutory requirement for DTSC oversight of all school sites. What we have learned is that the school oversight program may provide a useful analogy for more brownfield redevelopment. DTSC has noted a different "corporate culture" that has evolved with this program - where the government-to-government relationship has fostered a sense of "serving clients" rather than acting as the enforcers. All the "clients" of this program are innocent of environmental bad deeds, they just need the land to build schools. These were among the few voluntary clean-ups that didn't require a VCA, but used a newly developed EOA. For various reasons, the DTSC started viewing and treating the school districts in new and practical ways.

Redevelopment agencies, like schools, are a form of local government, and, like schools, are not the polluters. These agencies are usually only "responsible parties" because of their intention to acquire property for public/private projects. The California Redevelopment Association has taken the lead as advocate of a new "Polanco" EOA, in the hope that brownfield redevelopment, using Polanco, will evolve to follow the schools program model, where DTSC has learned to become more of a "facilitator" than an "enforcer," thus enabling school sites to be developed at reasonable cost and within acceptable schedules.

The concept of an "Environmental Oversight Agreement," as distinguished from the old and nonnegotiable Voluntary Clean-up Agreement and its "Consent Order" format, helped with the success of the schools program and is likely going to bring more success when used with the redevelopment agencies. It is an encouraging development for many municipalities. The adoption of this new EOA and the appointment of a state coordinator for brownfields,

Megan Cambridge, both suggest an appreciation within the department of the opportunities for state and municipal partnerships. But the path is not all rosy, as the state's budget problems still leave cities worried about the capacity of the state to readily provide the help and support that is needed to keep projects on track.

Our CERCLA Legacy - the NCP

Currently, one of our greatest challenges to the state/municipal relationship stems from the different perceptions of the NCP. It is truly remarkable how resistant we and our institutions are to change. This is apparent when the conversation between the cities and the state turns to the gift that keeps on giving, the National Contingency Plan, or NCP. The need for the NCP grew out of particular circumstances - a desire for some consistent methodology for EPA to use when cleaning the huge superfund sites. These "super projects" often cost tens or hundreds of millions of dollars and take years, sometimes decades, to complete. Because EPA was free to make clean-up demands that could not be judicially reviewed (given the statutory constraints), a lengthy set of regulations, evolved over decades. The result of this regulatory epic, if you poke at the details long enough, is at least modestly confusing, turgid and draped with enough layers of process to allow some consultants to make whole careers publishing iterative, mind-numbingly boring reports on the same site.

Nowhere does the NCP have any instruction about how its process is to be combined with the municipal brownfield redevelopment process - it is wholly silent about those pesky details like closings, where banks are expected to get some assurances, or what "feasibility" might mean in light of a changing end use and project construction schedule. An approach to these issues is possible to construct out of the NCP, but only by making whole-cloth changes to "traditional" approaches. This is cold comfort to those who find security in the lengthy

checklists of detailed regulatory instruction found in the NCP. (The NCP's "public outreach process," for example, is particularly fascinating to try and integrate into a typical CEQA project approval process.)

Nonetheless, the state recently suggested that all the clean-ups done by local agencies must conform to the NCP. (See, Response Action Regulations proposal for Title 22 by DTSC, Draft of 5/12/03.) Readers of CEI may recall the reporting on City of San Diego RDA vs. Salvation Army, 103 Cal.App. 4th 755 (2002) (CEI November 27, 2002). The Salvation Army opinion is the leading guidance on the purpose and requirements of the Polanco Act, and the Court concluded, among other holdings, that an allegation that a redevelopment agency did not follow the NCP is not a defense to cost recovery using the Act. Still, even today, almost a year after the Salvation Army decision, the primary defenses encountered in cost recovery actions under the Act continue to be drawn from arguments based on the NCP. We should break the ties that bind us to this cumbersome process. Perhaps our state partners ought to rethink their proposed regulations in light of the Salvation Army decision and redevelopment realities. The issue of NCP consistency is frequently unhelpful to good projects, adding unnecessary time and costs, which Congress itself realized when it provided, in its recent brownfield reform package of CERCLA amendments, that compliance with the NCP would only be required "as appropriate" for any of the brownfield redevelopment projects that would be funded with federal grant dollars. No sense wasting *that* money!

