



Recent Federal Developments May 15, 2007

TSCA/FIFRA/EPCRA/NTP

NTP Issues Final Procedures To Review Items Nominated For Carcinogens Report -- On April 16, 2007, the National Toxicology Program (NTP) issued final updated procedures for reviewing chemicals and other substances nominated for inclusion in its *Report on Carcinogens (RoC)*. 72 Fed. Reg. 18999. The NTP report, which is published periodically, lists chemicals, mixtures of chemicals, and other exposures as “known” or “reasonably anticipated” to be human carcinogens. NTP reports there are two primary changes from current procedures. First, expert panels will conduct peer reviews of draft background documents prepared by NTP staff for each of the chemicals or other substances that have been nominated for possible inclusion. The background documents summarize published scientific studies about the substances and include the following information: chemical, physical, and biological properties; the extent of human exposure; epidemiological cancer studies involving the substances; and results from animal studies. Second, NTP’s Board of Scientific Counselors will conduct peer reviews of “substance profiles.” These profiles are descriptions of substances that could be included in the report. Substance profiles are included in the draft *Report on Carcinogens* that NTP sends to the Secretary of Health and Human Services, who thus makes the final decision as to what substances are included in the report and how they should be classified. The final review procedures are available at <http://ntp.niehs.nih.gov/>.

EPA Removes Two Chemical Substances From PAIR And Health And Safety Data Reporting Rules -- On April 30, 2007, the U.S. Environmental Protection Agency (EPA) issued a direct final rule removing chemical substances phosphorotrithious acid, tributyl ester, CAS No. 150-50-5, and phosphorodithioic acid, O,O-diethyl ester, sodium salt, CAS No. 3338-24-7, that were inadvertently added to the list of voluntary High Production Volume (HPV) Challenge Program orphan (unsponsored) chemical substances by EPA. 72 Fed. Reg. 21119. These chemical substances were inadvertently added to the Preliminary Assessment Information Reporting (PAIR) rule (Toxic Substances Control Act (TSCA) Section 8(a)) and the Health and Safety Data Reporting rule (TSCA Section 8(d)), both published on August 16, 2006. With this removal action, persons who manufacture (including import) either of these two chemical substances are no longer subject to the reporting requirements imposed by these TSCA Section 8(a) and 8(d) rules. This rule is effective on **June 29, 2007**, without further notice, unless EPA receives adverse comment on or before **May 30, 2007**.

EPA Proposes FIFRA Exemption For Certain Plant-Incorporated Protectants Derived From PVCP-PIPs -- On April 18, 2007, EPA proposed to exempt from Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) requirements plant-incorporated protectants derived from plant viral coat protein genes (PVCP-PIPs) when the PVCP-PIP meet specified criteria. 72 Fed. Reg. 19590. EPA proposed this exemption because EPA believes that the PVCP-PIPs covered by this exemption need not be subject to FIFRA to carry out the purposes of the Act. Certain PIPs are derived from PVCP-PIPs. Although PVCP-PIPs that are intended to prevent or mitigate viral



diseases meet FIFRA's definition of a pesticide, EPA said many of them do not need to be subject to FIFRA to avoid unreasonable adverse effects on the environment. EPA proposed three criteria that would allow PVCP-PIPs to meet the general requirement for exemption from FIFRA listed at 40 C.F.R. 174.21(a).

In a related proposed rule, EPA proposed to exempt from pesticide tolerance requirements under Federal Food, Drug, and Cosmetic Act (FFDCA) Section 408 certain residues of PVCP-PIPs consumed by humans. 72 Fed. Reg. 19640. Under FFDCA Section 408, a pesticide residue in or on a food is not considered safe unless the residue is within a tolerance limit established by EPA, or EPA has issued a tolerance exemption after determining with "reasonable certainty" that the residue will not cause harm. The proposed rule would exempt from Section 408 those PCVP-PIP residues that have a "long history of safe exposure and consumption." EPA said there was a reasonable certainty that no harm will result from aggregate exposure to such residues. Comments on the FIFRA and FFDCA rules are due by **July 17, 2007**.

EPA Announces Fragrance Notification Pilot Program -- On April 17, 2007, EPA's Office of Pesticide Programs (OPP) announced a Fragrance Notification Pilot Program for registrants seeking to add or modify fragrances used in currently registered pesticide products. OPP initiated the Fragrance Notification Pilot Program as a process improvement effort to streamline the current process used to amend registrations when fragrance ingredients are added, removed, or modified. The Pilot Program is intended to give registrants and OPP experience in a potential future notification process for fragrance formulation changes. The program will last 120 days and will commence on May 1, 2007, and end on August 31, 2007. More information is available at <http://www.epa.gov/opprd001/inerts/fragrancenote.pdf>.

EPA Proposes Administrative Revisions To Plant-Incorporated Protectant Tolerance Exemptions -- On April 25, 2007, EPA proposed to move existing active and inert ingredient plant-incorporated protectant (PIP) tolerance exemptions from 40 C.F.R. Part 180 (Tolerances and Exemptions from Tolerance for Pesticide Chemicals in Food) to 40 C.F.R. Part 174 (Procedures and Requirements for PIPs) Subpart W (Tolerances and Tolerance Exemptions). 72 Fed. Reg. 20489. EPA also proposed conforming changes to the text of the individual exemptions, so that they are consistent with Part 174, as well as other minor technical corrections to the wording of certain individual exemptions. This action is administrative in nature and no substantive changes are intended. Comments are due on or before **May 25, 2007**.

