

Inside Cal/EPA

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

Vol. 18, No. 3 — January 19, 2007

PORTS WARN ARB SHORE-POWER RULE PACKS HIGH COSTS; CREDIT SOUGHT

The state's major ports argue the air board has failed to address exorbitant anticipated costs to comply with a proposed rule requiring ships to use cold-ironing, the practice of plugging into dockside power to prevent the idling of diesel engines. At the same time, some ports are negotiating controversial plans with local air districts to obtain emission reduction credits (ERCs) for cold-ironing to help offset costs. But these efforts are expected to be challenged by activists.

Development of a shore-power regulation is considered a key effort by the Air Resources Board to cut pollution tied to commerce that is severely impacting major ports. The generation of ERCs is seen as controversial by activists in part because it may lead to disproportionate pollution impacts on some communities.

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OEHHA CLIMATE CHANGE STUDIES SEEN BACKING AIR BOARD GHG, PM RULES

Preliminary results of health hazard office studies on climate change and particulate matter (PM) risks to human health are seen bolstering aggressive air board regulation of diesel engines and other sources of both PM and greenhouse gas (GHG) emissions, according to sources. The studies probe the individual PM particles that are most harmful to human health, and assess how rising temperatures that may result from climate change will affect mortality.

The studies — and subsequent follow-up research — are not only likely to support new regulations, but could add fodder to nationwide debates over air quality and GHG regulation, sources said.

Joan Denton, director of the Office of Environmental Health Hazard Assessment, briefly announced early

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ACTIVISTS SAY GOVERNOR'S BUDGET SHORTCHANGES BIOMONITORING PROGRAM

Gov. Arnold Schwarzenegger's proposed budget fails to properly fund a landmark statewide biomonitoring program to be implemented by Cal/EPA and the health department this year, charges an environmental group that sponsored the bill creating the program last year. But Schwarzenegger Administration officials defend the budget allocations, asserting the program will be phased in and will receive sufficient funds in the coming years.

Funding and implementation of the biomonitoring program are being closely watched by stakeholders because it is the first large-scale state biomonitoring program in the nation.

Schwarzenegger's Jan. 10 budget proposal allocates to the biomonitoring program: \$1.21 million and three new positions to the Department of Health & Human Services (DHS); \$167,000 and three new positions to the

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Dischargers fear bad precedent

WRCB REMAND OF REGIONAL WASTEWATER PERMIT IGNITES CONFLICT

A draft state water board decision overturning a regional board wastewater facility permit may indicate the state board plans to take on significantly more oversight responsibilities, particularly over compliance schedules and water quality standards, activists say. The proposed decision is flustering local government permittees, who say they worry the state board may be setting a bad precedent by overtly second-guessing regional officials.

Stakeholders are carefully eyeing the draft document, because the future of water board-endorsed compliance schedules for permittees and more than a billion dollars in potential improvements to the East Bay Municipal Utilities District (EBMUD) may be at stake.

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Enclosed Supplement: Premiere Edition Of *Carbon Control News*

Water Resources Control Board members are scheduled to meet March 6 in Sacramento to consider the draft order, which remands a San Francisco Bay regional water board permit for an EBMUD wet-weather facility. During times of heavy, wet-weather sewage intake, the permit allowed these facilities to collect and discharge wastewater that is treated only to a primary level — although nearly every other facility in the state must treat their wastewater to a secondary level or better.

WRCB is undertaking this review because of “concern that discharges from the wet weather facilities do not meet treatment levels that are adequate to protect water quality and meet Clean Water Act requirements,” the draft order states. *A copy of the order is available at InsideEPA.com. See page 8 for details.*

Activists embraced the board’s decision to take on the EBMUD permit. “If this [order] is any indication, it really signals the state board is going to undertake serious oversight of regional board permitting,” one environmentalist said.

Among the issues addressed by the remand is the regional board’s use of compliance schedules in the National Pollutant Discharge Elimination System (NPDES) permit issued to the wet weather facility. Compliance schedules — which are designed to give NPDES permit-holders and other dischargers more time to comply with newly set standards — have been the target of environmentalist ire and litigation.

***“If this [order] is any indication, it really signals the state board is going to undertake serious oversight of regional board permitting.”
— An environmentalist***

Activists argue regional boards should not give dischargers so much time to comply with the new standards, and claim the schedules have been “given out like candy,” allowing dischargers to avoid compliance.

But dischargers defend the schedules, saying they help avoid costly litigation while allowing reasonable time to make necessary improvements to facilities.

Compliance schedules in the San Francisco Bay regional board’s permit are “specious” and lack an ultimate compliance date or final, enforceable standard to be attained, according to the draft order. In a footnote, board staff notes that U.S. EPA has ruled that water quality standards must be included in the enforceable aspects of a discharger’s

permit, even if the permittee’s compliance schedule does not require immediate compliance with the regulations.

A local government source said the footnote may indicate WRCB is leaning toward embracing the EPA’s more stringent policy toward compliance schedules, even though the board has yet to draft a statewide compliance schedule policy. Currently, WRCB allows regions to place the limit in an unenforceable area of their permit until the compliance schedule is complete; a reversal of this policy would represent a “landmark decision,” according to the local government source.

WRCB’s decision to involve itself in the EBMUD permit indeed may signal a shift in the way the board operates, since the board has “typically left the process alone,” the source said. Historically, WRCB has only attempted to influence regional board policy when it is appealed by stakeholder groups, and by setting statewide guidance on various matters. NPDES permittees would be worried if the state board were to start “second-guessing the regional board,” the source said.

An EBMUD spokesman said the state board’s decision to remand the permit is a bad precedent, because it means dischargers can be “punished for doing the right thing.” EBMUD — which set up the wet-weather system several years ago to comply with EPA restrictions on wastewater overflows — would be forced to spend billions of dollars to create a new system, he said.

