To: Shapiro, Mike[Shapiro.Mike@epa.gov]
From: BNA Highlights
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Latest Developments

California Releases Proposed Product List for Safer Materials

Posted March 13, 2014, 4:12 P.M. ET

Children's foam sleeping mats, spray-foam insulation systems and paint strippers containing chemicals identified as potentially harmful to the public and environment made California's first draft of "priority products'' under the Safer Consumer Products Regulations.

Announced at a March 13 news conference in Sacramento, the proposed list sets in motion a process designed to encourage manufacturers to find alternative safer materials for their products.

The Department of Toxic Substances Control said children's polyurethane foam mats contain the fire retardant tris (1,3-dichloro-2-propyl) phosphate, known as TDCPP. Spray-foam insulation systems sold in hardware stores contain toluene diiscocyantes and paint strippers contain methylene chloride.

"We are not announcing a ban," Debbie Raphael, director of the Department of Toxic Substances Control, said. "We are starting a conversation with manufacturers to answer that critical question: Are the chemicals necessary?''

The final version for the priority products will be released within the year.

Ninth Circuit Upholds FWS Opinion on Water Project Threat to Delta Smelt

Posted March 13, 2014, 3:50 P.M. ET

The U.S. Court of Appeals for the Ninth Circuit on Oct. 13 upheld a 2008 biological opinion by the U.S. Fish and Wildlife Service which concluded that federal water projects jeopardized the continued existence of the delta smelt and its habitat.

In its ruling, the three judge-panel rejected a ruling by the U. S. District Court for the Eastern District of California in December 2010 that the biological opinion was arbitrary and capricious.

"We hold that the [biological opinion] sufficiently explained the harmful relation between project operations, contaminants, and delta smelt such that the Fish and Wildlife Service did not arbitrarily and capriciously conclude to a reasonable certainty that Project operations contribute to harmful contaminant-related indirect effects," the court held.

A biological opinion is a scientific document that includes recommendations on “reasonable and prudent alternatives” that will allow a species' continued survival. The delta is a source of water for millions of Californians as well as the habitat for the smelt.

At issue was the 2008 biological opinion that the Bureau of Reclamation sought from the FWS regarding the impact of the bureau's operations on the endangered delta smelt. The FWS not only concluded that the operations would harm the fish but also proposed alternatives, including reducing water exported to southern California.

The Bureau of Reclamation's Central and State water projects supply water originating in northern California to more than 20,000,000 agricultural and domestic consumers in central and southern California. The source of this water, the estuary at the confluence of the San Francisco Bay and the Sacramento-San Joaquin Delta, is also the lone habitat for the delta smelt, a threatened species under the Endangered Species Act.

Various water districts, water contractors and agricultural consumers filed the lawsuit over the biological opinion under the Administrative Procedure Act against various federal defendants, including the FWS and the Bureau of Reclamation. The district court ruling found in their favor.

The Ninth Circuit reversed the district court's ruling, upholding the 2008 biological opinion and finding in favor of the Natural Resources Defense Council, Earthjustice, the Bay Institute and the federal government.

Agriculture Committee Approves Bill to End Discharge Permits for Pesticide Spraying

Posted March 13, 2014, 3:02 P.M. ET

Farmers, ranchers, forest managers and pesticide applicators would no longer be required to obtain Clean Water Act discharge permits for pesticide spraying near and over water under legislation the House Agriculture Committee approved on a voice vote March 13.

The Reducing Regulatory Burdens Act of 2013 (H.R. 935) would eliminate the need for National Pollutant Discharge Elimination System permits for pesticide spraying near or at waters if the pesticides already are registered under the Federal Insecticide, Fungicide and Rodenticide Act.

Absent this legislation, the NPDES permit on pesticide spraying would apply to 365,000 pesticide users, including state agencies, cities, counties, mosquito control districts, pesticide applicators, farmers, ranchers, forest managers, scientists and every day citizens, according to the committee.

H.R. 935 was introduced in March 2013 by Rep. Bob Gibbs (R-Ohio), who is chairman of the House Transportation and Infrastructure Subcommittee on Water Resources and Environment. H.R. 935 was approved in October 2013 by the House Transportation and Infrastructure Committee on a voice vote .

Social Cost of Carbon Figure Poorly Quantifies Some Climate Risks, Report Says

Posted March 13, 2014, 10:40 A.M. ET

The federal government's revised estimate of the social cost of carbon is too low to adequately reflect several social and economic harms that would result from climate change, environmental groups said in a report.

The $37 per metric ton figure that federal agencies use to calculate the impact of climate change in their regulations is either missing or improperly quantifying the threats posed by increased risk of Lyme diseases, additional high-ozone days, drought, ocean acidification and other impacts, according to the report “Omitted Damages: What's Missing From the Social Cost of Carbon,” issued March 13 by the Institute for Policy Integrity, Environmental Defense Fund and Natural Resources Defense Council.

“The public picks up the tab for the types of extreme weather events that come more frequently with a changing climate—homes ruined, property values disintegrated, relief funding,” Gernot Wagner, a senior economist at the Environmental Defense Fund, said in a statement. “But the government is not fully assessing climate risks in its decision-making.”