EPA Issues Final Rule On Dioxin And Dioxin-Like Compounds -- On May 10, 2007, EPA issued final revisions to the reporting requirements for the dioxin and dioxin-like compounds category under Section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA). 72 Fed. Reg. 26544. EPCRA Section 313 regulations now require facilities to report dioxin and dioxin-like compounds in units of total grams for the entire category, and provide a single generic distribution of the individual dioxin and dioxin-like compounds at the facility.



The final rule requires that, in addition to reporting total gram quantities for the category, facilities are required to report the mass quantity of each individual member of the category. The mass quantity data for the individual members of the category will be used by EPA to perform toxic equivalency (TEQ) computations which will be made available to the public. TEQs are a weighted quantity measure based on the toxicity of each member of the dioxin and dioxin-like compounds category relative to the most toxic members of the category, *i.e.*, 2,3,7,8-tetrachlorodibenzo-p-dioxin and 1,2,3,7,8-pentachlorodibenzo-p-dioxin. The final rule also eliminates the reporting of the single generic distribution for the members of the dioxin and dioxin-like compounds category. The rule is effective on **July 9, 2007**.

EPA Offers Tips For Experimental Use Permits -- On April 27, 2007, EPA issued “tips” for what information pesticide manufacturers should include when submitting experimental use permit (EUP) applications for PIPs. EPA noted that regulations at 40 C.F.R. § 172.4 stipulate the content requirements for EUP applications. EPA also stated that additional information is “helpful” in evaluating EUP requests for PIPs, including proposed studies to be conducted under the EUP, maximum acreage per state, maximum acreage per study, estimated acreage per state for each study, and estimated number of locations per state for each study. PIPs are pesticides made by genetically modified plants as they grow, as opposed to chemicals applied externally through spraying or dusting. The list of tips for submitting PIP EUPs is available at http://www.epa.gov/opppbd1/biopesticides/pips/pip_hints.htm.

EPA Publishes Database On FIFRA Section 18 Actions -- On April 30, 2007, EPA published a database of current and recent emergency exemptions granted under FIFRA Section 18. FIFRA Section 18 authorizes EPA to allow states and federal agencies to use a pesticide for an unregistered use for a limited time under “emergency conditions” as determined by EPA. The information provided from the database includes site (*e.g.*, the crop being protected), the pest causing the emergency, the state or federal agency that applied for the exemption, the date of application, and EPA’s response. If a tolerance was established, the date of the publication of that tolerance in the *Federal Register* is given, and the date the tolerance expires.

EPA Issues PR Notice 2007-2 -- EPA posted on May 1, 2007, Pesticide Registration (PR) Notice 2007-2, entitled *Guidance on Small-Scale Field Testing and Low-level Presence in Food of Plant-Incorporated Protectants (PIPs)*. EPA states: “This PR Notice provides clarification on the process by which EPA reviews and ensures the safety of residues of plant-incorporated protectants (PIPs) potentially present at low levels in food or feed, and the conditions under which a tolerance or exemption from the requirement of a tolerance would be required for field tests for biotechnology-derived food and feed crop plants containing plant-incorporated protectants.” PR Notice 2007-2 is available at http://www.epa.gov/opppmsd1/PR_Notices/pr2007-2.htm.



NTP Seeks Scientific Expert Nominations To Review RoC Nominations -- On May 9, 2007, NTP requested nominations for scientists to serve on expert panels as part of the review process for the *12th RoC*. 72 Fed. Reg. 26394. Under NTP's revised *RoC* review process, which it announced on April 16, 2007, NTP will prepare a draft background document for each substance nominated for listing or delisting in the *12th RoC*. NTP will convene an *ad hoc* expert panel to peer review the draft background document at a public meeting and make a recommendation to NTP on the candidate substance's listing status for the *RoC*. NTP seeks scientists to serve on the expert panels who have expertise and/or knowledge relevant to the evaluation of carcinogenicity for the candidate substances. According to NTP, relevant areas of expertise and/or knowledge include biostatistics, carcinogenesis, chemistry, epidemiology, exposure assessment, molecular biology, pathology, toxicokinetics, and toxicology. NTP will make its final selection of individuals to serve on the expert panels in accordance with the Federal Advisory Committee Act and Department of Health and Human Services implementing regulations. The candidate substances for the *12th RoC* are: aristolochic acid-related exposures: (1) botanical products containing aristolochic acid; and (2) aristolochic acid; captafol; cobalt-tungsten carbide powders and hard metals; di (2-ethylhexyl) phthalate; selected DNA topoisomerase II inhibitors: (1) etoposide; (2) etoposide in combination with cisplatin and bleomycin; and (3) teniposide; formaldehyde; glass wool fibers (certain); metalworking fluids; *ortho*-Nitrotoluene; riddelliine; and styrene. Nominations are due **June 8, 2007**.

