

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] Air/Greenhouse Gases: States Seek to Intervene in Challenge to EPA's Grant of California's Motor Vehicle Waiver

An 18-state coalition has reportedly sought to intervene in an industry challenge to EPA's decision allowing California to impose its own greenhouse gas (GHG) emissions limits on cars and light trucks. *Chamber of Commerce v. EPA*, No. 09-1237 (D.C. Cir. *motion to intervene filed* 10/08/09).

The U.S. Chamber of Commerce and the National Automobile Dealers Association challenged the EPA decision on September 8, 2009. EPA announced in June that it had approved California's request for a Clean Air Act waiver so that the state could implement its own GHG emissions limits. The decision reversed a 2007 agency determination denying the waiver request. 74 *Fed. Reg.* 32,744 (07/08/09).

When New York and 17 other states filed their motion to intervene on October 8, they announced that their opposition to the industry's challenge was "based on state's rights—the right of New York and other states to take commonsense steps to protect their environment, public health, and economy from being devastated by continued, unchecked global warming." Since the EPA decision granting California's waiver request, 13 states have adopted the California standards. Joining New York were attorneys general from Arizona, Connecticut, Delaware, Illinois, Iowa, Maine,

Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, and Washington. Also seeking intervention were the Florida and Pennsylvania Departments of Environmental Protection. See *BNA Daily Environment Report*, October 13, 2009.

[2] Air: California Appeals Court Upholds District Indirect Source Rules

A California court of appeal has upheld a regional air-pollution-control authority's indirect source rules that require developers to either cut emissions from their construction projects or pay a fee for emissions-cutting projects elsewhere. *California Bldg. Indus. Ass'n v. San Joaquin Valley Air Pollution Control Dist., No. 06-2100 (Cal. Ct. App 10/08/09)*. Plaintiffs, the California Building Industry Association, Coalition for Urban Renewal Excellence, Valley Taxpayers Coalition, and Modesto Chamber of Commerce, argued that the rules imposed development—rather than regulatory—fees in violation of the state's Mitigation Fee Act. Under the Act, an agency must meet specific requirements when imposing development fees, which must be reasonable given the construction's cost to the community and its benefit to the builder.

Rejecting plaintiffs' argument, the court held that "a fee does not become a development fee simply because it is made in connection with a development project." According to the court, the air district created the fees to "mitigate growth in air pollution from new development in order to achieve and maintain federal air quality standards,"



making them regulatory in nature. The court also ruled that the district had the power to more concretely define the term “indirect source,” because it was acting in a “quasi-legislative” manner when it elaborated the meaning of a key statutory term. Plaintiffs had argued that because a housing development did not itself have “significant emissions,” that it should not be classified as an “indirect source.” The court noted that “the fact that a housing development does not itself emit pollutants is [not] what causes it to be an ‘indirect source’ of pollution.” Had the court ruled that the fees were “development fees,” the air district would have had to show “a fairly close nexus between the amount of the fee and the adverse effects” of the development.

[3] **Air/Greenhouse Gases: Environmental Group Sues TCEQ over Failure to Regulate GHGs**

A Texas environmental group has sued the Texas Commission on Environmental Quality (TCEQ) in an attempt to force the agency to regulate greenhouse gas (GHG) emissions from coal plants and other facilities. *Public Citizen, Inc. v. TCEQ, No. 09-2426 (Tex. Dist. Ct. filed 10/06/09)*. Plaintiffs seek a judgment declaring invalid agency rules that allow unlimited carbon dioxide emissions from power plants. They ask the court to set aside TCEQ regulations that preclude parties from presenting testimony and other evidence on carbon dioxide, global warming and climate change in contested case hearings before the State Office of Administrative Hearings and in administrative pleadings. Plaintiffs also ask the court to require that power plants be permitted only after carbon dioxide emissions are considered. According to plaintiffs, the lawsuit seeks to extend to Texas the U.S. Supreme Court’s decision in *Massachusetts v.*

EPA, 549 U.S. 497 (2007), which held that EPA had authority to regulate GHGs as pollutants under the Clean Air Act. See *E & E News PM*, October 6, 2009.

Legislation, Regulations and Guidance

[4] **TSCA: EPA Seeks Comments on Petition to Tighten Lead Dust Standards and Definition of Lead-Based Paint**

EPA is seeking public comment on a petition filed by environmental groups arguing that data from studies published since the lead dust standard was promulgated justify lowering the health-based standards and modifying the definition of “lead-based” paint to lower the amount of lead in the definition. 74 Fed. Reg. 51,274 (10/06/09). Under the 2001 dust standards, dust is considered a hazard if the concentration of lead is greater than 40 micrograms per square foot or if there are more than 250 micrograms of lead in dust per square foot on interior window sills.

