



## Recent Federal Developments May 15, 2009

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### TSCA/FIFRA/NTP/EPCRA

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***EPA Publishes Toxics Release Inventory Final Rule*** -- On April 27, 2009, the U.S. Environmental Protection Agency (EPA) published a final rule amending the eligibility criteria regulations for submitting a Form A Certification Statement in lieu of the more detailed Form R submitted by facilities subject to Toxics Release Inventory (TRI) reporting under Section 313 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) and Section 6607 of the Pollution Prevention Act of 1990 (PPA). 74 Fed. Reg. 19001. The rule is intended to comply with the Omnibus Appropriations Act of 2009 enacted on March 11, 2009. The rule requires companies reporting releases of more than 500 pounds of a chemical on the TRI list of more than 650 chemicals and chemical categories to use a detailed reporting document referred to as Form R. Companies that manufactured, processed, or otherwise used more than 1 million pounds of a chemical listed on the Inventory during 2008 also must use Form R. In 2006, EPA raised the threshold for using the short Form A from 500 pounds to 2,000 pounds per year. Since the EPA action is being taken to conform the regulations to a Congressional legislative mandate, notice and comment rulemaking is unnecessary, and the rule was effective immediately.

***EPA Makes Available Draft Toxicological Review Of Pentachlorophenol And 1,4-Dioxane*** -- On May 7, 2009, EPA announced a public comment period for the external review draft documents titled “Toxicological Review of Pentachlorophenol: In Support of Summary Information on the Integrated Risk Information System (IRIS)” (EPA/635/R-09/004) and “Toxicological Review of 1,4-Dioxane: In Support of Summary Information on the Integrated Risk Information System (IRIS).” 74 Fed. Reg. 21362, 21361. EPA intends to consider comments and recommendations from the public and the expert panel meeting, which will be scheduled at a later date and announced in the *Federal Register*. Public comments will be accepted on both documents until **July 6, 2009**.

***EPA Announces Pesticide Reregistration Performance Measures And Goals*** -- On May 13, 2009, EPA announced progress in meeting its performance measures and goals for pesticide reregistration during fiscal year 2008. 74 Fed. Reg. 22541. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) requires EPA to publish information about EPA’s annual achievements in this area. The notice discusses the integration of tolerance reassessment with the reregistration process, and describes the status of various regulatory activities associated with reregistration and tolerance reassessment. The notice also provides total numbers of chemicals and products reregistered, Data Call-Ins issued, and products registered under the “fast-track” provisions of FIFRA. Comments are due by **July 13, 2009**.

***EPA Issues Final Rule Revoking Carbofuran Tolerances*** -- On May 15, 2009, EPA issued a final rule revoking all tolerances for carbofuran. 74 Fed. Reg. 23046. The final rule is the most recent regulatory action taken in cancelling carbofuran. EPA proposed to revoke carbofuran tolerances last July. EPA has concluded that combined exposure to carbofuran from food and



water “significantly exceeds EPA’s level of concern for children, and does not meet the U.S. food safety standard.” Following resolution of the tolerance revocations, EPA reportedly plans to proceed with cancellation of any remaining carbofuran uses due to unreasonable ecological and worker risks. Because dietary exposures to infants and children are of particular concern, EPA has moved to revoke carbofuran tolerances first, before canceling remaining carbofuran registrations. Carbofuran tolerances for all commodities will be revoked effective **December 31, 2009**. This means that no food crops in the U.S. will be allowed to have residues of carbofuran after December 31, 2009, unless it can be shown that the crop was treated before that date. This final rule is effective **August 13, 2009**. Written objections and comments are due on or before **July 14, 2009**.

## NANOTECHNOLOGY

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***PEN Report On Oversight Of Next Generation Nanotechnology Recommends New Federal Agency*** -- On April 28, 2009, the Woodrow Wilson International Center for Scholars Project on Emerging Nanotechnologies (PEN) released a report entitled [Oversight of Next Generation Nanotechnology](#), which calls for the creation of the Department of Environmental and Consumer Protection, which would oversee product regulation, pollution control and monitoring, and technology assessment. According to report author J. Clarence Davies, Ph.D., the agency would be primarily a scientific agency with a strong oversight component, in contrast to current federal agencies such as EPA and the Food and Drug Administration (FDA), which are primarily oversight bodies. Davies stated: “New thinking, new laws and new organizational forms are necessary. Many of these changes will take a decade or more to accomplish, but there is an urgent need given the rapid pace of technological change to start thinking about them now.”