ED Will Hold Webcast On REACH, TSCA, And CEPA Best Practices -- Environmental Defense (ED) will hold a webcast regarding its recent report, *Not That Innocent: A Comparative Analysis of Canadian, European Union and United States Policies on Industrial Chemicals*, on **May 24, 2007**, from 3:00 p.m. to 4:30 p.m. (EDT). The webcast will include a 45-minute presentation and a question and answer period. Dr. Richard Denison, Senior Scientist at ED, will present the findings and discuss his report, which compares the European Union's (EU) new Registration, Evaluation, and Authorization of Chemicals (REACH) regulation, TSCA, and the Canadian Environmental Protection Act (CEPA). Best practices for and a comparison of how each of these policies addresses the following "core functions" will be presented: identify and prioritize chemicals of concern; track chemicals and their production and use; foster the generation and submission of risk-relevant information; assess information to determine hazard/exposure/risk; impose controls to mitigate risk; and share and disclose information while protecting confidential business information. Implications of the findings for chemicals policy reform will also be discussed. The ED report is available at <http://www.environmentaldefense.org/article.cfm?contentid=6147>. To participate, contact Cathy Malina at cmalina@environmentaldefense.org by COB **May 22, 2007**. Details and a toll-free call-in number will then be forwarded prior to the call. In addition to a telephone line, Internet access is needed to view presentation materials.



CAA/CWA/SDWA

EPA Issues Clean Air Fine Particle Implementation Rule -- On April 25, 2007, EPA issued a final rule and guidance on the Clean Air Act (CAA) requirements for state and tribal plans to implement the 1997 fine particle (PM_{2.5}) national ambient air quality standards (NAAQS). 72 Fed. Reg. 20586. Fine particles and precursor pollutants are emitted by a wide range of sources, including power plants, cars, trucks, industrial sources, and other burning or combustion-related activities. EPA notes that health effects that have been associated with exposure to PM_{2.5} include premature death, aggravation of heart and lung disease, and asthma attacks. Those particularly sensitive to PM_{2.5} exposure include older adults, people with heart and lung disease, and children.

Air quality designations became effective on April 5, 2005, for 39 areas (with a total population of 90 million) that were not attaining the 1997 PM_{2.5} standards. By **April 5, 2008**, each state having a nonattainment area must submit to EPA an attainment demonstration and adopted regulations ensuring that the area will attain the standards as expeditiously as practicable, but no later than **2015**. The rule and preamble describe the requirements that states and tribes must meet in their implementation plans for attainment of the 1997 fine particle NAAQS. (Note that this rule does not include final PM_{2.5} requirements for the new source review (NSR) program; the final NSR rule will be issued at a later date.) The rule is effective on **May 29, 2007**.

EPA Issues Preliminary Determination On Second Drinking Water CCL -- On May 1, 2007, EPA announced its decision not to regulate 11 of 51 contaminants listed on the second drinking water Contaminant Candidate List (CCL). 72 Fed. Reg. 24016. The Safe Drinking Water Act (SDWA), as amended in 1996, requires EPA to make regulatory determinations on at least five unregulated contaminants and decide whether to regulate these contaminants with a national primary drinking water regulation (NPDWR). SDWA requires that these determinations be made every five years. These unregulated contaminants are typically chosen from a list known as the CCL, which SDWA requires EPA to publish every five years. EPA published the second CCL (CCL 2) on February 24, 2005. This action presents the preliminary regulatory determinations for 11 of 51 contaminants listed on CCL 2 and describes the supporting rationale for each. The preliminary determination is that an NPDWR is not appropriate for any of the 11 contaminants considered for regulatory determinations. The contaminants are: boron; dacthal di-acid degradate; dacthal mono-acid degradate; DDE; 1,3-dichloropropene (telone); 2,4-dinitrotoluene; 2,6-dinitrotoluene; EPTC; fonofos; terbacil; and 1,1,2,2-tetrachloroethane. EPA seeks comment on these 11 preliminary determinations. EPA requests public comment on the information and the options that EPA is considering in evaluating perchlorate and welcomes the submission of relevant, new information and/or data that may assist EPA in its regulatory determination. Comments must be received on or before **July 2, 2007**.



EPA Issues Supplemental Notice Of Proposed Rulemaking For PSD And Nonattainment NSR -- On May 8, 2007, EPA issued a supplemental notice of proposed rulemaking (SNPR) to its October 20, 2005, notice of proposed rulemaking (NPR) on Prevention of Significant Deterioration (PSD) and nonattainment major NSR programs (collectively "NSR") mandated by parts C and D of title I of the CAA. 72 Fed. Reg. 26202. EPA proposed three alternatives for the emissions test: a maximum achievable hourly emissions test, a maximum achieved hourly emissions test, and an output-based hourly emissions test. The notice proposed options so that the output-based test becomes an alternative method to implement the maximum achieved or maximum achievable hourly tests, rather than a separate option. The SNPR also proposes a new option in which the hourly emissions increase test is added to the existing requirements for computing a significant increase and a significant net emissions increase on an annual basis. It also includes proposed rule language and supplemental information for the October 2005 proposal, including an examination of the impacts on emissions and air quality. Comments must be received on or before **July 9, 2007**.

EPA Proposes To Extend Compliance Data For CAFOs -- On May 10, 2007, EPA proposed to extend certain compliance dates in the National Pollutant Discharge Elimination System (NPDES) permitting requirements and Effluent Limitations Guidelines and Standards (ELGs) for concentrated animal feeding operations (CAFOs). 72 Fed. Reg. 26582. EPA claims to need the extension to complete a rulemaking to respond to the decision of the Second Circuit Court of Appeals in *Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2nd Cir. 2005).

