

Inside Cal/EPA

An exclusive weekly report on environmental legislation, regulation and litigation
from the publishers of Inside EPA

Vol. 16, No. 27 — July 8, 2005

Confirmation fight seen

ACTIVISTS SEE SCHWARZENEGGER DTSC DIRECTOR PICK AS NEGATIVE TREND

Environmentalists are predicting Gov. Arnold Schwarzenegger's pick to head the toxics department will face close scrutiny from the Senate, with lawmakers expected to raise questions about the nominee's allegedly conservative views and relative lack of experience. Additionally, some environmentalists view the nomination of Timothy Swickard, currently the department's chief counsel, as part of a growing trend that has seen the governor appoint pro-business candidates to top environmental posts.

Meanwhile, a toxics department spokesman and industry sources say the appointment is a sign that the governor wants the department to continue its emphasis on strong enforcement of hazardous waste laws and

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Activists lose challenge

WATER BOARDS WIN ANOTHER LEGAL BATTLE OVER DISCHARGE WAIVERS

A Sacramento County judge last week upheld two contested regional water board conditional waivers of waste discharge requirements (WDRs) for timber harvest activities, marking the second time in less than two months that the courts have validated the boards' approach to crafting controversial waiver programs. The judge's decision is another blow to environmentalists, who in early May also lost a challenge to a state board-approved conditional waiver program for agricultural waste discharges.

In upholding the timber harvest waivers issued separately by the Central Valley and Lahontan regional boards, Sacramento County Superior Court Judge Lloyd Connelly June 30 found the waivers to be consistent with both the

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CEQA changes seen

MAJOR PLAYERS DRAFT PLAN TO SPUR URBAN DEVELOPMENT, SLOW SPRAWL

Several major stakeholder groups are working on a substantive legislative proposal to spur urban infill development and potentially slow sprawl through changes to environmental and other policies that would incentivize construction in cities without trampling local government control or sacrificing open space, according to sources. The proposal could represent a significant breakthrough in the state's housing crisis while showing a new willingness by environmentalists to allow changes to the California Environmental Quality Act (CEQA) to remove longstanding hurdles to infill development, sources said. However, the issues are complex and controversial, and it

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Greater flexibility sought

AMENDED BILL TARGETS WRCB'S DISPUTED REPLACEMENT WATER ORDER

Disagreeing with a state water board decision made earlier this spring, a leading lawmaker last week amended a bill to give regional boards greater discretion to order dischargers to provide replacement water to compensate for contaminated drinking water supplies. The bill responds directly to a May decision by the Water Resources Control Board to limit a regional board replacement water mandate issued to two flare manufacturers that had fouled residents' drinking water wells with perchlorate.

The bill is drawing strong opposition from one of the flare manufacturers subject to the WRCB order, the Olin Corp., which also produces metals and chemicals. "Olin Corp. strongly opposes the proposed legislation that would

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permit regional water quality control boards to ignore the state's drinking water experts, and to make their own individual health risk drinking water decisions and to set their own individual regional drinking water standards," the company said in a written statement. "This would lead to regulatory chaos, increasing the regulatory costs of the regional [water boards] and needlessly raising unwarranted concerns from the public at large."

But the bill's author, Assemblyman John Laird (D-Santa Cruz), said the legislation (AB 1421) is necessary to ensure regional boards have maximum flexibility to protect the public from drinking water contaminated with harmful chemicals. "I think we're giving the boards the flexibility to deal with situations that can't live with a cookie-cutter response," he said in an interview.

AB 1421, as amended June 27, would authorize the state and regional water boards to require replacement water for wells contaminated at levels above background water quality conditions. This differs from WRCB's interpretation of existing law. The board believes regional boards should defer to the health department and Office of Environmental Health Hazard Assessment on drinking water safety in determining when replacement water should be required. Under this view, replacement water should only be issued when contamination exceeds certain health or regulatory standards, such as public health goals (PHGs), maximum contaminant levels, or notification levels.

The bill comes in response to a May 19 decision by WRCB that relaxed a replacement water order issued to Olin and Standard Fusee by the Central Coast regional water board. The regional board initially ordered the two companies in 2002 to provide replacement water to residents in a south Bay Area community affected by perchlorate contamination at levels above 4 parts per billion (ppb), which was the state's action level for the contaminant at the time. But after OEHHA finalized a 6-ppb perchlorate PHG in March 2004, the two companies asked the regional board if it could cease providing replacement water for wells testing below this new level.

The regional board denied the request, and Olin and Standard Fusee appealed this decision to WRCB. The state board ultimately sided with the dischargers, concluding essentially that because OEHHA had determined that water contaminated with levels of perchlorate below 6-ppb is safe to drink there is no reason to provide replacement water to residents with wells contaminated below this level. "The water boards should defer to OEHHA and [the Department of Health Services] in determining the appropriate level of contamination requiring replacement drinking water service requirements," WRCB's May 19 order states. "Any other approach would require regional water boards to make individual, possibly inconsistent public health and toxicological determinations or, in the alternative, to require replacement drinking water whenever there is any detection of a contaminant."

Laird's bill will likely be supported by environmentalists, who strongly opposed WRCB's order. Environmentalists argue that the public has a right to drinking water completely free of perchlorate, particularly in this case where water supplies were tainted without residents' knowledge or permission. Some activists also charged OEHHA erred in setting the 6-ppb PHG, asserting 1-ppb is more appropriate.

Laird said he would personally prefer a PHG lower than 6 ppb, but stressed that his bill is not intended to strike at the science used by OEHHA to set its health goal. "I am very clear that we have worked hard to develop a science-based system," he said. "This is just a process issue, not a science issue."

OEHHA is unlikely to take a position on the measure, a spokesman with the office said. "It doesn't have anything to do with us, per se," said the spokesman. But "we still feel very secure in saying that if you're drinking water with contamination below the levels of the [PHG], there's no health risk."

Water board officials are still reviewing the legislation and currently have no position on it, a WRCB spokeswoman said.