Petitioners argue that the floor-dust standards should be reduced to 10 micrograms per square foot or less and that the sill-dust standard should be reduced to 100 micrograms per square foot. Petitioners cite numerous studies since 2001 that support their petition. The petitioners also urge EPA to revise the definition of lead-based paint. The current definition is “paint or other surface coatings that contain lead in excess of 1.0 milligrams per centimeter squared or 0.5 percent by weight.” Petitioners argue that under that definition, paint containing less than 5,000 parts per million of lead would not be considered lead-based paint. The petition asks EPA to revise its definition of lead-based paint to mean paint that contains 600



parts per million of lead or 0.06 percent lead by weight. Comments on the petition must be received by October 21, 2009.

[5] Safe Drinking Water Act: Aircraft Drinking Water Standards Established

EPA Administrator Lisa Jackson has signed a **final rule** to protect drinking water aboard aircraft through sampling, disinfection and flushing of water systems; it also contains requirements for corrective action when contamination is found.

The rule, promulgated under the Safe Drinking Water Act, will give aircraft operators 18 months after the rule is published to develop maintenance and sampling plans and two years after publication to begin routine sampling, disinfection and flushing. If contamination is found, the rule requires the notification of passengers and crew. The rule's elements were adapted from EPA's Total Coliform Rule, surface water regulations and Public Notification Rule.

[6] FIFRA: EPA Launches Comprehensive Evaluation of the Pesticide Atrazine

EPA **announced** on October 7, 2009, that it will conduct a comprehensive evaluation of the potential cancer and non-cancer effects on humans of the herbicide atrazine. The evaluation will include the most recent atrazine studies and assess its potential association with birth defects, low birth weight and premature births. Atrazine is a restricted-use herbicide used to control weeds in crops such as corn, sorghum, sugar cane, and trees raised for use during the holidays.

According to press reports, the evaluation was triggered by an August 2009 NRDC report which argued that, based on atrazine contamination spikes recorded by EPA in its monitoring program, too much of the contaminant reaches the public.

The report criticized EPA for "ignoring atrazine contamination." See *EPA Press Release* and *Law 360*, October 7, 2009.

[7] Chemicals: EPA Issues Voluntary Guidelines on Meth Lab Cleanups

EPA has issued voluntary **guidelines** for cleaning up methamphetamine "lab" sites. The guidance document includes EPA's review of the best available science and practices for methamphetamine lab cleanup, but also incorporates elements of existing state guidance, according to EPA. The document includes an appendix of state resources, and the online version includes a link to each of 31 states' guidance documents. It also includes a chart of 50 potentially hazardous chemicals associated with methamphetamine, listing their adverse health effects, chemical abstract service number and other properties. Also included is information on best practices for handling specific items or materials, sampling procedures and technical resources. The Methamphetamine Remediation Research Act of 2002 required EPA to prepare the voluntary guidelines.

[8] CERCLA: EPA Provides Guidance to Regional Offices on RD/RA Negotiations

In a September 30, 2009, **memorandum** to EPA regional directors and others, Elliot Gilberg, acting director of EPA's Office of Site Remediation Enforcement, set out a new interim policy that requires the prompt conclusion of Remedial Design/Remedial Action (RD/RA) negotiations, which the memo says have become too lengthy over the years.

According to the memorandum, the median number of days for these negotiations increased from 197 days in 1990-1993 to 305 days during 2004-2008. The memo encourages regions to issue unilateral administrative orders to potentially



responsible parties (PRPs) when negotiations are not moving successfully. The memo also requires stricter adherence to existing guidelines on lodging and entering consent decrees with PRPs and encourages EPA regions to work more closely with the Department of Justice to bring agreements into court as quickly as possible to get cleanups started.

[9] Air: GAO Report Says Sorbent Injection Systems Reduce Power Plant Mercury Emissions by 90 Percent

A Government Accountability Office (GAO) [report](#) dated October 8, 2009, says that sorbent injection systems have reduced mercury emissions from coal-fired power plants by an average of 90 percent. The reductions were reportedly achieved in systems using bituminous, sub-bituminous and lignite coal.