The proposal would revise the dates established in the 2003 CAFO rule and later modified by a rule published on February 10, 2006, by which facilities newly defined as CAFOs are required to seek permit coverage and by which all permitted CAFOs are required to develop and implement their nutrient management plans (NMPs). EPA is proposing to extend the date by which operations defined as CAFOs as of April 14, 2003, that were not defined as CAFOs prior to that date, must seek NPDES permit coverage, from July 31, 2007, to **February 27, 2009**. EPA is also proposing to amend the date by which operations that become defined as CAFOs after April 14, 2003, due to operational changes that would not have made them a CAFO prior to April 14, 2003, and that are not new sources, must seek NPDES permit coverage, from July 31, 2007, to **February 27, 2009**. Finally, EPA is proposing to extend the deadline by which permitted CAFOs are required to develop and implement NMPs, from July 31, 2007, to **February 27, 2009**. Comments on the proposed action must be received on or before **June 11, 2007**.

RCRA/CERCLA

EPA Extends Comment Deadline On Solid Waste Rule -- On April 24, 2007, EPA extended the comment period on the Revisions to the Definition of Solid Waste supplemental proposed rule from May 25 to **June 25, 2007**. 72 Fed. Reg. 20304. The supplemental proposed rule, would revise the definition of solid waste to exclude certain hazardous secondary materials from



regulation under hazardous waste provisions of the Resource Conservation and Recovery Act (RCRA). The proposed rule was published in October 2003, but EPA never made that proposed rule final. More information is available at <http://www.epa.gov/epaoswer/hazwaste/dsw/abr.htm>.

EPA Issues UST Inspection Grant Guidelines For States -- On May 9, 2007, EPA's Office of Underground Storage Tanks (OUST) issued its final inspection grant guidelines. 72 Fed. Reg. 26359. EPA developed the inspection grant guidelines as required by Sections 9005(c)(1) and 9005(c)(2) of Subtitle I of the Solid Waste Disposal Act, as amended by Section 1523 of the Energy Policy Act of 2005. EPA posted the inspection grant guidelines on its website, which can be found at http://www.epa.gov/oust/fedlaws/epact_05.htm#Final. The guidelines describe the minimum requirements a state's on-site inspection program must contain under Section 9005(c) for a state to comply with statutory requirements for Subtitle I funding. These guidelines include: identification of which underground storage tanks require an on-site inspection; requirements for the on-site inspection; who can perform the on-site inspection; and what information needs to be reported to EPA. Please consult the website for more information.

NANOTECHNOLOGY

PEN Issues Green Nanotechnology Report -- On April 26, 2007, the Woodrow Wilson International Center for Scholars released a report discussing research on ways to make nanomaterials that use less-toxic ingredients, less energy, or that have other environmental benefits compared to conventional manufacturing methods, as well as applications of nanotechnology that can provide environmental benefits. The report, *Green Nanotechnology: It's Easier Than You Think*, summarizes presentations from an American Chemical Society symposium and four workshops, all of which were held in 2006. The report can be found at <http://www.nanotechproject.org>.

B&C Announces Nanotechnology Law Blog -- Bergeson & Campbell, P.C. (B&C) is pleased to announce that its nanotechnology law blog is now available at <http://nanotech.lawbc.com>. B&C will update its blog with weekly and more frequent news items and documents, reporting on federal, local, and international regulatory, legal, and policy developments involving nanotechnologies and nanomaterials. Users may sign up to receive e-mails of new posts to the blog at <http://nanotech.lawbc.com/subscribe.html>.

LEGISLATIVE DEVELOPMENTS

Bill Would Reinstate Industry Fees For Site Cleanups -- Representative Maurice Hinchey (D-NY) introduced legislation on April 17, 2007, that would reinstate three industry "polluter" fees to finance the Superfund Trust Fund. The Superfund Equity and Megasite Remediation Act (H.R. 1887) would amend the Internal Revenue Code by reinstating the fees to the same level they were when they expired in 1995. Specifically, an excise tax on the petroleum industry



would be 9.7 cents per barrel; excise taxes on certain chemicals would vary; and a corporate environmental income tax would be 0.12 percent of taxable corporate incomes exceeding \$2 million. In addition, the bill would temporarily increase those fees by 50 percent for five years (from January 1, 2008, to December 31, 2012) to help clean up “megasites,” hazardous waste sites that cost more than \$50 million to clean up. The Secretary of the Treasury Department would be required to deposit revenue generated from the fee increase into a special megasite fund.

Senate Committee Adopts Requirements To Force Disclosure Of Earmarks -- The Senate Appropriations Committee announced on April 17, 2007, that it is adopting new rules that will force the disclosure of information on all the earmarks contained in regular spending bills. The new rules, which will require all earmarks to be clearly identified in Committee bills and reports, will apply to the bills that will provide annual funding for all federal agencies. The Committee is expected to begin drafting the spending bills in May and June 2007. The Committee elected to adopt the new rules on earmarks despite the fact that the House of Representatives and the Senate are expected to meet in conference on ethics and lobbying reform legislation that both chambers passed earlier in 2007. The bill the Senate passed (S. 1) contains many of the same provisions. The House of Representatives adopted new budget rules in January 2007 to require earmark sponsors to be identified publicly and make the Congressional appropriations process more transparent.

