

# Inside Cal/EPA

An exclusive weekly report on environmental legislation, regulation and litigation  
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## Activists Eye Constitutional Challenge To New CEQA-Streamlining Law

Environmentalists are charging that a new law that aims to streamline California Environmental Quality Act (CEQA) reviews for development projects is unconstitutional by infringing on the judicial process and potentially disrupting the ability of groups to challenge projects in court. But they are hoping to work with the law's supporters on "cleanup" legislation in 2012 to remove the language they deem as unconstitutional in order to avoid possible litigation, according to sources.

However, some sources say that the planned cleanup legislation likely will not address the constitutional issues being raised by activists.

At issue is the recently enacted law AB 900 by Assemblywoman Joan Buchanan (D-San Ramon) and Assemblyman  
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## New Central Coast Water Board Appointees To Consider Disputed Policies

Gov. Jerry Brown (D) Nov. 10 appointed four members to the Central Coast regional water board, a long-awaited move that is expected to lead to a vote early next year on a stalled, controversial proposal to regulate agricultural runoff. The regional board has lacked enough board members to vote on the controversial rules that have been stalled for months.

The new regional board members are also expected early next year to decide on a controversial stormwater permit for the city of Salinas that is expected to draw strong opposition from local governments and industry groups, according to a source.

Activists say they have been anxiously waiting for Brown to appoint new members so the runoff rules can be acted  
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## Peer Reviews Support OEHHA Perchlorate Drinking Water Standard

Three external scientific peer reviews of the health hazard office's draft perchlorate drinking water public health goal (PHG) generally back the agency and its use of scientific studies to craft the standard. The peer reviews, conducted by three scientific experts on perchlorate, were conducted at the request of industry groups that have challenged the draft PHG as too stringent, infeasible and ignorant of key studies on perchlorate health impacts. The agency released the draft PHG for public comment and review earlier this year.

The controversial draft PHG by the Office of Environmental Health Hazard Assessment, which is proposed at 1 part per billion (ppb), is being closely followed by multiple stakeholder organizations. Industry officials have argued that the limit is too stringent, while environmentalists have long argued for a tighter standard. The chemical in recent

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## Activists Target California Plan To Offset ZEV Mandate With GHG Credits

While applauding California regulators for releasing a bold plan this week requiring automakers to significantly reduce greenhouse gases (GHGs) and other air pollutants from vehicles in the coming years, environmentalists plan to press state officials to severely restrict a proposal that would reduce automaker obligations under the state's zero-emission vehicle (ZEV) mandate by allowing the use of credits generated from "overcomplying" with new state and national GHG standards.

The activists argue that the proposal could undermine the entire ZEV regulation — which they credit with accelerating the introduction of hybrid and battery-electric vehicles — and make it extremely difficult to achieve California's lofty long-term GHG-reduction goals, which include an 80% reduction in emissions by 2050.

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The California Air Resources Board (ARB) released Nov. 16 an 18-page summary of its upcoming “Advanced Clean Car” regulatory package, which will include GHG emission standards for 2017-2025 model-year vehicles that harmonize with federal GHG and corporate average fuel economy standards announced Nov. 16 by federal agencies; more aggressive ZEV requirements; tighter low-emission vehicle (LEV) standards that cover several pollutants; and a “clean fuels outlet” regulation, which primarily will require fuel providers to install hydrogen fueling pumps at stations under a certain time frame. The detailed regulatory proposal with an accompanying “initial statement of reasons” document is scheduled to be released by ARB on Dec. 7. ARB is scheduled to approve the package during its January board hearing.

According to ARB’s summary, the proposed ZEV regulatory amendments would cover 2018 and subsequent model years and include tighter requirements to push ZEVs and plug-in hybrid vehicles to about 15.4% of new sales by 2025. “This will ensure production volumes are at a level sufficient to bring battery and fuel cell technology down the cost curve and reduce incremental ZEV prices,” the summary states. *A copy of the summary is available at InsideEPA.com. See page 8 for details. (Doc ID: 2382500)*

The proposal also removes credits for near-zero emitting conventional technologies and advanced technology partial zero emission vehicles — which are typically non-plug-in hybrids — as compliance options for manufacturers “because these technologies are now commercialized,” according to ARB.

In addition, ARB is proposing to change a “so-called travel provision,” which allows ZEVs placed in any state that has adopted the California ZEV regulation to count towards the ZEV requirement in California, according to the summary. ARB is proposing to end the travel provision for battery electric vehicles after model year 2017 but at the same time to extend the travel provision for fuel-cell vehicles until sufficient complementary policies are in place in states that have adopted the California ZEV regulation. “This will allow fuel-cell vehicle technology to continue to mature, and provide time for states that have adopted California’s ZEV regulation to build infrastructure and put in place incentives to foster fuel-cell vehicles,” according to ARB.

But in the proposed amendment that environmentalists say could completely undermine the aggressive goals of the ZEV mandate, ARB plans to “allow manufacturers who systematically over-comply with the proposed GHG fleet standard to offset a portion of their ZEV requirement in 2018 through 2021 model years only,” according to the summary.

This requirement was committed to by ARB officials when they signed a pact earlier this year with the Obama Administration and automakers to harmonize the state’s GHG standards for 2017-2025 vehicles with the federal GHG and corporate average fuel economy proposal.

Earlier this year, environmentalists had raised strong concerns about the commitment and ARB said it was still considering whether to include the proposal in its advanced clean cars regulatory package (*see Sept. 2 issue*).

Now that ARB has confirmed it will include the provision in the regulations, environmentalists are planning to pressure the state officials to severely restrict its application.

“California needs to strengthen the ZEV program and not weaken it,” said an activist. “That provision really undermines the ZEV program and is unnecessary. Going forward, that provision needs to be significantly limited in use.”

Environmentalists plan to press ARB to strengthen the ZEV amendment proposal to require that 18% — rather than 15.4% — of vehicles on California roads are ZEVs by 2025, the source said. “An overcompliance provision obviously would result in those targets not being met. . . . If every automaker decides to take that deal, then how does that create certainty going forward for the program, and for the electric drive industry, in terms of a market?” the environmentalist asked.

Further clouding the issue is uncertainty over how many credits individual auto companies will have to potentially offset their ZEV obligations, the source said. “One of the problems is that we haven’t received information about which automakers are most likely to utilize this.”

Historically, Honda and Toyota have overcomplied with federal fuel economy standards, the source said, which would indicate that “half the market” in California could potentially take advantage of the ZEV offset provision.

The environmentalist said the blame for the regulatory provision being pursued by ARB falls on the automakers, who have “tried to cut the program — and now they’ve put a cut into the program. The question now is, how do you stop or limit the bleeding.”

Environmentalists consider California’s ZEV regulation crucial for reducing GHG emissions by advancing battery-electric and fuel-cell vehicles on an aggressive scale. The source said that the newly proposed federal auto GHG and fuel economy standards plan only requires 3% of the vehicle fleet on a national basis to be battery-electric or plug-in vehicles by 2025, making the ZEV monumentally more important in this regard.

