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Environmental Protection

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Environmental Protection; air pollution—control districts

Health and Safety Code § 40916 (amended).
AB 3242 (Aguiar); 1994 STAT. Ch. 430

Under existing law, air pollution control districts and air quality management districts with moderate,[1] serious,[2] severe,[3] or extreme[4] air pollution are required to include specified measures in an attainment plan to achieve ambient air quality standards[5] which include transportation control measures to substantially reduce the rate of passenger vehicle trips and miles traveled per trip.[6]

Furthermore, existing law requires districts with serious, severe, or extreme air pollution to try to provide employers and businesses with opportunities to develop and demonstrate alternative strategies to achieve equivalent emission

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1. *See* CAL. HEALTH & SAFETY CODE § 40921.5(a)(1), (b)(1) (West Supp. 1994) (defining moderate ozone nonattainment areas); *see also id.* § 40918(a)-(f) (West Supp. 1994) (providing that the duties of a moderate air pollution district are to create a program designed to achieve no net increase in emissions of nonattainment pollutants, to use available control technology for all existing stationary sources, and to provide reasonably available transportation control measures to reduce the rate of increase in passenger vehicle trips and miles traveled per trip).

2. *See id.* § 40921.5(a)(2), (b)(2) (West Supp. 1994) (defining serious ozone nonattainment areas); *see also id.* § 40919(a)-(f) (West Supp. 1994) (providing that the duties of a serious air pollution district include using all the measures required for moderate nonattainment areas as well as to provide measures to achieve the use of a significant number of low-emission motor vehicles by operators of motor vehicle fleets, and to develop strategies for lower emissions with businesses and employers).

3. *See id* § 40921.5(a)(3) (West Supp. 1994) (defining severe ozone nonattainment areas); *see also id.* § 40920(a)-(d) (West Supp. 1994) (providing that the duties of a severe air pollution district include using all the measures required for serious nonattainment areas as well as following state guidelines for crediting telecommuting and other measures that concurrently reduce persons per vehicle and vehicle trips).

4. *See id.* § 40921.5(a)(4) (West Supp. 1994) (defining extreme ozone nonattainment areas); *see also id.* § 40920.5 (West Supp. 1994) (providing that the duties of an extreme air pollution district include using all the measures required for severe nonattainment areas as well as permitting programs designed to achieve no net increase in emissions from new or modified stationary sources and any other feasible controls that can be implemented); Joanna M. Miller, *County Residents Breathing the Cleanest Air in 20 Years*, L.A. TIMES, Nov. 1, 1992, at B1 (stating that the four smoggiest counties in the nation are Los Angeles, Riverside, San Bernardino, and Orange, but that the Los Angeles Basin is the only area in the country with ozone pollution so bad that it is labeled extreme).

5. *See* CAL. HEALTH & SAFETY CODE § 39014 (West 1986) (defining ambient air quality standards); *see also* Western Oil & Gas Ass'n v. Air Resources Bd., 37 Cal. 3d 502, 509, 691 P.2d 606, 609, 208 Cal. Rptr. 850, 853 (1984) (holding that it is the duty of local air quality districts to promulgate and implement rules and regulations reasonably assuring, achieving, and maintaining ambient air quality standards); *cf.* 42 U.S.C.A. § 7409(a)-(d) (West 1983) (providing the standards for national primary and secondary ambient air quality standards).

6. CAL. HEALTH & SAFETY CODE §§ 40918-40920.5 (West Supp. 1994); *see also* Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist., 49 Cal. 3d 408, 425, 777 P.2d 157, 167, 261 Cal. Rptr. 384, 394 (1989) (indicating that air quality districts have authorization to evaluate and regulate emissions from existing pollution sources); *cf.* 42 U.S.C.A. § 7543 (West 1983 & Supp. 1994) (providing the standards for controlling vehicle emissions).

reductions.[7] Chapter 430 requires the State Air Resources Board[8] to develop and periodically update the guidelines used by districts to establish equivalent emission reduction targets for these alternative strategies.[9]

INTERPRETIVE COMMENT

Chapter 430 was enacted in order to require the Air Resources Board to develop and periodically update guidelines to be used by air districts.[10] These guidelines will be used to establish equivalent emission reduction targets for alternative strategies to trip reduction transportation control measures.[11]

According to the sponsor of Chapter 430, the Community Air Quality Task Force, existing law failed to define how mobile emission credits may be used, and whether they could have been used to offset stationary source emissions.[12]

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7. CAL. HEALTH & SAFETY CODE §§ 40919(f), 40920(a), and 40920.5 (West Supp. 1994); *cf.* 42 U.S.C.A. § 7401(b)(1)-(4) (West 1983) (providing that several purposes of the Federal Clean Air Act are to protect and enhance the quality of the nation's air resources in order to promote public health and welfare, initiate and accelerate national research and development programs, provide technical and financial assistance to state and local governments in air pollution control and prevention programs, and to assist in regional air pollution and control programs); ARIZ. REV. STAT. ANN. § 49-424 (Supp. 1993) (providing that the duties of the Air Pollution Control department are to develop programs to control air pollution and to maintain ambient air quality); COLO. REV. STAT. ANN. § 42-4-309 (Bradford Supp. 1993) (enacting state implementation plans to control emissions and providing an enhanced emissions program); CONN. GEN. STAT. ANN. § 14-164c (West Supp. 1994) (enacting emission control standards and procedures for regulatory inspections); LA. REV. STAT. ANN. § 30:2054 (West 1989 & Supp. 1994) (providing emission control standards to reduce pollutants for improving air quality); N.Y. ENVTL. CONSERV. LAW § 19-0301 (McKinney 1984 & Supp. 1994) (preventing, controlling, and prohibiting air pollution by providing emission control standards); VA. CODE ANN. § 10.1-1322.3 (Michie 1994) (providing emissions credits and regulations to reduce pollutants); WASH. REV. CODE ANN. § 70.94.715 (West 1992) (enacting emission reduction plans); WIS. STAT ANN. § 144.31 (West 1989 & Supp. 1993) (enacting plans for regulating air pollution). *See generally* Yvonne F. Lindgren, Note, *The Emissions Trading Policy: Smoke on the Horizon for Takings Clause Claimants*, 18 HASTINGS CONST. L.Q. 667, 667-673 (1991) (providing a comprehensive look at the Clean Air Act and evaluating its performance in reducing national air pollution).

8. *See* CAL. HEALTH & SAFETY CODE § 39003 (West 1986) (defining the State Air Resources Board as the state agency charged with coordinating efforts to attain and maintain ambient air quality standards, conduct research into the causes of and solution to air pollution, and to attack the problem caused by motor vehicles, which has often been attributed as the major source of air pollution in California); *see id.* §§ 39606, 39607, 39701 (West 1986) (listing some of the major duties of the State Board as: (1) Dividing the state into air basins; (2) adopting standards of ambient air quality in consideration of public health, safety, and welfare; (3) collecting air quality data; (4) keeping inventory on sources of air pollution; (5) monitoring air pollutants; (6) adopting test procedures to test data; (7) evaluating the state standards; and (8) conducting and collecting research data on air pollution).

9. *Id.* § 40916(c) (amended by Chapter 430); *see id.* (providing that the State Board must update guidelines to be used by the districts periodically in order to establish equivalent emission reduction targets for alternative strategies to vehicle trip reduction and transportation control measures).

10. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 3242, at 1 (Aug. 15, 1994).

11. *Id.*; *cf.* Tom Austin & Gary Rubenstein, *Finding Fault with Articles on Valley Air*, SACRAMENTO BEE, Nov. 29, 1993, at B13 (claiming pollutant levels in California have actually dropped, and air quality may be improving). *But see* Frank Clifford, *U.S. Plan to Clean State's Air Criticized*, L.A. TIMES, Sept. 2, 1994, at A3 (indicating that governmental clean-air standards and pollution standards can have a detrimental effect on the California economy by forcing businesses to look elsewhere for shipping locations).

12. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 3242, at 1 (Aug. 15, 1994).

Chapter 430 is a response to these inconsistencies, and will hopefully improve air conditions in California.[13]

Improving air quality is an important goal not only within California, but throughout the world as well.[14] It has been noted that as the ozone deteriorates around the world as a result of air pollution, the greenhouse effect could have a devastating impact on the global climate.[15] Chapter 430 could be a means of providing the alleviation needed in order to preserve the state's air quality.[16]

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Environmental Protection; air pollution—product variances

Health and Safety Code §§ 42365, 42366, 42367, 42368, 42369, 42370, 42371, 42372 (new); § 42352.5 (amended).
AB 2680 (Bowen); 1994 STAT. Ch. 443
(Effective September 6, 1994)

Existing law allows any person to apply to the hearing board[1] of an air pollution control district for a variance from district[2] air pollution or quality rules

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13. ASSEMBLY COMMITTEE ON NATURAL RESOURCES, COMMITTEE ANALYSIS OF AB 3242, at 1 (May 9, 1994).

14. Michael T. Donnellan, Note, *Transportation Control Plans Under the 1990 Clean Air Act as a Means for Reducing Carbon Dioxide Emissions,* 16 VT. L. REV. 711, 711-14 (1992).

15. *See* Jim Mayer, *Adapting to a Changing Planet—Experts Think Globally,* SACRAMENTO BEE, Sept. 13, 1993, at A1; *see id.* (contending that air pollution leads to global warming which could increase the local temperatures by 5.4 degrees Fahrenheit if nothing is done to alleviate air pollution); *see also* Donnellan, *supra* note 14, at 711, 714-15 (warning of the dangers of global warming and the need to cut down on emissions throughout the nation).

16. *See* Telephone Interview with Christopher Carlisle, Consultant to Assemblymember Sher, California State Assembly (Nov. 17, 1994) (notes on file with the *Pacific Law Journal*) (explaining that the State Air Resources Board will set up guidelines that will hopefully result in a reduction in the total pollutants released from mobile resources).

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1. *See* CAL. HEALTH & SAFETY CODE § 40800 (West 1986) (requiring each district to have one or more hearing boards consisting of five members each); *see also id.* § 40801 (West 1986) (defining the composition of a hearing board); SENATE FLOOR, COMMITTEE ANALYSIS OF AB 2680, at 1 (Aug. 16, 1994) (stating that the five member hearing board issues abatement orders and permits, and can grant variances to district rules after holding a public hearing and making findings). *See generally* CAL. HEALTH & SAFETY CODE §§ 40800-40809 (West 1986 & Supp. 1994) (providing the general provisions governing hearing boards); *id.* §§ 40820-40830 (West 1986 & Supp. 1994) (providing procedures for hearing boards to follow).

2. *See* CAL. HEALTH & SAFETY CODE § 39025 (West 1986) (defining district to mean an air pollution control district or an air quality management district); *see also* Facsimile Transmission from the office of Assemblymember Debra Bowen (July 25, 1994) (copy on file with the *Pacific Law Journal*) (stating that existing law allows a person to petition the hearing board of an Air Quality Management District or air pollution control district for a variance from rules, regulations, or orders of the district); SENATE FLOOR, COMMITTEE ANALYSIS OF AB 2680, at 1 (Aug. 16, 1994) (stating that California's 29 air pollution control districts and four regional Air Quality Management Districts regulate stationary and mobile sources of air

and regulations.[3] For a variance to be granted under existing law, the hearing board must find that the variance petitioner is or will be in violation of a district rule or regulation, the conditions are beyond the reasonable control of the petitioner, and compliance would result in an arbitrary or unreasonable taking of property or the closing and elimination of a lawful business.[4]

Chapter 443 allows the district hearing board to grant a product variance from district rules and regulations for people who manufacture a product, but only when the product does not comply with district rules or regulations, and the variance is necessary for the sale, supply, or use of the product.[5] The grant of the variance under Chapter 443 also requires other specific findings of fact, including that compliance with the district's rule or regulation would result in an arbitrary or unreasonable taking of property or the practical elimination of a lawful business.[6]

Chapter 443 allows the petitioner to manufacture, and any person to distribute, offer to sell, or use the product once the petitioner has met all of the requirements of Chapter 443.[7] Chapter 443 requires the hearing board to set a final compliance date and time period for a variance that does not exceed one year, unless a

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contaminants with emission source permits, fines, and penalties).

3. CAL. HEALTH & SAFETY CODE § 42350(a) (West Supp. 1994).

4. *Id.* § 42352(a)(1)-(2) (West Supp. 1994); *see id.* § 42352(a)(3)-(6) (West Supp. 1994) (requiring the board to also find that the closing or taking would be without a corresponding benefit in reducing air contamination, the applicant has considered curtailing operations of the source in lieu of obtaining a variance, the applicant will reduce excess emissions as much as possible during the variance term, and the district may require the applicant to monitor and report the emission levels created by the source during the variance term); *see also id.* § 42352(a)(2) (West Supp. 1994) (stating that where the petitioner is a public agency, the hearing board must consider whether immediate compliance would impose an unreasonable burden upon an essential public service); *id.* § 42352.5(a)-(b) (amended by Chapter 443) (providing the factors and standards of sufficiency of evidence for small business variances).

5. *Id.* § 42366 (enacted by Chapter 443); *see id.* (stating that the product variance is not granted to an individual, but to the product itself); *id.* § 42367 (enacted by Chapter 443) (stating that a product variance will not be granted in lieu of a permit to build, erect, alter, or replace any article, machine, equipment, or other contrivance pursuant to California Health and Safety Code § 42300).