***EC Begins Public Consultation To Prepare For Scientific Hearing On Nanotechnology*** -- The European Commission (EC) will hold a scientific hearing on nanotechnology on **September 10, 2009**. The hearing will focus on the scientific aspects of the issues covered in the nanotechnology opinions issued by the Scientific Committee on Emerging and Newly Identified Health Risks (SCENIHR) and the Scientific Committee on Consumer Products (SCCP) (which is now replaced by the Scientific Committee on Consumer Safety (SCCS)). To prepare for the hearing, the EC is launching a [public consultation](#) relating to the three main objectives to be addressed:

- Identification of any possible topics which have not been covered in the opinions from the relevant European Union (EU) risk assessment committees and bodies;
- Identification of what are -- according to current scientific knowledge -- the main potential risks that could emerge from the use of nanomaterials in the future; and



- Identification of the issues to be discussed at the hearing, including provision of background information and comments on those issues.

The outcome of the consultation will be presented at the scientific hearing. Comments are due **June 19, 2009**.

***European Parliament Urges The Labeling Of Nanomaterials In Consumer Products*** -- In an April 24, 2009, [press release](#), the European Parliament (EP) calls for the provision of information to consumers on the use of nanomaterials in consumer products. According to the EP, all ingredients present in the form of nanomaterials in substances, mixtures, or articles should be clearly indicated in the product labeling. The press release also specifically calls for the EC to evaluate the need to review the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH) concerning:

- Simplified registration for nanomaterials manufactured or imported below one tonne;
- Consideration of all nanomaterials as new substances;
- A chemical safety report with exposure assessment for all registered nanomaterials; and
- Notification requirements for all nanomaterials placed on the market on their own, in preparations, or in articles.

### **CAA/CWA**

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***EPA Issues Proposed Endangerment Finding For Greenhouse Gases*** -- On April 24, 2009, EPA proposed to find that greenhouse gases in the atmosphere endanger the public health and welfare of current and future generations. 74 Fed. Reg. 18886. According to EPA, concentrations of greenhouse gases are at unprecedented levels compared to the recent and distant past. These high atmospheric levels are the unambiguous result of human emissions, and are very likely the cause of the observed increase in average temperatures and other climatic changes. The effects of climate change are effects on public health and welfare within the meaning of the Clean Air Act (CAA). EPA proposed to find that atmospheric concentrations of greenhouse gases endanger public health and welfare within the meaning of CAA Section 202(a). EPA proposed to make this finding specifically with respect to six greenhouse gases that together constitute the root of the climate change problem: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. EPA also proposed to find that the combined emissions of carbon dioxide, methane, nitrous oxide, and



hydrofluorocarbons from new motor vehicles and new motor vehicle engines are contributing to this mix of greenhouse gases in the atmosphere. EPA thus proposed to find that the emissions of these substances from new motor vehicles and new motor vehicle engines are contributing to air pollution which is endangering public health and welfare under CAA Section 202(a). Comments on this proposed action must be received on or before **June 23, 2009**.

On May 15, 2009, EPA announced that it will hold the first of two public hearings regarding its proposed findings that greenhouse gases contribute to air pollution that may endanger public health or welfare. The hearing is an opportunity for stakeholders and members of the public to voice their opinions on the proposed findings. The hearing will be held on **May 18, 2009**, from 9:00 a.m. - 8:00 p.m. (EDT) at EPA Potomac Yard South Conference Center, 2777 Crystal Drive, Room S-1204, Arlington, VA. EPA will consider written comments submitted during the comment period with the same weight as oral comments presented during the public hearing. More information on the hearing and for the audio webcast of the hearing is available at [http://www.epa.gov/climatechange/endangerment/hearing\\_washington-may18.html](http://www.epa.gov/climatechange/endangerment/hearing_washington-may18.html).