Laird said he would like to see the bill passed this year, but acknowledged it is late in the legislative year and there are certain process issues and deadlines that need to be addressed. He also defended his use of the controversial "gut-and-amend" procedure on AB 1421. "I believe it's a process that you have to use very judiciously, but it's exactly for situations like this."

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Inside Cal/EPA is published every Friday by Inside Washington Publishers, P.O. Box 7167, Ben Franklin Station, Washington, DC 20044. Subscription rates: \$635 per year in U.S. and Canada; \$685 per year elsewhere (air mail). © Inside Washington Publishers, 2005. All rights reserved. Contents of *Inside Cal/EPA* are protected by U.S. copyright laws. No part of this publication may be reproduced, transmitted, transcribed, stored in a retrieval system, or translated into any language in any form or by any means, electronic or mechanical, without written permission of Inside Washington Publishers.

Controversial fees at issue

AUDIT COMMITTEE ADVANCES PROBE OF WRCB'S WATER RIGHTS DIVISION

The legislative audit committee last week unanimously approved a bipartisan request to probe the water board's water rights division and its contested fee system, which has drawn the ire of farmers and irrigation districts. The lawmakers requesting the audit question the fairness of the fee system and whether the rights division is operating efficiently.

The Joint Legislative Audit Committee June 29 unanimously approved the request made by Sen. Dean Florez (D-Shafter) and Assembly Republican Leader Kevin McCarthy (Bakersfield) to direct the California State Auditor (CSA) to investigate the operations of the Water Resources Control Board's Division of Water Rights and its fee system. The audit is projected to cost a little less than \$150,000, according to a CSA analysis of the request. Florez and McCarthy did not request a specific deadline for the audit, according to the analysis. *A copy of the analysis and audit request is available at InsideEPA.com. See page 11 for details.*

The lawmakers are particularly "concerned with the equitability of the division's new fee structure and whether the division is providing services in a timely and efficient manner," the CSA analysis states.

In 2003, former Gov. Gray Davis signed into law budget trailer legislation that made the water rights division's budget solely dependent on special fees, whereas in the past it was funded by a mix of general funds and fees. WRCB subsequently raised its water rights fees — assessed on water rights permit holders — to make up the shortfall. The water rights division's annual budget is between \$8 million and \$10 million.

The audit will seek to determine how the division allocates its resources to fulfill its statutory responsibilities; evaluate the timeliness of the division's permit processing branch; and determine how the division arrived at its new fee structure and whether those fees are fair, among other tasks.

In their request, however, Florez and McCarthy appear to have already made up their minds over whether the division's fee structure is fair. "This funding system requires large water users to fund most of the division's budget whether or not they demand any services from the division, while not necessarily requiring those who demand those services to pay their fair share," the request states. "This system is inequitable."

Farmers and irrigation districts subject to the water rights division's new fee system also believe the fees are unfair. They argue, among other points, that the fees are really taxes illegally adopted by the Legislature without the requisite two-thirds vote. Farmers and irrigation districts sued over the fees, but lost an initial challenge in late April when Sacramento County Superior Court Judge Raymond Cadei sided with WRCB in upholding the charges as valid regulatory fees. The plaintiffs plan to appeal the decision.

Florez has also introduced legislation seeking to overhaul the board's water rights fee structure, though that bill stalled and is now a two-year measure.

SAN JOAQUIN AIR BOARD EXPANSION FIGHT INTENSIFIES; FLOOR BATTLE LOOMS

A controversial bill seeking to increase the membership of the San Joaquin Valley air district board cleared a key committee this week, but faces two more fights in the Assembly Appropriations Committee and on the floor. The bill has ignited a conflict between environmental groups — which blast the district as ineffective and beholden to agribusiness — and valley officials and agriculture groups that argue the measure will remove crucial local control over regulatory decisions.

SB 999 (Sen. Mike Machado, D-Linden) proposes to expand the district governing board from 11 to 15 members, two of whom would be appointed by the Air Resources Board. One of the ARB selections must be a physician with expertise in the health effects of air pollution; and the other must have expertise in environmental engineering, chemistry, meteorology or pollution control. All members must live in the area covered by the air district, according to the bill. The bill would also change requirements for the three city representatives that serve on the board. Under the bill, one representative would have to come from a city with a population less than 40,000 and the other from a city with more than 40,000 people. The city councils of Bakersfield, Fresno and Stockton would then each be required to appoint one of its members to fill out the city slots. Eight county supervisors would continue to sit on the district board.

SB 999 supporters say the ARB appointments are critical to bringing more balance to the board — essentially more viewpoints that are sympathetic to public health and the environment and less sympathetic to the agriculture industry's interests.

While the bill passed the Assembly Natural Resources Committee July 5, it faces a test in the Assembly Appropriations Committee and on the Assembly floor, because there are a significant number of moderate Democrats in the Assembly who have at times been reluctant to pass measures tightening environmental requirements on industry, especially agriculture. Two members of the appropriations committee seen as key votes are Ron Calderon (D-Montebello) and Leland Yee (D-San Francisco), said a legislative source. However, supporters are optimistic about the bill's chances, especially because Machado earned the votes of Assemblyman Simon Salinas (D-Salinas),

the chairman of the Assembly Local Government Committee, where a compromise to reduce the number of state appointees to the district from four to two was recently reached; and Lois Wolk (D-Davis), who is a member of both the natural resources and local government panels, said the legislative source.

At this week's committee hearing, Machado blasted agriculture industry representatives who are trying to kill the bill. "We've seen all along ag being somewhat unwilling participants in trying to clean up the air," he said. He said SB 700, the 2003 law that lifted a longstanding Clean Air Act regulatory exemption for the industry, was met with vehement opposition by agriculture groups, and subsequent "foot dragging" to meet its provisions. Machado said he wishes the industry was "more forthright and engaging on how to solve problems rather than preserving the status quo."