6. *Id.* § 42368(a)(2) (enacted by Chapter 443); *see id.* § 42368(a)(3)-(5) (enacted by Chapter 443) (requiring the hearing board to also determine that the taking or closing would be without a corresponding benefit in reducing air contaminants, the petitioner exercised due diligence in attempting to locate, research, or develop a product that is in compliance with the district rules, and the petitioner will quantify excess emissions, if requested, in the manner requested); *id.* § 42368(b) (enacted by Chapter 443) (listing the other prerequisites, which include the petitioner giving written notice to any retailer, distributor, or purchaser of the product in the district where the product has been granted a product variance, the beginning and ending periods of the variance, and any other conditions on the variance); *id.* § 42368(c) (enacted by Chapter 443) (mandating that within 10 days of the effective date of the variance, a district must publish in a newspaper notice of the variance, the effective dates, and conditions of the variance); *id.* § 42368(d) (enacted by Chapter 443) (allowing the district hearing board to impose additional conditions on the product, unless the conditions are more onerous than those imposed by statute, rule, or regulation); *id.* § 42369 (enacted by Chapter 443) (prohibiting a variance from being granted if it would be a public nuisance or as an emergency product variance).

7. *Id.* § 42370 (enacted by Chapter 443).

petitioner can show good cause and proof that a variance in excess of one year, but limited to no more than two years, is needed.[8]

INTERPRETIVE COMMENT

Chapter 443 is intended to establish a new, streamlined product variance process that will allow categorical product variances from district rules or regulations.[9] Chapter 443 will eliminate multiple variance applications by businesses that produce, or want to use, a new product or technology that outpaces the rules.[10] Chapter 443 also allows the hearing board to grant a variance from an existing rule, for the use of a product that has not been developed yet.[11]

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8. *Id.* § 42372(a)-(b) (enacted by Chapter 443); *see id.* § 42372(b) (enacted by Chapter 443) (requiring that a product variance over one-year include a schedule of increments of progress specifying a final compliance date by which the emission of air contaminants from the product, for which the product variance is granted, will be brought into compliance with the applicable emission standards, district rules, regulations, and orders); *see also id.* § 42372(c) (enacted by Chapter 443) (mandating that where the product variance is granted for a process or product that equals or exceeds applicable district rules or regulations, the hearing board must within 180 days from the effective date of the variance set a public hearing before the district governing board to recommend adopting, or not adopting, a rule or regulation to bring the product into compliance; the district governing board has one year to adopt or amend the district rule or regulation to bring the product into compliance or determine that no amendment, rule, or regulation is required, and if the governing board fails to take this action the petitioner is entitled to rights and remedies under existing law). *See generally* Facsimile Transmission from the office of Assemblymember Debra Bowen, California State Assembly, *supra* note 2 (stating that the 180-day hearing schedule for products and technology that exceeds air district standards was implemented to ensure that the hearing board would hold a hearing to change or amend the rule, so as not to allow the variance to expire and leave the company with no remedy).

9. ASSEMBLY COMMITTEE ON NATURAL RESOURCES, COMMITTEE ANALYSIS OF AB 2680, at 1-2 (Apr. 4, 1994); *see* Press Release from Assemblymember Debra Bowen, California State Assembly 1 (Feb. 7, 1994) (copy on file with the *Pacific Law Journal*) (stating that AB 2680 is intended to reduce red tape and force the government to keep up with changing technologies); *Air Pollution: Bill Would Allow Blanket Variances For Products Not Meeting Standards*, Env't Rep. (BNA) No. 12, at 255 (Apr. 22, 1994) (quoting Assemblymember Debra Bowen, as stating that Chapter 443 allows a district to grant a blanket product exemption to all users, instead of forcing each company to apply for a variance individually).

10. *See* Press Release from Assemblymember Debra Bowen, California State Assembly, *supra* note 9, at 1 (stating that prior to Chapter 443 businesses could not use the technology because it had not been approved). Prior to Chapter 443, every company that wanted to use or buy the product had to individually apply for a variance. *Id.*; *see also* ASSEMBLY COMMITTEE ON NATURAL RESOURCES, COMMITTEE ANALYSIS OF AB 2680, at 2 (Apr. 4, 1994) (stating that AB 2680 allows simultaneous grants for product variances to all companies that want to use the new technology, even though existing rules have not kept up with the technology); Press Release from Assemblymember Debra Bowen, California State Assembly, *supra* note 9, at 1 (stating that Chapter 443 allows the district hearing boards time to update their rules to include the new technology).

11. ASSEMBLY COMMITTEE ON NATURAL RESOURCES, COMMITTEE ANALYSIS OF AB 2680, at 2 (Apr. 4, 1994); *see id.* (stating that AB 2680 allows a district hearing board to grant a product variance to all companies affected by the lack of a technology-forcing product); *see also Air Pollution: Bill Would Allow Blanket Variances For Products Not Meeting Standards*, *supra* note 9 (quoting Assemblymember Debra Bowen as stating that Chapter 443 is intended to solve problems where a rule exists, but a product that would comply with the rule has not been developed). *But see id.* (stating that the two-year variance term limit is needed to ensure that technology-forcing rules maintain integrity).

Environmental Protection; Air Quality Management Districts—post employment conflict-of-interest requirements

Government Code § 87406.1 (new).
AB 3214 (Pringle); 1994 STAT. Ch. 747

Existing law, the Political Reform Act of 1974,[1] prohibits former state administrative officials[2] from accepting compensation for acting as agents or attorneys on behalf of other persons before any court or state administrative agency[3] or any officer or employee thereof, or by making specified contacts with the intent to influence any judicial, quasi-judicial, or other proceeding as specified.[4] Chapter 747 prohibits, for one year after employment ends, any former district board member,[5] officer, or employee[6] of any Pollution Control District or Air Quality Management District,[7] from acting as an agent or attorney for another

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1. *See* CAL. GOV'T CODE §§ 81000-91015 (West 1993 & Supp. 1994) (setting forth the Political Reform Act of 1974, which defines the parameters for the election process for state and local officials, conflicts-of-interest, ethics, and disclosure); 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 201 (9th ed. 1988) (stating that the Political Reform Act of 1974 is a measure that extensively amended California Government Code § 81000 et seq., which regulates many aspects of the election process for state and local officials).

2. *See* CAL. GOV'T CODE § 87400(b) (West 1993) (defining state administrative official as every member, officer, employee, or consultant of a state administrative agency who as part of their official responsibilities engage in any judicial, quasi-judicial, or other proceeding in other than a purely clerical, secretarial, or ministerial capacity); *see also id.* § 87400(c) (West 1993) (defining judicial, quasi-judicial, or other proceeding as any proceeding, application, request for a ruling, or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party in any court or state administrative agency).

3. *See id.* § 87400(a) (West 1993) (defining state administrative agency as every state office, department, division, bureau, board, and commission, but not including the Legislature, the courts, or any agency in the judicial branch of government).

4. *Id.* § 87401(a)-(b) (West 1993); *see id.* § (stating that this provision applies where the State of California is a party or has a substantial and direct interest in the proceeding, and the proceeding is one in which the former state administrative official participated); *see also id.* § 87400(d) (West 1993) (defining "participated" as having taken part personally and substantially in the decision, approval, disapproval, formal written recommendation, rendering of advice on a substantial basis, investigation, or use of confidential information as an officer or employee); *id.* § 87402 (West 1993) (prohibiting former state administrative officials from consulting or assisting in the representation of another person in any proceeding from which the official would be prohibited from appearing in pursuant to California Government Code § 87401). *See generally* CAL. GOV'T CODE § 87403(a)-(c) (West 1993) (providing the exemptions for §§ 87401-87402); 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law*, § 211 (9th ed. 1988) (stating that California Government Code § 87402 prohibits former state administrative officials from indirectly participating in the prohibited proceedings by assisting another person in those proceedings).

5. *See* CAL. GOV'T CODE § 87406.1(a) (enacted by Chapter 747) (defining district board as the governing body of an air pollution control district or an air quality management district).

6. *See id.* § 87406.1(b) (enacted by Chapter 747) (providing that the position held by the employee must have involved making or participating in decisions that may foreseeably have a material effect on any financial interest).

7. *See* CAL. HEALTH & SAFETY § 40701 (West Supp. 1994) (setting forth provisions regarding the power of an air quality management district); *see also id.* § 40000 (West 1986) (declaring that local and regional authorities have the primary responsibility for control of air pollution from all sources other than emissions from motor vehicles); *id.* §§ 40000-40728.5 (West 1986 & Supp. 1994) (setting forth provisions regarding the general powers and duties of County, Unified, and Regional Air Pollution Control Districts, as

person, for compensation, by making a formal or informal appearance before, or by making any oral or written communication to that district board,[8] if the contact is made for the purpose of influencing a regulatory action.[9] Chapter 747 does not apply to an individual who is a board member, officer, or employee of another district at the time of the communication or appearance, nor does it apply to an employee or representative of a public agency.[10] A violation of the Political Reform Act is a misdemeanor, thus any violation of Chapter 747 is also a misdemeanor.[11]

INTERPRETIVE COMMENT

Prior to Chapter 747, key staff persons of an Air Quality Management District or Air Pollution Control District could, and did, begin lobbying the board and staff of the district that previously employed them.[12] Chapter 747 was enacted to prevent potential conflicts of interest by former air district employees as they are in a unique position to influence regulatory policy which affects every business or individual in a community.[13] Chapter 747 provides additional prophylactic

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well as the Bay Area and South Coast Air Quality Management Districts).

8. *See* CAL. GOV'T CODE § 87406.1(b) (enacted by Chapter 747) (providing that the one year prohibition on formal or informal appearances, or written or oral communications, includes contact with the district committee, subcommittee, present members of that district board, or any officer or employee of that district).

9. *Id.* § 87406.1(b) (enacted by Chapter 747); *see also id.* § 87406.1(d) (enacted by Chapter 747) (applying Chapter 747 to members and former members of district hearing boards).

10. *Id.* § 87406.1(c) (enacted by Chapter 747); *see also* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 3214, at 1 (Aug. 12, 1994) (stating that former members, officers, or employees who are working for and attempting to influence actions on behalf of another state agency are not barred from appearing before or communicating with the former air pollution control or air quality management district).

11. *See* CAL. GOV'T CODE § 91000(a) (West 1993) (providing that a knowing or willful violation of the Political Reformation Act is a misdemeanor).

12. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 3214, at 2 (Aug. 12, 1994); *see id.* (stating that several key staff members of the South Coast Air Quality Management District began lobbying the board and staff after they left that district).

13. ASSEMBLY COMMITTEE ON NATURAL RESOURCES, COMMITTEE ANALYSIS OF AB 3214, at 2 (Apr. 18, 1994); *see also* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 3214, at 2 (Aug. 12, 1994) (stating that the same standard which applies to legislators and executive staff should also be applied to board members and staff of Air Quality Management Districts and Air Pollution Control Districts).

measures for one year which are not dependent upon the former employee having been involved with the issue during their employment.[14]

Cary G. Hipps

Environmental Protection; bear gall bladders—penalties for possession

Fish and Game Code § 12005 (amended).
SB 1597 (Marks); 1994 STAT. Ch. 745

Existing law generally provides that the violation of a Fish and Game Code provision is a misdemeanor, with specified exceptions.[1] Existing law prohibits the sale, purchase or possession of the body parts of any bear and provides that possession of more than one bear gall bladder is *prima facie* evidence[2] that the gall bladders are possessed for sale.[3]

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14. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 3214, at 1-2 (Aug. 12, 1994); *see id.* (showing that AB 3214 will institute a ban on appearing before the district, on behalf of another, for one year, regardless of whether the previous employee was involved with the issue while still employed). *Compare* CAL. GOV'T CODE § 87406.1(a)-(c) (enacted by Chapter 747) *with id.* § 87401(a)-(b) (West 1993) (illustrating that no former state administrative official, after termination, is allowed to represent as an agent or attorney for compensation, any person before any state court, administrative agency, or any officer or employee thereof, by formal or informal appearance, or by making any oral or written communication with the intent to influence in connection with any judicial, quasi-judicial, or other proceeding where the State of California is a party or has a direct and substantial interest and the proceeding is one in which the former state administrative official participated).

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1. CAL. FISH & GAME CODE § 12000 (West Supp. 1994); *see id.* § 12002(a)-(b) (West Supp. 1994) (providing that unless specified as an exception, any violation of the Fish and Game Code is a misdemeanor, punishable by a maximum fine of $1000, up to six months imprisonment in the county jail, or both); *id.* § 12002.5 (West Supp. 1994) (providing that, notwithstanding California Fish and Game Code § 12002, any violation of California Fish and Game Code § 1764 relating to pass or license requirements for entrance onto Department managed lands is an infraction).

2. *See* BLACK'S LAW DICTIONARY 1190 (6th ed. 1990) (defining *prima facie* evidence as such evidence as, in the judgment of the law, is sufficient to establish a given fact, or chain of facts constituting the party's claim or defense, which if not rebutted or contradicted, will remain sufficient on its face); *see also* CAL. EVID. CODE § 602 (West 1966) (declaring that a statute providing that a fact or group of facts is *prima facie* evidence of another fact establishes a rebuttable presumption); Kansas v. Haremza, 515 P.2d 1217, 1222 (Kan. 1973) (defining *prima facie* evidence as evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence).