***EPA Delays Effective Date Of Prevention Of Significant Deterioration And Nonattainment New Source Review Aggregation*** -- On May 14, 2009, EPA issued a final rule that amends and delays the that amends and delays the effective date for the rule addressing “aggregation” under the Prevention of Significant Deterioration (PSD) and the nonattainment New Source Review (nonattainment NSR) programs (collectively NSR). 74 Fed. Reg. 22693. The “NSR Aggregation Amendments” were published on January 15, 2009, and described when a source must combine nominally-separate physical changes and changes in the method of operation for the purpose of determining whether they are a single change resulting in a significant emissions increase. On January 30, 2009, the Natural Resources Defense Council (NRDC) submitted a petition for reconsideration of the NSR Aggregation Amendments. In response to the NRDC Petition, EPA announced on February 13, 2009, that it would convene a reconsideration proceeding for the NSR Aggregation Amendments and would delay the effective date of the rule from February 17, 2009 until May 18, 2009. On March 18, 2009, EPA proposed an additional delay of the effective date and solicited comment on the duration of the additional delay. EPA delayed the effective date of the NSR Aggregation Amendments for an additional 12 months, which will allow for additional time to conduct the reconsideration of the NSR Aggregation Amendments. The new effective date of the rule is **May 18, 2010**.

## **RCRA/SPCC**

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***Supreme Court Issues Ruling In Burlington Northern & Santa Fe Railway Co. v. United States*** -- In an 8-1 decision, the Supreme Court on May 4, 2009, held that a company’s mere knowledge of spills in the course of delivery of a product is not a sufficient basis for liability as an arranger, and that defendant may avoid joint and several liability based on reasonable evidence supporting apportionment. *Burlington Northern & Santa Fe Railway Co. et al. v.*



*United States et al.* (No. 07–1601). In 1960, Brown & Bryant, Inc. (B&B), a now defunct agricultural chemical distributor, began operating on a parcel of land in California and expanded onto an adjacent parcel owned by two railroads. As part of its business, B&B purchased and stored various hazardous chemicals, including a pesticide supplied by Shell Oil Company. During transfers and deliveries, chemical spills occurred, resulting in soil and ground water contamination. In 1989, EPA and the state cleaned up the site and brought suit to recover their cleanup costs against Shell and the Railroads.

The District Court ruled in favor of the Governments, finding that both the Railroads and Shell were potentially responsible parties under the Comprehensive Environmental, Response, Compensation, and Liability Act (CERCLA) -- because the Railroads owned part of the facility and Shell because it had “arranged for disposal . . . of hazardous substances,” within the meaning of CERCLA Section 107(a)(3). The District Court apportioned liability, holding the Railroads liable for 9% of the Governments’ total response costs, and Shell liable for 6%. On appeal, the Ninth Circuit agreed that Shell could be held liable as an arranger under Section 107(a)(3). Although the Court of Appeals agreed that the harm in this case was theoretically capable of apportionment, it found the facts present in the record insufficient to support apportionment, and therefore held Shell and the Railroads jointly and severally liable for the Governments’ response costs.

In an opinion by Justice Stevens, the Supreme Court held that Shell is not liable as an arranger for the contamination at the facility; because CERCLA does not specifically define what it means to “arrang[e] for” disposal of a hazardous substance, the phrase should be given its ordinary meaning. The Supreme Court also found that the District Court reasonably apportioned the Railroads’ share of the site remediation costs at 9%. Justice Stevens delivered the opinion of the Court, in which Justices Roberts, Scalia, Kennedy, Souter, Thomas, Breyer, and Alito joined. Justice Ginsburg filed a dissenting opinion. The opinion is available at <http://supremecourtus.gov/opinions/08pdf/07-1601.pdf>.