But environmentalists embraced the board’s tough take on the compliance schedules and its decision to remand the permit, arguing regional boards have drafted compliance schedules for almost any NPDES permittee that seeks one, the activist said. The EBMUD order may mean dischargers statewide will be held to legal standards within a shorter amount of time, since other regions are likely to heed the lessons of the San Francisco Bay region, the source said.

The activist also praised the state board’s draft decision to revisit bacteria standards for the EBMUD facility, as well as most of WRCB staff’s 26 separate conclusions about the regional board’s permit, the source said. If upheld by WRCB, staff’s “fine-toothed comb” analysis of the regional permit could set a precedent for future review of permits.

A WRCB spokeswoman could not say whether the decision would be approved as written by the board, or whether it would be a precedent-setting decision if adopted as written. “We never speculate what the state board will do in the future.”

GOVERNOR'S CLIMATE CHANGE RATIONALE FOR NEW DAMS SPARKS DISPUTE

Environmentalists are blasting as unscientific and unnecessary Gov. Arnold Schwarzenegger's inclusion of climate change impacts as a rationale to propose construction of new dams and other surface water storage facilities in the state. But water agencies supporting the plan charge activists are being hypocritical about climate change impacts and are attempting to block projects that will improve water quality.

Water storage is expected to be one of this year's most contentious environmental issues during deliberations over budget and policy legislation, with water quality a key component in the debates.

Schwarzenegger's Jan. 10 proposed Fiscal Year (FY) 2007-2008 budget includes major water infrastructure spending proposals, including about \$4.5 billion for surface water storage upgrades that will provide an estimated half-million acre-feet of water per year. Money to fund these improvements comes from two November initiatives, Proposition 84 and Prop. 1E.

An estimated 25% of the state's snowpack will be lost by 2050 because of climate change, meaning water that could serve an estimated 6 million-8 million homes will be lost, unless more surface storage is built, Schwarzenegger said in a statement accompanying his budget proposal. "With California's booming population, and with the impact that global warming will cause to our snowpacks, we need more infrastructure, a wide-ranging water storage and delivery system, including above-ground facilities," he said.

Schwarzenegger's budget proposal singles out two pending reservoir projects — the Sites and Temperance Flat proposals — as recipients of the new funding.

The governor's plan to increase spending on water storage "is critical to addressing the long-term sustainability of California's water system," according to Santa Clara Valley Water District officials, who were part of a group of water agencies that came out in support of the budget plan.

But environmentalists argue it is "too early" to assume new dams — which activists generally oppose — will combat the effects of climate change. "Let's find out what climate change is actually going to do, before we build a dam," one environmentalist said.

With "cheaper and better" alternatives available for both flood control and water storage, building a dam might be the "un-economically feasible" way to address global warming's impacts on the state's snowpack and water supply, the source said, noting that the California Environmental Quality Act (CEQA) requires agencies to consider all "economically feasible" solutions to global warming.

Activists will dispute whether the available science shows a need for more surface water storage, even as they continue to seek via the regulatory and litigation process more CEQA consideration of the effects of global warming (*see Jan. 5 issue, p1*), the source said.

There is nothing hypocritical about this position, the source said, because activists have the same position they always have had: that climate change is something that must be planned for and mitigated in the most economically feasible way possible.

A second activist — who also said the scientific evidence linking climate change to a need for more surface water storage is shaky — predicted the Legislature this year will reject the governor's plan for more dams and surface storage projects, even with the administration's new argument that they are in part justified because of climate impacts. Rather, the source said, the governor is trying to placate pro-surface storage Republicans, such as Assemblyman Mike Villines (R-Clovis), the new Assembly Republican leader.

If the governor considered water storage a key priority, he would have attempted to leverage water storage into last year's package of infrastructure bonds, the source said.

But a water agency source dismissed the activist arguments as "spin," noting several reputable models that predict drastic impacts from climate change. Water officials will have to work with others in the administration to react to the potential effects of global warming, the source said. "The state government in general is addressing climate change. We must use every authority we have to achieve beneficial uses" of water.

The source said it is too early to say how the water storage proposal will fare in the Legislature, and whether it will appear in the final budget in June.

Proponents of the projects also are expected to assert that surface storage will also improve water quality in the state, because water that is stored can be released as needed to dilute quantities of salinity and other pollutants in rivers and in the San Francisco Bay/Sacramento-San Joaquin Delta, according to a water agency source. Storage of water in surface waters allows the water to cool, preventing the impairment of a water body by temperature.

Activists have disputed this argument, asserting that building dams causes more environmental damage than it prevents. Most activists have said they prefer to see enforcement of existing standards for salinity in the delta in lieu of any technological fixes via water projects.

In addition to water storage, the governor's budget also provides \$1 billion for delta "sustainability," \$250 million for water resources stewardship and \$200 million for water conservation purposes.

ENVIRONMENTALISTS SEEK ARB BAN ON PERC, HYDROCARBON ALTERNATIVES

Activists plan to call on air board members to phase out a controversial dry cleaning chemical, perchloroethylene (perc), and to prohibit less-toxic hydrocarbon dry cleaning alternatives that emit pollutants contributing to smog. But the additional phaseout of hydrocarbon perc alternatives sought by activists could further shrink dry cleaning options for the industry.

Perc is a potential cancer and health risk, activists argue, and the chemical appears on the state's Proposition 65 list of carcinogens.

Air Resources Board members are scheduled Jan. 25 to consider adopting a perc air toxic control measure (ATCM), which would phase out the use of the chemical in the state in the coming years. Staff has spent the last several months revising the ATCM, following backlash from activists when board staff proposed only a partial phaseout of the chemical in a revised ATCM brought to the board for consideration last year.