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**“One of the problems is that we haven’t received information about which automakers are most likely to utilize this.”**

**— An environmentalist**

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## Green Chemistry Panelists To Lobby Lawmakers For Program Funds, Fee

Members of a science panel advising the toxics department on its landmark draft green chemistry rules fear that the program may not get off the ground due to a lack of funding, with some panelists saying they will lobby state lawmakers to find money for the program, including passing legislation to enact new program fees. The department's new director this week acknowledged the agency's funding dilemma and admitted that finding a new source of revenue to make the program viable in the long-term will be difficult.

Meanwhile, panelists this week also flagged a variety of technical and policy issues with the department's latest "informal" draft rules unveiled Oct. 31. For example, some panel members and stakeholders questioned a list of about 3,000 "chemicals of concern" that the department plans to evaluate in the program. Panelists also questioned how chemical "alternatives analysis" will be handled, and reiterated concerns that confidential trade secret protections will prevent the agency from obtaining key chemical data from companies.

The Department of Toxic Substances Control's latest draft of green chemistry regulations is being closely watched by numerous stakeholders and lawmakers not only in California, but nationally and internationally because the program could be a model for phasing out hazardous chemicals in everyday consumer products. The latest draft represents the Brown Administration's first stab at implementing the controversial program. DTSC released a draft for public review last year under former Gov. Arnold Schwarzenegger (R). But that draft was shelved following numerous concerns raised by lawmakers, industry groups and environmentalists for a variety of reasons.

The "Green Ribbon" science panel, which was formed to advise DTSC on the green chemistry program, met Nov. 14-15 in Sacramento to discuss the latest informal draft of regulations. The 2008 law AB 1879, which authorizes DTSC to adopt the green chemistry rules, created the science panel.

AB 1879 requires DTSC to adopt regulations to address "chemicals of concern" in consumer products. DTSC has the authority under the law to ban certain chemicals and to require companies to study whether substituting dangerous chemicals in products for less toxic substances is feasible.

DTSC says the Oct. 31 draft rules establish an immediate list of roughly 3,000 "chemicals of concern," based on work already done by other authoritative organizations. The draft rules specify a process for DTSC to identify additional chemicals of concern, the department said (*see Nov. 4 issue*).

At the Nov. 15 science panel meeting, some panelists echoed concerns raised previously by many environmentalists that the green chemistry program may not get off the ground due to a lack of long-term funding.

Panel member Tim Malloy, a University of California (UC)-Los Angeles professor of law, questioned whether the AB 1879 program can work without a sustainable funding source. He argued that the law not only authorizes the science panel to advise DTSC on technical aspects of the regulations, but also to give advice on implementing the program, including funding.

"It would be nice to see a [DTSC] budget submission that reflects what you think the actual costs of doing an effective program would be," Malloy said to DTSC officials. "Maybe I'm naive, but it seems like it's not apparent that anybody has identified what the costs of this program would be and asked the Legislature to fund it. There ought to be some meaningful effort to obtain that funding . . . otherwise this program, I fear, will be [limited]."

Malloy argued that the Legislature ought to consider a green chemistry program fee, something that environmentalists have called for since the law was enacted.

Other panelists, including Julia Quent, a former Department of Public Health scientist, and Meg Schwarzman, a UC-Berkeley research scientist, also supported the argument for more program funding. Schwarzman noted that the Assembly Environmental Safety & Toxic Materials Committee is scheduled in December to hold a green chemistry program oversight hearing, saying that some panelists may raise the funding issue at that hearing.

Quent and Schwarzman also indicated that members of the science panel may consider drafting a letter to the Legislature to formally request new funding for the green chemistry rules.

DTSC Director Debbie Raphael responded during the meeting that the funding situation for DTSC is "dismal" and "it's much worse than I understood when I became director. It's truly robbing Peter to pay Paul, and I don't know that we can keep paying Paul," she said of shifting department resources.

Raphael noted that the governor has directed agencies to conduct a "general inquiry" into agency programs, including DTSC "looking at our statutes and [determining], can we give up anything? We have big questions to ask as an agency even if green chemistry isn't on the table," she said.

Meanwhile, stakeholders and some panelists questioned the list of nearly 3,000 chemicals that DTSC says it will consider regulating in the draft rules.

Dawn Koepke of the Green Chemistry Alliance, an industry coalition, said during the public comment portion of the meeting that the group has great concerns with the broad chemicals of concern list and that it may ultimately include "far [more than] 3,000 chemicals." The group also questions the way DTSC would compile the list, saying it likely would represent a "list of lists," referring to the department using chemical data from a variety of authoritative bodies around the world. This approach may violate the requirements of AB 1879, the group says.

Malloy during the Nov. 14 meeting said he has concerns that the latest draft doesn't seem to have any "standards for

decision making” in terms of how DTSC takes regulatory action. On the issue of chemical alternatives analysis, “it seems to me there are no standards for making the evaluation itself, so my concern is, there’s not going to be a lot of consistency across cases,” he said. The draft also lacks standards for how DTSC issues regulatory responses when companies submit alternatives analyses, he said.

Under the alternatives analysis portion of the rules, product manufacturers would be required to study the feasibility of whether certain chemicals of concern can be replaced in products.

Panelist Joe Guth, a UC-Berkeley research scientist and a member of environmental groups, said the draft represents a “very good implementation of AB 1879,” but added that the law itself is problematic and limits DTSC in what it can accomplish.

For example, AB 1879 does not address “enormous problems with DTSC’s ability to collect [chemical] information” as well as trade secret protections for companies, he said. “So, maybe we’re stuck with running this as a pilot [program] to show that it works, and at that point, figure out what it takes to make it a complete chemicals policy.”

Guth noted that the Legislature would have to address all of these issues in future legislation “to actually create a comprehensive policy.”

## Industry Urges ARB To Revisit Diesel Rules In Light Of Decertified Filter

Construction industry officials and other groups are urging the state air board to explain how the board plans to enforce diesel filter requirements under its landmark diesel rules, following a board action earlier this year to pull the verification of a filter that is used on diesel trucks and equipment after it was discovered the filter has caused fires and raised safety issues, according to sources.

Industry officials are growing increasingly concerned because they say board officials have largely been silent on the agency’s plans to certify other diesel particulate matter (PM) filters for use in the near future to comply with the board’s rules, according to sources.

The industry gripes over the Air Resources Board’s policies on PM filters and how the agency implements landmark diesel rules could be significant because the rules in question are considered a huge piece of the state’s efforts to meet federal air quality standards. The diesel rules, targeting emissions from diesel highway trucks and construction equipment, are also viewed as the most stringent rules of this kind in the nation and have come under industry fire in recent years due to their compliance costs.

The Construction Industry Air Quality Coalition (CIAQC), in a Nov. 8 letter to ARB, requests that the board discuss during an upcoming board meeting how it plans to enforce the PM filter requirements of its diesel rules and to discuss the ARB staff process for verifying PM filters.

The CIAQC letter is in direct response to a September ARB decision requiring the immediate suspension of the sale and installation of a specific brand of PM filter. The industry has installed hundreds of these filters on equipment over the past 18 months in an effort to comply with ARB’s diesel rules, the industry letter says.

ARB has adopted in recent years an “on-road” diesel truck rule, which requires truck owners to generally upgrade their engines to newer model years and to install PM filters in many cases. The board’s “off-road” diesel rule targets emissions from construction equipment. However, the board recently relaxed that rule to essentially remove PM-reduction requirements, and most construction equipment is not required to install PM filters, an industry source said. But this equipment must still be upgraded to reduce smog-forming emissions.