Committee Approves Legislation Mandating Increased Fuel Economy -- The Senate Commerce, Science, and Transportation Committee approved legislation (S. 357) on May 8 to increase fuel economy standards for automobiles and trucks by 10 miles per gallon by 2019. The bill would raise corporate average fuel economy (CAFE) standards for cars and light trucks by 4 percent each year from a combined average of 25 miles per gallon to 35 miles per gallon by 2019. The current standard is 27.5 miles per gallon for cars and 21.6 miles per gallon for light trucks. In addition, the bill for the first time would impose fuel efficiency standards on medium- and heavy-duty trucks. The bill would require 4 percent improvements in fuel efficiency for new medium- and heavy-duty trucks each year.

The bill retains provisions to allow the National Highway and Traffic Safety Administration (NHTSA) to issue size-based standards for individual models. In addition, the bill would allow NHTSA to lower the rate of improvement for CAFE standards below 4 percent if the maximum feasible level of improvement is less than 4 percent each year.

The Committee adopted several amendments, including amendments that would establish a national program to develop advanced technology batteries for electric-powered vehicles, and require the Department of Energy (DOE) to establish quality standards for biodiesel, or diesel fuel produced from vegetable and animal sources.



Bill Would Offer Loans For Coal-To-Liquids Plants -- Representatives Rick Boucher (D-VA) and John Shimkus (R-IL) introduced a coal-to-liquids bill on May 8, 2007, that would provide federal loans to build the first commercial plants in the United States to make diesel and jet fuel from coal. The bill would authorize DOE to make loans for up to six coal liquefaction facilities. The bill would establish a price floor for crude oil so that if the price of oil falls below a level that makes a coal-to-liquids plant uneconomical, the federal government would make a payment to the plant owner. The legislation also would require that to qualify for the federal payments, each project must be certified as producing a fuel that has a life cycle of carbon dioxide emissions at or below that of a comparable petroleum refinery.

Clean Fuels Bill Contains Carbon Dioxide Benchmarks -- Senator Barbara Boxer (D-CA) introduced legislation on May 3, 2007, that would set a goal of increasing the volume of clean transportation fuels to as much as 35 billion gallons by 2025. The bill is a rival to legislation (S. 987) the Senate Energy and Natural Resources Committee approved on May 2, 2007, to increase the renewable fuel standard in the CAA from the current target of 7.5 billion gallons in 2012 to 36 billion gallons by 2022. Under Boxer's bill, to count toward the renewable fuels standard, fuel must produce at least 20 percent fewer greenhouse gas emissions than gasoline. As the volume of biofuels produced increases, the measure also would require that these fuels produce at least 50 percent and 75 percent fewer greenhouse gas emissions than gasoline. Senators Susan Collins (R-ME) and Joseph Lieberman (I/D-CT) are co-sponsoring this legislation.

Legislation Would Require Intelligence Agencies To Study Security Risks Global Warming Present -- The House of Representatives passed legislation on May 11, 2007, that would require U.S. intelligence agencies to conduct a 30-year national estimate study on the geopolitical effects of global climate change and their potential impact on national security. The provision, which calls for the director of national intelligence to submit the study to Congress within 270 days of enactment, is contained in the fiscal year 2008 Intelligence Authorization Act (H.R. 2082). The bill would require the Director of National Intelligence to assess the political, social, agricultural, and economic risks climate change poses for countries or regions that are of strategic national security importance to the United States and at risk of significant impact due to global climate change, or at significant risk of large-scale humanitarian suffering with cross-border implications. All 16 U.S. intelligence agencies, as well as the Director of National Intelligence, would be directed to contribute to the climate-related intelligence assessment. In the Senate, the study is included in a stand-alone bill (S. 1018) that Senator Richard Durbin (D-IL) introduced on March 28, 2007.

Renewable Fuels Bill Moves Forward -- On May 2, 2007, the Senate Energy and Natural Resources Committee approved 20-3 a bill that would greatly increase the 2005 renewable fuel standard from the current target of 7.5 billion gallons in 2012 to 36 billion gallons by 2022. The Committee combined four energy-related measures, introduced earlier this year, into one bill for the markup. Few changes were made from the original measures, and in approving the bill the



Committee rejected a mandate for coal-to-liquid fuels. The second title of the new bill would enact into law new energy efficiency standards for several appliances and promote research on more efficient vehicles, including plug-in electric hybrids. The third title would authorize \$315 million over three years for carbon sequestration research and direct the Interior Department to assess capability for underground storage of carbon dioxide from coal-fired power plants and any future coal-to-liquids plants. The Committee approved a proposal of Senate Energy Chair Jeff Bingaman (D-NM) that would establish a five-year program with a 50-50 public-private match to demonstrate and perfect large-scale capture of carbon dioxide from industrial sources.

Administration's Alternative Fuels Proposal Introduced -- Senator James Inhofe (R-OK) on April 19, 2007, introduced a bill the Bush Administration assembled that would implement President Bush's proposal to reduce projected U.S. gasoline consumption 20 percent by 2017, known as the "Twenty in Ten" initiative. The "Alternative Fuel Standard Act" seeks to replace the current renewable fuels standard, established in the 2005 energy bill, by requiring 10 billion gallons of alternative fuels to be used in 2010 and increasing to 35 billion gallons in 2017. Qualifying alternative fuels would be expanded to include fuels derived from natural gas, coal, and hydrogen, among others.