The latest ARB staff proposal to be considered would ban dry cleaners from using perc machines beginning Jan. 1, 2023. New installation of perc machines would be banned starting in 2008, while perc machines 15 years or older would need to be removed from service by 2010. *A copy of the staff report is available at InsideEPA.com. See page 8 for details.*

Environmentalists plan to argue at the Jan. 25 meeting that the proposed 2023 deadline for eliminating perc is much too far ahead in the future. Instead, activists will advocate a 10-year phaseout, with an accelerated phaseout in "human areas" where there is a high concentration of people, such as apartment buildings.

Activists say they also will oppose allowing dry cleaners to use hydrocarbon alternatives to perc because the volatile organic compound (VOC) emissions they emit contribute to smog.

The attack on hydrocarbon alternatives reflects a new position by environmentalists, who had argued at meetings last year that perc alternatives with air quality downsides still represent an acceptable tradeoff, since the amount of VOCs released would be minimal compared to the cancer risk perc presents to the public.

"We'd like ARB to also phase out the hydrocarbon systems as well," an environmentalist said. "We're saying to ARB, 'why not get rid of it now?'" . . . "Why not instead go to these nontoxic [wet] cleaners?"

Phone calls to a source with the California Cleaners Association, a leading industry group, were not immediately returned by press time. The industry has complained ARB's proposed perc phaseout limits its technology options.

ARB's staff report includes an alternative for the board to both phase out perc and prohibit the use of hydrocarbon and other machines that release smog-forming pollutants. But ARB staff does not recommend this approach, the report says. "Staff is not recommending this option primarily because of cost, 17% more than the proposed amendments, and [air] district opposition."

Citing dramatic impacts

CRITICS URGE NEW A.G. TO DROP GHG NUISANCE CASE AGAINST AUTOMAKERS

Steep economic impacts and a bad legal precedent are two good reasons newly inaugurated Attorney General (AG) Jerry Brown (D) should drop a greenhouse gas (GHG) "public nuisance" lawsuit filed last year by the state against automakers, according to briefs filed in the case. Brown and his deputy attorneys are still discussing whether to pursue the case, which was filed by former AG Bill Lockyer (D), according to a spokesman.

Supporters and detractors alike agree the case could potentially have significant legal implications because it may lead to a situation where the courts decide how much global warming emissions are appropriate or legal.

The U.S. District Court for the Northern District of California is scheduled to decide during a March 6 hearing whether to accept amicus brief arguments commenting on the landmark case. So far, the state of Michigan and the conservative Pacific Legal Foundation (PLF) — both staunch opponents of the suit — have filed arguments blasting the state's case. PLF sent a separate Jan. 11 letter to Brown, asking him to drop the \$1-billion "public nuisance" case against the automakers.

Emissions from vehicles made by the automakers — including General Motors Corp., Ford Motor Co., Nissan North America, Honda North America, Chrysler Motors Corp. and Toyota Motor North America, Inc. — are a "nuisance," the September 2006 suit claims. Lockyer, who now serves as state treasurer, sought to recover about \$1 billion in alleged damages caused by GHG emissions from automobiles.

It is unclear whether Brown will pursue Lockyer's case. Brown in a pre-election interview told the *San Diego Union-Tribune* that he was uncertain about the "causation" link between the production of automobiles and the suit's stated global warming impacts, which include decreased mountain snowpack and increased flooding and wildfire danger.

Brown has yet to file a response to a December automaker motion to dismiss the case; attorneys are still discussing whether to continue to argue the case, according to the spokesman. "No decision has really been made"

as to how to proceed, he said. The AG has until Feb. 1 to reply to the automakers' motion.

PLF argues in its letter to Brown that the case could devastate multiple industries in the state. "Your office's legal theory has the potential of swallowing up not only the automobile industry, but virtually every lawful business in the state," the letter states. "It is easy to imagine that the sale of any legal products which has deleterious side effects — including paint, guns, fattening foods, violent movies and countless others — might give rise to job-killing, multi-million dollar lawsuits." *Copies of the letter and amicus briefs are available at InsideEPA.com. See page 8 for details.*

PLF's brief supporting dismissal of the suit also attempts to make the case for a narrowed, "reasonable" definition of public nuisance. This narrow definition is important to defending industry from legal attack, according to the group. Past decisions, including one from a California court, have concluded that it is not the job of the judiciary to set standards for air toxics or to otherwise act in the place of the Legislature or U.S. Congress in many similar instances, the brief argues.

Environmental legislation and products laws, not a potentially harmful definition of public nuisance law, would be better ways to deal with global warming, PLF concludes.

The state of Michigan brief shares many of the same sentiments about executive or legislative means being the best way to address pollution, but argues a decision by the court to side with California may force the courts to set a nationwide standard for global warming-causing emissions. To decide what the appropriate level of GHG emissions is, federal officials would have to first determine proper allocations of GHG emissions from the automotive sector.

Such a decision would be better left to lawmakers and the executive branch because of its complexity, the Michigan brief states. "Allocating [GHG] emission limits among economic sectors and among individual companies within an economic sector is a political task that requires a balancing of economic, environmental and political concerns."

Michigan is siding with the automakers because the damages sought by California would come from many companies based in Michigan, where nearly 22% of the state's residents are employed by automakers, according to the brief. If successful, the suit could prompt other suits, potentially costing Michigan industries billions, the brief asserts.

ACTIVISTS TURN TO LEGISLATURE FOR PORT-INFRASTRUCTURE PLAN CHANGES

Environmentalists disappointed with a final Schwarzenegger Administration plan to guide the expansion of port infrastructures statewide are turning to the Legislature to prioritize projects that are more environmental friendly. The activists say the plan, co-drafted by Cal/EPA, should have more thoroughly addressed port project mitigation costs and promoted projects that are less harmful to air and water quality.

Forthcoming battles over "goods movement" spending in the state will determine what portion of billions of dollars of bond financing will go toward environmental protection.

Cal/EPA and Business, Transportation & Housing Agency (BTH) officials Jan. 11 submitted the final draft of the Goods Movement Action Plan (GMAP) to the California Transportation Commission. Commission members will use the GMAP and other plans developed by local governments to recommend which projects are eligible to receive \$2 billion in bond money approved by voters last November through Proposition 1B.