3. CAL. FISH & GAME CODE § 4758(a)-(b) (West Supp. 1994); *see id.* § 12005(2) (amended by Chapter 745) (providing that each violation of California Fish and Game Code § 4758 is punishable by a fine of up to $5000, imprisonment in the state prison or county jail for a maximum of one year, or both); *see also id.* § 3087(b) (West Supp. 1994) (permitting a taxidermist to sell the prepared, stuffed, or mounted skin of any mammal, prepared for another person, when that person neither pays for nor takes delivery of the skin); *cf.* IDAHO CODE § 36-601 (1994) (providing that a person who possesses a fur buyer's license may engage in the business of buying black bear skins or parts of black bears); ME. REV. STAT. ANN. tit. 12, § 7352(4)(A) (West 1994) (permitting any person who lawfully possesses any deer, moose, or bear, to sell the hide, head, or gall bladder thereof).

Chapter 745 mandates that for a person who is convicted for possession of two bear gall bladders, a condition of probation or suspension of the person's sentence is imprisonment in the county jail for not less than thirty days.[4] Chapter 745 makes the possession of three or more bear gall bladders punishable by imprisonment in the county jail for not less than one year, or by a fine of not more than $10,000, or both, where a condition of probation or suspension of such a sentence is imprisonment in the county jail for not less than three months.[5]

INTERPRETIVE COMMENT

Proponents of Chapter 745 state that the poaching of game in California is a lucrative business.[6] By enacting Chapter 745, the Legislature is attempting to reduce poaching in California, by providing both incentive for local law enforcement to pursue poachers and increased penalties for judges to impose.[7]

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4. CAL. FISH & GAME CODE § 12005(b) (amended by Chapter 745).

5. *Id.* § 12005(c) (amended by Chapter 745).

6. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1597, at 2 (June 2, 1994); *see* Letter from Mark J. Palmer, Executive Director, Mountain Lion Foundation, to Assemblymember Bob Epple, Chairman, Assembly Public Safety Committee (June 17, 1994) (copy on file with the *Pacific Law Journal*) (stating that black bears are being poached in California for their gall bladders, which now command a price, on the black market, ounce for ounce, that is higher than cocaine); *see also* Marla Cone, *Man Arrested for Allegedly Trafficking in Bear Parts*, L.A. TIMES, June 24, 1994, at 3 (describing the arrest of a Rosemead businessman after he purchased from California Department of Fish and Game agents 164 bear gall bladders worth an estimated $715,000, and reporting that the man sells each bladder for $2000 to $5000 in California, and as much as $100,000 in Asia); Glen Martin, *A Bull Market in Bears: San Francisco Has Become the Center for Illegal Traffic in Black Bear Gall Bladders, Much in Demand in Asia*, S.F. CHRON., June 18, 1989, at 13/Z1 (claiming that during most of the 1980s, black bear populations declined precipitously in much of the state, due to a recondite medical theory that black bear gall bladders are good for ailments); Glen Martin, *California Wildlife in Peril: State Can't Keep up with Boom in Poaching*, S.F. CHRON., Nov. 29, 1993, at A1 (quoting fish and game wardens as saying that the great majority of the people they cite for poaching or trafficking in wild animal parts are Asian immigrants, and those who are non-Asian are often slaughtering animals illegally to cash in on the Asian pharmacology trade); *id.* (reporting that a single bear carcass is a cornucopia of illicit profits, with the gall bladder worth up to $5000 to a dealer in Korea, bear claws fetching between $40 to $60 each, hides going for $500 or more, and bear meat selling to restaurants and game aficionados for $15 to $20 a pound); *id.* (declaring that the demand for bear gall bladders has led to the near-extinction of bears throughout Eurasia, leaving North America as the world's last stronghold for bears, with 15,000 black bears living in California alone).

7. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1597, at 2 (June 2, 1994); *see* Letter from David Gardner, Legislative Representative, California Fish and Game Warden's Protective Association, to Senator Milton Marks, California State Senate (Mar. 30, 1994) (copy on file with the *Pacific Law Journal*) (stating that SB 1597 will give game wardens additional leverage to aid the mission of eliminating the illegal commercialization of California's wildlife by imposing more stringent punishments).

Environmental Protection; California Coastal Sanctuary Act

Public Resources Code §§ 6240, 6241, 6242, 6243 (repealed and new); §§ 6250, 6251, 6252, 6253, 6871.1, 6871.2, 6872, 6872.5 (repealed); § 6872.5 (amended).
AB 2444 (O'Connell); 1994 STAT. Ch. 970

Under prior law, drilling on the California coast was inconsistently regulated; sunset dates for drilling prohibitions varied between neighboring coastal areas.[1] Further, the State Lands Commission was permitted to reconfigure existing oil lease boundaries to encompass the entirety of an oil or gas field that encroached on protected land.[2]

Chapter 970 creates a uniform, permanent prohibition of new oil and gas leases along the entire California coast, and repeals the State Land Commission's authorization to extend existing leases.[3] Further drilling will be allowed under Chapter 970 only in response to a presidential finding of serious petroleum shortages and the need for coastal drilling.[4]

INTERPRETIVE COMMENT

Chapter 970 was enacted to unify California oil and gas drilling policy, and to protect fragile marine resources.[5] Prior to the passage of Chapter 970,

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1. 1992 Cal. Legis. Serv. ch. 1174, sec. 1, at 4737-38 (enacting CAL. PUB. RES. CODE § 6871.2); *see id.* (prohibiting gas and oil extraction in tide and submerged land offshore Los Angeles, Orange, and Santa Barbara counties until January 1, 1995 and prohibiting gas and oil extraction in San Mateo, San Francisco, Marin, Sonoma, Mendocino, Humboldt, Del Norte, Napa, Contra Costa, and Alameda counties in tide and submerged land until Jan. 1, 2003, with the exception of areas east of the Carquinez Bridges of Interstate 80, over the Sacramento/San Joaquin River delta).

2. *Id.* (enacting PUB. RES. CODE § 6240); *see id.* (allowing the California State Lands Commission to extend the boundaries of an existing oil exploration lease, if the lease will allow for the more efficient utilization of state resources and if drilling occurs from an upland site or from an existing facility); *cf.* MASS. GEN. LAWS ANN. ch. 132A § 13 (West 1994) (establishing the Cape Cod Coastal Sanctuary). *See generally* William J. Rathje, *Saving Byron's Sea: Federal and State Regulation of Oil Pollution from Ocean Petroleum Production*, 22 HASTINGS L.J. 485, 511-21 (1971) (discussing California's approach to regulating offshore oil and gas drilling).

3. CAL. PUB. RES. CODE § 6243 (enacted by Chapter 970); *see id.* § 6242 (enacted by Chapter 970) (prohibiting new oil and gas exploration leases in all coastal areas subject to tidal influence, unless later authorized by the California Legislature, and exempting leases in effect on Jan. 1, 1995).

4. *Id.* § 6243 (enacted by Chapter 970); *see* 43 U.S.C.A. § 1346 (1994) (mandating an assessment of potential negative environmental impacts for new offshore oil drilling leases); *cf.* 42 U.S.C.A. § 6241 (d) (1977 & Supp. 1994) (describing the requirements for presidential disbursement of resources under the Strategic Petroleum reserve). *See generally* Alfred E. Yudes, Jr., Comment, *Coastal Zone Impacts of Offshore Oil and Gas Development: An Accommodation Through the California Coastal Act of 1976*, 8 PAC. L.J. 783, 790-93 (1977) (discussing the threats posed by offshore oil drilling).

5. ASSEMBLY COMMITTEE ON NATURAL RESOURCES, COMMITTEE ANALYSIS OF AB 2444, at 1-2 (Mar. 14, 1994); *see id.* (calling the prior law a "confusing hodgepodge" and discussing the dangers of oil drilling to marine ecosystems); *see also Assembly OK's Drilling Ban*, SACRAMENTO BEE, Apr. 8, 1994, at A4 (reporting that oil platforms routinely discharge small amounts of oil and large amounts of waste into the ocean). *But see* Letter from John Geoghegan, Research Consultant, Kahl Associates, to Assemblymember Jack

enforcement of oil and gas drilling prohibition was inconsistent, and the California State Lands Commission had discretion to allow drilling in areas that were otherwise statutorily protected from petroleum exploration on a case-by-case basis.[6]

Critics of Chapter 970 fear a serious negative impact to California's economy and doubt the reality of potential harm to marine habitats.[7] Further, there is concern of increased dependency on foreign oil as a result of the passage of Chapter 970.[8]

Timothy M. Harris

Environmental Protection; dredging—standards and regulation

Fish and Game Code §§ 5653, 5653.9 (amended).
AB 1688 (Hauser); 1994 STAT. Ch. 775

Existing law requires a person[1] to obtain a permit from the Department of Fish and Game (Department)[2] before using a vacuum or any suction dredge equipment in any river, stream, or lake in California.[3] Prior law authorized the Department to designate waters or areas where vacuums or suction dredges could be operated under a permit, which waters or areas were closed to those dredges, the maximum size of dredges allowed, and the time of year when the dredges could be

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O'Connell (Mar. 8, 1994) (copy on file with the *Pacific Law Journal*) (pointing to the dangers of increased oil tanker traffic that will result from a ban on offshore oil drilling).

6. 1992 Cal. Legis. Serv. ch. 1174, sec. 1 at 43737-43738 (enacting CAL. PUB. RES. CODE § 6871.2—the California Coastal Sanctuary Act); *see supra* note 1 and accompanying text (describing the incongruous implementation of sunset dates); ASSEMBLY COMMITTEE ON NATURAL RESOURCES, COMMITTEE ANALYSIS OF AB 2444, at 2 (Mar. 14, 1994) (calling for the unification of existing sanctuaries); Ken Chavez, *Wilson Signs Landmark Ban on New Offshore Oil Drilling*, SACRAMENTO BEE, Sept. 29, 1994, at A1 (discussing the benefits of Chapter 970 and Governor Wilson's involvement in environmental concerns).

7. Letter from John Geoghegan, *supra* note 5; *see id.* (citing a projected decline in revenue from oil and gas production in California from $282 million over the last 10 years to an estimated $80 million over the next 10 years)

8. J.E. Mitchell, *Permanent Offshore Oil, Gas Ban Sought*, L.A. TIMES, Jan. 11, 1994, at B2; *see id.* (discussing California's future oil consumption needs and the options for energy sources).

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1. *See* CAL. FISH & GAME CODE § 67 (West Supp. 1994) (defining person as any natural person or any partnership, corporation, trust, or other type of association).

2. *See id.* § 700 (West Supp. 1994) (creating the Department of Fish and Game); *id.* § 702 (West 1984) (requiring the Department of Fish and Game to enforce the provisions of the Fish and Game Code); *id.* §§ 1000-1017 (West 1984 & Supp. 1994) (setting forth the provisions regarding the powers and duties of the Department of Fish and Game).

3. *Id.* § 5653(a) (amended by Chapter 775); *cf.* NEV. REV. STAT. § 503.425(1) (1993) (providing that before a person may use any vacuum or suction dredge equipment in any river, stream or lake of Nevada, the individual must submit an application for a permit, which will be issued by the state if the operations will not be deleterious to fish).

operated.[4] Existing law authorizes the Department to adopt regulations to carry out the dredging laws.[5]

Chapter 775 expressly prohibits the use of a vacuum or suction dredge by any person in any river, stream, or lake in California, unless that person has received a permit issued pursuant to regulations adopted by the Department.[6] Chapter 775 requires, rather than permits, the Department, by regulation, to designate waters or areas where vacuum or suction dredges may be operated under a permit, which waters or areas are closed to those dredges, the maximum size of dredges allowed, and the time of year when the dredges may be operated.[7]

INTERPRETIVE COMMENT

Due to the potential for impact upon fish as well as aquatic and riparian systems, the Department regulates suction dredge mining in California.[8] By enacting Chapter 775, the Legislature intends to clarify the Department's authority to establish standards and regulations for vacuum and suction dredging

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4. 1988 Cal. Legis. Serv. ch. 1037, sec. 1, at 3371 (amending CAL. FISH & GAME CODE § 5653(b)); *see* CAL. CODE REGS. tit. 14, § 228(b)-(h) (1994) (setting forth the permitting procedure for the operation of a suction dredge); *id.* § 228.5(a)-(b) (1994) (setting forth classes of suction dredge use restrictions applicable in California's lakes, reservoirs, streams, and rivers); *see also* CAL. FISH & GAME CODE § 5653.3 (West Supp. 1994) (providing that any person required to possess a suction dredge permit must present his or her equipment for inspection upon request of a state or county game warden).

5. CAL. FISH & GAME CODE § 5653.9 (amended by Chapter 775).

6. *Id.* § 5653(a) (amended by Chapter 775); *cf.* NEV. REV. STAT. § 503.425(3)(a) (1993) (prohibiting any person from conducting dredging operations without first securing a dredging permit).

7. CAL. FISH & GAME CODE § 5653(b) (amended by Chapter 775); *see id.* § 5653.9 (amended by Chapter 775) (providing that the Department must adopt regulations to carry out the provisions in California Fish & Game Code § 5653 pursuant to California Public Resources Code §§ 21000-21005 and California Government Code §§ 11340-11356); *see also* CAL. GOV'T CODE §§ 11340-11356 (West 1992 & Supp. 1994) (setting forth the procedure, rules, and regulations regarding the adoption, amendment, or repeal of regulations by state agencies, and creating administrative agencies to carry out and enforce the procedures, rules, and regulations); CAL. PUB. RES. CODE §§ 21000-21005 (West 1986 & Supp. 1994) (declaring the need for state agencies to protect environmental quality and setting forth provisions regarding environmental impact reports, planning and review policies, and other state agency duties designed to ensure environmental quality).