Bill Would Combine Energy Efficiency And Fuel Savings Provisions -- A group of Democratic and Republican Senators introduced a comprehensive energy-efficiency bill on April 17, 2007. The Energy Efficiency Promotion Act (S. 1115) goes beyond traditional energy-efficiency measures to include provisions that would improve vehicle and fuel efficiency. Senate Energy & Natural Resources Committee Chair Jeff Bingaman (D-NM) introduced the bill with a group of co-sponsors, including Senator Pete Domenici (R-NM), Senate Energy Committee Ranking Member, and Senators Byron Dorgan (D-ND), Ken Salazar (D-CO), Lisa Murkowski (R-AK), and Richard Lugar (R-IN).

The bill would set a national goal of reducing gasoline usage by 20 percent by 2017, 35 percent by 2025, and 45 percent by 2030. The savings would be based on projected levels from the Energy Information Administration. Under S. 1115, automakers and suppliers would be paid up to 30 percent of their investment for the incremental costs incurred in redesigning, expanding, or establishing a manufacturing facility to produce advanced technology vehicles and eligible components. They also would be eligible for federal loan guarantees established by the 2005 energy bill for making fuel-efficient vehicles and components. The bill includes a 10-year research program for advanced batteries and energy storage, at \$230 million per year.

S. 1115 also would enact into law new appliance standards that are being developed at DOE. It gives DOE an "expedited" rulemaking authority to speed up the approval process, which has lagged for years. It also dictates higher energy-savings standards for the federal government.



House Passes Second Measure Addressing Chemical Security Preemption After President Bush Vetoes First Attempt -- The House of Representatives passed a supplemental appropriations bill on May 10, 2007, that retains a provision ensuring states can impose stricter standards for chemical plant security than the federal government. This language is part of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007 (H.R. 2206), the second supplemental appropriations bill the House passed in the past three weeks. On April 26, 2007, the Senate passed legislation by a 51-46 vote providing that federal standards for chemical plant security cannot preempt more rigorous state standards, however, President Bush vetoed the provision, which was contained in the conference agreement on a fiscal year 2007 supplemental spending bill (H.R. 1591) to fund military operations in Iraq and Afghanistan. President Bush vetoed H.R. 1591 because it contained a timetable for troop withdrawal. The new measure contains the same chemical security preemption language that H.R. 1591 contained. The measure states that the federal law shall not preclude or deny the right of any state or locality to adopt or enforce any chemical security regulation, requirement, or performance standard that is more stringent than the federal standard or impair or restrict state jurisdiction over chemical facilities within the state. It would override language in a Department of Homeland Security (DHS) interim final chemical security rule (72 Fed. Reg. 17688 (Apr. 9, 2007)) allowing DHS to preempt state laws and requirements that conflict or interfere with federal regulations or their purpose. The Bush Administration has voiced its opposition to several provisions in H.R. 2206.

Bills Would Cut Emissions From Power Plants -- Senators Thomas Carper (D-DE) and Lamar Alexander (R-TN) introduced separate bills on April 19, 2007, and Senator Bernie Sanders (I-VT) introduced legislation on April 24, 2007, to reduce power plant emissions of carbon dioxide as well as nitrogen oxides, sulfur dioxide, and mercury. The Carper and Alexander bills are similar in many respects. Both would seek to reduce carbon dioxide emissions from power plants, as well as the three other pollutants, below current levels by using emissions trading. Each of the three bills would use emissions trading to reduce emissions of nitrogen oxides, sulfur dioxide, and carbon dioxide, while prohibiting trading of mercury emissions.

The bills differ principally in how they would allocate allowances. Carper's bill would allocate allowances to power plants based on the amount of electricity they produce. Companies that produce electricity with natural gas or nuclear power (which result in lower emissions) or wind or solar power (which result in no emissions) would be able to sell their excess allowances to coal-fired power plants, which produce higher emissions. Alexander's bill would allocate allowances based on the historical amount of energy the plants have used, also referred to as "heat input-based" allocation.

The Carper bill would require the power industry to reduce carbon dioxide emissions to 2.2 billion tons in 2015, the same level of emissions logged in 2001. After 2015, it would require a 1 percent reduction a year, and after 2020, a 1.5 percent reduction. Between 2012 and 2015, it



would cap carbon dioxide at 2.3 billion tons, the 2006 level. Alexander's bill would cap carbon dioxide at 2.3 billion tons from 2011 to 2015, 2.1 billion tons between 2015 and 2019, and 1.8 billion tons between 2020 and 2024. After 2025, the bill would cap emissions at 1.5 billion tons. Sanders' bill would cap carbon dioxide emissions from power plants at 2.3 billion metric tons in 2011, the 2006 level. In 2015, emissions would be capped at 2.1 billion tons, and in 2020, at 1.8 billion tons, the 1990 level. After 2025, the bill would cap emissions at 1.5 billion tons. The Sanders bill also includes a provision that would require power plants to reduce carbon dioxide emissions by 3 percent every year after 2012 if economy wide emissions limits have not been imposed by then. The requirement would apply until greenhouse gases are stabilized at 450 parts per million carbon dioxide equivalent.

Both the Carper and Alexander legislation would reduce emissions of nitrogen oxides, sulfur dioxide, and mercury by 68 percent, 82 percent, and 90 percent, respectively, by 2015. The Sanders bill would reduce nitrogen oxide emissions by greater than 80 percent by 2013, sulfur dioxide emissions by about 90 percent, and mercury emissions by 90 percent.