Following the commission's recommendations, the state Legislature will make the final determination as to which projects will receive funding, according to Prop. 1B. Sen. Alan Lowenthal (D-Long Beach) is expected to carry the bill that actually funds the goods movement allocations.

Cal/EPA and BTH in the GMAP stress the dual importance of investment in the state's infrastructure and "the urgency of the needs for environmental and community impact mitigation." *A copy of the plan is available at InsideEPA.com. See page 8 for details.*

But activists assert this mitigation aspect is largely missing from the GMAP. For instance, the GMAP could have required that environmental mitigation costs — which potentially could reach into the millions of dollars — be included in the cost of the actual project, one activist said. These potential mitigation costs could be used to help rank projects, and may have given contractors incentives to use cleaner construction equipment, the source said.

"That way, the most environmentally sound projects would get funding first," the source said. "Why should a really dirty project get addressed first? It's frustrating."

GMAP's recommendations also fail to include concrete timelines and goals projects would have to meet to mitigate pollution, a second activist said. Without a concrete plan to address emissions and other potential pollutants, the project is merely "a compilation of a lot of government paper."

Both environmentalists said they will attempt to influence the way the Legislature allocates spending for the goods movement projects.

A Cal/EPA spokeswoman said the plan serves only to "outline possible candidates for allocating that money" earmarked for goods movement in Prop. 1B.

However, the GMAP does recommend immediate, short-term, intermediate-term and long-term action measures

that can be taken by vessels, trucks, railroads and the ports themselves to reduce pollution.

For instance, in order to improve air quality, truckers over the immediate term can start using California low-sulfur diesel fuel, while ports over the long term can begin using zero-emission cargo handling equipment. And to address water quality, the plan recommends projects adopt Low Impact Development, which stresses reduced runoff from projects during the construction phase and after completion.

A spokesman for the Port of Long Beach said officials see the GMAP as “a guide” the port can use while working with the Legislature and transportation commission on funding and developing specific projects.

ENVIRONMENTALISTS OPPOSE CREDITS FOR COLD IRONING . . . begins on page one

ARB staff Jan. 11 held its first meeting with stakeholders to discuss the development of the shore-power, or cold-ironing, regulation. Staff anticipates bringing a proposed rule to the full board for approval later this year. A copy of a staff presentation is available at InsideEPA.com. See page for 8 details.

Cold-ironing allows container ships to plug into dockside power instead of running their diesel engines to generate electricity. This would eliminate nearly all emissions from ships docked at ports, ARB says.

But ARB staff has yet to assess the significant costs to support cold-ironing at the state’s major ports, representatives of some major ports argued at the meeting. Representatives of the ports of Oakland and San Diego argued that ARB staff has yet to address the costs for infrastructure, saying ports will be forced to make a huge commitment in funding.

A source with the Port of San Diego said after the meeting that the total costs for its port could be anywhere between \$500,000 and \$800,000 to install cold-ironing infrastructure for certain container ships at ports.

Some of the ports’ anxiety over funding stems from uncertainty about how much state funding — specifically, \$1 billion earmarked in an infrastructure bond for air quality approved by voters last year — will be dedicated to ARB’s cold-ironing regulation.

ARB staff indicated it is unclear how much of the \$1 billion will be dedicated to shore-power infrastructure, because the allocations must still be determined by the Legislature.

Meanwhile, port representatives at the meeting unveiled plans to seek ERCs for cold-ironing with at least one southern California air district. Generation of more ERCs is seen as critical to ports and industry groups because they are in short supply statewide and is viewed as critical to spurring economic growth. Port of San Diego representatives said at the meeting the port is working with the San Diego air District to generate ERCs for ship emission reductions that could help finance the cold-ironing infrastructure.

A source with the San Diego air district confirmed the district is set to discuss this month with the port the potential of banking

ARB SHORE-POWER RULE TO INCLUDE GHG REDUCTION COST ANALYSIS

An air board rule expected to be adopted later this year may be one of the first significant greenhouse gas (GHG)-reduction measures the board will seek prior to implementing the global warming law, AB 32, sources say. The rule would require that technology be put in place to reduce engine emissions from ships docked at ports.

Development and implementation of the rule may indicate how cost-effective GHG reduction mandates will be as the board implements AB 32.

Air Resources Board staff is developing a shore-power, or “cold-ironing,” regulation expected to be brought to the board for adoption in November (*see related story, p1*). The regulation would require certain ships employ cold-ironing technology when docked, instead of being powered by their diesel engines.

Cold-ironing — which refers to plugging ships into dockside power to generate on-board electricity — is being promoted primarily as a way to reduce soot and smog-forming pollutants such as nitrogen oxide (NOx) and particulate matter (PM) at congested ports.

However, ARB’s staff developing the shore-power regulation said at a Jan. 11 shore-power working group meeting they have discussed with AB 32 staff the significant GHG reductions the rule is expected to achieve as a side benefit.

Dave Modisette of Public Policy Advocates LLC, a lobbying firm representing several industry groups including the California Electric Transportation Coalition, asked at the meeting how the rule would mesh with AB 32 and also questioned staff if it would perform a cost-effectiveness analysis for GHG reductions, in addition to PM, NOx, and other emissions.

ARB staff responded that this will be one of the first GHG-reduction rules to go forward, and added it would include GHG cost analysis. But staff said it is unclear to what extent the GHG cost analysis for cold-ironing would be applied for AB 32 purposes.

“This again is something new to us,” one ARB staffer said at the meeting. “We don’t know how it fits in, but it will be part of the analysis. We look forward to seeing what it looks like, and [what] decisions may be made based on those results.”

emission reductions from cold-ironing. But because ARB is developing the cold-ironing rule, it is questionable whether emission reductions from cold-ironing would be eligible for banking, the district source said.