But Tom Jordan, a staffer for the San Joaquin Valley air district, challenged these assertions at this week's hearing. The 11 locally elected board members represent the valley "quite well," he said. He cited a board "track record" that includes the passage of 500 rules or rule amendments, the reduction of pollution by stationary sources by about 47%, and "dramatic" reductions of one-hour-ozone and particulate matter standard exceedances. He added that the San Joaquin Valley air district is the first in the state to propose a program to mitigate the impacts of new development and is leading the way to control dairy pollution. He also pointed out that ARB, which is being chosen in SB 999 to pick two new district members, has never found any San Joaquin Valley air plan deficient. "SB 999 does nothing to further efforts to control air pollution in the valley," Jordan said.

DTSC SOURCE SEES SWICKARD ENFORCEMENT FOCUS . . . begins on page one

regulations. As chief counsel, Swickard headed up sting operations designed to ensnare illegal hazardous waste haulers.

Schwarzenegger July 5 nominated Swickard, 48, a Republican, as director of the Department of Toxic Substances Control, a job paying \$123,255 annually. Swickard, who has served as DTSC's chief counsel since September 2004, previously worked for the law firm Stoel Rives LLP. He handled cases there that ranged from urban encroachments to efforts to dismantle the O'Shaughnessy Dam at Hetch Hetchy.

One environmentalist predicted Swickard will face a tough road to confirmation due to his lack of experience. "The Senate is likely going to look to Swickard's lack of . . . experience," with toxic substance and hazardous waste issues, the environmentalist said. "There's very little about Swickard that would give [senators] much confidence at this point."

Generally, Swickard's nomination may be part of a new trend in the way the administration makes appointments to environmental positions, the environmentalist said. Earlier in his tenure as governor, Schwarzenegger would nominate "moderates" to positions requiring Senate confirmation, and appoint more conservative officials to subordinate positions that do not require confirmation by the upper house.

Swickard's appointment now appears to be a part of a new strategy by Schwarzenegger to put conservative, pro-business personnel in the top spots at environmental agencies, the environmentalist said. For instance, just last week, the governor appointed Cindy Tuck, a lobbyist with the business-backed California Council for Environmental & Economic Balance, to chair the Air Resources Board, a move heavily opposed by environmentalists (*see July 1 issue, p1*). And in September of last year, the governor appointed Mary-Ann Warmerdam, a longtime California Farm Bureau Federation official, to head up the Department of Pesticide Regulation. While environmentalists initially raised concerns about her nomination, she ended up being supported by some environmental organizations at her confirmation hearing (*see June 10 issue, p17*).

"The Administration seems to be changing tactics. . . . We're seeing a trend toward pretty conservative nominations," the environmentalist said.

But unlike with the Tuck nomination, administration officials did not consult with environmentalists prior to Swickard's appointment, the environmentalist said. "[Administration staff] certainly hasn't consulted with us on this," the environmentalist said. Although the level of administration consultation with stakeholders "varies," environmentalists would have liked to weigh in on Swickard's nomination, the source said.

Environmental justice (EJ) activists are also taking a dim view of Swickard's appointment, with one EJ activist charging that Swickard has little experience with the Resource Conservation & Recovery Act (RCRA), the main law that guides DTSC's policies and activities. "He doesn't have any experience or specific knowledge with RCRA or its implementation, which is pretty much what the department does."

Swickard has little support among the EJ community, the activist said. "He hasn't done much" of note, the source said, other than approve the department's \$849,500 settlement with Romic Environmental Technologies Corporation, a settlement EJ activists have filed a civil rights complaint over (*see related story, p10*).

While environmentalists say Swickard lacks DTSC experience, his business background is extensive. Prior to his law firm work, Swickard lobbied regulatory agencies over timber harvest and construction permits during his term as chief executive officer at real estate development and agribusiness corporation Mapes Ranch, Inc., accord-

ing to a Stoel Rives biography.

But despite Swickard's lengthy business and agriculture experience, few industry sources were familiar with him. He has "not been on our radar screens," said an agriculture industry source. Lately, the agriculture industry has been pressuring Schwarzenegger to name more industry-friendly members to environmental agencies, and lobbied to get Tuck and Warmerdam their appointments, the source said. Still, Swickard was not among the candidates they pushed for.

A DTSC spokesman and an industry source said Swickard's nomination likely means the governor wants to continue DTSC's focus on enforcement and its new management strategies. As chief counsel, Swickard headed up a DTSC sting operation that zeroed in on illegal waste haulers. "He certainly does focus on enforcement issues. . . . It's a safe bet that we'll see more enforcement," the spokesman said.

Industry does not mind increased DTSC enforcement as long as the department is fair and does not seek to catch only the biggest fish in its nets, the industry source said.

STORMWATER MANAGEMENT AGENCIES BRACE FOR PESTICIDE CRACKDOWNS

Concerned with a buildup of traditional pesticides and potential threats from new pesticides, stormwater management officials plan to meet next week to discuss measures to prepare for forthcoming regulatory crackdowns. The meeting comes as several regional boards are grappling with setting limits for pesticide chemicals in urban creeks and rivers.

Regulators and stormwater management agency officials are scheduled to meet at a July 15 conference sponsored by the California Stormwater Quality Association (CASQA) in Sacramento, to discuss the impact of two key legacy pesticides — diazinon and chlorpyrifos — and new pesticides that may cause increasing problems in urban creeks and rivers.

Although diazinon and chlorpyrifos have been phased out for residential use by Department of Pesticide Regulation and U.S. EPA restrictions, the pesticides are still in use by people who bought the products before the ban. New pesticides, known as pyrethroids, could also build up in urban creeks, according to a local government source.

Recognizing that urban pesticide use may represent "one of the biggest sources of aquatic toxicity," according to the local government source, several regional boards have moved to create total maximum daily loads (TMDLs) for the chemicals. The Los Angeles and Central Valley regional water boards recently started TMDLs for diazinon and chlorpyrifos, and the San Francisco regional board is beginning to implement a TMDL already in place. Local stormwater regulators plan to explore those TMDLs at next week's conference.