Coastal Protection Bill Gains Approval -- A bill authorizing the Secretary of Commerce to provide grants to states to protect coastal and estuary lands cleared the Senate Commerce, Science, and Transportation Committee unanimously on April 25, 2007. Senator Maria Cantwell (D-WA) sponsored the Coastal and Estuarine Land Protection Act (S. 1142), which would codify an existing program within the Commerce Department that would be charged with protecting threatened coastal areas with "significant conservation, recreation, ecological, historical, or other value." States would submit proposals for grants, which would be awarded based on demonstrated need for protection. Approved grant applications could receive grants for up to 75 percent of the cost of protection. The bill, however, does not authorize a specific amount for the program but rather leaves Commerce Secretary discretion to disburse such sums through 2012.

House Approves Water Restoration Funding Bill -- Legislation authorizing the U.S. Army Corps of Engineers to embark on a six-year backlog of navigation, flood control, and environmental restoration projects across the United States cleared the House of Representatives on April 19, 2007. H.R. 1495 includes a \$950 million authorization for wetlands restoration and hurricane protection in coastal Louisiana and \$2.4 billion each for water-related projects in Louisiana and Florida, including restoration of the Everglades. The Senate Environment and Public Works Committee on March 29, 2007, approved its version of the Water Resources Development Act of 2007, which contains approximately \$12 billion in projects.

MISCELLANEOUS

Council On Environmental Quality Issues Guide For Aligning National Environmental Policy Act Processes With Environmental Management Systems -- On April 26, 2007, the White House Council on Environmental Quality (CEQ) published *Aligning National Environmental*



Policy Act Processes with Environmental Management Systems -- A Guide for NEPA and EMS Practitioners to assist federal agencies in aligning their National Environmental Policy Act (NEPA) processes with their Environmental Management Systems (EMSs). 72 Fed. Reg. 20848. CEQ used an interagency work group to develop the guide and issued it in final after considering public comments. The final guide is being provided to federal agencies to help them recognize the complementary relationship of EMS and NEPA and assist in aligning EMS elements with NEPA when establishing, implementing, and maintaining their EMS. The guide also encourages the integration of EMS and NEPA as a means to bring substantial benefits to an agency's environmental performance and further our national environmental policy. The final guide is available from CEQ and at <http://www.NEPA.gov>.

EPA Publishes Semiannual Regulatory Agenda -- On April 30, 2007, EPA published its semiannual Regulatory Agenda. 72 Fed. Reg. 23156. According to the notice, EPA intends the Regulatory Agenda to update the public about:

- 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.

EPA includes regulations and certain major policy documents in the Regulatory Agenda. EPA notes that there is no legal significance to the omission of an item from the Agenda, however, and that it generally does not include minor amendments or the following categories of actions:

- Administrative actions such as delegations of authority, changes of address, or phone numbers;
- Under the CAA: Revisions to state implementation plans; equivalent methods for ambient air quality monitoring; deletions from the new source performance standards source categories list; delegations of authority to states; and area designations for air quality planning purposes;
- Under FIFRA: Registration-related decisions, actions affecting the status of currently registered pesticides, and data call-ins;
- Under the FFDCA: Actions regarding pesticide tolerances and food additive regulations;



- Under RCRA: Authorization of state solid waste management plans; and hazardous waste delisting petitions;
- Under the Clean Water Act: State water quality standards; deletions from the Section 307(a) list of toxic pollutants; suspensions of toxic testing requirements under NPDES; and delegations of NPDES authority to states; and
- Under the SDWA: Actions on state underground injection control programs.

EPA's Regulatory Agenda is available on the Internet at <http://www.epa.gov/fedrgstr/EPA-GENERAL/2007/April/Day-30/>.

Appellate Court Dismisses Petition Challenging Incorporation Of ACGIH TLVs In The HCS

-- On May 11, 2007, the U.S. Court of Appeals for the District of Columbia Circuit dismissed a petition filed by the National Association of Manufacturers (NAM) challenging the incorporation of American Conference of Governmental Industrial Hygienists (ACGIH) threshold limit values (TLV) in the Hazard Communication Standard (HCS). *NAM v. OSHA*, No. 06-1122. Under the HCS, chemicals included in the "latest edition" of the ACGIH TLV booklet must be treated as hazardous. The 2006 TLV booklet, which was published on January 31, 2006, included five new substances and their corresponding TLVs; established a TLV for a substance previously identified only as an "asphyxiant"; lowered the TLVs for nine substances already listed; and changed the substantive notations for three substances already listed. NAM argued that when ACGIH published its 2006 booklet, the Occupational Safety and Health Administration (OSHA) "effectuated a new standard that imposes both new and modified compliance obligations on employers." Because OSHA imposed these new obligations without notice and comment, NAM claimed that it violated Section 655 of the Occupational Safety and Health Act, which provides that parties adversely affected by an occupational safety or health standard may file a petition for review "at any time prior to the sixtieth day after such standard is promulgated." OSHA responded that the HCS provisions referencing the ACGIH TLV booklet were promulgated in 1983 and 1987, and that NAM "misse[d] the statutory deadline by about two decades." OSHA also contended that the HCS "has always required employers, manufacturers and importers to treat a substance as hazardous if it is listed in the latest edition of the ACGIH TLV compilation." The court found OSHA's arguments persuasive, noting that, both before and after publication of the 2006 TLV booklet, "regulated parties were required to treat as hazardous any chemical listed in the then-current version." The court notes that "we recognize that time limits like the one contained in section 655(f) may have no applicability where 'the petitioner lacked a meaningful opportunity to challenge the agency action during the review period.'" The court then states: "But given that NAM failed to argue in its opening brief that it lacked a meaningful opportunity to challenge the HCS in either 1983 or 1987, we have no need to pass on the applicability of the



exception to this case.” The decision is available on the Internet at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200705/06-1122a.pdf>.