Under the on-road diesel truck rule, PM filters are required on many trucks starting Jan. 1, 2012, ARB says. Older trucks must begin to be replaced in 2015. Under the off-road rule, the largest construction fleets need to begin reducing emissions by 2013.

But ARB’s “recall announcement” on the PM filters in question has served as a “particularly confusing development for our membership,” the CIAQC letter says. “This overall situation has caused a host of questions to emerge.”

ARB’s suspension action regarding the PM filter happened after serious safety issues came to ARB’s attention from Washington state, where a malfunctioning filter is being blamed for a catastrophic fire, the letter says.

But CIAQC is troubled that ARB staff has been seemingly reluctant to communicate “about what is going on . . . and the associated ramifications regarding regulatory compliance concerns,” the letter says. “This has left us in the dark . . . it is almost like [ARB staff] is ducking the issue altogether.” *A copy of the letter is available at InsideEPA.com. See page 8 for details. (Doc ID: 2382501)*

An industry source this week said the PM filter in question has mainly been applied to many diesel trucks that will have to comply with the board’s “on-road” diesel truck rule. One of the questions the industry raises to ARB is whether those who invested in the PM filter and have already installed them must remove them and invest in other, costly filters, the source said. And the industry also wants to know what other filters are appropriate for use, the source indicated.

Although ARB last year relaxed both diesel rules by delaying compliance dates, industry groups are still

concerned about “what is really going to be available” in terms of PM filters when compliance deadlines approach, the source said. ARB has been silent on its intentions as far as what PM filters may be “coming down the pike,” the source said. “These filters just don’t work in all of the applications. Another broader question is: What does the ARB verification mean?”

The source noted that ARB’s verification process for filters mainly focuses on whether a device can reduce emissions or PM to a certain level, and does not adequately take into account other installation issues, such as safety.

ARB spokespersons did not respond to requests for comment on the letter.

## **Biomonitoring Program May Link With Other States On Chemical Research**

Officials overseeing California’s biomonitoring program may collaborate with New York and Washington state officials, who are also implementing similar programs, in an effort to share key research data on chemicals and other findings, sources said. Officials with California’s program, which has been limited in its scope due to resource and funding constraints, may be interested in at least sharing laboratory protocols developed by the other states, according to sources.

Meanwhile, an advisory panel for California’s biomonitoring program is urging state lawmakers and Cal/EPA officials to increase funding for the program or at least fill staff vacancies. The pitch for more funding is expected to be presented in a report to state lawmakers early next year.

The state’s biomonitoring program is significant because the program is considered by some to be a pioneering, national model for investigating chemicals in humans. The program, once fully implemented, could serve as a driver for chemical policy reforms in California and nationally, according to officials. However, California’s program to date has been dramatically limited in its scope due to a lack of state funding. The program has had to rely heavily on grants from the Centers for Disease Control (CDC) & Prevention.

The Biomonitoring California Scientific Guidance Panel met Nov. 10 to discuss the status of the program. New York and Washington state officials during the meeting updated California officials on the status of their programs and on biomonitoring research findings to date. The notion of a multi-state biomonitoring network was briefly discussed at the meeting. California, New York and Washington were the three states to be awarded biomonitoring grants in 2009, according to presentations at the meeting.

According to a Department of Public Health (DPH) presentation for the meeting, the three states have discussed the concept of a “state biomonitoring network.” The states have already started quarterly conference calls, having held an in-person meeting Nov. 8-9, according to the presentation.

A DPH spokesman said officials were unavailable for comment. DPH is the lead agency overseeing the program and recent CDC grants.

An environmentalist said that a biomonitoring network among the three states has not yet developed “per se,” but that the three programs are “getting to know each other for the first time, really.” The source noted that the three state programs all have in common memorandums of understanding with CDC to grow biomonitoring capacity in each state. “I think the programs might be interested to collaborate and they could no doubt capture some efficiencies by sharing their resources,” the source said. “But any discussions would be at an early stage and I’m sure the emphasis would be on sharing lab protocols rather than any joint policy projects.”

New York officials during the meeting, for example, indicated they are in the process of developing methods to study perchlorate and bisphenol-A in their program. New York is also developing methods to biomonitor for manganese and selenium, officials said. *Copies of presentations are available at InsideEPA.com. See page 8 for details. (Doc ID: 2382504)*

Meanwhile, California’s biomonitoring panel is also requesting lawmakers and state agency directors to allocate more funding to the program in the coming years, or at least fill key staffing vacancies. The panel in August drafted a letter to the directors of the Office of Environmental Health Hazard Assessment, DPH and Department of Toxic Substances Control, which formally requests more money for the program.

An OEHHA spokeswoman said the letter has not been sent directly to the Legislature, but it will be included in the biomonitoring program’s 2012 report to the Legislature.

The letter says the funding needed to biomonitor a representative sample of California’s 37 million residents would amount to an estimated \$10 million annually, which is more than five times greater than the current state budget for the program. The panel is “well aware of the severe financial challenges currently facing the state and that it is not possible to increase program funding at this time,” the letter states.

The panel strongly supports the maintenance of current program staffing levels and, at the earliest possible time, DPH, OEHHA and DTSC should fill several critical vacancies that resulted from a hiring freeze and ensure that these vacant program positions are not eliminated, the letter adds. *A copy of the letter is available at InsideEPA.com. See page 8 for details. (Doc ID: 2382504)*

## California Energy Agency's Cost Analyses Raise LCFS Scale-Back Issues

New compliance and cost analyses of California's low carbon fuel standard (LCFS) unveiled this week by state energy regulators are raising considerable doubt about the ability of fuel providers to meet the regulation's more stringent requirements in the second half of this decade. With uncertainty rampant concerning how companies will simultaneously comply with the federal renewable fuel standard (RFS2), coupled with slow development of cellulosic ethanol and other advanced biofuels, the new analyses are expected to intensify debate over whether the state should scale back its fuel regulation.

But environmentalists are criticizing the new cost estimates analyzed by the energy officials for various compliance scenarios, claiming they include questionable assumptions and contrast significantly with the more positive outlooks published by state air regulators who oversee the landmark regulation.

California's LCFS is one of the most controversial regulations in the state — requiring fuel suppliers to reduce the carbon intensity of gasoline and diesel 10% by the end of 2020 — yet is considered a model for other states and regions in the country. The LCFS is also a cornerstone of California's climate change regulatory strategy to reduce greenhouse gas emissions to 1990 levels by the end of 2020. The California Air Resources Board (ARB) adopted the LCFS in 2009, but it did not take effect until this year.

Staff with the California Energy Commission (CEC) during a Nov. 14 workshop on “the Role of Alternative Fuels in California's Transportation Energy Future” unveiled a new LCFS “analysis and compliance costs” paper as well as an RFS2 “proportional share analysis and implications” paper. *Copies of the papers are available at InsideEPA.com. See page 8 for details. (Doc ID: 2382499)*

The CEC staff's LCFS analysis is intended primarily to “evaluate compliance feasibility using various types of biofuels and costs,” using certain cases with varying assumptions, including two separate scenarios — one with high petroleum prices and the other with low petroleum prices.