The report recommends that federal agencies continue to use the $37 per metric ton of carbon dioxide figure while they reconsider the factors they use to determine the costs of climate change.

In November 2013, federal agencies set the social cost of carbon at $37 per metric ton in 2007 dollars for 2015. That is up from the $24 per ton figure established in 2010. The White House said the increase was the result of better data input into the models. The social cost of carbon is used to calculate impacts such as the net effects on damaged property, agriculture and human health from extreme weather linked to climate change for each metric ton of carbon dioxide emissions.

The Institute for Policy Integrity, Environmental Defense Fund and Natural Resources Defense Council have launched the website http://costofcarbon.org/ to collect academic research on the social cost of carbon figure. The environmental groups argue that the revised social cost of carbon figure is too low to reflect the actual harms caused by climate change.

Climate Change Poses Significant National Security Threat, Military Experts Say

Posted March 13, 2014, 4:26 P.M. ET

Failure to address and adapt to the risk of climate change will pose significant national security threats around the world, military experts said March 13.

Speaking at an event organized by the Bicameral Task Force on Climate Change, military experts said the effects of climate change were already being felt on U.S. military installations and had the potential to exacerbate existing conflicts by causing droughts, food price increases and forced migrations, among other things.

“There is an impact from climate change on military operations and national security, and I believe it needs to be recognized,” retired Brig. Gen. Gerald Galloway of the U.S. Army said. “When communities and installations are unaware of their vulnerability, the results can be disastrous.”

Galloway, one of three military experts speaking at the panel, echoed the conclusions of the Defense Department in its Quadrennial Defense Review. That review found climate change could increase the frequency, scale and complexity of future defense missions, while also potentially compromising the ability of domestic defense sites to support training missions.

Hastings Asks Interior Official to Produce Unredacted Stream Buffer Report

Posted March 13, 2014, 1:52 P.M. ET

The House Natural Resources Committee chairman in a March 13 letter called on Interior Deputy Inspector General Mary Kendall to produce an unredacted copy of an inspector general report and related documents on the development of a stream protection rule that the mining industry and congressional Republicans oppose.

The report, released in December, said coal mining regulators directed contractors to alter criteria used in the stream protection rule's environmental impact statement, which estimated coal production and employment impacts, after seeing job losses would be high under the initial criteria.

During a December House Natural Resources Committee hearing on the report, Republicans said the report proved that actions by the Obama administration were likely politically motivated. However, the report and several related documents were highly redacted, which an inspector general staffer said at the hearing was, in part, because the documents are privileged.

In his letter, Chairman Doc Hastings (R-Wash.) said this was the department's “last chance” to produce the unredacted documents, and set a deadline of noon March 17, before he chooses whether to compel production of the materials. He added that the Interior Department's ability to review and restrict what information the inspector general shares with the committee “is counterproductive and undermines not only the OIG's role in fostering integrity and accountability within the Department but also its relationship with Congress.”

The House Natural Resources Committee approved a motion Jan. 16 to allow Hastings to issue subpoenas for information on development of the stream protection rule, which would restrict where coal mining waste can be dumped.

Boxer Says Health Impact Study on Keystone in National Interest

Posted March 13, 2014, 11:37 A.M. ET

Sen. Barbara Boxer (D-Calif.), joined by the National Nurses United, repeated calls for the State Department to conduct an immediate analysis of the health impacts of Keystone XL, saying it is in the national interest to do so.

Boxer and Sen. Sheldon Whitehouse (D-R.I.) sent a letter to Secretary of State John Kerry on Feb. 26 calling for a health impact study before making a final decision on the project.

Boxer said she speaks "constantly" with President Barack Obama and Kerry about the Keystone XL project, but received no indication of whether they will ultimately approve the project.

"They are not going to tell me what they're going to do," Boxer said.

House Energy and Commerce to Consider Natural Gas Export Legislation, Upton Says

Posted March 13, 2014, 4:08 P.M. ET

Legislation that would expedite the approval of applications to export liquefied natural gas will be the subject of a House Energy and Commerce Committee hearing, Chairman Fred Upton (R-Mich.) told Bloomberg BNA March 13.

The Domestic Prosperity and Global Freedom Act (H.R. 6), by Rep. Cory Gardner (R-Colo.), would require the Energy Department to approve 24 pending applications to export LNG to non-free trade agreement countries.

Upton said the legislation will be considered after the congressional recess that ends the week of March 24.

Separately, Lisa Murkowski (R-Alaska), the top Republican on the Senate Energy and Natural Resources Committee, said in an interview that she and committee Chairwoman Mary Landrieu (D-La.) also have been in discussions about holding a hearing on natural gas exports.

Court Says Applying State Implementation Plan Deadline Retroactively Would Be Unfair

Posted March 13, 2014, 4:07 P.M. ET

A federal district court said March 11 that it would be unfair to require states to retroactively meet a deadline for developing plans to clean up particulate matter in light of a court decision and Environmental Protection Agency rules that gave seemingly contradictory direction about which deadline is applicable (WildEarth Guardians v. McCarthy, D. Colo., No. 13-1275, order issued 3/11/14).