8. SENATE COMMITTEE ON NATURAL RESOURCES AND WILDLIFE, COMMITTEE ANALYSIS OF AB 1688, at 2 (June 28, 1994); *see* Jim Mayer, *State Shift on Mine Rules Upsets Environmentalists: River Miners Hit Gold—Tougher Rules Dropped*, SACRAMENTO BEE, Dec. 24, 1993, at A1 (reporting on the Department of Fish and Game's withdrawal of 1993 mining regulations after receiving substantial protest from miners on the grounds that the new regulations were not properly adopted according to legal procedures); *id.* (reporting that fish and game officials believe dredgers suck up and kill fish egg and are concerned about miners moving boulders, cutting down vegetation, and washing away banks in search of gold); *id.* (reporting that many miners believe they are being blamed for damage to fisheries which has really been caused by dams and water diversions); *Riches May Not Pan Out, but Gold Miners Treasure the Hunt*, SACRAMENTO BEE, Aug. 31, 1993, at B1 (reporting that independent gold miners may be a dying breed due to low gold prices and more importantly, increasing federal and state regulation of mining); Kay Saillant, *West Ventura County Focus: Piru Creek; Public Queried on Gold-Mining Issue*, L.A. TIMES, Dec. 6, 1993, at B2 (reporting that the United States Forest Service is considering restricting recreational gold dredging in Piru Creek, where gold dredging operations could be destroying the eggs of the nearly endangered Arroyo toad); *see also* Ken Payton, *Klamath Miners Dig in for a Fight*, SACRAMENTO BEE, Mar. 8, 1988, at B1 (reporting on the United States Forest Service crackdown on persons possessing full-time mining permits who do not mine, but only utilize the permit for its grant of authorization to reside on public land).

permits as well as to clarify that each person who desires to suction dredge will need to first obtain a permit.[9]

Darren K. Cottriel

Environmental Protection; environmental impact reports

Public Resources Code § 21080.14 (new); §§ 21002.1, 21005, 21064.5, 21065, 21080, 21080.1, 21081.6, 21100, 21100.1, 21167.6 (amended).
SB 749 (Thompson); 1994 STAT. Ch. 1230
(Effective September 30, 1994)

Existing law, the California Environmental Quality Act (CEQA),[1] requires lead public agencies[2] to prepare environmental impact reports (EIRs)[3] for projects[4] they approve or carry out.[5] CEQA mandates that EIRs be prepared pursuant to its

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9. SENATE COMMITTEE ON NATURAL RESOURCES AND WILDLIFE, COMMITTEE ANALYSIS OF AB 1688, at 2 (June 28, 1994).

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1. *See* CAL. PUB. RES. CODE §§ 21000-21178.1 (West 1986 & Supp. 1994) (setting forth the provisions of CEQA); *cf.* 42 U.S.C.A. § 4321 (West 1983) (setting forth the provisions of the National Environmental Policy Act (NEPA)).

2. *See* CAL. PUB. RES. CODE § 21067 (West 1986) (defining lead agency as a public agency that has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment); *see also* City of Sacramento v. Water Resources Control Bd., 2 Cal. App. 4th 960, 973, 3 Cal. Rptr. 2d 643, 650 (1992) (holding that in determining which agency is to be classified as the lead agency for purposes of environmental impact report preparation, the agency in the best position to make an assessment is to be regarded as the lead agency).

3. *See* CAL. PUB. RES. CODE § 21061 (West 1986) (defining environmental impact report as a detailed statement setting forth enumerated items); *see also* Inyo County v. City of Los Angeles, 71 Cal. App. 3d 185, 192, 139 Cal. Rptr. 396, 401 (1977) (holding that the environmental impact report is the heart of the environmental control process); Ron Galperin, *Property Values: Environmental Reports Complicate Development Process*, L.A. TIMES, Dec. 14, 1993, at B4 (defining an EIR as an informational document produced by a city, county, or state agency vested with the authority to either build public projects or review privately proposed developments); *id.* (stating that the definition of EIR varies from agency to agency because CEQA does not clearly define EIR); Michael Zischke, *Commentary; Repairing the Engine for the Environment*, THE RECORDER, Sept. 17, 1993, at 8 (defining EIRs as CEQA's primary tool of implementation and as hefty documents that are filled with a technical analysis of environmental impacts, mitigating measures, and possible alternatives to proposed actions). *See generally* Aram Kouyoumdjian, Review of Selected 1993 Legislation, *Environmental Protection; Environmental Impact Reports*, 25 PAC. L.J. 368, 658 (1994) (discussing other aspects of EIRs).

4. *See infra* notes 14-16 and accompanying text (discussing project and its definition).

5. CAL. PUB. RES. CODE § 21061 (West 1986); *see* Sierra Club v. Morton, 405 U.S. 727, 734 (1972) (discussing environmental protection principles and stating that aesthetic and environmental well-being are important ingredients of the quality of life in our society); No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68, 75-78, 529 P.2d 66, 70-72, 118 Cal. Rptr. 34, 38-40 (1975) (addressing how an agency is to decide whether a pending project requires an EIR); CAL. CODE REGS. tit. 14, § 1685 (1994) (providing for adequate time for the evaluation of environmental impact reports); *id.* §§ 12000-12003 (1994) (providing guidelines for the implementation and evaluation of projects under CEQA for the Colorado River Board of California); *id.* §

guidelines and contain certain items, including a description of the potentially significant effects[6] of a project on the environment and a statement indicating the reasons that contributed to the classification of various potential effects as insignificant.[7] Under Chapter 1230, any detailed discussion of potential environmental effects that are insignificant must be omitted from the reports.[8] Under prior law, environmental impact reports were required to include, *inter alia*, a discussion of the relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity.[9] Chapter 1230 deletes the requirement for that information.[10]

Under existing law, a failure to comply with the reporting and disclosure requirements mandated by CEQA may be found to be an abuse of discretion.[11]

15002 (1994) (discussing the aims of CEQA and providing specific definitions); *see also* CAL. GOV'T CODE §§ 66425-66451.25 (West 1983 & Supp. 1994) (setting forth the provisions of the California Subdivision Map Act); *id.* § 66474.61 (West 1983) (prohibiting cities from approving projects that do not comply with the general and specific area plans); 66 Op. Cal. Att'y Gen. 461, 462-463 (1983) (requiring the California Highway Patrol to prepare an environmental assessment under CEQA before adopting radioactive material transportation routes pursuant to § 33000 of the California Vehicle Code); Diane K. Danielson, Comment, *Environmental Regulation in Michigan and Massachusetts: Two States with Two different Solutions to the Same Problem*, 20 B.C. L. REV. 99, 100 (1993) (discussing the different approaches two states take to environmental regulation). *See generally* Galperin, *supra* note 3, at B4 (discussing CEQA's mandated EIRs and their purposes, which include informing the public as well as government decisionmakers of all the potential harms that may result from the proposed development).

6. *See* CAL. PUB. RES. CODE § 21068 (West 1986) (defining significant effect on the environment as a substantial, or potentially substantial, adverse change in the environment); *see also No Oil*, 13 Cal. 3d at 85, 529 P.2d at 77, 118 Cal. Rptr. at 45 (holding that since EIRs serve to guide agencies in deciding whether to approve or disapprove proposed projects, CEQA impliedly requires that the agency render a written determination on whether a project requires an EIR before it gives final approval to that project). *See generally* Galperin, *supra* note 3, at B4 (stating that the details which an EIR must contain include traffic patterns, air pollution, toxic waste, natural habitat, water and energy needs, and the extent to which a building blocks the sun).

7. CAL. PUB. RES. CODE § 21100(a) (amended by Chapter 1230); *see No Oil*, 13 Cal. 3d at 85, 529 P. 2d at 77, 118 Cal. Rptr. at 45 (holding that since the preparation of an EIR is the key to environmental protection under CEQA, the accomplishment of goals set forth under CEQA requires that an EIR be prepared whenever it can be argued on the basis of substantial evidence that the project may have a significant environmental impact). *See generally*, Galperin, *supra* note 3, at B4 (stating that if all potential detrimental effects are not provided for in an EIR, the whole project is jeopardized as it is left vulnerable to legal attack which could successfully stymie approval of the project).

8. CAL. PUB. RES. CODE § 21100(d) (amended by Chapter 1230); *see id.* § 21002.1(e) (West 1986) (providing that the purpose of preparing EIRs is to identify alternatives to the project and to indicate the manner in which those significant effects can be mitigated or avoided); *see also* 66 Op. Cal. Att'y Gen. 461, 462-63 (1983) (providing that the primary purpose of CEQA is to ensure that environmental information is considered by an agency in its decision making process).

9. 1994 Cal. Legis. Serv. ch. 1230, sec. 14, at 6320 (amending CAL. PUB. RES. CODE § 21100).

10. CAL. PUB. RES. CODE § 21100 (amended by Chapter 1230).

11. *Id.* § 21005(a) (amended by Chapter 1230); *see id.* § 21168 (West 1986) (providing that in any action attacking, reviewing, setting aside, voiding, or annulling a determination made by a public agency, discretion in determining the facts is vested in a public agency and prohibiting the court from exercising independent judgment); *id.* (requiring the court to determine only whether the decision is supported by substantial evidence in the light of the whole record); *id.* § 21168.5 (West 1986) (providing that in any action to attack, review, set aside, void, or annul a determination of a public agency on grounds of noncompliance with CEQA, the inquiry extends only to determine whether there was a prejudicial abuse of discretion and providing that an abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence); *see also No Oil*, 13 Cal. 3d

Existing law further contains a declaration of legislative intent that courts do not presume prejudicial error.[12] According to Chapter 1230, it is the intent of the Legislature that courts specifically address each ground of non-compliance with CEQA's requirements.[13]

Existing law, for purposes of applying CEQA, defines project as any activity directly undertaken by a public agency[14] or by any person[15] that is supported at least partially by a form of assistance by a public agency, as well as any activity that involves the issuance of an entitlement which allows usage of the project by a public agency.[16] Chapter 1230 adds to this definition any activity that may cause

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at 88, 529 P.2d at 79, 118 Cal. Rptr. at 47 (stating that judicial review of an agency's or city's decision focuses on whether there was a prejudicial abuse of discretion and concluding that abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination is not supported by substantial evidence).

12. CAL. PUB. RES. CODE § 21005(b) (amended by Chapter 1230).

13. *Id.* § 21005(c) (amended by Chapter 1230).

14. *See id.* § 21063 (West 1986) (defining public agency as any state agency, board, or commission, any county, city and county, city, regional agency, public district, redevelopment agency, or other political subdivision).

15. *See id.* § 21066 (West 1986) (defining person as including any person, firm, association, organization, partnership, business).

16. *Id.* § 21065 (amended by Chapter 1230); *see* Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ., 32 Cal. 3d 794, 795, 654 P.2d 168, 178, 187 Cal. Rptr. 398, 408 (1982) (holding that whether an action is a project within the purview of CEQA is an issue of law which can be decided on undisputed data in the record on appeal); *id.* at 797, 654 P.2d at 179, 187 Cal. Rptr. at 410 (holding that formation of a new school district constituted a project because it was a necessary step in a chain of events which would culminate in physical impact on the environment); Stand Tall on Principles v. Shasta Union High Sch. Dist., 235 Cal. App. 3d 772, 781, 1 Cal. Rptr. 2d 107, 111 (1991) (holding that a school district need not conduct an environmental review of its project to build a new school until it had selected a tentative site for the school); *id.* at 780-81, 1 Cal. Rptr. 2d at 110 (emphasizing the need to balance the protection afforded by early environmental review against the practical requirements of specific information to permit meaningful environmental assessment); City of Santa Ana v. City of Garden Grove, 100 Cal. App. 3d 521, 532, 160 Cal. Rptr. 907, 913 (1979) (holding that an amendment to a general plan is a project because general plans embody fundamental land use decisions that guide the future growth and development of cities and counties); CAL. CODE REGS. tit. 14, § 15378 (1994) (defining project as the whole of an action which has a potential for resulting in physical change in the environment, direct or ultimately, and is an activity directly undertaken by the public agency, by a person supported in whole or in part by public agency contracts, or is an activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies, but does not include anything specifically exempted by state law, proposals for legislation, submittal of proposals to a vote of the people of the state or particular community, or the closing of public schools and the transfer of students to another school); *see also* Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 249, 502 P.2d 1049, 1056, 104 Cal. Rptr. 761, 768 (1982) (concluding that the Legislature intended CEQA to be interpreted in such a manner as to afford the fullest possible protection to the environment within the scope of the statutory language); *id.* at 262, 502 P.2d at 1059, 104 Cal. Rptr. at 771 (addressing the question of whether CEQA applies to private activities for which a permit or other similar entitlement is required); *id.* at 262-63, 502 P.2d at 1058, 104 Cal. Rptr. at 771 (holding that project includes not only construction, acquisition, or other development, but also the issuance of permits, leases, and other entitlements); Bozung v. Local Agency Formation Comm'n, 13 Cal. 3d 263, 277-79, 529 P.2d 1017, 1027, 118 Cal. Rptr. 249, 258-59 (1975) (holding that LAFCO approval of an annexation constitutes a project because it was a necessary step in the development and in effect constituted an entitlement for use for such development); Stein v. City of Santa Monica, 110 Cal. App. 3d 458, 462, 168 Cal. Rptr. 39, 41 (1980) (holding that CEQA does not apply to an urban rent control initiative charter amendment, that the act of placing this initiative measure on the ballot is not a project contemplated by CEQA because it qualified as a nondiscretionary ministerial act not contemplated by the provisions of CEQA); Simi Valley Recreation and Park Dist. v. Local Agency Formation Comm'n, 51 Cal. App. 3d 648, 666-67, 124 Cal. Rptr. 635, 647-48 (1975) (holding that the requirements of CEQA were not

direct physical changes or reasonably foreseeable indirect changes in the environment.[17]

Existing law provides lead agencies with the authority to adopt negative declarations[18] if the agency determines that a proposed project will not have a significant effect on the environment because there is an absence of evidence that the project will have a significant effect on the environment and/or because revisions made to the plan serve to mitigate or avoid its detrimental effects.[19] Chapter 1230 provides the lead agency with the authority to delete mitigation measures that are infeasible,[20] substituting for them other mitigating measures that are more effective or at least equivalent to the proposed measures intended to

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applicable to Local Agency Formation Commission of Ventura County in proceedings whereby undeveloped land within the district was attached because the action was purely ministerial in nature and was not a discretionary project); *id.* at 665, 124 Cal. Rptr. at 641 (stating that the evaluation process contemplated by CEQA relates to the effect of proposed changes and not to every change which may affect further determinations relating to the environment). *See generally* Prentiss v. Board of Educ., 111 Cal. App. 3d 847, 853, 169 Cal. Rptr. 5, 8-9 (1980) (concluding that the actions of the school board in deciding to close one elementary school and transfer its pupils to another school does not constitute a project as to bring them within the scope of CEQA provisions).