Overall, CEC's LCFS paper estimates that under the high petroleum price scenario the LCFS could cost fuel providers nearly \$3 billion in 2018, nearly \$4 billion in 2019 and about \$4.5 billion in 2020. In addition, the paper raises concerns about the availability of biodiesel, the feasibility of corn-oil biodiesel in 2017 and beyond, the supply of renewable diesel, and the feasibility of using half of the U.S. supply of cellulosic fuels in 2018 and beyond.

Further, overall costs could be higher depending on the price of various fuels if and when government subsidies end, the analysis notes. CEC's analysis also indicates that if other states in the U.S. adopt LCFS regulations, the costs are likely to rise even further, because advanced biofuels will be in higher demand.

Dwight Stevenson with Tesoro Corp. praised the estimates during the workshop as representing the “big picture costs, societal costs,” adding that CEC should also separate out the RFS2 compliance costs, which he suspects will be “a big number.”

Environmentalists criticized the cost projections and their potential impact. Simon Mui, representing the Natural Resources Defense Council, said during the Nov. 14 workshop that the “overarching message” the LCFS analysis sends is that “CEC doesn't believe the LCFS can be met, or that the LCFS won't be met and is basically too expensive and probably won't spur additional alternative fuel production . . .”

Mui said CEC assumptions appear to underestimate improvements in carbon-intensity reductions for many types of fuels over time, which will be bolstered because producers will receive credits under the regulation. In addition, Mui questioned whether the LCFS currently sends the “right signal to large-scale institutional investors, including oil companies to invest more in expanding advanced biofuels beyond the venture capital and private equity levels.” If not, he asked what complementary policies CEC sees as necessary to make the LCFS a success.

John Shears, representing the Center for Energy Efficiency & Renewable Technologies — a partnership of major environmental groups and private-sector clean energy companies that works on climate change solutions — said he expects oil industry representatives will be “salivating over these cost figures,” indicating that they likely will be cited in industry's further efforts to convince ARB to scale back the regulation, especially in the later years. In addition, Shears noted that the analysis fails to acknowledge the substantial subsidies the oil industry receives from the government to develop and sell fuel.

During the workshop ARB staffer Mike Waugh gave a short presentation summarizing recent ARB compliance scenarios that show a “multitude of pathways” available to fuel providers to comply with the LCFS. However, ARB lacks any detailed cost estimates in its analyses, a major difference and potential contradiction between the CEC and ARB over the standard.

CEC senior fuels specialist Gordon Schremp said during the meeting that energy commission staff plans to work closely with ARB officials on a variety of LCFS-related work, including “the right way to assess these costs” — for example, estimating biofuel prices under different scenarios and assumptions. Schremp acknowledged differences between ARB's compliance scenarios “and our cases.” CEC expects to issue an updated report on LCFS compliance scenarios and costs in the coming weeks, he added.

## Activists' Appeal Details Charges California Climate Plan Violates AB 32

Environmental justice activists in their opening brief to a California appellate court detail wide-ranging arguments that regulators violated the state's 2006 global warming solutions law, AB 32, when they approved a multi-faceted strategy to reduce greenhouse gases (GHGs) to 1990 levels by the end of 2020. The plaintiffs contend the state violated multiple sections of AB 32, including by approving a cap-and-trade program, limiting control measures to only those that would achieve minimum GHG reductions, and failing to impose direct regulations on various industry sectors.

The activist groups are appealing a March 18, 2011, ruling by San Francisco County Superior Court in *Association of Irrigated Residents (AIR), et al. v. California Air Resources Board (ARB)* that the board did not violate AB 32 when it approved a climate change regulatory "scoping plan" in 2008. The court found that the Legislature intended to delegate to ARB broad authority to interpret AB 32, including to choose cap-and-trade as a major component of its implementation plan.

The court did side with the activists on a separate charge in the case that ARB violated the California Environmental Quality Act by failing to consider alternatives to cap-and-trade under the AB 32 scoping plan. However, ARB has since readopted its environmental review document to comply with the court order.

Attorneys for the environmental justice groups argue in a Nov. 9 opening brief in their cross-appeal to the Court of Appeal of the State of California, First Appellate District, that ARB violated several sections of AB 32. "The Superior Court misapplied the standard of review, and therefore erred in its subsequent judgment denying AIR's AB 32 causes of action," the brief states. *A copy of the brief is available at InsideEPA.com. See page 8 for details. (Doc ID: 2382494)*

ARB violated the law by limiting its scoping plan measures to only those necessary to achieve the minimum reductions required by AB 32, the brief argues. In addition, ARB failed to create and apply a standard criteria for cost-effectiveness and failed to include feasible and cost-effective direct regulations on the agricultural and industrial sectors in the scoping plan, the brief states.

And ARB's decision to include the cap-and-trade program also violated "the plain language" of AB 32 because the agency "never conducted any analysis or made any findings that would support the inclusion of cap and trade as a maximum feasible and cost-effective reduction," the groups contend. "ARB exceeded its statutory authority when it chose cap and trade without first determining whether cap and trade complied with the Legislature's mandate to maximize reductions."

The original AIR lawsuit was filed in 2009, charging that ARB in 2008 illegally approved the regulatory scoping plan to carry out dozens of GHG regulations in compliance with AB 32. The groups argued that the cap-and-trade program will allow industrial facilities to avoid reducing emissions from some of their operations, which will exacerbate pollution in heavily polluted areas, in violation of AB 32's provisions to protect such communities.

In the appeal brief, the groups add that the scoping plan must maximize the GHG reductions possible and ensure that its policies "do not disproportionately harm low-income communities and communities of color already overburdened with a greater share of toxic pollution." Rather than "requiring major greenhouse gas sources like refineries, power plants, factories, and mega-dairies to directly reduce their own emissions, ARB made cap and trade the centerpiece of its Plan, counting on the scheme to achieve a 20% share of all reductions, more than any other single measure. While AB 32 theoretically allows the use of market mechanisms, it does not exempt such mechanisms from the analysis required by the statute's regulations," the plaintiffs argue.

With respect to the decision to exclude the agriculture sector from mandatory cuts in GHGs, the groups argue ARB violated a section of AB 32 that mandates the board "consider the total potential economic and noneconomic costs and benefits of the Scoping Plan," the brief adds. "ARB failed to consider the effect of excluding the agricultural sector from mandatory requirements and failed to consider the public health impacts of cap and trade using the best available data . . ."

AIR is asking the court to vacate the superior court's decision and direct the court to issue a writ of mandate that requires ARB to comply with AB 32, revise the scoping plan and "steer ARB back to maximum reductions and environmental justice," the brief states. "A decision by this court is important not only to ensure that ARB corrects its errors, but, given that the statute requires ARB to revise its scoping plan every five years, that it will not continue to perpetuate its erroneous interpretation of the statute."

A source with the state attorney general's office, which is defending ARB in the case, said "we will file an opposition [brief] and we expect the trial court's decision denying the claims that are the subject of the cross-appeal to be upheld."