ERCs must be tied to projects that achieve emission reductions that go beyond federal, state or local rules.

ARB staffers at the meeting echoed that “the door is probably closed” on ERCs for cold-ironing, but hesitated to say it is “completely off the table,” stating that anything that “goes above and beyond” in terms of emission reductions could be eligible for ERCs.

The port is being as creative as possible with the district in trying to hammer out ERCs for cold-ironing, the Port of San Diego source said. The port has yet to submit an application to the district for ERCs, the source said.

There are discussions ongoing at other districts around the state, including the South Coast air district, over the generation of ERCs for cold-ironing. However, these talks are not very far along, said a source with the California Council for Environmental & Economic Balance (CCEEB).

While the question of surplus reductions for cold-ironing is the key factor, it should not be considered a deal breaker for the ports or industry, the CCEEB source said. “ARB may require certain ‘frequent flyer’ vessels to use cold-ironing, but is there a second tier that may remain surplus, thus qualifying for ERC generation?” the source said. “At a minimum, you should be able to get credits for early implementation.”

But an environmentalist argued that the emission reductions associated with shore-power rules would clearly not be surplus.

The environmentalist also defended the ARB cold-ironing regulatory proposal as very cost-effective. Much of the funding “needs to come from the shipping industry, the ports, and terminal operators,” the source said. “We also will see part of the \$1 billion . . . and we hope to see a container fee bill. I believe the whole credit system requires surplus, but these are not surplus. We are very much opposed to ERCs for any regulation.”

COURT FAULTS WRCB WATER FEE RULES, BUT BACKS CHARGES’ LEGALITY

Emergency water rights fee regulations drafted in 2003 by the state water board are unconstitutional and invalid, but the board nonetheless retains the right to charge the fees, a California appellate court ruled this week. The fees charged by the water board fund its water rights program, which manages the distribution of water to municipal and agricultural users throughout the state.

Despite faulting the 2003 water board emergency rules, the decision concludes that water users who buy their water from the federal government can be charged fees, and the fees are not a tax, as alleged by California farmers and other water rights holders in the lawsuit.

Justices for the California Court of Appeals for the Third District Jan. 17 ruled some emergency regulations used to implement a 2003 water rights fee levied by the Water Resources Control Board were illegal. At the same time, the court found WRCB has the authority to charge a fee to implement its water rights program, ruling against the California Farm Bureau Federation (CFBF) and federal water contractors’ assertion that a water rights fee represents an “unlawful tax.” *A copy of the decision is available at InsideEPA.com. See page 8 for details.*

WRCB must issue refunds to those improperly charged a licensing and permitting fee under the emergency regulations that implemented the fee, as long as they have submitted the proper paperwork, and draft new fee schedules, according to the ruling. WRCB failed to show the water rights fees charged under those regulations bore “a fair or reasonable relationship” to the benefits and burdens shared by water rights holders, the decision states.

The 2003 fees were mandated by a budget trailer bill passed to cover General Fund shortfalls.

However, the court upheld the board’s ultimate right to charge the fee itself, since the fee is a “regulatory fee,” and will allow the board to draft new regulations that lawfully implement the regulatory fee. Case law has held that “the fact that fee payers may not believe they benefit from regulatory programs does not transform a regulatory fee into an unlawful tax,” according to the ruling.

WRCB also is legally allowed to charge the water rights fee to users of federal water project water rights, such as beneficiaries of U.S. Bureau of Reclamation water projects, the decision states. The federal contractors had challenged the board’s authority to levy these fees, since federal law prohibits states from charging regulatory fees to the federal government.

Since the fees are passed on to the contractors — which are not actually entities of the federal government — it is fair to pass the fee on to them, according to the ruling. WRCB must redesign its fee schedule so that federal water rights users pay a fairer share of the fee.

WRCB is deciding whether to appeal the decision or let it stand, a spokeswoman for the board said. “If the decision stands, the board will work quickly to develop a revised fee schedule that addresses the court’s concerns within the timelines.”

One attorney close to the case also was still reviewing the decision, but said water attorneys are now scrutinizing part of the ruling that seems to indicate water rights are not “real property.” Such a ruling could have a significant impact on water law in general, the source said.

OEHHA MORTALITY STUDY SEEN BACKING AB 32 RULES . . . begins on page one

findings from the studies during a Jan. 11 legislative briefing on the governor's proposed Fiscal Year 2007-2008 budget. The PM study was released last week; early results from OEHHA's climate change study are expected to be published in a forthcoming document by the United Nations' intergovernmental program on climate change.

OEHHA's establishment of a link between higher temperatures and mortality reveals the "strong public health rationale" behind GHG regulation, Denton said at the budget briefing. The study links higher temperatures — those above 75 degrees Fahrenheit — to increases in mortality, estimating a 2.5% increase in mortality for every 10 degrees increase in temperature.

In OEHHA's most surprising finding, mortality rates were found to increase at lower temperatures than predicted, meaning even slight climate change could increase mortality, an OEHHA source said.

OEHHA staffers studied four years of daily mortality data in nine California counties, focusing on nonviolent causes of death, primarily cardiovascular in nature, the source said. They next plan to study emergency room data, because mortality data only capture some of the potential effects of temperature spikes.

Staffers also plan to examine factors such as race, gender and education status to determine whether "sensitive populations" — such as those who live in environmental justice communities — would be disproportionately affected by climate change.

Data from the mortality study may help local governments prepare for the effects of climate change, the source said. "We will inform local public health agencies that they need to take proactive steps" to protect residents even in cases of slight temperature spikes.

The temperature-mortality study is the first to include factors that filter out mortality caused in part by air pollution, such as PM and ozone, the source said. It kicked off "about a year ago, and did not start out as an attempt to respond to last year's passage of AB 32," but is intended to help the Air Resources Board "identify populations at risk" as the board crafts regulations implementing AB 32, the source said.