EPA Seeks Comment On Enhancing Environmental Outcomes From Audit Policy Disclosures Through Tailored Incentives For New Owners -- On May 14, 2007, EPA requested comment on whether and to what extent EPA should consider offering tailored incentives to encourage new owners of regulated entities to discover, disclose, correct, and prevent the recurrence of environmental violations. 72 Fed. Reg. 27116. EPA is considering whether actively encouraging such disclosures has the potential to yield significant environmental benefit, since new owners may be particularly well-situated and highly motivated to focus on, and invest in, making a clean start for their new facilities by addressing environmental compliance.

Any tailored incentives for new owners would be beyond those offered as EPA is currently implementing EPA’s April 11, 2000, policy on “Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations,” commonly referred to as the “Audit Policy” (65 Fed. Reg. 19618). These incentives would be designed to enhance implementation of the Audit Policy and encourage its use in the new owner context, but would not constitute a change to the Policy overall.

After the comment period closes, EPA intends to review comments and decide whether to develop a pilot program to test the policy of offering tailored incentives to encourage new owners to self-audit and disclose under the Audit Policy. If EPA decides to proceed, it would then publish a second *Federal Register* notice to seek comment on a proposed pilot program. After a second round of public comment, EPA would publish in the *Federal Register*: the final description of the pilot program; and announcement of its start date; and a description of how its success in achieving increased self-auditing and disclosure and significant improvement to the environment will be evaluated. Comments are due by **July 13, 2007**. EPA also intends to convene two public meetings. The first meeting is scheduled in Washington, DC at the J.W. Marriott Hotel, 1331 Pennsylvania Avenue, N.W., on **June 12, 2007**. The second one is scheduled for San Francisco at the Palace Hotel, 2 New Montgomery Street, on **June 20, 2007**. Both meetings will begin at 10 a.m. and end at 4:00 p.m.

Korean RoHS, ELV, And WEEE Regulation -- Korea is the latest country to introduce a variation of the Restriction of the Use of Hazardous Substances (RoHS), End-of-Life Vehicles (ELV), and Waste Electronic and Electrical Equipment (WEEE) regulations. The National Assembly of the Republic of Korea passed the Act for Resource Recycling of Electrical and Electronic Equipment and Vehicles on April 2, 2007, in a second reading, based on Bill Nr. 6319 proposed on March 30, 2007, by the Environment and Labor Committee. This Act was introduced into law on April 27, 2007, and will take effect on **January 1, 2008**.



The Act places general duties on the following industries: (1) producers and importers of electrical and electronic equipment and vehicles to facilitate waste recycling by reducing the use of hazardous substances; (2) operators of recycling facilities to save resources through the recovery of recyclable resources; and (3) operators arranging disposal of waste to minimize adverse effects to the environment. The Ministry of the Environment and the Ministry of Commerce, Industry, and Energy are responsible for enforcing the Act and are also tasked with producing technical guidance and evaluation methods.

Failure to comply with the Act could result in up to 12 months imprisonment and over \$60,000 in fines.

OMB Clarifies EO And Bulletin Regarding Agency Guidance Documents -- On April 25, 2007, the Office of Management and Budget (OMB) issued a compliance assistance memorandum regarding the implementation of Executive Order (EO) 13422, which amended EO 12866, and the OMB Bulletin on Good Guidance Practices. In its cover memorandum, OMB states that the “primary focus of EO 13422 and the Bulletin is on improving the way the Federal government does business with respect to guidance documents -- by increasing their quality, transparency, accountability, and coordination.” According to OMB, when an agency issues a guidance document that has a significant impact on society, “the guidance document should be subject to an appropriate level of review -- by the public, within an agency, and by other Federal agencies.” OMB intends the compliance assistance memorandum to help federal agencies implement EO 13422 and the Bulletin. The memorandum describes what agencies should do to comply with the EO and the Bulletin. The memorandum is available at <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-13.pdf>. EO 13422 is available at <http://www.whitehouse.gov/news/releases/2007/01/20070118.html>, and the January 18, 2007, OMB Bulletin on Good Guidance Practices is available on the Internet at <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-07.pdf>.

In the compliance assistance memorandum, OMB states that the principal change made by EO 13422 is that it amends EO 12866 to establish a process providing an opportunity for interagency coordination and review of significant guidance documents prior to their issuance. EO 13422 also amends EO 12866 in several other ways. To ensure appropriate accountability, the EO modifies the procedures for an agency’s adoption of its annual Regulatory Plan and requires that the agency’s Regulatory Policy Officer be a Presidential appointee. The EO also updates the Principles of Regulation in EO 12866 to reflect the guidance-coordination provisions added by EO 13422, as well as pre-existing OMB guidance. Finally, the EO invites agencies to consider whether they would want to rely on formal rulemaking procedures for resolving complex determinations.



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