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## Lawyers Fear Law Will Deny CEQA Challenges . . . begins on page one

Richard Gordon (D-Redwood City). The new law creates an expedited judicial review process under CEQA for various types of infill-site projects, renewable energy projects and clean energy manufacturing projects, according to an Assembly floor analysis. The law also authorizes the governor to certify a project for CEQA streamlining if certain conditions are met. The law expires Jan. 1, 2015.

Under the expedited judicial review process, a project's CEQA review that is challenged would proceed directly to a court of appeal instead of a state superior court. Supporters of AB 900 argue that this will reduce the time to resolve a CEQA lawsuit over a project.

Senate President Darrell Steinberg (D-Sacramento) was a vocal supporter of AB 900 and urged lawmakers on the Senate floor to pass the bill in the closing hours of this year's session. Steinberg has also told stakeholders that he or other lawmakers would likely seek a cleanup bill in 2012 to resolve various unresolved issues regarding AB 900 (*see Oct. 28 issue*).

Many environmental groups opposed AB 900 as it advanced in the final days of the session, arguing that it could limit the public's voice in challenging certain projects under CEQA. After analyzing the law's language in recent weeks, environmentalists now say that provisions allowing the expedited judicial process for CEQA challenges appear unconstitutional.

However, one environmentalist said that most groups are focused on fixing AB 900 through cleanup legislation in 2012 and not on suing to block its implementation. But the source noted that some attorneys have determined that AB 900 may be unconstitutional over the language depriving superior courts from taking up lawsuits challenging project CEQA review. In applying existing case law to AB 900, the Legislature cannot constitutionally cut the superior courts out of their original mandate jurisdiction, the source said.

When AB 900 was still being debated in the Legislature, the law firm of Rossman and Moore, LLP sent a letter in September to the Senate Environmental Quality Committee in opposition to AB 900. The attorneys argued in the letter that they are "haunted by [AB 900's] unprecedented command of original jurisdiction in the Courts of Appeal." The attorneys recommended that the state's "Judicial Council," a state advisory body made of judges and attorneys, review AB 900 because "if they are aware of this proposal, I'm confident they would be concerned," the letter states. *A copy of the letter is available at InsideEPA.com. See below for details. (Doc ID: 2382502)*

Of particular concern is that AB 900 does not expressly require the court of appeal to issue the "alternative writ of mandate," meaning the entire case could transpire with no hearing on the merits, the letter adds. The court could deny the lawsuit without further briefing or opinion, according to the law firm. "Much serenity will flow if this court of appeal business can be deleted" from AB 900, the letter states. "The same accelerated schedule can be established for the superior court."

A legislative source described the environmentalists' constitutionality arguments against AB 900 as "murky." The source was familiar with the argument that because an appeals court can refuse to hear a case, it might simply refuse to hear a CEQA challenge under AB 900. But judges on the Judicial Council with whom legislative staffers have talked to on this issue "think that is highly unlikely," the source said.

It is also unclear whether the constitutionality issues raised about AB 900 will be addressed in potential cleanup legislation next year, the source added.

### **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*:**

- Activists File Opening Brief In Appeal Charging California Rules Violate AB 32 (2382494)
- California Researchers Recommend State Require Utilities To Buy Energy Storage Projects (2382496)
- Rep. Issa Requests ARB Answer Questions Over Auto GHG Rule Development (2382497)
- California Energy Officials Unveil Reports Questioning Low Carbon Fuel Costs, Compliance (2382499)
- California Unveils Summary Of Advanced Clean Car Regulations (2382500)
- Industry Seeks Clarity From California Air Board On Diesel PM Filter Policy (2382501)
- Activists, Attorneys Say CEQA Streamlining Law Unconstitutional (2382502)
- Peer Reviews Back California Perchlorate Drinking Water Goal (2382503)
- California, Other States Discuss Status Of Biomonitoring Programs (2382504)
- EPA, NHTSA Propose Next Round Of Vehicle GHG/CAFE Standards (2382383)

## California Researchers Say State Must Set Energy Storage Buying Targets

A new report by California researchers laying out a comprehensive strategy to advance energy storage technologies in the state recommends that regulators require utilities to meet energy storage procurement targets, while citing a litany of policy and cost barriers that state officials must overcome in the coming years.

Energy storage is considered by some as vital to helping state electricity providers meet California's stringent 33% renewable portfolio standard (RPS) by the end of 2020.

The California report comes as the electricity storage industry is launching a concerted effort to strengthen advocacy for the fast-emerging sector, which in recent months has seen a major Federal Energy Regulatory Commission (FERC) rule expected to significantly boost the technologies' role in electricity markets. The new industry effort includes a series of agreements signed between the Electricity Storage Association, the industry's lead federal advocacy group, and three major state groups: the California Energy Storage Alliance; the New York Battery and Energy Storage Technology Consortium; and the Texas Energy Storage Alliance.

Energy storage is generally defined as various technologies that can capture electricity generated by different sources, which can then later be dispatched at different times for multiple purposes. These technologies include batteries, flywheels, hydroelectricity pumps and compressed air. Energy storage technologies are seen as critical to an expansion of renewable energy generation because of the intermittent nature and solar and wind power. However, the new California report also says energy storage could benefit residents who have electric vehicle charging units and solar power devices, could help during natural disasters or terrorist strikes, and could help deploy smart grid systems.

Last year, California passed a law requiring energy regulators to determine whether to set targets for load-serving entities to procure energy storage systems. The bill requires load-serving entities to meet any targets regulators adopt by 2015 and 2020. The bill also requires publicly owned utilities to set their own targets for the procurement of energy storage and then meet those targets by 2016 and 2021.

Some California utility officials have raised concerns that state regulators will rely too heavily on emerging energy storage technologies to help achieve the state's RPS, and have suggested they fully evaluate the effectiveness and cost of the untested technologies before making any regulatory or policy decisions that could affect the state's power supply reliability.

The 221-page report — *2020 Strategic Analysis Of Energy Storage In California* — was written for the California Energy Commission (CEC) by researchers at the University of California (UC)-Berkeley School of Law, UC-Los Angeles and UC-San Diego, through a \$325,000 grant by CEC's Public Interest Energy Research program.

The report highlights the potential importance of energy storage in achieving California's RPS as well as its overarching greenhouse gas-reduction mandates. But it cites a number of technology gaps, research needs and policy reforms that must be addressed by regulators and lawmakers.

"There are significant challenges that must be solved in order to achieve desired storage goals," the report states. "These goals include: finding appropriate sites for these facilities, obtaining necessary permits from various agencies and levels of government, overcoming regulatory hurdles associated with environmental review, meeting high capital costs for construction, and addressing a lack of access to transmission lines." *A copy of the report is available at InsideEPA.com. See page 8 for details. (Doc ID: 2382496)*

The researchers are recommending that regulators set targets for energy storage procurement, following the 2010 state law's provisions, "ideally in a two-phase process with short-term and long-term targets," the report states. "Setting procurement targets would ensure that conventional energy storage technologies do not have an unfair advantage over newer or less proven options that may nonetheless become more cost effective over time."

Even if regulators decide not to set targets, they should still take a number of actions to bolster the industry, such as opening ancillary services and capacity markets to energy storage, expanding existing incentive programs to cover energy storage, and focusing additional research and development dollars on energy storage demonstration projects that prove the feasibility of grid applications and seek ways to reduce costs, according to the researchers.