Injunctive Relief

On August 28, 2003, redevelopment agencies were handed another strong opinion supporting their capacity to undertake projects using the Polanco Act. The facts are these: San Diego's RDA, a redevelopment agency, entered into a Joint Powers Agreement with the San Diego Port District for

continued on next page

Brownfields

continued from previous page

the purpose of a clean-up of a site under regional water board jurisdiction in a project area. A 60-Day Notice letter to provide a clean-up plan was sent on behalf of the agencies to San Diego Gas and Electric, which failed to respond with either a plan or an agreement to work cooperatively on the site.

When the RDA went to court to seek an order to compel SDG&E to undertake the clean-up itself, the company demurred to the complaint, asserting that the agency had no standing to use the Polanco Act, because it would be indemnified by the Port under the Joint Powers Agreement, and because the Act did not provide for an Order to Compel. The trial court agreed and, by May, had dismissed the agency's request for injunctive relief. The Court of Appeal agreed to hear an expedited appeal. The Court reversed the trial court rejecting the argument that the Act does not provide for injunctive relief, and also rejecting the argument that injunctive relief cannot be obtained upon less than a showing of "imminent and substantial endangerment." City of San Diego Redevelopment Agency vs. San Diego Gas & Electric, ___ Cal. App. 4th ___ (2003). The Court of Appeal also rejected the attack on the agency's standing in light of the clear legislative mandate and sent the matter back to the lower court with directions to reinstate the case.

This opinion justifies reliance by redevelopment agencies on a new strategy, and suggests that, in the right cases, the public can avoid the cost of clean up and the risk of cost recovery litigation altogether, and shift those costs and risks to the "responsible parties" and "dischargers" - arguably where they properly rest.

Who Wins? Who Loses?

Using the Polanco Act in California helps get brownfield projects done. These are tough projects, and it isn't easy to find developers, lenders, and even tenants who will commit to projects without substantial assur-

ances. The Act provides a vehicle for making sure projects are safe (by providing separate and independent oversight - as distinguished from the CERCLA model which is based on regulatory "process," the NCP) and helps ensure that the cost of environmental mitigation is borne by responsible parties or dischargers.

Defendants have sometimes argued that there are two "unfair" aspects to this process. First, that it is unfair to apply "joint and several" liability principles to responsible parties and second, that it is unfair that a local government entity gets to make a decision that can change the end-use of a property from industrial to residential.

As to the first argument - the most common "responsible party" in a redevelopment project is the owner of the property being acquired for redevelopment. True, owners are frequently able to argue, and prove, that not all the contamination on their property was caused by them or occurred on their "watch." These are technical arguments that have most relevance to the technical world of CERCLA. Although there are differing views historically, a majority of common law cases in California hold that property owners are routinely liable for the "cost to cure" nuisance defects related to their property. The same result occurs from considering the value of property in the constitutional terms of just compensation - defined to be fair market value in California. The law is clear that there is no "value" to the property owner that can ignore the presence of a nuisance, as title to property does not include the "right" to maintain a nuisance. Property owners have, of course, the right of contribution or equitable indemnity or other action against other potentially responsible parties - but the buck starts with them. Polanco merely provides an expedient process for achieving that goal. The benefit to the winners, which include the many stakeholders who benefit from brownfield redevelopment, especially the communities that have suffered the burdens of a dirty neighbor for too long, should

outweigh the costs to the losers.

The second argument, that the government has "unfairly" changed the use, depends on your point of view, and reflects a well known reality that most property owners would rather be next to a redevelopment project than under one. Most of the redevelopment choices made by local government have a real and immediate impact on property and, therefore, the people who own it. These properties are often not "moving" in the marketplace because of contamination - or the fear of it. The problem may well persist unless local government is willing to use its powers to facilitate redevelopment and kick-start the marketplace. This requires hard choices.

Imagine two gas stations, across the street from each other. They've both been there for decades. The city decides to acquire a city block and build sorely needed downtown parking with a below street-level lot. Which block is selected? The one station owners will likely face costs for investigating and cleaning the leaks that are commonly associated with old tanks and will have the business relocated or acquired, while the other remains and likely prospers more than ever before. Seen from the vantage point of the first owner only, this seems unfair. But seen from the vantage point of the community that needs downtown parking, it's a matter of which eggs are chosen for the omelet. If the best block for the parking structure displaces a gas station, then that owner will have to face decisions that he or she didn't seek, but cannot fairly avoid. These are the costs, the Legislature has made plain, that should be borne by responsible parties, often the property owners, and not the public. I believe that ensuring the predictability of this outcome does more to assist the success of brownfield redevelopment projects than Congress accomplished with its own brownfield reform package. Preserving and strengthening the Act is our best path to turning our brownfields green.