TMDLs set load allocations for how much of a chemical or other contaminants can appear in discharges. They also often set monitoring requirements. Monitoring has shown the amount of diazinon and chlorpyrifos in urban creeks is not decreasing. "I don't think we've necessarily seen a downward trend to the monitoring," the local government source said. "This stuff's remarkably good, it's toxic in the low parts per trillion."

Setting load allocations for the two pesticides has not proven very controversial among southern California agencies, because they have been worked out among stakeholders, according to a regional board source. "It's a very stakeholder-involved process." The Los Angeles regional board will require additional studies by local stormwater management agencies in its diazinon and chlorpyrifos TMDL for the Calleguas Creek and Mugu Lagoon areas, the board source said.

In the Central Valley, a Sacramento County Superior Court June 21 ruled against diazinon manufacturer Makhteshim Agan of North America, Inc., which had sought to block the regional board's efforts to set a TMDL for the chemical. Still, a regional board source said, the board plans to revisit in 2007 the objectives it has set for the chemical in the Sacramento River. The regional board also has begun work on a TMDL for both diazinon and chlorpyrifos in the Sacramento-San Joaquin Delta.

New worries have grown over pyrethroids, which collect in the sediment of urban creeks. Commonly used, these pesticides could potentially prove more toxic to fish than diazinon and chlorpyrifos, the stormwater management agency source said. "I don't think anybody is monitoring for that yet."

With TMDLs now in place, and with the new worries over pyrethroids, CASQA has begun paying attention to DPR pesticide registration rules and application regulations. "We're stuck [with the TMDLs]," the local government source said. Pesticide applicators and regulators can do more to reduce pesticides in stormwater than the local stormwater agencies can do, the source said. "You need to regulate on our behalf."

Changes to local codes and practices, as well as to DPR's regulation of pest control applicators, could spark a change in the amount of pesticide residue that winds up in stormwater discharges, the local government source said. For instance, the use of perimeter sprays to control pests at homes and businesses adds pesticide to urban runoff during storm events, the source said. "We hate perimeter spraying," the source said.

DPR has long urged operators to avoid the "spray by the calendar approach," a DPR spokesman said.

Overall, transition among homeowners and businesses from traditional pest control methods to integrated pest management (IPM) would limit nonessential spraying at homes and businesses, the local government source

said. Many local governments have already made the switch, the source said, and local stormwater management agencies are working on residents to get them to change their behavior.

But regulators have been slow to catch on to water quality concerns, especially during the registration process, the source said. "I wouldn't say DPR is moving in the regulatory direction that way."

A CASQA source blamed differing mandates of various Cal/EPA outfits that do not consider multimedia impacts. "There is this disconnect. . . . We're trying to figure out how to work together on this cross-media problem."

While the DPR spokesman acknowledged DPR has no mandate to weigh water quality impacts during registration, he did say the department is conducting further study into the subject. "DPR is helping refine policies that will guide public agencies when they respond to pesticides in urban waters."

For example, DPR is helping the San Francisco Bay regional water board develop its water quality attainment strategy for its urban creeks pesticide TMDL, the spokesman said. "This strategy will undoubtedly serve as a model for other regional boards seeking comprehensive plans for addressing pesticides in urban waters."

INDUSTRY APPLAUDS TIMBER WAIVER DECISION . . . begins on page one

California Environmental Quality Act (CEQA) and Porter-Cologne Water Quality Control Act. The judge's decision is another sign that the state and regional water boards are on "the right road" when it comes to issuing these waivers, said a Water Resources Control Board source. The state board approved the Central Valley and Lahontan regional board waivers after they were challenged administratively.

"The regional boards and the state board have this huge task of starting to regulate these activities that really haven't been regulated before," said the source. "So we feel very positive that the courts both in ag and timber have supported our position."

An environmentalist called the court's decision "disappointing." The plaintiffs in the case, led by the Environmental Protection Information Center (EPIC), have not yet decided whether to appeal the ruling, the source said.

Environmentalists, though, have indicated they will appeal a May 9 decision by Judge Judy Holzer Hersher upholding the Central Valley board's agriculture waiver program. Some of the same environmental groups suing over the farm waiver program are also involved in the timber harvest waiver suit.

The environmentalists challenged both the Central Valley and Lahontan regions' timber waiver programs on CEQA grounds, alleging the boards illegally opted to issue negative declarations as opposed to conducting full environmental impact reports (EIRs) in developing the waivers. EIRs were required, the environmentalists alleged, because there was substantial evidence that the waivers would result in significant adverse impacts on water quality.

The judge, though, found that the waivers would provide additional protection to water quality and "the evidence in the record establishes that the waiver projects are regulatory systems that impose an improved level of control upon timber harvest activities to prevent waste discharges from degrading water quality and beneficial uses, including aquatic and wildlife habitat. In the absence of evidence that the waiver projects may adversely affect the environment, the court concludes that the Central Valley and Lahontan regional boards properly adopted negative declarations for the waivers." *A copy of the court ruling is available at InsideEPA.com. See page 11 for details.*

Environmentalists also challenged the Central Valley's timber waiver on the grounds that it violated Porter-Cologne because it was "against the public interest." Here, too, the judge disagreed. "The weight of the evidence in the record establishes that the Central Valley regional board waiver provides a reasonable method of regulating discharges from timber harvest activities so as to protect water quality and beneficial uses in accordance with the requirements of applicable basin plans and the state board's antidegradation policy," Connelly wrote. "The Central Valley regional board acted within its discretion in adopting the waiver and within the public interest under Porter-Cologne."

A source with the California Forestry Association, which challenged the Lahontan region's timber harvest waiver administratively but chose not to sue over it, said, "having this waiver process upheld was a positive thing. . . . [Waivers] are, I believe, a mechanism to help reduce duplication of permitting processes and at the same time meet all of California's environmental statutes."

The Lahontan regional board's waiver, first approved Jan. 30, 2003, is set to expire Dec. 31, 2007. The Central Valley region's timber waiver was scheduled to expire Jan. 30, 2005, but has been extended to Dec. 31, 2007. The environmentalist criticized the Central Valley regional board's decision to extend its timber waiver. "It has all the same flaws, but the law has changed significantly," the source said, referring to statutory changes enacted in 2003 that generally strengthen waiver conditions. The regional board's decision to extend its timber waiver has been petitioned by environmentalists to WRCB, the source said.