Demonstration programs will help advance technologies, including "bulk energy storage demonstrations for variable renewable energy integration," such as pumped hydro, concentrating solar power, and solar thermal, the report says. Field demonstrations of modular energy storage technologies, such as batteries and flywheels, in various grid applications should also be pursued.

### Renewables' Impact On Storage

In addition, California officials should model "the impact of 33% renewable energy on California's electricity grid to determine needs for energy storage to support the grid, including sensitivity analysis to address cost variables of storage and other needed energy resources, environmental impacts, and emerging smart grid performance enhancements."

Policymakers "should explore all cost-effective options, given California's environmental and greenhouse gas goals and need to avoid curtailment of renewable resources," the report states.

The researchers claim that "studies indicate" California may require between 3,000 and 4,000 megawatts (MW) of

“fast-acting energy storage by 2020 to integrate the projected increase in renewable energy.”

However, this conclusion was disputed by some stakeholders during a Nov. 15 CEC workshop on the report. A representative of Pacific Gas & Electric Co. said the claim that this much energy storage will be needed by 2020 appears premature and contradicts a recent report by the California Independent System Operator, which controls the state’s electricity grid.

Ethan Elkind, with UCLA’s School of Law and the report’s principal investigator, responded during the meeting that the 3,000-4,000 MW estimate is in part based on the probability that utilities may go beyond the 33% RPS mark toward a 40% level by 2020.

Federal and California regulators can also “ensure greater certainty of cost recovery for investments in energy storage technologies by developing a valuation method to help monetize the benefits provided by energy storage,” the report states. “Complementing these regulatory initiatives, the state and federal governments could promote incentive programs, either by developing new programs or by expanding existing ones, to help finance energy storage projects, bring down costs and help manufacturers provide better data to spur further investment by 2020.”

Monetizing the benefits provided by energy storage technologies is critical, the California researchers conclude. “The state lacks such a valuation framework. The high costs of current energy storage technologies and investment risk will persist without adoption of a valuation framework that monetizes the independent benefits and creates opportunities for cost recovery.”

California officials should also conduct studies to “review the effects of recent tariff changes at the New York Independent System Operator, ISO New England, PJM Interconnection, and other grid operators on energy storage technologies attempting to compete in the area and frequency regulation market.”

## **Water Board Expected To Soon Consider Farming Rules . . . begins on page one**

upon. Farmers in the region have strongly opposed the draft rules, which would require new management practices and water quality monitoring to address polluted runoff.

An environmentalist this week was not familiar with the appointees, but groups are optimistic that the new board will adopt the rules by early 2012. The regional board this week indicated the new board members could vote on the runoff rules at a March 2012 meeting.

The appointments to the Central Coast regional board are significant in part because of the controversy surrounding the draft rules on agricultural discharges, which are considered a potential national model for addressing the impact of farming practices on water quality. The region, including the Salinas Valley, is one of the largest farming areas in the country. The proposed rules have already been delayed several times dating back to last year because farmers, environmentalists and regional board officials have struggled to compromise.

Brown last week appointed Bruce Delgado, Michael Johnston, Michael Jordan and Jean-Pierre Wolff to the board. Delgado, registered as a member of the Green Party, has been the mayor of the city of Marina since 2008. He has worked as a botanist for the U.S. Department of the Interior and Bureau of Land Management since 1988, according to the governor’s office.

Johnston, a Democrat, is currently a consultant for Teamsters Local 948 and the California Teamsters State Council of Cannery and Food Processing Unions.

Jordan, registered as a decline-to-state voter, has been an account executive for Hub International Insurance Services since 2000. He was also an administrative officer for Commander Fleet Activities, U.S. Navy, Yokosuka, Japan and a supervisory recreation specialist from 1989 to 1992, according to the governor’s office.

Wolff, a Republican, was reappointed to the board and has been serving on the board since last year. Wolff is vice president of the Coastal San Luis Resource Conservation District and the vice chair of the San Luis Obispo County Agriculture Liaison Advisory Board. He has also been the owner of Wolff Vineyards since 1999, according to the governor’s office.

The regional board, dating back to last year, has proposed various plans to update its agricultural “waiver” program addressing discharges from farmland. But the various drafts have been delayed several times due to the inability of environmentalists, farmers and the board to agree on a plan. The board’s proposals have focused on new monitoring and reporting requirements for water quality. Regional board staff has proposed to renew the conditional waiver with significant revisions to control discharges of wastes, including nitrates, pesticides and sediment to surface or groundwater.

Further complicating the matter is the fact that the regional board has lacked a quorum to vote on a new farm-runoff program. Past members had recused themselves from voting because they had ties to agriculture, and other seats were vacant and awaiting appointments by Brown.

Environmentalists earlier this year sued the regional board for failing to adopt new rules to address polluted runoff and challenged the agency’s extension of the existing conditional waiver program adopted several years ago. Activists argue the current waiver is inadequate.

Environmentalists are pleased that Brown made these “balanced” appointments to the board in order to estab-

lish a quorum to advance the important rules, the environmentalist said. The source said the regional board is now likely to move forward with the rules early next year. The source said groups are not too familiar with the new members and “cannot give a read on the leanings of the board” regarding the farm rules. “With each delay has come a weakening of the staff proposal; we are now to the place where we can only hope we will be able to support what is eventually passed.”

The regional board staff is also in the process of negotiating a federal Clean Water Act stormwater permit for the city of Salinas, with the intent of bringing it to the board for action early in 2012, the source said. The permit shouldn't be controversial, the source argued, but added that some industry representatives are saying the waiver program and the stormwater permit collectively represent examples of “over-regulation” and that industry groups are “trying to whip up anti-board sentiment,” the source said.

A regional board source said the agency anticipates that the agriculture order will be considered by the board at a March 2012 meeting in San Luis Obispo and the Salinas stormwater permit may be considered at a Feb. 2 meeting.

A spokesman for the California Farm Bureau Federation said the group is encouraged to see a board quorum now in place. “The appointment of new board members would be a good reason for the board staff to rework its proposal to reflect the comments received so far. We hope the new board members will be given enough time to gain a thorough understanding of the complex issues before them.”

## **EPA, DOT Include First-Time Cost Estimates In New Vehicle GHG Proposal**

U.S. EPA and the Department of Transportation's (DOT) newly released greenhouse gas (GHG) and fuel economy proposal for model year 2017-2025 vehicles includes first-time cost estimates for the rule, showing that the plan — which has support from major automakers — will cost about \$157 billion over the lifetime of the regulation.

The cost estimates and other documents in the Nov. 16 proposal are already prompting swift reaction from opponents of the rules, with the National Automobile Dealers Association (NADA) warning that the proposal could add thousands of dollars to the cost of an automobile. Rep. Darrell Issa (R-Vista), chair of the House oversight panel, also criticized the costs of the rule and vowed to continue his investigation into the “closed-door” development of the plan. This includes Issa's recent letter to Air Resources Board Chairwoman Mary Nichols seeking answers to dozens of questions about California's role in developing the standards, as well as voluminous documents related to those efforts. *A copy of the letter is available at InsideEPA.com. See page 8 for details. (Doc ID: 2382497)*

Prior to releasing the proposal, EPA had only discussed the benefits of the plan and not its costs. The agency released cost estimates for its previous landmark fuel economy and GHG rules for model years 2012-2016.