ENDANGERED SPECIES

Sacramento Splittail Delisted

The U.S. Fish and Wildlife Service has issued a final rulemaking dropping the Sacramento splittail (*Pogonichthys macrolepidotus*) from the list of “threatened” species under the federal Endangered Species Act. The Service’s action results from its reanalysis of the population trends of the Sacramento Delta species after it was ordered to do so by Judge Oliver Wanger of the U.S. District Court in Fresno.

The splittail is a small member of the minnow family. It inhabits the Sacramento-San Joaquin Delta, and its population has declined significantly from its historic range due to modifications of its habitat (loss of wetlands, diking, etc.) and the withdrawal of water by the State Water Project and Central Valley Project. The Service listed the splittail as threatened in 1999 (CEI February 16, 1999).

The listing was immediately challenged by the San Luis & Delta-Mendota Water Authority and several other farm water agencies. The groups feared that the listing might result in the shutdown of the water pumps used by the two projects. In their lawsuit, the groups argued that the analysis used by the Service in listing the splittail was flawed in that it ignored evidence that the splittail’s population was increasing. Judge Wanger agreed and remanded the matter to the Service for its reconsideration (CEI July 13, 2000). However, the Judge agreed to leave the splittail on the threatened species list pending the Service’s reanalysis.

The Service then began a new comment period for reconsidering whether the splittail should be listed. The initial comment period was extended four times reflecting the Service’s changing views on what type of model it should use in analyzing the admittedly sketchy data on the species’ population trends. The Service ended up using an analysis favored by the California Department of Fish and Game and the U.S. Bureau of Reclamation. The Service con-

cluded that the existing population of the splittail made it unlikely that its survival would cause it to face extinction in the foreseeable future. Although the fish’s population continues to be threatened by water withdrawals in dry years, the Service felt that improvements in the Delta being implemented through the CALFED and Central Valley Project Improvement Act (CVPIA) processes will be sufficient to mitigate these threats.

The Service’s decision was published in the September 22 Federal Register [68 FR 55139].

WATER QUALITY

State Board Objects to Congressional Effort to Allow Limited Discharges in No Discharge Zones

At the request of the San Diego regional board (Region 9), State Water Board Executive Director Celeste Cantu has written a letter to California’s Congressional delegation urging it to oppose proposed federal legislation that she contends would eliminate the state’s ability to limit discharges of partially treated sewage in state no discharge zones. The legislation (HR 1027) was introduced in February by New Jersey Republican Jim Saxton. It would amend the federal Clean Water Act to prohibit states from banning discharges from recreational boats that install a new type of Marine Sanitation Device (MSD). The State Board contends that the new prohibition would allow the disposal of partially treated sewage in its recreational waters thereby imperiling both swimmers and divers.

Under section 312 of the Clean Water Act [33 USC section 1322], recreational vessels are prohibited from discharging sewage in the waters of the United States, unless they use MSDs that are certified by EPA. Section 312(f) preempts states from establishing their own limits on sewage discharge, so long as the boater is using the EPA certified device. However, subsection 312(f)(1)(B)(3)

allows a state to apply to EPA for authorization to completely ban discharges in waters of the state that require greater protection. In order to receive authorization, the state must demonstrate that adequate on shore pump out facilities exist to service recreational boaters. California has successfully applied to EPA for the creation of 14 of these “no discharge” zones. In these areas, recreational boaters may only discharge waste into holding tanks. Examples of no discharge areas in California include Avalon Harbor at Santa Catalina Island, Mission Bay in San Diego, Lake Tahoe, and Richardson Bay in Marin County.

Representative Saxton’s bill would require EPA to certify a new type of MSD device known as a Type 1A device. This device treats recreational vessel sewage to a standard of 10 fecal coliform and removes 35% of biochemical oxygen demand (BOD). Saxton’s bill then bans any state from prohibiting discharges in its no-discharge zones from boats using Type 1A devices.

When this bill was brought to the attention of Region 9, the staff asked the regional board to oppose the bill. The staff was particularly concerned with the impact of the bill on divers. It points out that the introduction of non-toxic bottom paints on boats will require greater frequency of boat bottom cleaning and thus more business for divers. The staff envisioned the unpleasant possibility of partially treated sewage “raining down” on the divers while they are doing their work. The staff also expressed concerns that extensive use of the Type 1A devices would make it more difficult for Region 9 and other regions required to prepare fecal coliform TMDLs for no discharge waters.