Environmentalists continue to push for more legislative changes that would strengthen conditions associated with WDR waivers and limit their use. SB 646 (Sen. Sheila Kuehl, D-Santa Monica), which aims to enact more stringent requirements related to waiver programs, is still making its way through the Legislature, though it has been significantly weakened from the time it was introduced. The environmentalist said legislative changes are necessary to at least "clarify" when waivers can be used and what types of conditions they must contain.

OEHHA OPPOSITION STALLS PERCHLORATE PHG REVIEW MANDATE

A bill requiring the health hazard office to review its perchlorate drinking water health goal as soon as new evidence emerges that the standard is not health protective has stalled in the face of objections from the office, which views the measure as unnecessary and potentially a bad precedent. The bill also drew opposition from industrial dischargers, which made similar arguments as those raised by the Office of Environmental Health Hazard Assessment.

Sponsored by Environment California, SB 187 (Sen. Nell Soto, D-Pomona) sought to compel OEHHA to quickly review its 6 parts-per-billion (ppb) public health goal (PHG) for perchlorate as soon as new information becomes available indicating that the health goal is not health protective. Under the terms of the bill, OEHHA would have also been required to review the PHG if another state sets a standard lower than OEHHA's for perchlorate in drinking water.

Environment California has been an outspoken critic of OEHHA's 6-ppb PHG and actively pushed the office to adopt a health goal of 1 ppb. One of the purposes of the bill, a source with the organization said, was to highlight to lawmakers that other states, such as Massachusetts, are moving forward with perchlorate standards more stringent than California's.

SB 187, however, stalled in the Assembly Environmental Safety & Toxic Materials Committee June 27 in the face of opposition from OEHHA. The office believes the bill is unnecessary because OEHHA already has the authority to review its PHGs when new scientific information emerges, an office spokesman said.

The bill also could set a "very troubling precedent," OEHHA Director Joan Denton wrote in a June 24 letter to Soto. "While SB 187 may have the sincere objective of protecting public health, its enactment could inspire other measures seeking to attach special conditions intended to influence the revision or development of PHGs for other contaminants," Denton wrote. "Future bills of this type conceivably could have political objectives." *A copy of this letter is available at InsideEPA.com. See page 11 for details.*

Denton also says the state's perchlorate PHG is on solid scientific ground and has already undergone extensive review. "All available scientific information indicates that the current PHG for perchlorate is protective of the health of pregnant women, fetuses, infants and others who may be sensitive to perchlorate's health effects," she stated in the letter.

The environmental safety committee did not vote on the bill; instead it gave Soto the opportunity to amend the measure and bring it back to a future hearing. However, a source with Soto's office said the senator has decided not to push the bill this year, but may advance an amended version in 2006.

MOVE TOWARD BETTER, CHEAPER DESALINATION HEIGHTENS ACTIVIST CONCERNS

The University of California, Los Angeles, has begun an ambitious project to vastly improve desalination technology and lower costs that includes a focus on traditional freshwater sources such as the Colorado River and the state's aqueducts. But some environmental groups complain that continued movement toward ocean water desalination could result in more energy use, loss of sea life and unchecked growth in the state.

UCLA's Water Technology Research Center (WaTeR Center) aims to better desalination science and cut costs by a factor of two, a source said. The center has received a \$1-million state Department of Water Resources grant and \$1.6 million in other grants, and plans to work with desalination researchers in Davis, Riverside, southern California and Spain.

Scientists will study membranes used in the process of reverse osmosis, a desalting process where the membrane acts as a filter to remove salt and other minerals. Over time, these membranes have been prone to quickly become contaminated or clogged, wearing out in some cases up to 10 times faster than initially predicted. UCLA researchers plan to improve the membranes, making them resistant to fouling and scaling by bacteria and other contaminants, a UCLA source said.

Desalination processes are not only used in ocean water, their most controversial uses. For instance, the Colorado River currently has an approximate salinity level of 700 milligrams per liter, which is 200 milligrams higher than U.S. EPA's drinking water level for salt. Colorado River water has become so salty because of runoff into the river, over-utilization of Colorado River water and sediment erosion, the UCLA source said.

Additionally, the center estimates, about 630,000 tons of salt annually accumulates in California aquifers, costing \$95 million per year to remove. Desalination can also be used to filter salt from brackish groundwater drawn from wells.

Traditionally, environmentalists do not object to desalination of groundwater and other kinds of water, as long as the concentrated, sometimes toxic effluent is disposed of properly, a Surfrider Foundation source said. Groundwater desalination results in no net increase in water usage and often will not use much more energy than moving water from the northern part of the state to the south, the source said. "You don't have a growth concern," the

environmentalist said.

Still, effluent from the process is highly salty and can contain concentrated amounts of pollutants such as perchlorate and MTBE, and should not be discharged into oceans, an idea some such proposals have promoted, the source said.

Ocean desalination itself still sparks environmentalist concerns. For one thing, the source said, more available water will increase development, causing even more of a burden on infrastructure — through stormwater and wastewater discharge — that already causes concern among environmentalists. “I don’t think we can keep developing and be sustainable [in California],” the environmentalist said. “The first step toward [sustainability] is getting people to quit wasting water like there’s an endless supply.”

Water conservation could lead to smaller desalination plants, the environmentalist added. Larger plants co-locate with power plants, drawing on the cooling water for desalting. But drawing in cooling water, in a process known as “once-through cooling,” requires giant underwater screens that can suck in or mangle sea life. Known as “impingement and entrainment,” the damage these screens cause results in harm to creatures as small as zooplankton and as large as sea lions, the source said.

EPA regulations designed to curtail the damage to sea life have been held up in court, the environmentalist said.