17. CAL. PUB. RES. CODE § 21065 (amended by Chapter 1230); *see Sierra Club*, 405 U.S. at 727 (1972) (relying on NEPA to construe the definition of the word "project," which uses the word "action" instead of "project"); *id.* (concluding that the Legislature intended CEQA to be interpreted in such a manner as to afford the fullest possible protection to the environment and that the Legislature necessarily intended to include private activities for which a governmental permit or other entitlement for use is necessary within the provisions); Kaufman & Broad-South Bay Inc. v. Morgan Hill Unified Sch. Dist., 9 Cal. App. 4th 464, 468-70, 11 Cal. Rptr. 2d 792, 794-95 (1992) (discussing the challenge by a developer based on CEQA provisions of the formation of a Mello-Roos district by a school district and discussing the different types of projects and which ones warrant the preparation of EIRs and/or negative declarations); *id.* at 476, 11 Cal. Rptr. at 800 (concluding that the establishment of a Mello-Roos district is not a project within the meaning of CEQA and is thus not subject to its provisions because the causal link between the formation of the Mello-Roos district and the challenged environmental impact is missing); City of Livermore v. Local Agency Formation Comm'n of Alameda City, 184 Cal. App. 3d 531, 538, 230 Cal. Rptr. 867, 874 (1986) (holding that revisions to sphere of influence guidelines constitute a project because they will have an ultimate impact on the environment); *see also* 68 Op. Cal. Att'y Gen. 108, 109 (1985) (providing that since the concept of project is broadly defined, CEQA covers a wide range of activities, such as land development approvals of a regional transportation plan, increases in bridge tolls, and approvals of plans to create new schools). *See generally* Zischke, *supra* note 2, at 2 (discussing legislation that was proposed during the 1993 session which changed the definition of project by requiring some direct or indirect link to physical environmental impacts, as opposed to the broader definition, thus eliminating some of the more creative uses of CEQA to attack entirely non-environmental matters).

18. *See* CAL. PUB. RES. CODE § 21064 (West 1986) (defining negative declaration as a written statement that describes why a proposed project will not have a significant effect on the environment and thus does not require the preparation of an environmental impact report).

19. *Id.* § 21080(c) (amended by Chapter 1240); *see* Residents Ad Hoc Stadium v. Board of Trustees, 89 Cal. App. 3d 274, 286-87, 152 Cal. Rptr. 585, 593 (1979) (stating that each public agency must mitigate or avoid significant effects of projects it approves or carries out whenever it is feasible to do so). *See generally*, Galperin, *supra* note 3, at B4 (stating that approvals of projects usually are continent upon the measures the developer plans to take to make up for harm caused to the environment).

20. *See* CAL. PUB. RES. CODE § 21061.1 (West 1986) (defining feasible as capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors).

reduce the project's environmental impact.[21] Chapter 1230 acknowledges the authority project applicants have to challenge the legality of a condition of project approval imposed by a lead agency and provides that a lead agency's approval of a project will be invalidated and reapproval required if an administrative body or court sets aside a condition of approval in order to lessen or mitigate the likelihood of the occurrence of a significant effect on the environment.[22]

Existing law provides that lead agencies are responsible for determining whether an EIR or negative declaration is required for a project subject to CEQA's requirements.[23] Chapter 1230 provides that lead agencies are also responsible for determining when mitigated negative declarations[24] are required for projects subject to the provisions of CEQA.[25]

Existing law exempts particular projects from complying with the provisions of CEQA, including extensions of time granted for the purpose of preparing and adopting a city or county plan and actions taken by the Department of Housing and Community Development or the California Housing Finance Authority for the purpose of providing financial assistance or insurance for the construction of low or moderate income housing.[26] Chapter 1230 creates an additional exception

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21. *Id.* § 21080(f) (amended by Chapter 1230); *see* Des Brisay v. Goldfield Corp., 637 F.2d 677, 680 (1981) (stating that since a state agency had the task of complying with CEQA's provisions, then it was obligated to consider alternatives and mitigate adverse consequences of the project); *id.* (noting that those obligations are meaningless without the power to select an alternate project); *id.* (stating that CEQA obligations may exceed those imposed by NEPA); *id.* (stating that if a lead agency lacked the authority to select an alternate project for final environmental impact statement, it could not fulfill its lead agency obligations).

22. CAL. PUB. RES. CODE § 21080(g) (amended by Chapter 1230); *see* 23 C.F.R. 771.18(j)(3) (1994) (providing that the draft environmental statement should indicate that all alternatives are under consideration and that a specific alternative will be selected by the agency following a public hearing and that an environmental statement will be prepared for the selected alternative). *See generally* Bruce C. French, *More Effective Citizen Participation in Environmental Decision Making*, 24 U. TOL. L. REV. 389 (1993) (discussing citizen participation in enforcement of environmental control legislation and asserting that the citizen role may cause delays, but will not cause the elimination of a project on the merits).

23. CAL. PUB. RES. CODE § 21080.1(a) (amended by Chapter 1230); *see* City of Sacramento v. Water Resources Control Bd., 2 Cal. App. 4th 960, 973, 3 Cal. Rptr. 2d 643, 650 (1992) (holding that it was error to mandate compliance with CEQA by the Water Control Board because the Department of Food and Agriculture was the lead agency).

24. *See* CAL. PUB. RES. CODE § 21064.5 (West Supp. 1994) (defining mitigated negative declaration as a negative declaration prepared for a project when the initial study has identified potential significant effects on the environment but revisions in the project before the negative declaration is released for public review would avoid effects so that no significant effect would be imposed on the environment, or there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment).

25. *Id.* § 21080.1(a) (amended by Chapter 1230).

26. *Id.* § 21080.10(a)-(b) (amended by Chapter 1230); *see* CAL. GOV'T CODE § 65361 (West Supp. 1994) (setting forth situations that would warrant an extension of the deadline for the preparation and adoption of all or part of the general plan, including, *inter alia*, unavailability of necessary data, occurrence of a disaster, or the inability to obtain necessary staff or consultant assistance); Napa Valley Wine Train v. Public Utilities Comm'n, 50 Cal. 3d 370, 383, 787 P.2d 976, 983-84, 267 Cal. Rptr. 569, 576-77 (1990) (applying the passenger service exemption to the Napa Valley Wine Train); *id.* (holding that CEQA does not apply to the institution of passenger services on rail rights of way already in use); *Friends of Mammoth*, 8 Cal. 3d at 266-67, 502 P.2d at 1061, 104 Cal. Rptr. at 773 (providing that the exemptions to the provisions of CEQA reflect a variety of policy goals, including compelling local governments to study and record the environmental implications of proposed activities); *see also* CAL. CODE REGS. tit. 14, § 15300.2(c) (1994) (providing that

to the provisions of CEQA, exempting development projects which construct low to moderate income housing developments containing not more than forty-five units in an urban area that meet particular requirements.[27]

Existing law specifies particular requirements that must be fulfilled in all actions or proceedings brought to attack, review, set aside, void, or annul the act or decisions of a public agency on the grounds of noncompliance.[28] Chapter 1230 imposes particular requirements regarding the contents of the record of proceedings brought pursuant to CEQA.[29]

INTERPRETIVE COMMENT

The provisions of Chapter 1230 are intended to facilitate actions regarding noncompliance brought pursuant to CEQA's provisions.[30] Chapter 1230 additionally codifies existing case law as to the definition of project for purposes of applying CEQA.[31] Because the definition of project when CEQA was first enacted was left rather broad, it has been interpreted inconsistently and has resulted in CEQA being used by anti-development advocates as a vehicle for attacking development

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regulatory exemptions should not be applied when there is a reasonable possibility that the exempted activity will have a significant effect on the environment).

27. CAL. PUB. RES. CODE § 21080.14(a) (amended by Chapter 1230); *see id.* (specifying certain requirements that must be fulfilled in order to qualify for the exception); *id.* § 21080.14(c) (enacted by Chapter 1230) (providing that even when certain requirements are met, the exception cannot be used if there is a reasonable possibility that the development project would have a significant effect on the environment due to unusual circumstances or due to related or cumulative impacts of reasonably foreseeable projects in the vicinity of the development project). *See generally Zischke, supra* note 3, at 1 (discussing SB 1031, a bill introduced during the 1993 session that contained provisions identical to those contained in SB 749, but was vetoed by the Governor); *id.* (discussing EIRs and stating that the requirements that must be fulfilled in order to qualify for the exemption from CEQA essentially limits the use of the exemption for low and moderate income housing projects to sites in developed areas that do not present substantial environmental issues).

28. CAL. PUB. RES. CODE § 21167 (West 1986); *see id.* (specifying how an action attacking, reviewing, setting aside, voiding, or annulling the decisions of public agencies must be commenced); *id.* § 21167.6 (amended by Chapter 1230) (setting forth provisions and requirements related to the record of proceedings, the clerk's transcript on appeal, the procedure for filing briefs on appeal, and how a date or hearing of an appeal will be set).

29. *Id.* § 21167.6(e)(1)-(11) (amended by Chapter 1230); *see id.* (providing that the record of proceedings must include, *inter alia*, all project application materials, all written comments received in connection with environmental documents prepared for the project, and the record of the final public agency decision).

30. ASSEMBLY COMMITTEE ON NATURAL RESOURCES, COMMITTEE ANALYSIS OF SB 749, at 3 (Mar. 24, 1994); *see* 68 Op. Cal. Att'y Gen. 108, 109 (1985) (stating that the provisions of CEQA are to be interpreted so as to afford the fullest possible protection to the environment).

31. 1994 Cal. Legis. Serv. ch. 1230, sec. 12, at 6319; *see id.* (stating that the primary purpose of the change is to codify the holdings of Kaufman & Broad v. Morgan Hill Unified Sch. Dist., 9 Cal. App. 4th 464, 11 Cal. Rptr. 2d 792 (1992), and City of Livermore v. Local Agency Formation Commission, 184 Cal. App. 3d 531, 230 Cal. Rptr. 867 (1986)); *see also supra* notes 13-16 and accompanying text (discussing the definition of project).

projects, causing developers and builders undue delay as well as considerable expense.[32]

Moreover, since the preparation of EIRs can prove to be quite expensive, by providing that EIRs need not contain discussions of potential environmental effects that would not prove to be significant, Chapter 1230 facilitates the production of EIRs and mitigates needless expense involved in preparing them.[33]

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32. ASSEMBLY NATURAL RESOURCES COMMITTEE, COMMITTEE ANALYSIS OF SB 749, at 2 (Mar. 24, 1994); *see Kaufman & Broad*, 9 Cal. App. 4th at 469, 11 Cal. Rptr. 2d at 797 (discussing challenges made by Kaufman & Broad on grounds of CEQA because it believed that the formation of a Mello Roos district would impede its ability to maintain the moderate pricing of their homes and thereby would cause them to lose their competitive edge); *Napa Valley Wine Train*, 50 Cal. 3d at 385, 787 P.2d at 985, 267 Cal. Rptr. at 578 (Kaufman, J. dissenting) (stating that this case brought by citizens and others in the community does not present the situation of an agency seeking early environmental review while a project proponent seeks delay); *see also* Bruce C. French, *More Effective Citizen Participation in Environmental Decision Making*, 24 U. TOL. L. REV. 389, 390 (1993) (discussing citizen participation in environmental legislation and stating that any wins which citizens may have are mere fortuitous and are not the result of a carefully designed plan). *See generally* Mary Beth Barber, *Compromising on CEQA: Changes in California's Environmental Law Cushions the Impact on Business*, CAL. J., Oct. 1, 1993, at 1 (discussing the power of citizens to challenge projects and bring them to a halt by using the provisions of CEQA to their best advantage); *id.* (mentioning a situation where a construction workers union used CEQA to create more construction work on oil refineries by forcing the refinery owners to modify their facilities for reformulated gasoline); Danielson, *supra* note 5, at 100 (providing that the Michigan Environmental Protection Act (the Sax Act) allows citizens to bypass administrative agencies and directly sue any project proponents or developers); Zischke, *supra* note 3, at 8 (stating that CEQA has been used in efforts to prevent or block proposed projects and has been identified as a cause of businesses and jobs departing California); *Southwest Diversified Files Action Against City of Signal Hill on Basis of CEQA Violations*, BUS. WIRE, Apr. 15, 1992, at 1 (discussing a company's attack of an approval of an environmental impact report on the basis of CEQA violations).