As OEHHA continues to probe climate change's potential health effects, the office's newly published study of PM means "scientists are able to document" what it is about PM that contributes to mortality, Denton said at the budget briefing.

The PM studies find elemental carbon and organic carbon components of PM are what most threaten human health, the OEHHA source said. Diesel engine emissions; burning biomass, as in woodstoves; and some restaurant cooking emissions cause releases of this harmful form of PM, the source added. The findings "support the direction that the state is heading," particularly the ARB goal of reducing diesel engine PM emissions by 75%.

Findings from the studies ultimately will also support efforts to reduce the carbon content of fuel through the governor's proposed Low Carbon Fuel Standard, the source added, because less carbon taken into an engine means less carbon content in emissions.

Background Documents For This Issue

Subscribers to InsideEPA.com have access to hundreds of documents, as well as a searchable archive of back issues of *Inside Cal/EPA*. The following are some of the documents available from this issue of *Inside Cal/EPA*. For a full list of documents, go to the latest issue of *Inside Cal/EPA* on InsideEPA.com. For more information about InsideEPA.com, call 1-800-424-9068.

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

- Schwarzenegger Executive Order Lays Out Fuel Carbon Reduction Plan (epa2007_0079)
- California Air Officials Probe New Nitrogen Dioxide Standards (epa2007_0060)
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PELOSI PLAN FOR SELECT CLIMATE PANEL SPARKS HOUSE JURISDICTIONAL FIGHT

House Speaker Nancy Pelosi's (D-San Francisco) plan to establish a select committee on global warming is already causing jurisdictional battles with members of the House energy committee and could slow the progress of climate change legislation this year, sources say.

Pelosi's controversial plan comes just days after House Energy & Commerce Committee Chairman John Dingell (D-MI) sought to assert jurisdiction on the issue and said he hoped to see legislation enacted in the 110th Congress — despite previous assertions from Dingell that it may take several years to develop such legislation.

In response to Pelosi's plan, Dingell said Jan. 17 that “these kinds of committees are as useful as feathers on a fish.” Dingell called the Democratic members of the House energy committee to a meeting slated Jan. 18 to discuss Pelosi's plans, though the outcome of that meeting was unclear at press time.

Pelosi's plan also comes as environmentalists are raising concerns about whether Senate Democrats have a strategy for addressing jurisdictional issues among the three key Senate committees with an interest in climate change, with one activist describing the proliferation of climate bills introduced in the upper chamber since the 110th Congress convened as “chaos.”

Pelosi's plan comes less than one week after Dingell argued in a Jan. 12 memo to colleagues that his committee is best suited to deal with the issue of climate change. Pelosi's office did not return calls.

Democratic and other sources suggest that Rep. Ed Markey (D-MA) may be in line to chair the select committee. A Markey spokesman declined to comment.

Select committees can hold hearings but traditionally do not vote on legislation.

Some sources believe that Pelosi may be talking about the select committee as a way to pressure Dingell into agreeing to back an aggressive climate bill, or because of concerns that Dingell may not want to move climate bills that would affect the auto industry in his home state. But at least one source said such a “threat” will not succeed and is more likely to stall climate legislation than accelerate it.

The speaker's move is already prompting a fierce bipartisan backlash from House energy panel lawmakers who believe Pelosi is taking away their jurisdiction, several sources said.

And one industry source said the jurisdictional fight could hobble the legislative process on climate change as lawmakers struggle to establish authority on the issue.

Anything that slows the development of climate change bills would run contrary to a Jan. 12 letter Dingell wrote to former Vice President Al Gore, in which Dingell said he planned to hold a series of House energy panel hearings on climate change “that we hope will lead to the enactment of legislation in the 110th Congress.” Dingell also invited Gore to testify before the energy panel on the issue.

Dingell also wrote in his memo to energy panel members noting the committee “more than any other” is best suited to address climate change and “brings a broad and deep range of expertise and experience to the climate change debate.”

The industry source said the select committee “is all about politics and nothing about policies” and said it will slow if not kill the chances for the House to pass climate legislation anytime soon. “Climate change policy is going to be much harder to figure out if you bring more politics into it through a new select committee,” the source added.

Dingell in his memo also argues his committee is well positioned to lead any House effort on climate change because it has jurisdiction over a slew of relevant areas, including transportation and energy issues, emissions trading systems, environmental regulation “and many other substantive concerns directly relevant to climate change policy.” He also cites several environmental laws drafted by the committee, including the Clean Air Act amendments of 1990, which passed the House by a 401-25 vote margin.

One House Republican aide said any attempt to take jurisdiction away from the energy panel and give it to Pelosi's select committee will prompt a fierce bipartisan backlash. “Bipartisan alliances have a way of arising when committees face losing great hunks of jurisdiction, especially when the booty is seen as a payoff to loyal followers instead of a legitimate concern for a unique issue,” the source said.

Jurisdictional disputes are not limited to the House, according to several sources who said Senate lawmakers also face major struggles over committees' authority on climate change.

One environmentalist said, “You've got everybody issuing bills but no idea what to do or how to deal with them,” referring to the fact that several different bills have already been introduced and referred to different committees all exerting jurisdiction over climate legislation.

This month, Sens. John McCain (R-AZ) and Joseph Lieberman (I-CT) reintroduced a climate change bill to establish a nationwide cap-and-trade system for reducing greenhouse gases which was referred to the commerce committee. Sens. Barbara Boxer and Bernie Sanders (I-VT) introduced a more stringent climate bill that was referred to the Senate Environment & Public Works (EPW) Committee, and Sens. Thomas Carper (D-DE) and Dianne Feinstein Jan. 17 introduced a bill also establishing a cap-and-trade program for the utility industry that at press time had not been referred to a committee.

“My sense is that there isn't a Democratic strategy” for moving a particular climate bill, the environmentalist

said, adding, "Everyone just seems to be trying to one-up each other right now . . . I'm not quite sure what proposals might come out of all of this. What are we actually going to end up having a vote on?"