But co-location with power plants is still desirable, the UCLA source said. Not only does the intake provide water to be desalted, desalination plants can also discharge their effluent with that of the power plant, the source said. Still, “all environmental issues must be considered and desalination plants should be built with careful considerations of site-specific environmental issues,” the source said.

The source also said desalination proponents are considering new ideas to address environmentalists’ concerns, including using more renewable energy to operate the systems, which would in turn help further drive down the cost of the desalted water. If the cost of the process is lowered, “desalination could play an important role and reach a significant portion of drinking water usage,” the source said.

Meanwhile, new federal legislation introduced by California congressional representatives Richard Pombo (R-Stockton) and Ellen Tauscher (D-Walnut Creek), would send new funding to Lawrence Livermore National Laboratory to “explore, develop and help commercialize” water supply treatment methods, including desalination, according to a statement released by the representatives. The bill, H.R. 4835, the National Water Supply Enhancement Act, also would require the Secretary of the U.S. Department of the Interior to report on the concentrated discharges potentially produced during desalination.

PERATA BILL EYED AS VEHICLE FOR CEQA CHANGES . . . begins on page one

is still up in the air as to whether a deal will be brokered and advanced in the Legislature this year, sources said.

Supporters of the effort hope to reach a deal among the multiple parties within the next few weeks and insert extensive language into SB 823 (Senate President pro Tem Don Perata, D-Oakland). The bill this week cleared the Senate Natural Resources & Water Committee, but at this point the measure only includes two relatively minor provisions expanding the size of urban infill lots that could qualify for CEQA exemptions.

Kip Lipper, a Perata staffer, told the committee at its July 5 hearing that there are ongoing “negotiations and discussions among local government, environmental groups, affordable housing advocates, home builders and others to establish new policies and incentives” that aim to spur infill development. If these negotiations are successful and the bill is substantially amended, he said Perata would return the bill to the Assembly panel for consideration.

There are three key issues being discussed by the stakeholders, according to a source close to the process. First, the development of measures, such as reducing mitigation obligations and regulatory barriers for developers, to encourage development on urban infill lots. Standardizing mitigation options and easing CEQA provisions are keys to incentivizing urban infill development. The more urban infill is pursued, the less developers are forced to outlying “greenfield” areas to develop sprawled housing, the source said. Some of the ideas being discussed to change CEQA provisions were hatched by a working group formed by the governor earlier this year to improve CEQA. These include allowing area-wide CEQA reviews that would place the same rules for each lot to meet the law, instead of having the current “project-by-project” CEQA application, said the source. This would allow developers to know the costs and mitigation requirements for a certain area, which could eliminate much of the uncertainty and concern over expenses that are currently discouraging many infill developments, sources have said in the past.

Second, the discussions are aimed at encouraging and empowering regional government efforts to define how to manage growth in the larger context, which is being done by some local government councils in the state. Planning at the macro level to dictate density, more efficient land use patterns and to establish better infrastructure are seen as critical to improving the state’s current development trends.

Third, stakeholders are aiming to craft a section that would put in place a consistent and fair process by which developers are required by local governments to help preserve resources and agricultural lands when obtaining

approvals for projects. The current process used by various agencies often ends up in disputes between the parties because mitigation fees can be unevenly applied and hiked significantly depending on the timing of a project in a specific area, said the source close to the process. The negotiators are looking for new tools to plan and develop core agricultural preservation areas and wildlife protection strategies earlier in the development process so it is cheaper and fairer, said the source. Essentially, this process involves a local government charging a mitigation fee, which is then used to purchase land for preservation. One tool could be a revolving fund mechanism to secure reserves at the outset, which would be kept afloat by developer fees that are applied evenly to all the companies, said the source.

It remains cloudy whether the reform measure will make it into a bill and advance in the Legislature. Assemblywoman Loni Hancock (D-Berkeley), chairwoman of the natural resources panel, said at this week's hearing that she supports Perata's effort and hopes a compromise can be reached. However, she said as a representative of urban counties, "too often, bills dealing with this problem come across as incentives only for the developers of housing and there are no incentives for communities in which the housing will be located, and it's vitally important that we retain certain design reviews." Hancock indicated that too often new development projects lack the libraries, schools, and urban parks that are critical to healthy communities.

A legislative source described the effort to craft a compromise as a "delicate balance between protecting the environment and promoting infill development."

DEAL PROVIDES HYDROGEN HIGHWAY \$6.5 MILLION; EJ ASSESSMENT REQUIRED

The governor and Democrats agreed this week to compromise on funding for the administration's hydrogen highway initiative, approving \$6.5 million for three fueling stations, vehicle leases and support staff in the Fiscal Year 2005-06 budget. The funding represents a little more than half of what the governor initially sought, and lawmakers conditioned the appropriation on special hearings, consideration of environmental justice (EJ) impacts and other "environmental" issues, sources said.

In May, Democrats on both houses' budget subcommittees with oversight of Cal/EPA voted to cut most of Gov. Arnold Schwarzenegger's proposed \$12.2 million for the hydrogen highway project, which aims to advance the technology by constructing fueling stations and leasing fuel-cell vehicles and hydrogen internal combustion engine vehicles. The Senate recommended \$1.5 million and the Assembly \$4.1 million.

The new \$6.5 million funding level will pay for up to three demonstration fueling stations in the state and provide an undetermined number of support staff for the program, said a Cal/EPA source. The money will also provide leasing for hydrogen vehicles, including buses, for demonstration purposes, the source said. The funding, which will be drawn from the Motor Vehicle Account and Energy Resources Programs Account, will be split between the Cal/EPA secretary's office and the Air Resources Board.

An environmentalist said the final budget language, which is still being finalized, will dictate that the administration conduct hearings on the initiative, EJ "consultation" and other environmental considerations.

Democrats on the budget subcommittees in each house had complained that it appeared the administration may be prematurely advancing the hydrogen initiative without considering potential impacts. They said the program should ensure planning for hydrogen generation from as many renewable sources of energy as possible to limit environmental impacts. And the administration should also acknowledge and promote other cleaner vehicle technologies, such as hybrid-electrics, before putting all its money and time into promoting hydrogen, the lawmakers said (see *May 20 issue, p1*).