In the new proposal, EPA and DOT do not assess whether auto sales will rise or fall due to higher technology costs automakers will incur in complying with the new rule, which will require a fleet-wide fuel economy average of 54.5 miles per gallon (mpg) in 2025. The level of the proposed standard was widely predicted, and is slightly lower than activists sought.

EPA Office of Transportation & Air Quality Director Margo Oge said during a Nov. 16 conference call with reporters that the agencies believe automakers will see a sales benefit, but the agencies are seeking comment in the proposal on whether it should use a methodology from earlier rules to estimate sales impacts for model years 2017-2025.

Oge and other EPA and DOT officials on the call stressed the rule's benefits, including net benefits of \$421 billion in 2025, including \$1.7 trillion in reduced fuel spending, cutting 12 billion barrels of oil and slashing 6 billion metric tons of GHG emissions. Additionally, they say the average family will save \$6,600 in fuel costs over the lifetime of a model year 2025 vehicle, with a net savings of \$4,400 accounting for increased vehicle costs.

The \$6,600 fuel savings figure is less than an \$8,000 estimate stated in July when the deal was announced, but officials noted it would still mean average drivers would fill up their cars every other week instead of every week. *Relevant documents are available at InsideEPA.com. See page 8 for details. (Doc ID: 2382383)*

EPA Administrator Lisa Jackson said on the call that the proposal had input from automakers, the United Auto Workers, environmentalists and others to ensure that they are achievable and cost effective.

DOT Secretary Ray LaHood vowed that neither the agencies nor automakers would compromise safety, such as reducing vehicle weight, to meet the standards, while EPA air chief Gina McCarthy said the rules are designed to ensure that purchasers of every class of vehicle get the most efficient product possible.

But critics quickly raised questions, particularly about the first-time cost estimates. Issa in a Nov. 16 statement noted that the White House's estimates “say this will cost \$157 billion to implement.”

NADA asked in a statement, “Can consumers afford the upfront costs of fuel economy hikes? . . . [W]e are concerned that adding about \$3,000 to the average cost of a car will price millions of Americans out of the market, which could reduce fleet turnover and delay environmental gains. This regulation gambles that millions of consumers will be able to afford thousands more” for vehicles.

And a source with the Alliance of Automobile Manufacturers noted that the 2012-2016 standards are estimated to cost \$52 billion, making the two rules combined cost “a whopping \$209 billion to industry.”

The source added, “We are also especially concerned that we could make these investments, and if consumers don't

buy these new technologies in very large numbers, then we will face fines.”

Administration officials also sought to preempt concerns by releasing their 2012 annual fuel economy guide, which they say shows that automakers are already producing more consumer choice in fuel-efficient technologies, including 265 models that achieve 30 mpg or more, a 65% increase over model years 2011.

Jackson on the call noted that the top 10 vehicles on the list use a range of technologies including conventional engines. “With the certainty of these standards, automakers will continue to make fuel-efficient vehicles available. The Obama Administration is ensuring that American car-buyers have their choice of the most efficient vehicle every produced in our country.”

## **Perchlorate Peer Review Seen As Delay Tactic . . . begins on page one**

years has been at the center of controversy in California because it is prevalent in groundwater and has been detected in commodities like lettuce and milk.

OEHHA Nov. 10 released for public review the comments of three scientific peer reviewers. OEHHA released the draft PHG in January. OEHHA already set a PHG for perchlorate of 6 ppb in 2004. The Department of Public Health (DPH) then finalized the 6-ppb level as a maximum contaminant level (MCL). But now OEHHA is revising the PHG based on the latest research.

OEHHA says it will revise the draft PHG document as appropriate in response to the peer reviews and public comments on the peer reviews, and then release the revised draft PHG for a 30-day comment period. A final OEHHA response to all comments, including peer review comments, will be published at a later date when the PHG is finalized, OEHHA says. *Copies of the three peer reviews are available at InsideEPA.com. See page 8 for details. (Doc ID: 2382503)*

Two industry groups — the Perchlorate Study Group and the Partnership for Sound Science in Environmental Policy — in March asked OEHHA to submit its risk assessment for the perchlorate PHG to scientists outside the agency for a peer review. A source with the Partnership for Sound Science in Environmental Policy said the group was still examining the peer review comments as of press time.

An environmentalist said the peer reviews appear to be generally supportive of OEHHA’s analysis and approach to the PHG. The recommendations made to OEHHA were minor, and “there is absolutely no indication that OEHHA’s revision of the current PHG should be changed from what they proposed at the beginning of the year,” the source said.

The peer reviewers’ support of the PHG also “demonstrates what the environmental community has contended all along — that this [peer review request] was a delay tactic by the industry-backed entities who requested this additional peer review,” the source said.

In comments to OEHHA earlier this year, the industry groups argued that their comments submitted on the PHG highlighted “the preponderance of scientific evidence demonstrating that lowering the existing PHG will provide no additional benefits to public health.” The groups also said they have identified a number of serious scientific flaws and misplaced assumptions in OEHHA’s PHG analysis.

## **Peevey Defends Solar Power Costs . . . continued from page 14**

sion last week, acknowledged that while the project is more expensive than others, it offers “positive attributes,” such as solar thermal technology, which offers benefits “beyond those of wind and solar PV,” according to his written testimony. “For instance, solar thermal generation is much less intermittent than wind or solar PV projects, meaning that power output does not decrease rapidly when a cloud passes overhead or the wind stops blowing.”

Peevey also said that because the Mojave project is fully permitted and has received a \$1.2-billion Department of Energy loan guarantee, it is much more viable than other projects seeking PG&E contracts.

“Finally, I’d like to point out that the project developer, Abengoa, has invested five years and \$70 million of dollars to get to the point where they are ready to begin construction on this project,” Peevey added. “For this project to spend those resources and successfully make it through the utility [bid] process, negotiations, permitting, interconnection, financing, and winning the support of unions and environmental groups, only to be rejected by the CPUC would send a chilling message to the business community. Future RPS bidders may be reluctant to invest the time and money needed to bring successful bids before the commission if they believe us to cavalier about rejecting otherwise viable projects.”

The lone vote against the deal was cast by CPUC member Mike Florio, who said during last week’s hearing that the state should be getting twice the power for the amount PG&E will pay.

DRA complained in its statement that the Mojave contract is the second “overpriced renewable contract approved by the CPUC in recent weeks.” In October, CPUC approved the North Star Solar project based in Fresno, DRA says. “Like Abengoa, the North Star project is not price-competitive with other current in-state renewable options available to PG&E. By approving these overpriced projects, the commission is not allowing customers to benefit from decreased costs of a more favorable renewable energy market.”

In a February report titled *Green Rush*, DRA criticized a rise in renewable power project costs in California.

## DTSC Remains At Odds With Air Force Over Preferred Site-Cleanup Levels

Toxics department officials and the Air Force remain at odds over what chemical toxicity values and protection levels should be used in hazardous waste cleanups, an issue that has arisen in other states and which has raised concerns from some state regulators that the military may try to “cherry pick” favorable toxicity values from one state and apply them elsewhere.