***EPA Announces Next Steps On Two Hazardous Waste Rules*** -- EPA announced on May 5, 2009, next steps on two hazardous waste rules to respond to concerns raised by stakeholders: the Definition of Solid Waste (DSW) rule and the Emission Comparable Fuels (ECF) rule. EPA is planning to hold a public meeting to discuss possible revisions to the DSW rule in response to an administrative petition asking EPA to reconsider and repeal the rule. The rule became effective on December 29, 2008. The DSW rule modified the regulations for recycling hazardous secondary materials to encourage the recycling of certain materials to help conserve resources. The rule includes conditions designed to ensure that the recycling of the materials is protective of human health and the environment. The rule also takes into account a series of opinions issued by the U.S. Court of Appeals for the D.C. Circuit on the meaning of the term “discard,” which forms the basis of the definition of solid waste. Since publication of the DSW rule, the Sierra Club has raised concerns about the effectiveness and protectiveness of the rule and has requested



EPA stay the rule in an administrative petition. In addition, the Sierra Club and the American Petroleum Institute have filed judicial petitions for review in the U.S. Court of Appeals for the D.C. Circuit. Various industry groups have also filed letters opposing the Sierra Club's administrative petition. EPA expects that stakeholders' input at the public meeting will assist it in deciding whether to make revisions to the rule and how such revisions would further ensure that the rule appropriately and safely encourages resource conservation for those hazardous secondary materials that are conditionally excluded.

EPA is also planning to propose a rule to withdraw the ECF rule, which became effective on January 20, 2009. The proposal will present EPA's concerns and request comments from the public after publication in the *Federal Register*, planned for November 2009. After evaluating the public comments, EPA will make a decision on whether to repeal the exclusion.

The ECF rule removed regulatory costs by reclassifying certain manufacturing byproducts as non-wastes. ECF is fuel that is produced from a hazardous waste, but which generates emissions when burned in an industrial boiler that are comparable to emissions from burning fuel oil. The materials must also be stored under an elaborate set of requirements. The final rule has been criticized for allowing hazardous waste to evade the hazardous waste regulatory system, and also for being difficult to administer. Industry members have also criticized it because of the detailed and prescriptive conditions for reclassification, which they believe will limit the rule's use.

## REACH

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***ECHA Announces First Coordinated REACH Enforcement Project*** -- On April 30, 2009, the European Chemicals Agency (ECHA) announced the launch of a joint Registration, Evaluation, Authorization and Restriction of Chemicals (REACH) enforcement project. National inspectors are checking pre-registrations, registrations, and, where applicable, the provisions for Safety Data Sheets (SDS). The Forum for Exchange of Information on Enforcement reviewed the start of the project and agreed on further steps. The ECHA press release is available at [http://echa.europa.eu/doc/press/pr\\_09\\_05\\_enforcement\\_project\\_forum%2020090430.pdf](http://echa.europa.eu/doc/press/pr_09_05_enforcement_project_forum%2020090430.pdf). National inspectors are targeting the following areas: verification of pre-registration; registrations; and where applicable, the provisions of SDSs, including whether they have been supplied.

A designated national coordinator will oversee the implementation of the project in each participating country while also providing training for local inspectors. The project is intended to provide an initial snapshot of the level of compliance by manufacturers and importers (including Only Representatives) with REACH in the EU and European Economic Area (EUA). In addition, the capacity of enforcement authorities to enforce REACH will be enhanced. The results of the project are to be collected and reported to the Forum Working Group (FWG) by the end of 2009, which will allow for the analysis of the results to be available in early 2010. A



second coordinated project is scheduled to be launched in 2010. The specifics of this project are not currently identified.

Manufacturers and importers impacted by REACH should ensure that a documented evaluation of its supply chain is readily available to national inspectors in Europe, or that your Only Representative maintains a copy of such evaluation. For any substance in which a pre-registration under REACH is necessary, ensure that a REACH pre-registration number is documented and available. Although not required until 2010, some manufacturers and importers have initiated early registrations under REACH. As a result, it is anticipated that registration evaluations performed by national inspectors under the current project will only have a direct impact on early registrations. In all cases, please ensure that SDSs are maintained and disseminated appropriately.

***UN Committee Will Discuss Ongoing Work On The Safety Of Nanomaterials*** -- During the **June 29-July 1, 2009**, meeting of the United Nations (UN) Committee of Experts on the Transport of Dangerous Goods and on the Globally Harmonized System of Classification and Labeling of Substances (GHS), the Committee will discuss a paper entitled “Ongoing Work on the Safety of Nanomaterials.” The paper provides a summary of current activities by the EU, including REACH program, International Organization for Standardization (ISO), and the Organization for Economic Cooperation and Development (OECD). The paper includes the following questions:

- Can it be considered, for the same chemical (same [Chemical Abstracts Service (CAS) Number] and purity) that nanomaterials with new properties have the same hazards as conventional form?
- Is it possible to distinguish for a same chemical, the properties of its different nanoforms?
- How can this be done? Should new endpoints be determined?
- To which extent information about nanomaterials need be provided?
- What kind of information is needed?
- What kind of communication tool is needed for this purpose?
- What kind of collaboration can be suggested in order to contribute to clarification of nanomaterials hazard classification and indeed to health safety and environmental issues of nanomaterials?