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NRC FINDS IMPROVEMENTS IN STATE'S RADIOLOGICAL HEALTH PROGRAM

The Nuclear Regulatory Commission (NRC) is no longer considering terminating the state's "agreement" status after finding that the health department has made progress over the last year in addressing deficiencies in its radiological health program. Last year, NRC placed the state's program on "heightened oversight" after a formal review found "significant program weaknesses."

NRC recently conducted an on-site review of the Department of Health Services' (DHS) radiological health branch, and found that the state has made progress in addressing several program deficiencies noted in an NRC staff report approved July 28, 2004. The state, however, continues to lag when it comes to adopting regulations to maintain compatibility with NRC requirements, according to a June 30 written summary of a late May on-site review conducted by NRC staff. *A copy of this summary is available at InsideEPA.com. See page 11 for details.*

DHS does not disagree with NRC's findings, a department spokeswoman said.

"With the special review we feel a little better and [the branch] has made some improvements," said an NRC source. The commission is no longer considering terminating the state's agreement status, which gives the state the authority to conduct its own radiological health program as long as it remains compatible with NRC's requirements and policies. NRC will conduct a special management review of the report in late July and then do a full review of the program in October. Following that October review, NRC may decide to keep the state's program on heightened oversight or drop to a lower level of scrutiny, the source said.

One of the most significant steps DHS's radiological health branch has taken to improve its program is approving a regulation that calls for higher license fees. Last year's review found that many of the department's program deficiencies could be tied to a lack of resources at the department. With more revenue, the department will be able to hire more staff, which should help address backlogs in investigations and evaluations cited last year by NRC's review team.

The state, however, continues to struggle to adopt regulations needed to stay current with NRC requirements and policies, the June 30 summary states. Based on the "indicator rating criteria for compatibility requirements, the branch would still be likely to be found 'unsatisfactory' at an actual . . . review," NRC staff's summary states.

"Part of the problem is the onerous method that they have to get through . . . to get the regulations through," said the NRC source, noting that DHS faces personnel shortages in its budget office, which must approve all department regulations, not just rules related to radiation.

CITING EJ ISSUES, YOUTH GROUP FILES CIVIL RIGHTS COMPLAINT AGAINST DTSC

A youth group has filed a civil rights complaint against the state toxics department, alleging the department discriminated against an East Palo Alto low-income environmental justice (EJ) community.

Youth United for Community Action (YUCA) filed a June 11 complaint with U.S. EPA in response to a recent \$849,500 Department of Toxic Substances Control settlement with Romic Environmental Technologies. The complaint was filed through EPA's Office of Civil Rights. *The complaint is available at InsideEPA.com. See page 11 for details.*

YUCA alleges DTSC allowed Romic to operate in the community for 14 years without a permit; took an "unacceptably long" 11 years to complete an environmental impact report (EIR) on the company's permit; failed to translate the draft EIR into Spanish; and neglected to inform community members about hazardous waste violations that took place on the property.

YUCA might be on the right track with the Spanish translation allegations, an EPA source said. "If the community is non-English speaking, you need to look if you should provide interpreters and translations," under recently issued federal draft public participation guidelines, the source said.

EPA is investigating the complaint because DTSC receives federal funding, the source said. "Investigation takes years," the EPA source said.

Now, the youth group has just cause for a federal civil rights suit, an EJ attorney opined. "The agencies know about EJ now, they just choose not to do anything about it." The attorney called Romic "a very bad situation," which was capped off by a "secret" settlement with DTSC. "The agency is a public agency, it should be conducting its business in public" and allow for comments on the settlement, the attorney said.

The youth group has no immediate plans to file a civil suit, according to a YUCA source.

DTSC's settlement with Romic includes \$526,700 in penalties, \$122,800 for reimbursement of DTSC's administrative costs, and \$200,000 for Supplemental Environmental Projects. Former DTSC Director B.B. Blevins said in an April 7 statement applauding the settlement that it set a "stiff penalty for violations revealed during DTSC inspections."

A review of past EPA civil rights complaints reveals three complaints against DTSC were at least partially accepted for investigation out of five complaints submitted. Most complaints against the department deal with hazardous waste permitting issues.

TRADE COMMISSION SAYS MTBE, REFORMULATED FUELS CAUSE PRICE SPIKES

The Federal Trade Commission (FTC) has issued a study that analyzes factors contributing to increases and fluctuations in gasoline prices in the United States, including current state bans on a widely-used gasoline oxygenate, MTBE, and supply disruptions in cleaner-burning reformulated gasoline required for certain regions of the country to reduce air pollution. The FTC report relies in part on U.S. EPA data as part of an ongoing investigation into antitrust matters related to the petroleum industry.

The commission's findings were released a little more than a week before Congress resumes negotiations on pending energy legislation that is intended to boost domestic fuel production to reduce energy prices and includes provisions that could affect continued use of MTBE. The legislation is pending before a House-Senate conference committee, which could issue a final bill next month.

The FTC report issued July 5 analyzes the factors that influence fluctuations in local gasoline prices, citing regional environmental requirements, access to pipelines, local refinery capacity and a sometimes limited supply of substitute blends of gasoline as factors in price variability.

Specifically, the report cites state environmental requirements and unusual regional disruptions in supply that have resulted in price spikes. For example, the Air Resources Board requires stricter air quality and emissions standards than other states, and the state has joined with officials in the Northeast in banning use of the fuel additive MTBE, both of which have caused price volatility, particularly in California. MTBE has been banned out of concern for groundwater contamination detected throughout the country.

"Regional differences in access to gasoline supplies and environmental requirements for gasoline affect average retail prices and the variability of regional prices," a summary of the report says. "Different regions of the country differ in their access to gasoline supplies, and these differences affect gasoline prices. Gasoline prices on the East Coast, in the Midwest and in the Rocky Mountain states are significantly more variable than Gulf Coast gasoline prices, due to the availability of excess refining capacity along the Gulf Coast. In addition, regional environmental requirements for 'boutique' fuels, such as ARB gasoline requirements in California, can limit substitute gasoline supplies and can thus lead to cost increases during supply shortages."