33. ASSEMBLY COMMITTEE ON NATURAL RESOURCES, COMMITTEE ANALYSIS OF SB 749, at 3 (Mar. 24, 1994); *see* Ogden Martin Sys. v. San Bernardino County, 932 F. 2d 1284, 1286 (1990) (discussing a company which expended $3.5 million to produce an EIR); *see also* Joseph J. Brecher, *The Public Interest and Intimidation Suits: A New Approach*, 28 SANTA CLARA L. REV. 106, 106 (1988) (discussing suits brought against citizens who advocate public interest positions before courts and legislative bodies, with the goal being to retaliate against public interest spokespersons and to discourage further activism); Jeffrey L. Rabin, *Hayden Criticizes Vast Playa Vista Project*, L.A. TIMES, Dec. 13, 1992, at 1 (discussing a huge project, the EIR it required, and the potential implications on the successful completion of the project). *See generally* Anthony C. Ching & Ella L. Brown, *New Approaches to Old Problems*, L.A. BUS. J., Apr. 12, 1993, at 2 (stating that what may have started out as a measure that sought to protect the environment has developed into a potent weapon that is used by anti-growth forces as a combative tool to hinder or stall development through the instigation of costly and time-consuming litigation); Galperin, *supra* note 3, at B4 (discussing the effect that environmental legislation has had upon the development of real estate and, in particular, the complexity and delays which environmental impact reports can produce, especially in the context of commercial development); John T. Ronan III, *Commentary: State Legislation; An Environment Established by Facts*, THE RECORDER, Nov. 16, 1993, at 1 (stating the necessity of further and more comprehensive environmental law reform and quoting Governor Wilson as saying that reforms enacted during the 1993 legislative session are modest and that he expects the Legislature to revisit the issue).

Environmental Protection; establishment of employer programs

Health and Safety Code § 40717.1 (new).
SB 1336 (Leonard); 1994 STAT. Ch. 538

Existing law authorizes Air Pollution Control Districts[1] to establish programs aimed at reducing vehicular emissions by the use of methods, including remote sensors, which identify gross polluters.[2] Existing law also requires districts to adopt, implement, and enforce transportation control measures in order to attain state and federal ambient air quality standards.[3] Chapter 538 authorizes employers to establish programs, subject to approval by the district, equivalent to those that would be achieved by a district rule or regulation, and which produce emission reductions by identifying gross polluters or other high emitting vehicles and which result in the repair of those vehicles.[4] Chapter 538 requires districts to

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1. *See* CAL. HEALTH & SAFETY CODE § 40002 (West Supp. 1994) (providing that every county in the state must have a county air pollution control district or air quality management district (AQMD), unless the county is included in a larger regional district); *id.* §§ 40200-40276 (West 1986 & Supp. 1994) (describing the Bay Area AQMD); *id.* §§ 40400-40719 (West 1986 & Supp. 1994) (establishing the South Coast AQMD); *id.* §§ 40950-41082 (West Supp. 1994) (setting forth provisions regarding the Sacramento Metropolitan AQMD); *id.* §§ 41100-41133 (West Supp. 1994) (describing the San Joaquin Valley AQMD); *id.* §§ 41210-41267 (West Supp. 1994) (describing the Mojave Desert AQMD).

2. *Id.* §§ 44080-44086 (West Supp. 1994); *see id.* § 44081 (West Supp. 1994) (providing that polluters are classified as gross polluters based on nonregulatory guidelines issued by the State Air Resources Board, and specifying that vehicles which comply with emission requirements applicable at the time of manufacture will not be classified as gross polluters). *See generally* William B. Johnson, Annotation, *Validity of State and Local Air Pollution Administrative Rules,* 74 A.L.R. 4TH 566, 624-25 (1989) (discussing the validity and scope of transportation control measures); Annotation, *Orders or Penalties Against State or its Officials for Failure to Comply with Regulations Directing State to Regulate Pollution-Creating Activities of Private Parties under § 113 of the Clean Air Act (42 U.S.C.S. § 1857c-8),* 31 A.L.R. FED. 79 (1977) (discussing the ability of the federal government to impose sanctions upon states for failing to control pollution).

3. CAL. HEALTH & SAFETY CODE § 40717 (West Supp. 1994); *see id.* § 40717(a) (West Supp. 1994) (requiring each district to adopt, implement, and enforce transportation control measures in order to attain state or federal ambient air quality standards and comply with the federally imposed requirements of the Clean Air Act); *see also* 42 U.S.C.A. §§ 7401-7671 (West 1983 & Supp. 1994) (setting forth the provisions of the Clean Air Act); People v. Department of Navy, 431 F. Supp 1271, 1274 (N.D. Cal. 1977) (stating that although the EPA is responsible for promulgating ambient air quality standards, the states are primarily responsible for implementing these standards through implementation plans imposed on a regional or local level). *See generally* 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property,* §§ 71-73 (9th ed. 1987) (discussing the California statutes relating to air pollution control and the implementation of air pollution programs); 61A AM. JUR. 2D, *Pollution Control* § 75 (1981) (discussing transportation control measures as a means of controlling air pollution).

4. CAL. HEALTH & SAFETY CODE § 40717.1(a) (enacted by Chapter 538); *see id.* § 40717.1(b) (enacted by Chapter 538) (providing that employer-established programs will not impose any new emission reduction requirements on employers beyond those established under current law); *id.* § 43845 (West Supp. 1994) (providing for the establishment of a parking cash-out program, an employer-funded program under which an employer provides the employee with a cash allowance equivalent to the parking subsidy that the employer would otherwise pay to provide the employee with a parking space); *id.* § 44085 (West Supp. 1994) (providing that emission reduction credits generated pursuant to this section may be used to meet or offset transportation control requirements, AVR reductions, or other mobile source emission requirements as determined by the particular district); *see also id.* §§ 40709-40711 (West 1986 & Supp. 1994) (providing the districts with the authority to establish regulations by which approved emission reductions can be banked, certified, transferred, and sold); S. Rep. No. 228, 101st Cong., 2d Sess., at 44-45, 66 (1990), *reprinted* in 1990 U.S.C.C.A.N. 3385,

establish a process by which these employer-established programs are either approved or disapproved within ninety days from their submittal.[5]

INTERPRETIVE COMMENT

The Legislature's intent in enacting Chapter 538 is to provide employers with greater flexibility in meeting air quality requirements, including trip reduction regulations.[6] Because vehicles and the emissions they produce are a primary

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3430-32, 3452 (providing that an employer can demonstrate compliance with the transportation control requirements even if the mandated increase is not achieved if it can be shown that expenditures have been made equal to or greater than the cost of providing each employee with a parking space at the workplace); *cf.* COLO. REV. STAT. § 25-7-803 (Supp. 1993) (describing a pilot program targeting employers initiated for the purpose of determining the feasibility of implementing a regional travel reduction program, which may include provisions to offer employers credits against their established goals for reducing work-related trips and which may also include a level of flexibility which encourages creativity in the development of a cost-effective program); CONN. GEN. STAT. ANN. § 13b-38p(e) (West Supp. 1994) (requiring certain employers to conduct a survey and implement a transportation management program to reduce traffic congestion and air pollution and to include within those programs options for telecommuting or compressed work weeks); N.J. STAT. ANN. § 27:26A-7(g) (West Supp. 1994) (providing that affected employers are encouraged to utilize alternative fuel vehicles in order to reduce air pollution levels in the state and that such utilization shall receive appropriate recognition in the regulations adopted by the state). *But see* State v. EPA, 530 F.2d 215, 221 (4th Cir. 1975) (holding that a requirement imposed on certain employers to submit a plan for encouraging employees to use mass transit facilities was impermissibly vague, as it failed to state a goal, a standard to be applied, or factors to be used); 75 Op. Cal. Att'y Gen. 256, 261 (1992) (providing that air pollution control districts may not require employers to charge parking fees as a means of achieving average vehicle ridership goals for purposes of complying with the California Clean Air Act of 1988). *See generally* South Terminal Corp. v. EPA, 504 F.2d 646, 674 (1st Cir. 1974) (upholding a requirement imposed on employers mandating them to reduce the number of available employee parking spaces in order to force commuters to rely upon carpools or public transit, as long as reasonable provisions are made for exceptional hardships); Laura M. Litvan, *Clean Air Act's Carpool Mandate*, NATION'S BUS., Apr. 1994, at 36 (stating that states use different approaches to the federal mandate, with some directing employers to use specific plans and others giving employers the freedom to write their own plans); Catherine Romano, *Business Copes with the Clean Air Conundrum; Employee Trip Reduction Provision of the 1990 Clean Air Act*, MGMT. REV., Feb. 1994, at 34 (discussing employers' compliance with the requirements of the Clean Air Act and describing different incentive programs offered by employers, including rewarding ridesharers with points to be cashed in for merchandise, providing preferential parking for carpoolers, establishing shopping centers at work locations to reduce vehicle usage, allowing flexible work schedules and telecommuting, and purchasing vouchers for public transportation for employees).

5. CAL. HEALTH & SAFETY CODE § 40717.1(a) (enacted by Chapter 538); *see id.* (requiring the procedures adopted to be consistent with the guidelines set forth in California Health and Safety Code §§ 40916 and 40919); *id.* (providing that the employer-established programs shall produce emission reductions equivalent to those that would be achieved under the district rule or regulation).

6. SENATE COMMITTEE ON TRANSPORTATION, COMMITTEE ANALYSIS OF SB 1336, at 1-2 (Mar. 15, 1994); *see* CAL. HEALTH & SAFETY CODE § 40927 (West Supp. 1994) (prohibiting the application of mandatory employer established programs to companies employing less than 100 people); *see also* 42 U.S.C.A. § 7511a(d)(1)(B) (West Supp. 1994) (mandating states located in particular areas to establish programs which require businesses employing more than 100 people to implement programs by November 1992 which will reduce average vehicle ridership by 25% by November 1996); 58 Fed. Reg. 13596 (1993) (providing guidance to employers for establishing employee commute options); South Terminal Corp. v. EPA, 504 F.2d 646, 674 (1st Cir. 1974) (upholding an employer parking control measure which included a reasonable provision for exceptional hardship); S. Rep. No. 228, 101st Cong., 2d Sess., at 44-46 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3430-32 (discussing the provision of the Clean Air Act which requires employers of 100 or more employees to provide services, facilities, or incentives to encourage employees to share commuting trips); *id.* (stating that the objectives can generally be achieved by providing assistance and incentives for ridesharing and mass transit trips); *id.* (indicating that the intent of the provision is to reduce both the number

source of pollution in California, private industry employers should be encouraged to exercise initiative in developing new cost-effective technologies for mobile source pollution reduction and should be given the flexibility and freedom to comply with pollution reduction regulations through the development of new techniques.[7]

Laura J. Fowler

Environmental Protection; hazardous waste—transport and consolidation

Health and Safety Code §§ 25110.10, 25121.3, 25163.3 (new).
AB 1448 (Rainey); 1994 STAT. Ch. 1194

Existing law prohibits the transportation of hazardous waste[1] by any person, unless that person receives an applicable manifest[2] from the producer[3] of the

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of vehicles on the road during rush hour and the time the remaining cars spend idling or operating at inefficient low speeds, thereby reducing emissions). *See generally* Craig A. Moyer & Michael Francis, CLEAN AIR ACT HANDBOOK: A PRACTICAL GUIDE TO COMPLIANCE (1993) (describing the Clean Air Act amendments of 1990 and discussing the transportation control measures imposed on companies employing more than 100 people); Pamela S. Reimer & Stephen C. Yohay, *Compliance with Clean Air Act Employer Trip Reduction Requirements*, EMP. REL. L.J., Mar. 22 1994, at 21 (explaining the compliance requirements and illustrating the different approaches to implementation, including the banking and marketing of emission reduction credits); Eddie Caine & Ira Domksy, *Arizona Passes New Pollution Control Measure, Including Provision for Mandated Telecommuting*, GORDON REP., Dec. 1993, at 1 (discussing a bill introduced in the Arizona Legislature which mandated employers to impose a telecommuting program); Thomas M. Power & Paul Rauber, *The Price of Everything; Free-Market Environmentalism*, SIERRA, Nov. 1993, at 86 (discussing the marketability and sale of emission credits).

7. CAL. HEALTH & SAFETY CODE § 44080(a)-(c) (West Supp. 1994); *see id.* (declaring that the greatest source of air pollution in California is automobiles, with a small percentage of automobiles causing a disproportionately large amount of the air pollution in California); *see also id.* § 40919(f) (West Supp. 1994) (providing that in implementing transportation control measures, districts must endeavor to provide employers and business subject to regulation with incentives to facilitate compliance and provide them with the opportunity to develop and demonstrate alternative strategies to achieve equivalent emission reductions not otherwise required by statute, rule, or regulation); Romano, *supra* note 4, at 34 (stating that automobiles are responsible for 90% of the carbon monoxide pollution); *cf.* N.J. STAT. ANN. § 27:26A-2(e)(3) (West Supp. 1994) (providing that employers who have instituted travel demand management programs prior to the state's institution of a state-mandated program are given credit for these programs and are not required to attain a higher average passenger occupancy rate than is set for the region as a whole); PA. STAT. ANN. tit. 35, § 4007.10(a) (1993) (providing for the establishment of a transportation management association to provide services to employers affected by the employee trip reduction plans mandated by the Clean Air Act); WASH. REV. CODE ANN. § 70.94.521 (West 1992) (declaring that major employers have significant opportunities to encourage and facilitate the reduction of employee single-occupant vehicle commuting by implementing transportation programs). *See generally* Annotation, *What Are "Land-Use and Transportation Controls" Which May Be Imposed, Under § 110(a)(2)(B) of Clean Air Act of 1970 (42 USCS § 1857c-5(a)(2)(B)), to Insure Maintenance of National Primary Ambient Air Quality Standards*, 30 A.L.R. FED. 156, 157 (1976) (discussing transportation control measures that can be imposed).