In her letter to the state’s Congressional delegation, Ms. Cantu expresses concern over the impact of the bill on the state’s seafood industry and restaurants if the public perceives that the state’s recreational waters are polluted. She cites her understanding that the bill is aimed at addressing

continued on next page

State Board Objects

continued from previous page

problems associated with Rhode Island's discharge zone, which includes all of its ocean waters extending three miles from shore. She points out that California's zones, however, are typically located in enclosed waters with limited circulation.

HR 1027 has yet to be acted upon. It is assigned to the House Committee on Transportation and Infrastructure.

OEHHA Finalizes Eleven Drinking Water Goals

The Office of Environmental Health Hazard Assessment (OEHHA) has released Technical Support Documents (TSDs) supporting final Public Health Goals (PHGs) for eleven chemicals when found in drinking water. The final PHGs for the chemicals are for the most part the same as those originally proposed in June of last year (CEI June 14, 2002). However, the agency has revised three of the PHGs, and has made changes to the text of the TSDs for most of the chemicals in response to public comment.

Under the state's Safe Drinking Water Act, OEHHA establishes PHGs based solely on consideration of the health impacts of the ingested chemicals. Once a PHG has been established, the Department of Health Services then reviews it and establishes a legally binding Maximum Contaminant Level (MCL) set as close as is economically and technically feasible to the PHG. The PHG itself is non-regulatory, although water suppliers have to report to their customers any variance between the quality of the water they supply and the standard set by the PHG. PHGs are also occasionally used as targets in groundwater cleanup orders.

The eleven chemicals and their final PHGs are as follows:

- **Asbestos.** 7 million fibers per liter (7 MFL).
- **Barium.** 2 mg/l (2 ppm). This differs from the 0.7 mg/L PHG originally proposed. EPA currently has a MCL equal to 2 mg/L while DHS actually

has a more stringent MCL of 1 mg/L.

- **Beryllium.** 1 microgram/L (1 ppb)
- **Chlorobenzene.** 200 micrograms/L (200 ppb) for chlorobenzene. This is less stringent than the 100 micrograms/L originally proposed. It is also less stringent than EPA's current MCL of 100 micrograms/L (100 ppb).
- **1,1-Dichloroethane (1,1-DCA)** 3 micrograms/liter (3 ppb)
- **Di-(2-ethylhexyl) adipate (DEHA).** 0.2 mg/liter (0.2 ppm). This is more stringent than the 0.6 mg/L (0.6 ppm) originally proposed. Both DHS and EPA have MCLs of 0.4 mg/L (0.4 ppm).
- **Ethylene dibromide.** 0.01 micrograms/liter (0.01 ppb)
- **Hexachlorobenzene.** 0.03 micrograms/liter (0.03 ppb)
- **Silvex.** 25 ppb
- **Tetrachloroethane (TCA).** 0.1 micrograms/L (0.1 ppb)
- **Toxaphene .03 micrograms/liter (.03 ppb)**

Copies of the final TSDs can be found on OEHHA's website at www.oehha.ca.gov.

New Member Appointed to the Central Valley Regional Board

Governor Davis has announced the appointment of Lucille Palmer-Boyd to the Central Valley Regional Water Quality Control Board. Ms. Palmer-Boyd, 51, of Newman in Stanislaus County, has been a business agent for the Operative Plasterers and Cement Masons Local 300 since 2001. Previously, she held various other positions with labor organizations representing workers in Stanislaus and surrounding counties. She has been a member of the Plasterers and Cement Masons Union since 1985.

Ms. Palmer-Boyd will be joining probably the most conflicted regional board of the nine in the state. The Central Valley board has been besieged by representatives of environmental and agricultural groups over its handling of wastewater discharge waivers for agricultural dischargers. The regional board recently extended

the waiver for those discharges, an action that pleased neither side. Ms. Palmer-Boyd will fill the public (undesigned) position on the Board.

HAZARDOUS MATERIALS

DTSC Issues Protocols for Burn Dump Sites

The Department of Toxic Substances Control has issued a set of protocols to be used by local and state agencies in investigating closed solid waste disposal sites where burning of waste took place. DTSC received input from both the Integrated Waste Management Board and the State Water Board in preparing the protocols. The issuance of the protocols fulfills an obligation imposed on the Department by legislation enacted last year (AB 709 Wayne).

The protocols are set forth in a 71 page guidance document. The guidance is intended to provide assistance to responsible parties, their contractors, local solid waste enforcement agencies (LEAs), and state regulatory agencies. It has the following specific purposes:

- To provide guidance on appropriate screening procedures for waste and site characterization;
- To provide appropriate options that may be used for screening of potential risk to public health, safety, and the environment;
- To describe the roles of regulatory agencies and specify regulatory authority; and
- To fulfill the requirements of AB 709.