The U.S. District Court for the District of Colorado sided with the EPA and dismissed a case filed by WildEarth Guardians.

Under a 2007 rule, the EPA required states to submit implementation plans that detail how they intend to clean up fine particulate matter based on the 1997 national ambient air quality standards. The deadline for doing so was three years after the agency designated areas as not meeting the standards. The agency made the designations Dec. 14, 2009, which made the plans due Dec. 14, 2012.

However, complicating the matter was a 2013 decision by the U.S. Court of Appeals for the District of Columbia Circuit, which said the 2007 rule should not have been issued under subpart 1 of part D of title I of the Clean Air Act, which requires plans to be submitted within three years. Instead, the court said the EPA should have implemented the standards through the more rigorous subpart 4, one provision of which requires plans to be submitted within 18 months (Natural Resources Defense Council v. EPA, D.C. Cir., No. 08-1250, 1/4/13; 04 DEN A-6, 1/7/13).

Wyoming Supreme Court Says State Has Burden of Justifying Nondisclosure of Fracking Chemicals

Posted March 13, 2014, 4:10 P.M. ET

The Wyoming Supreme Court has ruled the state has a higher burden of proof in determining whether to apply a "trade secrets" exemption to the disclosure of chemical compounds used in hydraulic fracturing (Powder River Basin Resource Council v. Wyoming Oil and Gas Conservation Comm'n, Wyo. Sup. Ct., No. 2014-WY-37, 3/12/14).

Ruling in a case brought by four groups against the Wyoming Oil and Gas Conservation Commission, which

regulates oil and gas development in the state, the court held that the commission supervisor and the courts should apply the definition of "trade secrets" as provided by the Freedom of Information Act.

The commission has been applying a broader definition of trade secrets, which resulted in more withholding of chemical information from public disclosure, the groups alleged.

"We're pleased the court recognized that the oil and gas commission has to fully and rationally justify its use of trade secrets exemptions before it can hide fracking chemical information from public review," said Marilyn Ham, board member with the Powder River Basin Resource Council, one of four groups that sued the commission.

Wyoming Gov. Matt Mead (R), who serves on the commission, said he believes Wyoming's "first-in-the-nation disclosure requirements are well done as evidenced by the fact that several states followed Wyoming's lead in this area."

Judge Denies BNSF Railway Motion to Dismiss Citizen Lawsuit on Coal Discharges

Posted March 13, 2014, 3:40 P.M. ET

A federal judge in Seattle has declined to dismiss a citizen lawsuit against BNSF Railway Co. for allegedly contaminating U.S. waterways with coal, instead dismissing some of the railroad company's arguments as "a game of semantics" and "absurd" (Sierra Club v. BNSF Railway, W.D. Wash., No. 13-cv-0967, 3/12/14).

The plaintiffs, six environmental advocacy groups, assert that as BNSF trains hauling coal from the Powder River Basin in Montana and Wyoming pass through Washington state, coal drops through holes in the bottoms and sides of rail cars or is ejected from the tops of the open cars and ends up in adjacent waterways in violation of the Clean Water Act.

The lawsuit is part of a coordinated effort by the groups, tribal governments and grass-roots organizations to stop three proposed coal export facilities in the Northwest that cumulatively would more than match the total of 107 million tons of coal exported from the U.S. in 2011.

BNSF said in its motion to dismiss that plaintiffs' notice of intent to bring the citizen suit was inadequate. District Judge John C. Coughenour's order conducts a point-by-point analysis of the elements required in a notice of intent and concludes plaintiffs'' notice is adequate. It provided "lengthy descriptions of the nature of the violations, the specific pollutants allegedly discharged, and ways to determine when and where the discharges occurred," he wrote.

In a companion case in the Eastern District of Washington, a federal judge denied Jan. 2 a BNSF motion to dismiss an essentially identical lawsuit brought by the Sierra Club and other environmental groups. BNSF spokesman Steve Forsberg told Bloomberg BNA in a March 13 e-mail, "BNSF continues to believe the lawsuit is without Merit."

West Virginia Firm Submits First Phase of Tank Removal Plan

Posted March 13, 2014, 11:34 A.M. ET

Freedom Industries Inc., the company responsible for the chemical spill that fouled drinking water supplies for 300,000 West Virginians, has submitted the first phase of its aboveground storage tank decommission plan to the state.

Approved by the West Virginia Department of Environmental Protection, the plan unveiled March 12 details the order that activities workers will use to begin removal of aboveground storage tanks at the Charleston, W.Va., site, including demolition of the tank that leaked an estimated 10,000 gallons of 4-methylcyclohexane methanol into the Elk River.

On Jan. 24, 15 days after the spill was documented, Gov. Earl Ray Tomblin (D) ordered Freedom Industries to begin the process of dismantling, removing and properly disposing of all of its aboveground storage tanks, as well as associated piping and machinery, at the Elk River site by March 15.

To comply with the governor's order, Freedom Industries has begun the process of decommissioning and cleaning its tanks for demolition, state officials said.

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