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## LEGISLATIVE DEVELOPMENTS

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***Budget Resolution Provides For Carbon Recapture*** -- Congress has adopted a budget resolution for 2010 that provides for carbon capture and storage, subject to a deficit-neutral reserve fund. The resolution also provides funds to speed deploy carbon capture and storage from coal fired power plants to cut emissions and facilitate the changeover to any future carbon caps by those power plants.

***Senator Barrasso Blocks A Top EPA Appointment*** -- Senator John Barrasso (R-WY) has placed a hold on the appointment of Gina McCarthy to be EPA Assistant Administrator for Air and Radiation. Through a spokesman, the Senator indicated that he placed the hold because EPA has not provided sufficient answers to questions on how EPA would use the CAA to regulate greenhouse gases without negatively affecting farms, schools, hospitals, and other small sources of such emissions.

***Senators Introduce Bill To Update Sewer Systems*** -- Senators Frank Lautenberg (D-NJ) and George Voinovich (R-OH) have introduced legislation to provide \$1.8 billion to update combined sewer systems that are not presently able to cope with overflow from combined sanitary sewage, industrial discharge, and storm water that run through the same system. Local governments would receive monies directly over the first two years after passage, and then states would receive the funds and distribute them to cities that need to address overflow problems over the next three years

***House Gets Bill That Would Improve Transmission Of Renewable Power*** -- Representative Jay Inslee (D-WA) has put a bill in the hopper to facilitate the siting of transmission lines to transmit renewable energy from rural areas to the cities. The bill would have states submit plans for alternate sitings within 18 months after establishing multi-state transmission planning authorities. If the states do not submit plans consistent with interstate transmission policy, the Federal Energy Regulatory Commission would be empowered to use the right of eminent domain for the sitings.

***Ocean, River Power Would Be Harnessed By New Measure*** -- Representative Jay Inslee (D-WA) and Senator Lisa Murkowski (R-AK) introduced bills in the House and Senate, respectively, to fund projects designed to develop waves, tides, and ocean and river currents as power sources. The funding would amount to \$250 million a year from 2010 to 2021. It has been estimated that 6.5% of America's electricity generation could be generated from the river and ocean sources.

***House Passes Legislation To Deal With Electronic Waste*** -- On April 22, 2009, the House of Representatives passed a measure introduced by Bart Gordon (D-TN) to fund grants to train and educate professionals and students in the electronic device manufacturing, design, refurbishing,



and recycling industries to reduce the amount of electronic waste, including potentially hazardous chemicals such as lead, mercury, and chromium. The Senate has yet to act on a comparable measure.

***Draft Chemical Security Legislation Could Force Changes*** -- The House Homeland Security Committee is working on legislation that would require chemical companies to consider use of safer technology -- that might force the companies to use less risky chemicals or reduce risks in their manufacturing operations. The draft being reviewed would also remove an exemption in current law for drinking water facilities and would allow citizen litigation to enforce the rules. The new legislation would replace the existing measure that “sunset” on September 30, 2009. Using inherently safer technology would involve a determination of whether methods available would significantly reduce the risk of serious adverse effects to human health without significantly impairing the ability of a plant owner to continue to operate.

***Bill To Ban Mercury In Chlorine Production Re-Introduced*** -- Representative Janice D. Schakowsky (D-IL) had introduced legislation to ban the use of mercury in the manufacture of chlorine. Four plants in the United States still use the chemical and the process is said to pollute the air and water surrounding the plants and contaminate other products made in the facilities.

***Senator Wants Yucca Mountain Waste Fund Rebated*** -- Senator Lindsey Graham (R-SC) has introduced a bill that would give the Obama Administration 30 days to certify the Yucca Mountain site as the preferred permanent geologic repository for high-level radioactive waste, or refund to utilities and ratepayers the \$29.6 billion presently in the waste fund for the proposed facility. The Obama Administration has said on various occasions that Yucca Mountain was no longer an option for waste storage.