DTSC emphasizes that the guidance does not itself impose any regulatory requirements on responsible parties or agencies. The procedures set forth are recommendations only. Other technically equivalent procedures may exist that can be utilized at burn dump sites.

The document is built around a Preliminary Waste Characterization



Study (PWCS) for each covered site. In preparing the PWCS, the responsible party or agency will undertake a historical records review, do some preliminary sampling, perform a health risk screening evaluation, do an ecological screening assessment, and enter into a consultation process for selection of a lead regulatory agency. All of these elements of the PWCS process are laid out in separate chapters in the guidance.

The guidance document emphasizes that this PWCS process is not necessary or appropriate for all burn dump sites. If the LEA has determined that the site is stable, there is no threat to human health or the environment, the site is not currently a "sensitive land use" nor is it proposed for one, and there is no application for AB 2136 funding, a PWCS need not be completed. The AB 2136 process involves a request for a loan from the IWMB to a local government for the purposes of a solid waste cleanup.

The guidance also attempts to explain the rather hazy dividing lines in oversight authority of DTSC, the IWMB, and the State Water Board over burn dump sites. Generally, DTSC has authority to characterize burn ash as a hazardous substance and to determine the need to comply with the state's hazardous materials and hazardous waste laws. The IWMB's role is to provide assistance to LEAs in investigating the sites, and to participate in the remediation of high priority sites where the responsible party is unable or unwilling to perform. The SWRCB and the nine regional boards have the authority to require cleanups at burn dump sites where there is a threat or impact to surface or groundwaters.

The burn dump site protocols are available on the DTSC website at: www.dtsc.ca.gov.

PESTICIDES

DPR Releases Draft of Methyl Bromide Regulations

The Department of Pesticide Regulation has released draft regulations that will significantly tighten the Department's requirements for the application of the fumigant methyl bromide. The Department contends that the new regulations will impose the first geographic use limits on methyl bromide in the nation, and DPR intends to ask U.S. EPA to impose similar restrictions on methyl bromide users throughout the country.

Status of Methyl Bromide Use

Methyl bromide is a gaseous fumigant used to treat soil before planting a wide variety of crops. It is used most extensively by strawberry growers in the Central Coast area of California (Ventura north through Santa Cruz Counties).

The pesticide has been implicated in the destruction of the upper ozone layer. Consequently, under the Montreal Protocol, the use of the chemical is being gradually phased out with full phase out scheduled for 2005. However, the Protocol allows treaty signatories to exempt "critical uses" from the phaseout. A critical use is one for which no feasible alternative exists. Earlier this year U.S. EPA submitted 16 critical use exemptions to the United Nations, which supervises compliance with the Protocol. California users are among those expected to benefit should EPA's requests for exemption be granted (CEI February 14, 2003).

Regulation in California

For some time methyl bromide has been a "restricted" material in California, meaning that anyone proposing to apply the fumigant first has to obtain a permit from the applicable County Agricultural Commissioner (CAC). In December of 2000, DPR adopted a number of changes to its regulations governing methyl bromide imposing new restrictions on its use to protect against short-term

exposure to agricultural workers and the neighboring public. Those regulations became effective in January of 2001. Additional restrictions were adopted in June 2001 that imposed further obligations on field fumigation. These additional regulations were adopted on an emergency basis and ultimately became final in April of 2002.

Meanwhile, a San Francisco Superior Court judge ruled in April of 2002 that DPR had failed to adequately consult with the Department of Food and Agriculture in adopting the December 2000 regulations. He voided the regulations but issued a 45-day stay to enable the Department to adopt replacement regulations. In May, DPR adopted the same regulations (including the June 2001 additions) on an emergency basis (CEI May 31, 2002). Those regulations were readopted on an emergency basis in May of 2003 and those emergency regulations remain in effect.

The Department's Proposal

The Department is proposing to make the December 2000 and July 2001 changes permanent. It is also proposing a number of additional changes based on the need to protect against seasonal exposure. The current emergency regulations protect against short-term (acute) exposure only. However, the Department was sued by environmental groups who contended that it also should protect against seasonal exposure. This occurs when farm workers or nearby residents are exposed to continuing applications of methyl bromide to the same fields during the August to October peak season for the fumigant's use. The current short term restrictions are aimed at an exposure target level of 210 parts-per-billion. Although these restrictions will remain, they will be joined by further restrictions aimed at a target exposure of 9 parts-per-billion for children and 16 parts-per-billion for adults. This is an average exposure level over the selected "season."