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1. *See* CAL. HEALTH & SAFETY CODE § 25117 (West 1992) (defining hazardous waste).

2. *See id.* § 25160(a) (West Supp. 1994) (defining manifest as a shipping document originated and signed by a generator of hazardous waste which contains all of the information required by the Department of Toxic Substances Control and which complies with all applicable federal and state regulations).

hazardous waste and holds a registration issued by the Department of Toxic Substances Control.[4] Any violation of a law regulating hazardous waste is a crime.[5]

Chapter 1194 deems non-RCRA hazardous waste[6] generated at a remote site[7] and subsequently transported to a consolidation site[8] operated by the generator of the hazardous waste to have been generated at the consolidation site, if certain requirements are met by the generator.[9] Chapter 1194 allows a generator of non-RCRA hazardous waste to hold the waste at the remote site or transport and hold the hazardous waste at another site operated by the generator, exempt from the

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3. *See id.* § 25120 (West 1992) (defining producer as any person who generates a waste material).

4. *Id.*; *see id.* § 25160(b)(1)-(2) (West Supp. 1994) (specifying the persons who are required to obtain a manifest and the procedure for obtaining an applicable manifest); *id.* § 25163 (West Supp. 1994) (requiring a registration for any person who transports hazardous waste and for transporting hazardous waste in a vehicle); CAL. VEH. CODE § 32000.5 (West 1985) (requiring a license for motor carriers of hazardous waste); *see also id.* § 31303 (West Supp. 1994) (setting forth requirements for transporting hazardous waste for which registration is required); *cf.* ALASKA STAT. § 46.03.302(a) (1994) (prohibiting any person from treating, transporting, storing, or disposing of hazardous waste without a permit and without first submitting a manifest or required report to the department). *See generally Company Fined $161,000 for Hauling Toxic Waste*, L.A. TIMES, Feb. 17, 1990, at B2 (reporting that a firm was fined $161,000 for transporting five drums containing 200 gallons of hazardous waste when the firm failed to provide the driver with a manifest and failed to have a manifest in the truck).

5. CAL. HEALTH & SAFETY CODE § 25190 (West 1992) (providing that, with exceptions, any violation of the laws regulating hazardous waste is a misdemeanor, punishable by fine or imprisonment).

6. *See* 40 C.F.R. § 261.3 (1993) (defining hazardous waste); *id.* § 260.10 (1993) (defining RCRA as the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976); CAL. HEALTH & SAFETY CODE § 25117.9 (West 1992) (defining non-RCRA hazardous waste); *id.* § 25120.2 (West 1992) (defining RCRA hazardous waste as waste identified as hazardous waste in 40 C.F.R. §§ 261.1-261.35); *see also id.* § 25117.9 (West 1992) (presuming all hazardous waste in the state to be RCRA hazardous waste, unless it is determined, pursuant to regulations adopted by the Department of Toxic Substances Control, that the hazardous waste is a non-RCRA hazardous waste).

7. *See* CAL. HEALTH & SAFETY CODE § 25121.3(a) (enacted by Chapter 1194) (defining remote site as a site operated by the generator where hazardous waste is initially collected, at which the generator staff, other than security staff, is not routinely located and which is not contiguous to a staffed site operated by the generator of the hazardous waste or which does not have access to a staffed site without the use of public roads); *id.* (providing that generator staff who visit a remote location to perform inspection, monitoring, or maintenance activities on a periodic scheduled or random basis, less frequently than daily, are not considered to be routinely located at the remote location); *id.* § 25121.3(b) (enacted by Chapter 1194) (stating that a remote site may also be a site at which the generator staff is routinely located, if the Department of Toxic Substances Control determines that it is not reasonable to expect the generator to maintain a hazardous waste accumulation area at the site subject to all requirements pertaining to generator onsite accumulation for up to 90 days, and setting forth the criteria for making the determination).

8. *See id.* § 25110.10(a) (enacted by Chapter 1194) (defining consolidation site as one to which hazardous waste initially collected at a remote site is transported).

9. *Id.* § 25110.10(b) (enacted by Chapter 1194); *see id.* § 25110.10(b)(1)-(7) (enacted by Chapter 1194) (setting forth the requirements a generator must meet in order for its hazardous waste, created at remote sites and subsequently transported to a consolidation site, to be deemed generated at the consolidation site, including the requirements that the hazardous waste be non-RCRA hazardous waste, the waste is not generated through large spill cleanup activities, the hazardous waste is not handled at any interim site, and each container of non-RCRA hazardous waste is properly labeled); *see also id.* § 25110(d)(1)(A)-(D) (enacted by Chapter 1194) (requiring generators to give annual notice of intent to operate under the exception provided in § 25110(b) and § 25121.3(c) and setting forth the requirements of such notice).

manifest and transporter registration requirements regarding hazardous waste, if specified conditions are met.[10]

INTERPRETIVE COMMENT

By enacting Chapter 1194, the Legislature is exempting non-RCRA hazardous waste generated at remote sites from hazardous waste regulations until such waste is accumulated at a consolidation site by the generator.[11] Chapter 1194 is intended to eliminate expensive procedural requirements regarding small amounts of hazardous waste which may encourage generators to leave hazardous waste at remote, unstaffed locations.[12] By exempting the transport of remotely generated non-RCRA hazardous waste from requirements common to hazardous waste, Chapter 1194 is intended to encourage the consolidation of hazardous waste in

10. *Id.* §§ 25121.3, 25163.3 (enacted by Chapter 1194); *see id.* § 25121.3(b)(1)-(6) (enacted by Chapter 1194) (permitting a generator who notifies the Department of Toxic Substances Control pursuant to California Health and Safety Code § 25110.10 to hold non-RCRA hazardous waste at a remote site where the waste is initially collected or at another remote site operated by the generator if specified requirements are met, including that the hazardous waste is non-RCRA hazardous waste, all persons handling the waste at the remote site are properly trained according to state regulations, and the non-RCRA hazardous waste is stored in proper containers and is properly labeled); *id.* § 25163.3 (enacted by Chapter 1194) (allowing a person who initially collects hazardous waste at a remote site and transports that waste to a consolidation site operated by the generator to be exempt from the manifest and transport registration requirements if specified conditions are met, including that the hazardous waste is non-RCRA hazardous waste, the vehicles used to transport the waste are owned by the generator or a registered hazardous waste transporter, not more than 275 gallons or 2500 pounds is transported in any shipment, unless the transporter is a public utility or municipal utility district, which may transport 500 gallons in bulk liquid, and proper shipping papers accompany the shipment); *id.* § 25163.3(d) (enacted by Chapter 1194) (providing that the generator shall assume liability for a spill of hazardous waste being transported under California Health and Safety Code § 25163.3, unless the waste is transported by a registered hazardous waste transporter in a vehicle not under the control or ownership of the generator); *id.* § 25163.3(g)(1)-(10) (enacted by Chapter 1194) (listing the information to be required in a shipping paper).

11. SENATE COMMITTEE ON TOXICS AND PUBLIC SAFETY MANAGEMENT, COMMITTEE ANALYSIS OF AB 1448, at 1 (May 9, 1994).

12. 1994 Cal. Legis. Serv. ch. 1194, sec. 1(d), at 5995; *see id.* § 1(a) (June 23, 1994) (stating that non-RCRA hazardous waste is sometimes initially collected in small quantities at remote, unstaffed locations such as field pumping stations, pipelines, power poles and lines, and utility light poles); *see also id.* § 1(b) (June 23, 1994) (stating that although current law permits hazardous waste to accumulate for up to 90 days at a site before being removed, current law does not specifically address hazardous waste initially collected at remote locations where it is not feasible to maintain a 90-day generator accumulation area); *id.* § 1(c) (stating that under current law, to move small amounts of hazardous waste from a remote location, a hazardous waste manifest is required, and the hazardous waste must be transported by a registered transporter). *See generally* Ann R. Klee, *Cleaning up in a Big Way*, THE RECORDER, June 8, 1993, at 10 (reporting on the plight of small businesses trying to conform to environmental laws and their complex and often overlapping permitting, monitoring, reporting, and waste-management requirements).

locations where the generator can reasonably monitor the waste according to all applicable safety requirements.[13]

Darren K. Cottriel

Environmental Protection; oil spills—felony violations

Government Code § 8670.59 (amended).
SB 1720 (Hart); 1994 STAT. Ch. 613

Existing law generally requires that legal actions brought under state law as a result of an oil spill to recover civil damages and penalties must be commenced within three years of the date of discovery of facts or circumstances regarding the spill.[1] However, existing law allows some actions to be brought within five years of discovery.[2] Existing law further states that misdemeanor criminal actions[3] must be commenced within one year, but lists no statute of limitations for felony violations.[4]

Chapter 613 designates that prosecutions of felony violations must be commenced within three years of the date of discovery.[5] Chapter 613 also defines

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13. 1994 Cal. Legis. Serv. ch. 1194, sec. 1(d), at 5995; *see id.* (stating the intent of the Legislature to encourage generators to consolidate hazardous waste in locations where generators can reasonably be expected to manage the hazardous waste in compliance with the applicable safety requirements); *see also* SENATE COMMITTEE ON TOXICS AND PUBLIC SAFETY MANAGEMENT, COMMITTEE ANALYSIS OF AB 1448, at 4 (May 9, 1994) (stating that AB 1448 is intended to encourage generators to accumulate non-RCRA hazardous wastes in a safe, fully staffed location, rather than leaving them unattended at a remote site). *See generally Advisory Group Considers Exemption on Manifests for Recyclable Materials*, DAILY REP. FOR EXEC. (BNA), July 29, 1993, at A144 (reporting on the consideration of exempting recyclable materials from manifest requirements so as to present fewer burdens on generators of such materials, and to lessen the stigma of the hazardous waste classification of such materials).

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1. CAL. GOV'T CODE § 8670.59(c) (amended by Chapter 613); *see id.* § 8670.59(a) (amended by Chapter 613) (requiring any civil actions be brought in the county in which the violation, spill, or discharge occurred).

2. *Id.* § 8670.59(d) (amended by Chapter 613); *see id.* (requiring that civil actions brought pursuant to California Government Code § 8670.56.5(g)(3)-(7) be commenced within five years of discovery); *see also id.* § 8670.56.5(g)(3)-(7) (West 1992) (specifying that injuries to, destruction of, or loss of natural resources, subsistence use of natural resources, loss of taxes, rents and royalties, profits, and use and enjoyment are all recoverable).

3. *See id.* § 8670.64 (West 1992) (setting forth provisions establishing misdemeanor violations relating to oil spills).

4. *Id.* § 8670.59(b) (amended by Chapter 613); *see id.* (providing that all prosecutions of misdemeanor violations must be commenced within one year from the date of discovery).

5. *Id.* § 8670.59(c) (amended by Chapter 613); *cf.* 33 U.S.C.A. §§ 404, 411 (West Supp. 1994) (declaring that it is unlawful to discharge, deposit, or throw away any refuse matter other than that in the liquid state from streets and sewers, and that the penalty will be a fine between $500 and $2500, or by imprisonment between 30 days and one year); N.Y. ENVTL. CONSERV. LAW § 17-1001 (McKinney Supp. 1994) (describing the desire of the New York Legislature to limit oil discharges); *id.* § 71-1933 (McKinney Supp. 1994) (utilizing criminal sanctions to deter oil discharges); TEX. NAT. RES. CODE ANN. § 40.202(a)-(d) (West Supp. 1994)

date of discovery as the actual date that the facts establishing a violation are discovered by a Fish and Game peace officer.[6] Chapter 613 authorizes the Department of Fish and Game administrator to adopt regulations to implement its provisions.[7]

INTERPRETIVE COMMENT

Chapter 613 is the legislative response to a suit brought against the Unocal Corporation for an oil leak in its Guadalupe oil field.[8] Prosecutors were alerted to an oil spill through a confidential informant, but the violations were not confirmed until later, and the prosecution did not commence the action within one year of being informed.[9] The court ruled that the statute of limitations began to run on the date the Department received the confidential information, and not on the date the actual violations were discovered.[10] The leaks were some of the largest in history.[11] Chapter 613 makes the statute of limitations for felony oil spill violations the same as other criminal violations[12] and is similar to other statutes of limitation that require knowledge or discovery of the violation before the statute of limitation begins to run.[13]

Chris J. Ore

(creating liability for unauthorized discharges).

6. CAL. GOV'T CODE § 8670.59(f) (amended by Chapter 613).

7. *Id.* § 8670.59(g) (amended by Chapter 613).

8. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1720, at 2 (May 19, 1994); *see id.* (stating that SB 1720 is necessary to provide guidance to prosecutors and to the courts as to the statute of limitations for a violation of the oil spill laws); *id.* (indicating that the problem was brought to Senator Gary Hart's attention when a San Luis Obispo County judge ruled that the local prosecutor had missed the filing deadline by two days in a case against Unocal for a major oil spill).