## **MISCELLANEOUS**

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***Robert Bonnie Appointed USDA Senior Advisor*** -- On April 16, 2009, Agriculture Secretary Tom Vilsack announced the appointment of Robert Bonnie, Environmental Defense Fund (EDF) Vice President for Land Conservation and Wildlife, as his Senior Advisor for Environment and Climate. Bonnie will help guide broad policy and program decisions, particularly those concerning domestic natural resources and climate issues. Vilsack said that two of President Obama’s top goals are “expanding the capacity of our land, our farms, and our ranches to produce alternative forms of energy and fuel; and developing the research that will help agriculture transition away from its significant dependence on fossil fuels.”

***Obama Nominates Cass Sunstein To Head OMB*** -- On April 20, 2009, President Obama nominated Cass R. Sunstein, a Harvard law professor, to head the Office of Management and Budget (OMB) Office of Information and Regulatory Affairs (OIRA). OIRA has responsibility for reviewing all major regulations proposed by executive branch agencies and departments.



Sunstein, who has been working as a counselor at OMB since shortly after Obama's inauguration, formerly directed Harvard Law School's program on Risk Regulation. Sunstein's nomination will be referred to the Senate Homeland Security and Government Affairs Committee. A hearing on the nomination occurred on May 12, 2009. From 1981 until early 2008 when he left to teach at Harvard, Sunstein taught at the University of Chicago Law School where he became a friend of Obama, who also was a member of the law school faculty.

***Obama Withdraws Bush Rule On ESA Consultations*** -- On May 4, 2009, the U.S. Departments of the Interior and Commerce revoked a December 16, 2008, rule that modified the 1986 regulations designed to guide the consultation process under Section 7 of the Endangered Species Act (ESA). 74 Fed. Reg. 20421. Members of Congress used the Omnibus Appropriations Act of 2009 (Pub. L. No. 111-8) to give Interior and Commerce authority to withdraw the rule without going through the rulemaking steps typically required by the Administrative Procedure Act. While reinstating the status quo ante on consultations, the notice also announces the agencies will conduct a comprehensive review of the consultation procedure. The consultations have been required when a federal action may affect endangered or threatened species. The federal agency involved in the action has been required to consult with either Interior's Fish and Wildlife Service (FWS) or the National Marine Fisheries Service in Commerce, depending on the species. The Bush Administration rule allowed agencies to avoid consulting with FWS or NMFS if an action was not anticipated to affect adversely any species listed as endangered or threatened. Comments are due by **August 3, 2009**.

***CDTSC Will Host First Green Ribbon Science Panel Meeting*** -- On April 29-30, 2009, the California Department of Toxic Substances Control (CDTSC) hosted its first meeting of its Green Ribbon Science Panel. The Panel is intended to provide advice and act as a resource to CDTSC as it creates analytical methods for safer chemical alternatives and identifies and prioritizes chemicals of concern. CDTSC staff presented draft proposals for developing processes for identifying and prioritizing chemicals of concern, and developing processes for conducting alternatives analyses and lifecycle analyses. The Office of Environmental Health Hazard Assessment (OEHHA) made a presentation on the development of the Toxics Information Clearinghouse to date, and requested advice from the Panel. More information regarding the meeting is available at <http://www.dtsc.ca.gov/PollutionPrevention/GreenChemistryInitiative/index.cfm>.

On April 21, 2009, during a public workshop on safer alternative regulations, the CDTSC released its draft straw proposal for the regulations, which are intended to "accelerate the transition to safer, environmentally more benign consumer products." The regulations would set forth processes to:

- Reduce the presence of hazardous chemicals in products sold or used in California;



- Drive technological innovation and development of safer, healthier, and environmentally more benign products across their lifecycles;
- Consider alternatives so actions do not lead to adverse consequences;
- Move beyond limitations of existing risk assessment system (*i.e.*, “focus on the better, not how bad is bad”);
- Manage unknowns and take action (*i.e.*, make decisions where data may be incomplete or unavailable);
- Apply market-based compliance measures; and
- Oversee and measure progress.