Responding to reporters' questions Jan. 17 on the proliferation of climate legislation, Feinstein said, "Individuals are free to produce bills . . . I always welcome everybody's legislation." She also suggested that the process on the Senate floor for developing and passing climate change legislation is "wide open."

Senate Energy & Natural Resources Committee Chairman Jeff Bingaman (D-NM) announced in a floor statement Jan. 4 that EPW has "primary jurisdiction" over climate change issues. However, since his floor statement, the energy committee chairman has aggressively touted in public statements the need for global warming legislation and, according to some observers, may even have a leg up in formulating key elements of any legislation.

ADMINISTRATION DEFENDS BIOMONITORING BUDGET . . . begins on page one

Office of Environmental Health Hazard Assessment; and \$123,000 and one new position to the Department of Toxic Substances Control.

Last year's biomonitoring bill, SB 1379, requires the program to take statewide surveys every two years to establish baseline levels and trends of several chemicals found in humans. The program will include a scientific advisory panel made up of 13 members, including seven appointed by the administration, three by the Senate president and three by the Assembly speaker.

The scientific panel and the Schwarzenegger Administration agencies determine which chemicals may be monitored. The list of chemicals it may monitor are limited to those that have already been monitored by the Centers for Disease Control & Prevention.

A source with Commonweal, a health and environmental research group that co-sponsored SB 1379, said the governor's proposed funding falls well short of what is needed to get the program up and running for its first year.

The source said about \$10 million total is needed in this first year to fund new laboratory equipment and staff to get the program started. "This is less than 25% of what is needed in year one. The governor signed this bill to some fanfare," so he should follow through with proper funding, the source said.

Senate President Don Perata (D-Oakland), who co-authored the bill, will likely have this funding discrepancy "on his radar screen," the source said.

Since Perata just received the budget, it marks the beginning of a long discussion about the biomonitoring program, a Perata spokeswoman said. "We are pleased to see funds for the program but want to understand how they are spent and whether they are sufficient before offering further comment. At the end of the day, Senator Perata will make sure this program is adequately funded."

But the budget proposal is sufficient because it is only to initiate planning for the implementation of the program, a DHS spokeswoman said.

DHS will use its proposed \$1.21 million allocation to prepare for the initiation of the program in subsequent budget years. This would include designing the sampling program and study what would be needed to provide a strong scientific foundation for the program, the DHS spokeswoman said.

An OEHHA spokesman said the office will actually be getting three new positions with the \$167,000, with these positions established at various times during Fiscal Year 2007-08. "This level of resources will enable OEHHA to work with DHS and DTSC to begin setting up the program."

ACTIVISTS SEE GROWING USE OF 'PRECAUTIONARY PRINCIPLE' FOR CHEMICALS

Environmentalists and other public health advocates say recent movements by states including California, businesses and international regulatory bodies are signs of increased use of the so-called "precautionary principle" — efforts that come as Democrats are raising key questions about federal toxics laws.

Activists say the precautionary principle is beginning to emerge in a variety of political and commercial arenas, including efforts by businesses to reduce potential toxic exposure; the growth of green chemistry programs; and, to a lesser degree, a recently adopted European chemical regulatory program. The precautionary principle places the burden on those advocating new policies or products to prove the efforts will not cause public harm. For example, the chemical industry would be burdened with proving a chemical is safe before introducing its use.

The chemical industry remains the primary focus of the precautionary principle, as environmentalists argue federal laws are insufficient to regulate chemicals that may pose a threat to human health. Activists say it takes U.S. EPA years or decades to regulate harmful chemicals, because the agency must first prove the chemicals pose a health threat. They cite lead, mercury and other well-defined hazards as examples where the agency has struggled to eliminate hazardous uses. In particular, environmentalists say the Toxic Substances Control Act (TSCA) is problematic. The law, which has not been updated since Congress passed it in 1976, may face intense scrutiny from Democrats who are promising oversight of toxics issues.

The concept of the precautionary principle ruffles chemical industry officials, who say it is ill-defined and poses

unnecessary burdens on the industry. Officials argue TSCA is sufficient to regulate chemicals and also note that industry voluntarily supplies data to EPA on a number of the most highly-used chemicals in the United States. Given that information, EPA has enough data to screen for chemicals that may pose a threat, industry officials say.

Environmentalists, however, say the precautionary principle is already being successfully applied. For example, the Democratic governors of Maine and Michigan issued executive orders in 2006 promoting “green chemistry,” or the substitution of less toxic forms of chemicals for those that may pose health risks. Environmentalists say the efforts represent a form of the precautionary principle being actively applied, and note the results could generate significant economic benefits for those states. Other states, including Massachusetts and New York, are considering similar programs. In addition, California is considering a legislative approach to green chemistry, though it has yet to be unveiled.

In another example, environmentalists cite San Francisco’s recent decision to ban phthalates in children’s toys as a regulatory driver for the precautionary principle. The city voted to ban the chemicals, which are used to soften plastics, based on concerns that the chemicals may cause reproductive harm. But industry and retailers say the risks are minimal, and filed suit to block the ban. If the ban sticks, toy manufacturers may be forced to examine other alternatives.

Some businesses are also taking steps to reduce toxics in their products, which environmentalists say is another application of the precautionary principle. For instance, some retailers are leaning on suppliers to provide furniture, medical supplies or other products that do not contain chemicals suspected of causing health problems.

In the international arena, the European Union (EU) adopted a new chemical regulatory program known as Registration, Evaluation & Authorization of Chemicals (REACH) in late 2006. REACH is aimed at requiring data on most chemicals produced or sold in the EU, and requires safety testing for certain chemicals before they can be used.

Environmentalists are divided on whether the program is an example of the precautionary principle. Some argue it is one of the greatest triumphs of the principle, while others argue it is simply a more stringent regulatory program than that of the United States and does little to implement the precautionary principle.