GAO contacted all 50 state air agencies to identify coal-fired power plants subject to regulatory requirements to reduce mercury emissions. The state agencies identified 14 plants that operated sorbent injection systems and six that used existing air pollution control equipment to meet the requirements. The report also found that the sorbent injection systems cost a fraction of the cost of other pollution-control systems.

[10] Air: Canada Issues Final Rules Limiting VOC Content in Paint and Architectural Coatings

The Canadian environmental agency Environment Canada has published a [final rule](#) to reduce emissions of volatile organic compounds (VOCs) from consumer and commercial architectural coatings such as paints, finishes, dyes, and varnishes. The new rules set VOC content limits for

53 categories of coatings and apply to all products manufactured, imported, sold, or marketed in Canada.

Although the rules take effect immediately, prohibitions applicable to the manufacture and import of affected coatings will be phased in over a five-year period that starts September 30, 2010. VOCs were designated as toxic in June 2003, when they were added to the list of Toxic Substances in Schedule 1 of the Canadian Environmental Protection Act. The listing gave Environment Canada authority to develop VOC control measures.

[11] Air/Greenhouse Gases: Interim Guidance Issued on Carbon Dioxide Sequestration Tax Credit

The Internal Revenue Service (IRS) has reportedly issued interim guidance on eligibility requirements and tax credit amounts for carbon dioxide sequestration under section 45Q of the tax code. Section 45Q, added to the code by the Energy Improvement and Extension Act of 2008, makes the credit generally available to taxpayers who capture carbon dioxide at a qualified facility and dispose of it in "secure geological storage" domestically. The credit is available for carbon dioxide captured after October 3, 2008.

To be eligible for the tax credit, an individual must (i) own an industrial facility where carbon capture equipment is in service, (ii) capture no less than 500,000 metric tons of qualified carbon dioxide at the industrial facility during the taxable year, and (iii) physically or contractually ensure that the qualified carbon dioxide is securely stored in a "geologic formation," including where such gas is captured and moved for use in an enhanced oil or natural gas recovery project. The notice will be



published in IRS Bulletin 2009-44, dated November 2, 2009. See *BNA Daily Environment Report*, October 9, 2009.

Scientific/Technical Items

[12] Air: Study Claims Common Air Pollutants Can Combine and Form Greater Health Risk

A recent study by researchers from the University of California, Irvine, and several other universities claims that common air pollutants can combine with each other and create greater health risks than any of the individual pollutants. Jonathan Raff, “Chlorine Activation Indoors and Outdoors Via Surface-Mediated Reactions of Nitrogen Oxides with Hydrogen Chloride,” *Proceedings of the National Academy of Sciences* (2009).

The pollutants studied—gaseous hydrochloric acid (HCl) and oxides of nitrogen (NO_x)—are abundant in both indoor and outdoor air. The researchers found that absorbed nitrogen oxides can react with gaseous HCl to form nitrosyl chloride (ClNO) and Nitryl chloride (ClNO₂)—two intermediates that can react with light to create highly responsive chlorine atoms. In areas where both NO_x and HCl concentrations are generally high (such as urban coastal areas), these chemical reactions can cause ozone pollution.

[13] Chemical Exposure: Toxic Chemicals Detected in Blood of Health Care Professionals

A **recent study** by Physicians for Social Responsibility claims to have found a significant number of toxic chemicals in the blood of health care professionals in Alaska, California, Connecticut, Maine, Massachusetts, Michigan, Minnesota, New York, Oregon, and Washington. Researchers tested the blood and urine

of 12 doctors and eight nurses, two in each of the 10 states, for six chemicals or groups (62 chemicals in all). The researchers found that each participant had at least 24 individual chemicals in their bodies and two participants had 39.

The researchers also found that (i) 18 chemicals were detected in every participant; (ii) all 20 participants had at least five or six kinds of tested chemicals, and 13 had all six; (iii) all participants had bisphenol A (BPA) and some form of phthalates, polybrominated diphenol ethers (PBDEs) and PFCs; and (iv) 13 participants had dimethyl phthalate metabolites, with nine above the CDC’s 95th percentile. The six chemical groups tested for were BPA, mercury, perfluorinated compounds (PFCs), phthalates, PBDEs, and triclosan.

The study recommends that the government take immediate action to phase out persistent, bioaccumulative toxic chemicals; industries be held accountable for the safety of their chemicals and products; and the best science be used to protect people and vulnerable groups. The study also recommends that the Toxic Substances Control Act be amended to better regulate persistent, bioaccumulative, endocrine-disrupting and known or suspected carcinogenic toxicants.



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