Under the draft straw proposal, the process to identify chemicals of concern in consumer products would use an approach modeled on the Proposition 65 system for identifying and listing chemicals known to the state as carcinogens or reproductive toxicants, accompanied by a dynamic list separate from regulations. The draft proposal states that a broad list of scientific criteria for placing chemicals on the list would be clearly laid out in regulation, but the chemical list itself would not be in regulation. CDTSC states: “This approach is preferred as it would be based on a clearly defined set of criteria, would capture a large universe of chemicals, and would allow rapid identification and listing (and delisting) of chemicals or chemical ingredients of concern for which pertinent information is available.”

Under the draft proposal, CDTSC would establish regulations for prioritizing the chemicals of concern. Those chemical ingredients in consumer products that are identified as chemicals of concern would be prioritized based on a broad set of criteria including: volume; use; potential for exposure; exposure of California citizens to specific chemicals based on biomonitoring data; potential effects on sensitive subpopulations, including infants and children; human experience suggesting that a chemical or chemical ingredient of concern poses a potential risk to human health or safety, or the environment; evidence of any actual adverse environmental impact; evidence of accumulation/persistence in the environment; evidence that otherwise suggests that there are “reasonable grounds for concern”; and/or minimum data sets regarding the potential risks associated with the chemical, including potential adverse health or environmental effects and exposure potential (estimated for new chemicals based on proposed use).

***President Obama Nominates CPSC Chair*** -- On May 5, 2009, President Obama nominated Inez Moore Tenenbaum to be the new chair of the U.S. Consumer Product Safety Commission (CPSC). Tenenbaum is the former state superintendent of Education for South Carolina and was



the Democratic candidate for U.S. Senate when Senator Hollings retired. (That seat was won by Jim DeMint, one of the three nay votes on the Consumer Product Safety Improvement Act of 2008.) Obama also raised the CPSC budget to \$107 million and appointed Bob Adler, of the University of North Carolina, to an open Commissioner spot on the CPSC.

***Court Affirms Labor Code Mechanism For Adding Chemicals To Proposition 65*** -- In an April 24, 2009, ruling, the Alameda County Superior Court ruled that chemicals identified in worker safety standards as carcinogens and reproductive toxicants must be listed under Proposition 65 without further review. *Sierra Club v. Schwarzenegger*, No. RG 07-356881 (Cal. Super. Ct. Apr. 24, 2009). The California Chamber of Commerce argued that the provision was a time-limited option applicable only when the initial Proposition 65 list of chemicals was adopted in 1987. According to the court, Proposition 65 “imposes a clear ministerial duty” to list chemicals linked to cancer and reproductive harm already identified in labor codes “without further review” and to update the Proposition 65 list annually. A spokesperson for the California Chamber of Commerce said it will appeal the ruling. The court has yet to rule on the related issue of whether OEHHA can list chemicals based solely on threshold limit values (TLV) adopted by the American Conference of Governmental Industrial Hygienists (ACGIH). The California Chamber of Commerce contends that if other authoritative bodies cited in Proposition 65 have not identified an ACGIH chemical as a carcinogen or reproductive toxicant, that chemical cannot be added to the list via the labor code mechanism without undergoing a scientific review by the state’s expert panel. Oral arguments on the ACGIH issue will be held on **May 27, 2009**.

A coalition of environmental and labor groups, including the Sierra Club, Natural Resources Defense Council, and United Steelworkers filed suit on November 19, 2007, accusing California of failing to enforce Proposition 65 by refusing to allow the Cancer Identification Committee to review independently chemicals for listing and not using other mechanisms to list chemicals. In a separate suit, the California Chamber of Commerce challenged OEHHA’s application of the labor code mechanism to add chemicals to Proposition 65. The suits were consolidated in *Sierra Club v. Schwarzenegger*. In addition to the ACGIH issue, the court has yet to rule on the environmental and labor groups’ claims that OEHHA has “unreasonably delayed consideration of chemicals” for listing. Environmental and labor plaintiffs want more than 90 chemicals already identified in workplace safety standards added to the Proposition 65 list, including styrene, gasoline additives such as tert-amyl methyl ether, and carbaryl.