The Department will enforce this new standard primarily through the first

continued on next page

Methyl Bromide

continued from previous page

geographic use caps in the nation. Under the Department's proposal, methyl bromide applications within a single township can not exceed 270,000 pounds in any one month. A township is a defined land surveying unit consisting of 36 square miles.

Based on 2001 data, the Department does not believe the new restrictions will cause pesticide applicators any great problems. During 2001, the highest use by any township (a unit straddling the Monterey/Santa Cruz County line) was 202,385 pounds.

In addition to the geographic caps, the draft regulations propose two additional major changes from the July 2001 version (which is being reenacted in this package):

- Mandatory buffer zone distances and durations are being put into the regulations. The current regulations contain advisory buffer zones. These could be changed by DPR upon request by an individual county without a formal rulemaking. This will no longer be possible.

- New measures for worker protection have been added to reduce exposure to the 16 ppb seasonal level. The changes include a provision clarifying that the worker protection standards apply not only to applicators, but also to equipment handlers, shovelers, and those involved in tarp cutting, maintenance, and removal. Maximum work hours in a 24-hour period are clearly specified and vary depending on the application method used. The hours for some activities can be increased, if the application rate is less than the maximum or if proper respiratory protection is worn.

Expected Criticisms

Although the Department has just issued the proposals, it is clearly expecting challenges from both sides. It notes that environmental advocates favor a 1 ppb target exposure for children, while industry has advocated targets of up to 36 ppb for children and 64 ppb for adults. The agency expects to deal with these

differing views during the comment period.

Hearings

The Department has scheduled three hearings on the proposed regulations:

- November 14 beginning at 1 p.m. at Cal/EPA Headquarters, 1001 I Street in Sacramento, with a 10 a.m. informational workshop preceding the hearing;

- November 15 beginning at 1 p.m. at the Gem and Mineral Building, Seaside Park, 10 West Harbor Drive in Ventura; and

- November 17 at 6 p.m. at the Salinas Community Center, 950 N. Main Street in Salinas.

Comments are due by November 18. A copy of the draft regulations and further information can be found on DPR's website at: www.cdpr.ca.gov under the "Laws and Regulations" category, or by calling Linda Irokawa-Otani at (916) 445-4300.

DPR Provides CACs with Guidelines in Issuing Local Regulations

The Food and Agriculture Code contains a prohibition against local regulation of the registration, sale, transportation, or use of pesticides [Food and Agriculture Code section 11501.1]. Sections 11503-11511 of the Code contain an exception to this prohibition that allows County Agricultural Commissioners (CACs) to adopt local regulations that supplement those of the Department of Pesticide Regulation (DPR). Regulations adopted by a CAC can cover the conduct of pesticide applications, the records and reports of those operations, applications within a quarter mile of a school, and qualification requirements for pest control business registrants, persons in charge of pest control operations, and persons employed by registrants to apply pesticides (other than by airplane).

The state Administrative Procedure Act does not technically apply to the CACs' issuance of local regulations. However, the Food and Agriculture

Code does require the CACs to follow APA procedures to the extent practicable in issuing local regulations. It also requires DPR to review CAC issued regulations to ensure that they meet the APA's standards of necessity, clarity, authority, and consistency.

DPR has now issued a guidance to the CACs aimed at giving them clear directions on how to meet APA standards and thereby ensure that DPR will accept any regulations they adopt. The guidance outlines the meaning of some of the APA sections, recites standards for adopting emergency regulations, and discusses CEQA compliance. The guidance itself has no regulatory impact. It is merely informational.

A copy of the guidance can be found on DPR's website at: www.dpr.ca.gov.

ENFORCEMENT

Union Oil Fined for Right-to-Know Violations

U.S. EPA Region 9 has levied a \$105,600 fine on Union Oil Company of California for the company's failure to file reports under the Toxic Release Inventory (TRI) program. TRI reporting is required under the federal Emergency Planning and Community Right-to-Know Act (EPCRA).

The releases in question occurred at UNOCAL's Wilmington refinery, which the company has subsequently sold. EPA accuses UNOCAL of failing to report releases of ammonia, hexane, methyl tert-butyl ether (MTBE), sulfuric acid, tetrachloroethylene, and 1,1-trichloroethane. All of these failures allegedly occurred in 1996. They were uncovered by EPA inspectors during a routine inspection of the refinery in 2000.