9. *Id.*

10. *See* Richard C. Paddock, *Unocal Admits Spillage into Ocean; Guilty Plea Expected,* L.A. TIMES, Mar. 12, 1994, at A1; *id.* (reporting the judge's ruling that the state missed the filing date by two days and therefore was unable to present its case).

11. *Id.*; *see id.* (comparing the Unocal spill with the Exxon Valdez spill which leaked 11 million gallons of oil into the waters off of Alaska).

12. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1720, at 2 (May 19, 1994) (stating that the limitation period under SB 1720 is the same as for other California Penal Code violations for felonies punishable by imprisonment in a state prison for a maximum term of eight years).

13. *Id.* at 3; *see id.* (stating that the statute of limitations for air pollution, water quality, and hazardous substance spills begins to run upon knowledge or discovery of the violation).

Environmental Protection; Water Quality Boards—immunity for witnesses

Water Code §§ 13308, 13328 (new); §§ 1105, 1106 (amended).
AB 2054 (Cortese); 1994 STAT. Ch. 45

Under existing law, no witness appearing in an investigation, inquiry, or hearing before the State Water Resources Control Board (State Board)[1] may be excused from testifying or producing evidence[2] on the grounds that testimony or evidence may be self-incriminating, subject to the requirement that immunity be provided.[3] Existing law provides transactional immunity[4] for witnesses from criminal prosecution for matters concerning those for which the person has been compelled to testify or produce evidence.[5] Under Chapter 45, the State Board may

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1. *See* CAL. WATER CODE §§ 174-189 (West 1971 & Supp. 1994) (establishing the State Water Resources Control Board, setting forth provisions regarding its composition, powers, and duties including issuing, denying or revoking permits or licenses to appropriate water, holding hearings, and making reports relating to water, water rights, water pollution, and water quality); *id.* §§ 13160-13176 (West 1992 & Supp. 1994) (setting forth provisions regarding other powers and duties of the State Water Resources Control Board, including state water pollution control, assessing fees, overseeing the regional water quality control boards, adopting regulations governing clean-up activities, and adopting water quality control plans).

2. *See id.* § 1076 (West 1971) (defining evidence as any paper, book, map, account, or document).

3. *Id.* § 1105(a) (amended by Chapter 45); *see id.* § 1105(c) (amended by Chapter 45) (setting forth an exception to the mandate of testifying set forth in subdivision (a)); *id.* (providing that if the State Board does not grant immunity after a person invokes the privilege against self-incrimination, the State Board must excuse the person from giving any testimony or producing any evidence to which the privilege against self-incrimination applies); *id.* (providing further that the State Board must dismiss, continue, or limit the scope of the proceedings as necessary to ensure that the unavailability of the testimony or evidence does not deny any party due process of law).

4. *See* BLACK'S LAW DICTIONARY 751 (6th ed. 1990) (defining immunity as freedom or exemption from penalty); *id.* (defining transactional immunity as immunity afforded to the witness from prosecution for an offense to which his compelled testimony relates); *see also* People v. Campbell, 137 Cal. App. 3d 867, 874, 187 Cal. Rptr. 340, 343 (1982) (stating that transactional immunity immunizes the defendant from prosecution for any offense which is implicated by the compelled testimony; despite whether the testimony is in fact used); *cf.* Doe v. United States, 487 U.S. 201, 208 n.6 (1988) (declaring that derivative use immunity prohibits the use of compelled testimony, as well as evidence derived directly or indirectly therefrom); BLACK'S LAW DICTIONARY 751 (6th ed. 1990) (defining use immunity as prohibiting a witness' compelled testimony and its fruits from being used in any manner in connection with criminal prosecution of the witness).

5. CAL. WATER CODE §§ 1105(b), 1106 (amended by Chapter 45); *see id.* § 1106 (amended by Chapter 45) (granting immunity to persons compelled to testify under California Water Code § 1105 from prosecution for matters which he or she has been compelled as a witness to testify or produce evidence); *see also* U.S. CONST. amend. V (providing that no person shall be compelled in any criminal case to be a witness against himself); CAL. CONST. art. I, § 15 (providing that no person shall be compelled in any criminal case to be a witness against himself); Kastigar v. United States, 406 U.S. 441, 453 (1972) (holding that an immunity statute, which prohibited the use in any criminal case of testimony or other information compelled under the statute directly or indirectly derived from testimony or evidence, is consistent with the Fifth Amendment standards); *id.* (stating that transactional immunity affords the witness considerably broader protection than the Fifth Amendment privilege); *Doe*, 487 U.S. at 212 (quoting Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 55 (1964)) (declaring that the Court's unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury, or contempt, mandates the grant of immunity to the witness). *See generally* United States v. North, 910 F.2d 843, 854 (D.C. Cir. 1990) (stating that the grant of use immunity under 18 U.S.C. § 6002 allows a court to compel witnesses' incriminating testimony because it prohibits the government from using the immunized testimony itself, as well as any evidence derived directly or indirectly from the testimony), *cert. denied*, 500 U.S. 941 (1991); *id.* (stating that a trial court must usually hold a *Kastigar* hearing for the purpose of allowing the government to demonstrate that it obtained all of its evidence

grant or deny immunity to any person who invokes the privilege against self-incrimination.[6] A witness that is not granted immunity will be excused from giving testimony or producing evidence.[7]

Chapter 45 authorizes the State Board or a regional water quality board[8] to impose civil fines for threatened or continuing violations of board orders.[9] Chapter 45 authorizes a regional board or State Board to impose civil fines of up to $10,000 per day on any facility, including federal facilities.[10] Chapter 45 also

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from sources independent from the compelled testimony).

6. CAL. WATER CODE § 1105(b) (amended by Chapter 45); *see id.* § 1106 (amended by Chapter 45) (providing that no person granted immunity under California Water Code § 1105(b) may be prosecuted for any act, transaction, matter, or thing material to the incident under investigation by the board concerning which he or she has been compelled to testify or produce evidence); *see also* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 2054, at 2 (Mar. 24, 1994) (stating that AB 2054 will limit application of the immunity to situations in which the witness had invoked his or her Fifth Amendment privilege against self-incrimination and was compelled to testify); *id.* at 3 (stating that AB 2054 will enable the governing state board, and not the witness, to decide when the immunity is granted).

7. CAL. WATER CODE § 1105(c) (amended by Chapter 45).

8. *See id.* § 13050(b) (West Supp. 1994) (defining regional board as any California regional water quality control board for a region as specified in § 13200); *id.* § 13200 (West 1992) (describing the nine regions that California is divided into for purposes of regional water resource control); *id.* §§ 13220-13247 (West 1992) (setting forth the general provisions relating to the powers and duties of regional water quality control boards, including administering oaths and issuing subpoenas, overseeing the production of evidence in proceedings, establishing and reviewing water quality control plans, carrying out investigations, reporting to the State Board, and enforcing and requesting enforcement of state and federal water quality control laws); *id.* § 13221 (West 1992) (granting regional water quality control boards the same power as the State Board within their region).

9. *Id.* § 13308(a) (enacted by Chapter 45); *see id.* § 13308(d) (enacted by Chapter 45) (authorizing the State Board to exercise the powers of a regional board under this provision in assessing civil fines).

10. *Id.* § 13308(a)-(b) (enacted by Chapter 45); *see id.* § 13304(a)-(d) (West Supp. 1994) (setting forth the procedure and effect of a cleanup and abatement order issued by a regional water resource control board); *id.* § 13308(a) (enacted by Chapter 45) (allowing the regional board to issue an order establishing a time schedule for correcting violations of any cleanup or abatement order, cease and desist order, or any order issued under California Water Code §§ 13267 or 13383, and to prescribe civil penalties which will become due if compliance with the order is not achieved in accordance with the time schedule); *id.* § 13308(c) (enacted by Chapter 45) (providing that any person who fails to achieve compliance according to an ordered time schedule shall be civilly liable according to the amount specified in the order); *see also id.* §§ 1831-1833 (West Supp. 1994) (setting forth the provisions relating to the issuance and effect of cease and desist orders, including preliminary and final orders, by the State Board); *id.* § 13267(a)-(d) (West Supp. 1994) (authorizing a regional board to investigate the quality of any waters within its region and to require monitoring program reports of any person who, through discharge, may affect the quality of waters within its region); *id.* § 13301 (West 1992) (authorizing a regional water resource control board to issue and enforce cease and desist orders for any discharge of waste in violation of requirements or discharge prohibitions established by a water resource control board); *id.* § 13383(a)-(c) (West 1992) (authorizing the State Board or a regional board to establish monitoring, inspection, entry, reporting, monitoring equipment, and recordkeeping requirements for persons who discharge pollutants, dredged material, fill material into navigable waters, or who own or operate sewage treatment works, or who use and dispose of sewage sludge); SENATE FLOOR, COMMITTEE ANALYSIS OF AB 2054, at 1 (Mar. 24, 1994) (stating that AB 2054 will authorize the board to impose civil fines of up to $10,000 per day on any facility, including a federal facility, when the facility violates or continues to violate a water quality law or fails to comply with an order establishing a time schedule for abatement of a violation). *See generally* United States Dep't of Energy v. Ohio, 112 S. Ct. 1627, 1640 (1992) (holding that a state may impose coercive fines on federal facilities for present and future violations, but may not impose punitive fines for past violations); SENATE FLOOR, COMMITTEE ANALYSIS OF AB 2054, at 3 (Mar. 24, 1994) (stating that the provisions of AB 2054 allowing the imposition of fines will not be limited solely to federal facilities, but that in practice they would be used primarily against federal facilities when they fail to comply with time schedules

authorizes the State Board to apply for and receive a judgment to collect civil fines for violations of orders issued by the State Board from the court clerk once the time for judicial review has expired.[11]

INTERPRETIVE COMMENT

Chapter 45 was enacted to prevent witnesses from abusing witness immunity by subpoenaing themselves in order to escape all subsequent prosecutions relating to their testimony.[12] By allowing immunity only in cases where it is granted by a water quality board in order to compel testimony, Chapter 45 enables the State Board or a regional board, and not the witness, to decide when the immunity is granted.[13]

Chapter 45 was also enacted to alleviate the need for the Attorney General to institute separate lawsuits to recover civil penalties from violators.[14] The State Board claims that in many cases, the cost of the lawsuit exceeds the amount to be

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for abating current violations).

11. CAL. WATER CODE § 13328 (enacted by Chapter 45); *see id.* (allowing the State Board to apply to the clerk of the appropriate court in the county where the penalty was imposed, for a judgment to collect the penalty); *id.* (stating that the judgment from the clerk has the same force and effect as a judgment in a civil proceeding and may be enforced in the same manner as any other judgment of the court); *see also id.* § 13325 (West 1992) (limiting the period for judicial review to within 30 days of issuance of an order by the State Board).

12. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 2054, at 2 (Mar. 24, 1994) (stating that the State Board claims that the immunity provisions under existing law may be abused); *id.* (reporting that in 1990, the East Bay Municipal Utility District reportedly had itself and its officers and directors subpoenaed in order to acquire immunity from prosecution by the San Joaquin County District Attorney for alleged pollution violations by the utility district); *id.* at 3 (reporting that witnesses appearing before state or regional water quality boards abuse witness immunity by subpoenaing themselves in order to avoid prosecutions for violations related to the subject of their testimony).

13. CAL. WATER CODE § 1105(b) (amended by Chapter 45); *see* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 2054, at 2 (Mar. 24, 1994) (stating that AB 2054 will narrow the grounds for obtaining transactional immunity for testimony before a state or regional water quality board by requiring the witness to invoke his or her Fifth Amendment privilege, rather than the compelled witness receiving immunity automatically upon appearance before the board); *id.* (stating that AB 2054 will conform to the California Water Code provisions for immunity to the California Penal Code requirements); *cf.* CAL. PENAL CODE § 1324 (West 1982) (requiring a witness to make a showing of cause in a felony proceeding for not testifying in order for a court not to order testimony or evidence, and granting immunity from prosecution for matters related to required testimony or evidence which would have been privileged if not for California Penal Code § 1324).

14. *See* CAL. WATER CODE § 13350(h) (West 1992) (providing that the Attorney General, upon request of a regional board or the State Board, shall petition the superior court to impose, assess, and recover civil penalties for water pollution violations); *id.* § 13385(h) (West 1992) (providing that the Attorney General, upon request of a regional board or the State Board, shall petition the appropriate court to collect any liability imposed due to a violation of the Federal Water Pollution Control Act); SENATE FLOOR, COMMITTEE ANALYSIS OF AB 2054, at 2 (Mar. 24, 1994) (stating that the ability of the State Board to obtain a court judgment to enforce and collect fines will obviate the need for the Attorney General's office to institute a separate suit to collect the fines because, upon submission of a proper application, the court clerk can enter an immediate judgment in conformity with the State Board's application).

collected.[15] Under Chapter 45, a water quality board may obtain a court judgment upon approval of application by the court clerk.[16]

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15. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 2054, at 3 (Mar. 24, 1994) (stating that the State Board claims to have trouble collecting fines, as the Attorney General is often reluctant to pursue collection proceedings when the cost of the suit is more than the amount to be recovered).

16. CAL. WATER CODE § 13328 (enacted by Chapter 45); *see* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 2054, at 3 (Mar. 24, 1994) (stating that AB 2054 will have a positive fiscal effect in that the Attorney General will save money by being relieved of the burden of instituting lawsuits to collect unpaid fines, the granting of an automatic judgment will enable the state to collect the fines at a minimal cost, federal facilities will now be paying penalties, and the percentage of collections of administrative fines will increase).