To clarify the listing process via the labor code mechanism, OEHHA has proposed to adopt a regulation that would clarify the procedures used to determine which chemicals qualify for the labor code listing process. OEHHA has not yet issued a final regulation.

***EPA Issues Spring 2009 Regulatory Agenda*** -- On May 11, 2009, EPA published its Spring 2009 seminannual regulatory agenda. 74 Fed. Reg. 21992. The agenda updates the public on:



regulations and major policies currently under development, reviews of existing regulations and major policies, and rules and major policymakings completed or canceled since the last agenda.

***Nations Agree To Add Nine Organic Pollutants To List Of Banned, Restricted Substances --***

On May 9, 2009, parties to the Stockholm Convention on Persistent Organic Pollutants (POP) endorsed an agreement on the listing of nine new chemicals under the treaty's annex of banned or restricted substances. The agreement on the listings was approved after negotiations worked to bridge differences on other issues addressed at the fourth Conference of the Parties (COP-4), most notably financial and technical assistance for developing countries to help them meet new phaseout and reduction obligations. The agreement marks the first addition of chemicals to the convention's annexes since the listing of the original "dirty dozen" when the treaty was adopted in May 2001. Eight new chemicals are added to Annex A: chlordecone, hexabromobiphenyl, lindane, alpha hexachlorocyclohexane, beta hexachlorocyclohexane, pentachlorobenzene, hexabromodiphenyl ether/heptabromodiphenyl ether, and tetrabromodiphenyl ether/pentabromodiphenyl ether. Chemicals listed under Annex A are subject to a ban on their use, import, and export among the Stockholm Convention's 146 member countries. All eight were recommended for placement in Annex A by the POPs Review Committee. Parties also agreed to add another chemical -- perfluorooctane sulfonic acid (PFOS), its salts, and perfluorooctane sulfonyl fluoride -- to Annex B of the convention, subjecting it to restrictions on production and use.

Parties agreed that, while the ultimate goal is the elimination of PFOS, production of the chemical may continue for "acceptable purposes," which include coatings for semiconductors, firefighting foam, photo imaging, aviation hydraulic fluids, metal plating, and certain medical devices such as *in-vitro* diagnostic medical devices and CCD color filters. Countries must notify the convention secretariat whether or not they intend to continue production for these acceptable purposes.

Five of the eight new chemicals added to Annex A will not have any exceptions to their elimination from production and use. The five subject to the total ban are alpha hexachlorocyclohexane, beta hexachlorocyclohexane, chlordecone, hexabromobiphenyl, and pentachlorobenzene. The three others -- lindane, hexabromodiphenyl ether/heptabromodiphenyl ether, and tetrabromodiphenyl ether/pentabromodiphenyl ether -- will have some exceptions on production and use. The United States has signed on to the Stockholm Convention but has not ratified it. U.S. delegates attended the May 4-9, 2009, meeting as observers.

***EPA Formally Terminates National Environmental Performance Track --***

On May 14, 2009, EPA issued its formal decision terminating the National Environmental Performance Track Program. 74 Fed. Reg. 22741. In June 2000, EPA announced the launch of the National Environmental Performance Track. On March 16, 2009, EPA Administrator Jackson issued a memorandum halting the Performance Track Program. According to the memorandum, Jackson



stated that the program “was developed in a different era and may not speak to today’s challenges.” The program includes 200 companies and more than 500 facilities, but has been criticized by environmental advocates because they say the program ensures less federal enforcement oversight. In a memorandum to Performance Track members and others, Jackson noted she has decided to halt the current Performance Track Program “with the intent to refining those concepts that can lead us to a stronger system of environmental protection as we go forward.” Information on EPA’s Performance Track Program and Administrator Jackson’s memorandum are available at <http://www.epa.gov/performancetrack>. The Administrator’s memorandum was followed by a memorandum from Chuck Kent, Director, Office of Policy Economics, and Innovation, dated March 25, 2009, which provided more details about the termination, including that the low priority for routine inspections incentive is no longer in effect. The *Federal Register* notice announces that EPA’s decision to terminate the Performance Track Program is effective as of the date of this publication, and provides public notice that the low priority for routine inspections incentive for Performance Track facilities is hereby terminated.

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