Although the Air Force and the Department of Toxic Substances Control have been able to avoid any delays in cleanups due to the disagreement so far, a final resolution to the debate is needed in order to avoid any potential future adverse effects to cleanups, an Air Force spokeswoman said.

DTSC and Air Force officials are at odds over what toxicity values to use for both cancer and non-cancer levels for cleanup decisions and the appropriate cancer risk level or range to use as a basis for taking action at a cleanup site, Air Force senior environmental restoration attorney Marc Trost said Oct. 27 at the Association of State & Territorial Solid Waste Management Officials’ (ASTSWMO) annual meeting in Bethesda, MD.

The Air Force says it is being consistent with U.S. EPA headquarters guidance, using EPA’s hierarchy of toxicity values for Superfund risk assessments. “While there is a hierarchy, ultimately we select the toxicity values that constitute the best science,” the Air Force spokeswoman said. The Air Force says it does not deviate from the EPA guidance, which calls for using the best science in making risk determinations.

“We would prefer that California aptly characterizes their position, but in prior correspondence they have stated to the Air Force the most health protective value should be used,” without referencing best science, she said.

California officials say they and EPA have for years agreed that the most protective level should be used for cleanups regardless of whether it is an EPA- or state-derived number, and that the Air Force, as the responsible party at contaminated sites, lacks the authority to select toxicity criteria.

EPA guidance lays out a hierarchy of three “tiers” of toxicity values to use in risk assessments at Superfund sites. Tier 1, which represents EPA’s generally preferred source of human health toxicity values, consists of EPA Integrated Risk Information System (IRIS) values. These generally include reference doses, reference concentrations, cancer slope factors, and drinking water and inhalation risk values that have gone through peer review and EPA consensus review, the EPA guidance says.

The second tier of toxicity values the guidance calls for considering are EPA’s Provisional Peer Reviewed Toxicity Values (PPRTVs). These are developed by the agency on a chemical-specific basis at the request of its Superfund office.

Tier 3 values use methods similar to those used for deriving the first two tiers and must be peer reviewed. These include such sources as Cal/EPA toxicity values, the guidance says. Consultation with the EPA Superfund program “is recommended regarding the use of the Tier 3 values for Superfund response decisions when the contaminant appears to be a risk driver for the site,” EPA’s guidance says. The guidance in general recognizes toxicological information outside of IRIS, saying it should be considered along with IRIS data, and “ultimately, the Agency should evaluate risk based upon its best scientific judgment and consider all credible and relevant information available to it.”

DTSC and EPA agree with the Air Force on the use of the tiered system EPA has set forth and they agree that the tiers “are not totally rigid,” according to a DTSC paper. But where they differ is in the Air Force’s position that the service, as the responsible party, has the authority to select the toxicity criteria and “that whenever there is an IRIS value for a contaminant, the IRIS value should be used,” the paper says.

DTSC’s position is to use the most health protective level, according to a state source. “For years on an informal basis, U.S. EPA and Cal/EPA toxicologists have agreed to use the more protective of Cal/EPA and IRIS criteria for risk assessment at California waste sites (both private sector and federal sites),” the DTSC paper says.

“The Air Force, who is not recognized as a credible source of toxicity criteria and is in the position of responsible party, is proposing to remove this flexibility of using the best toxicity criteria available at the time of the risk assessment, by imposing its interpretation of the EPA Guidance under its presidential lead agency implementation authority,” the paper says. Such an approach conflicts with the terms of interagency cleanup agreements governing federal facility Superfund sites and “ignores EPA’s role as the oversight agency” for Air Force Superfund site cleanups, it says.

“We have been going back and forth on this for quite a while at our sites in California,” Isabella Alasti, senior staff counsel with DTSC, said at the ASTSWMO meeting. She said “it’s the overarching concepts that we don’t agree with.” She noted that EPA Region IX agrees with the state’s position.

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## California Solar Power Deal Elevates Criticism Of Confidential Price Terms

A major deal reached between one of California's largest utilities and a solar power developer for a long-term electricity-supply contract is being blasted by ratepayer advocates and other groups over its costs and is elevating criticism of California's policy of keeping the terms of such deals confidential.

But utility officials and regulators are defending the deal, emphasizing in part that they are under heavy pressure to sign and approve renewable energy contracts to help meet California's stringent 33%-by-2020 renewable portfolio standard (RPS). The RPS also requires power providers to meet two interim targets: 20% by Dec. 31, 2013, and 25% by Dec. 31, 2016. The RPS is a cornerstone of California's strategy to reduce greenhouse gas (GHG) emissions to 1990 levels by the end of 2020.

At issue is the California Public Utilities Commission's (CPUC) Nov. 10 approval of a 25-year contract between Pacific Gas & Electric Co. (PG&E) and Abengoa Solar for solar thermal electricity to be produced at Abengoa's planned 250-megawatt (MW) Mojave Solar Project in the Mojave Desert in San Bernardino County.

Though CPUC has a policy of keeping the terms of utility energy supply contracts restricted only to agency officials and the parties involved in the deals, sources said.

The Division of Ratepayer Advocates (DRA), an independent consumer advocacy division of CPUC, has blasted the deal as excessively expensive, with sources saying that it is more than double the amount included in several other bids to PG&E by other companies competing with Abengoa.

CPUC "has the power to keep the cost of renewable energy reasonable," said Joe Como, DRA's acting director, in a statement. Instead, CPUC is "signaling to the market that California will accept overpriced renewable energy, and that it is willing to lock customers into higher rates for decades to come."

DRA sources also expressed frustration over CPUC's policy of not publicly disclosing the terms of renewable energy contracts reached between utilities and power providers, though they acknowledge that one justification for the policy is to prevent future bidders from merely offering the same price as previously approved contracts, which could tend to be high and prevent lower bids from being made.

"It certainly is frustrating to us quite often because we want to speak to the public frankly about what the prices are," said one DRA source. DRA's position is "the public has a right to know about it, and we want to inform the public as best we can regarding all costs coming in through bills."

State Sen. Alex Padilla (D-Pacoima), who has spearheaded a number of special hearings on California's renewable energy and energy efficiency programs, authored a bill that was signed into law this year that requires CPUC, beginning in February 2012 and annually thereafter, to release the costs of all electricity procurement contracts for renewable energy and all costs for utility-owned generation approved by the commission. However, the law does not require CPUC to report individual contract terms, which may dilute efforts by outside groups to shine more light on actual costs and whether they are exorbitant.

A Padilla spokesman did not respond to a request for comment on the Mojave Solar contract by press time.

But a PG&E spokeswoman defended the Mojave deal, saying in part that it is superior to other contract bids that were submitted to the utility much more recently because the project is fully permitted and has received a federal loan guarantee. In addition, the utility is under considerable pressure by state regulators to meet the state's RPS targets, the spokeswoman said.

"We would say that the state's deadlines for achieving renewable energy goals demonstrate an urgency to the process and utilities are aware of that," the spokeswoman said. "We're committed to achieving the goals in the most cost-effective way possible for our customers through competitive bidding and careful negotiation to try to keep costs low."

CPUC President Michael Peevey, who wrote the final proposal for the PG&E contract plan adopted by the commis-

*continued on page 12*

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