The study also highlights instances where weather or unexpected disruptions have caused price spikes.

One example is an August 2003 incident in which a pipeline in west Texas ruptured and resulted in a price spike for gasoline that had been specifically blended for use in Phoenix, but Arizona officials soon received a waiver from EPA to allow the sale of conventional gasoline in the Phoenix area, which is required under federal law to use cleaner-burning fuels to reduce smog. But the waiver had the unintended consequence of creating a supply shortage — and thus a price increase — for conventional gasoline in Tucson, which is not required to use reformulated gasoline under the Clean Air Act.

Similar instances occurred during the summers of 2000 and 2003 in the Detroit area when unexpected incidents led to price spikes. A pipeline break in 2000 and a blackout in 2003 that led to refinery shutdowns resulted in a significant price increase and the need for an EPA exemption to use conventional gasoline.

Both the Arizona and Detroit examples demonstrate how fuel supply concerns are most important in the summer when federal law requires the use of environmentally mandated fuels, which drives up demand for the cleaner-burning gasoline.

Background Documents For This Issue

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Documents available from this issue of *Inside Cal/EPA*:

- California Air Officials Exempt TBAC In Consumer Products From VOC Definition (epa2005_1199)
- California Central Valley Development Fee Rule Draws Builder Fire (epa2005_1200)
- California Air Officials Measure Tire Burning Pollutant Emissions (epa2005_1201)
- California Air Officials Identify Key PM Sources For Potential New Rules (epa2005_1202)
- Court Sides With California Officials In Logging Discharge Permit Dispute (epa2005_1203)
- California Health Official Opposes Bill Seeking Expedited Review Of Perchlorate Standard (epa2005_1204)
- California Lawmakers Approve Request To Audit State's Controversial Water Rights Fees (epa2005_1205)
- NRC Finds Improvements In California Radiological Health Program (epa2005_1206)
- California Water Officials Propose Long-Awaited Timber Permit Rules (epa2005_1207)
- Youth Group Targets California Toxics Officials In EPA Civil Rights Petition (epa2005_1208)

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DRAFT NORTH COAST DISCHARGE PERMITS ESCALATE LOGGING DISPUTES

Long-awaited draft North Coast regional water board pollution prevention requirements targeting two sediment-impaired watersheds would effectively halve the amount of timber that can be logged on land owned by the Pacific Lumber Co. (PALCO). The draft requirements, which are expected to be strongly challenged by the company, are important because they are expected to end a longstanding debate in the North Coast over just how much logging PALCO can conduct in the environmentally sensitive areas.

The draft Watershed-wide Waste Discharge Requirements (WWDRs) affect Freshwater Creek and the Elk River, two watersheds in which PALCO cannot now log following the Water Resources Control Board's June 16 decision overturning timber harvest plans (THP) that were approved in March by the regional board. The June THP decision came on the heels of a WRCB-approved stay of the THPs in April (*see June 10 issue, p1*).

Released June 29, the draft WWDRs would approve for logging only 219 of 500 acres in the Freshwater Creek area that were approved for logging by the California Department of Forestry & Fire Protection (CDF), and 318 of 600 CDF-approved acres in the Elk River watershed. The approvable acreage drops to 144 in Freshwater Creek and 133 in the Elk River area during landslide conditions. Acreage was measured as "clear-cut-equivalent," meaning one acre that is only half logged counts as 0.5 acres, according to the draft report. *The draft WWDRs and relevant documents are available at InsideEPA.com. See page 11 for details.*

The board is scheduled to finalize or reject the WWDRs at a September meeting.

"I would expect that [PALCO] will take issue with the permits as being too restrictive, and will try to cast doubt upon them by questioning the data and assumptions used by the regional water board staff in developing them," said a Humboldt Watershed Council (HWC) source.

But PALCO provided most of the data used by the regional water board, especially landslide data, the HWC source said. PALCO has successfully argued in Humboldt County Superior Court — in a lawsuit pitting the county's district attorney against the company — that freedom of speech means regulatory agencies still bear the burden of finding the truth, even when a company submits false data or underreports. "Given that, it seems pretty generous of the regional water board to accept [PALCO's] data at face value."

HWC, along with the Sierra Club and the Environmental Protection Information Center, filed for the original stay and overturn requests after the regional board's surprise March 16 decision to go beyond staff recommendations and approve 75% of PALCO's THPs approved by CDF. HWC members include area residents, who blame PALCO timber harvesting practices for a rise in sedimentation and flooding on the watershed areas they call home.

PALCO has yet to complete an expected written response to the draft requirements, a company spokesman said, and would not comment until the full written review was completed. The written response was expected to be released toward the end of this week.

The timber company on June 30 shut down its mill in Fortuna, citing "delays by the regional water board and actions by the state board."

"The Fortuna sawmill would be operating and PALCO employees working, had the state water board done their job," said Robert Manne, PALCO president and CEO, in a written statement. "By refusing to join with every other state and federal agency that has approved our timber harvest plans in the Elk River and Freshwater watersheds, and by disregarding the decision of the full nine-member North Coast regional water board, the state water board has taken an extreme position which has resulted in today's closure."

The state water board, however, disputes PALCO's assertion that its action caused the mill closure.

Meanwhile, the regional board lays the blame for WWDR delays at PALCO's feet. PALCO on several occasions refused supply the water board with reports of waste discharge and landscape data, said a board source. Citing "proprietary information," the company refused to release landscape data in the proper computerized format, forcing the regional board to go through as many as six iterations per data set, the source said. "We had a hard time getting what we needed in a timely fashion."

Although the regional board anticipates more debate on the proposal, the source said it is hoped that PALCO can meet WWDR mandates. "It is our intent that the WWDRs will bring a process to bear which will allow timber harvest, while protecting beneficial uses and allowing impaired beneficial uses to improve, and nuisance flooding to be reduced."

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