One public health advocate said REACH will generate more hazard data but is still shy of precautionary. “What’s going on in Europe is a preview,” the source said, but other regulatory efforts and incentive-based programs will likely be needed to take a precautionary approach to public health.

Industry officials, on the other hand are adamant that REACH is not a sign of the precautionary principle being invoked. Instead, they said the program simply adds significant regulatory burdens that may pose an economic threat to industry but offer little public health benefits.

Whether REACH is founded on the principle or not, environmentalists argue that the precautionary principle will not necessarily place an insurmountable burden on industry or regulators. Instead, they say the principle makes the case for analysis of available alternatives and places burden-of-proof that a product or regulation is safe on those advocating for use or implementation.

A public health advocate said industries invoking the precautionary principle by aggressively pursuing green chemistry and other safer alternatives can avoid long-term regulatory battles. “If you design safer products to begin with, there’s no need for a regulatory scheme to control it,” the advocate said.

Some environmentalists said that REACH will provide a benchmark, and hinted that new ideas for restricting toxics are yet to come.

For example, some argue that if the principle were to be adopted in the United States, regulations would work differently. One researcher cited the Food Quality Protection Act (FQPA) as a potential regulatory precursor. FQPA requires industry to submit data to EPA detailing whether pesticides cause adverse effects in children, and is an example of how the precautionary principle might be applied in a regulatory framework. The researcher argued that all chemicals, not just pesticides, should meet similar requirements. “At least as a first step, it would be important that industrial chemicals be given the same scrutiny as pesticides,” the researcher noted. “The current research

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structure is not working to protect kids.”

Some of those thoughts have been vocalized by Democrats as well, including incoming Senate Environment & Public Works Chair Barbara Boxer, who has vowed oversight of toxics issues. Other Democrats raising toxics concerns include Reps. Hilda Solis (El Monte) and Henry Waxman (Los Angeles). Observers expect Democrats to hold key oversight hearings in the 110th Congress, and question whether TSCA revisions might appear on the agenda.

INDUSTRY SEEKS WASTE DIVERSION AS TRADABLE GHG CREDIT UNDER AB 32

Waste industry practices that divert garbage away from landfills should be considered a tradable commodity by a potential future state greenhouse gas (GHG) trading program expected to be created under the state’s climate change law, AB 32, industry representatives argue. But environmentalists say it is premature to talk about diversion in a future GHG trading program, asserting that manufacturers using recycled material would be a more appropriate potential source of credit.

The emerging conflict reflects industry’s growing concerns about impending Air Resources Board rules to implement AB 32, which may include new regulations limiting methane emissions from landfills. Industry representatives are scrambling to advance various ideas to lessen the potential blow of these future rules and potential GHG emission caps on their industry.

At a Jan. 9 California Integrated Waste Management Board meeting regarding strategic policy development, consultant John Cupps said a forthcoming board study to quantify GHG reductions of garbage diversion and recycling is essential to help document the GHG benefits of diversion. *A staff report on the study is available at InsideEPA.com. See page 8 for details.*

While data on diversion’s ability to reduce GHG reductions are uncertain, Cupps said, the board may play a significant role in quantifying these possible reductions and determining how waste diversion may play a part in an AB 32 trading scheme. “To the extent that diversion of a waste does in fact result in [carbon dioxide] reductions, and to the extent that it is verifiable, there is the potential that diversion can become a tradable commodity and become a source of infusing resources into the system to push higher levels of diversion,” he said.

A 1989 law, AB 939, required local jurisdictions to divert 50% of their waste from landfills by 2000, which forced the waste management industry to ramp up its recycling and diversion efforts.

Compliance with this law has put the industry in a prime position to benefit from an AB 32 GHG trading program, an industry source said. “We had a jump on everybody else with AB 939. It got us motivated and positioned to draft this next opportunity. AB 32 is a new policy driver to allow us to piggyback on our infrastructure. A lot of people are excited because we have a head start on the energy sector and transportation.”

But ARB would undoubtedly heap great scrutiny on the industry and local jurisdictions before granting GHG credit for diversion in a trading scheme, a second industry source said. “You would have to look at what you are doing to increase diversion. And how do you verify a diversion program? Let’s say city A does a recycling ordinance, how do you quantify it? Sometimes diversion programs increase GHGs — you may not have clean burning fuels” for the collection trucks, the source said.

Arguments could be made that the waste management activity of composting, for example, is actually less environmentally sound from a GHG perspective than burying the material in landfill with methane gas controls, the second industry source said.

Gas control systems at landfills and the electricity generated from methane collected is another vehicle the industry wants to capitalize on to generate GHG credits if there is an AB 32 emissions market, the source said.

A third industry source said ARB, in designing a trading program, should recognize efforts the industry makes to avoid GHG emissions, and that these should also be eligible for GHG credits. “You could come up with an estimated amount of avoided [GHG] emissions,” the source said, noting that U.S. EPA already has developed default commodities, determining the amount of GHGs per ton of aluminum, paper and many other waste streams.

But the biggest question is who will be credited for GHG reductions through diversion, the source said. “Will it be the state for AB 939, the city, the [waste] service provider, or the manufacturer?” of products using recycled materials, the source said.

An environmentalist said any GHG reduction credit should go to manufacturers that use recycled materials instead of “virgin” materials. “The result is less processing, less energy, less pollution, less GHG emissions.”

California glass manufacturers are already selling air pollution credits due to their increased use of recycled glass and the resulting reduction in pollution, the environmentalist said. “Local haulers and collectors are not going to realize any GHG reduction hauling that glass to a manufacturer.”

Increased diversion and methane capture at landfills are necessary pieces of GHG reductions under AB 32, but whether they will generate tradable credits under the climate change law is impossible to say, because there is no concrete trading plan yet, a second environmentalist said. “Rules and standards for recycling, composting, methane capture, et cetera, probably will work better than a trading program would.”