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SENATORS TO HIGHLIGHT REDUCED HIGHWAY FUNDS IN ETHANOL BATTLE

Turning up the heat on a simmering debate over a proposed nationwide ethanol mandate, California's U.S. senators plan soon to argue that the mandate would create ethanol subsidies that essentially raid the federal Highway Trust Fund of billions of dollars, which are crucial to state highway improvements. Supported by New York's senators, Sens. Dianne Feinstein and Barbara Boxer are expected to lay out estimates that the fund could lose approximately \$7 billion between 2004 and 2012 if an ethanol-in-gasoline mandate is implemented, a source said.

The "Renewable Fuels Standard" — more accurately described as an ethanol mandate — proposed within broader federal energy legislation requires refiners nationwide to begin in 2004 to blend ethanol into gasoline, up

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Charges hard to prove

PIVOTAL DECISION SPURS EX-CALTRANS WORKER TO SUE PESTICIDE FIRMS

In a lawsuit bolstered by a pivotal 2001 appellate court ruling, a former transportation department worker is charging that more than 20 pesticide companies are liable for a number of alleged medical ailments. An appellate court ruling last year paved the way for the lawsuit because it found that pesticide manufacturers were not shielded from liability by federal preemption rules.

The former California Department of Transportation (Caltrans) landscape worker is alleging that severe medical ailments were caused by his exposure to pesticides. Dow Chemical and Monsanto are defendants in the case. As a result of exposure to toxic chemicals used during the worker's 29 years of spraying pesticides on the

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RACE TO BUILD MEXICONG TERMINALS FUELS RISING ANGST OVER POLLUTION

With several companies racing to win approval of construction of natural gas (NG) terminals in Baja California, southern California stakeholders say it is only a matter of time before the Mexico border is home to numerous power plants importing electricity into the U.S. Stakeholders fear the shift could bring massive amounts of pollution into southern California with little regulatory or legal recourse.

Late last year when Mexico and U.S. regulators approved two controversial Mexicali NG power plants under construction to provide power to California, a handful of oil companies began quickly pursuing the creation of NG terminals nearby to fuel the plants. Sempra Energy and InterGen Corp., the companies behind the two approved power plants, plan to use NG from the U.S. transported to Mexico via a controversial pipeline project soon to be

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ARB UNVEILS CRACKDOWN ON STATIONARY DIESEL-FUELED ENGINES

The air board has unveiled a two-part proposal to crack down on stationary diesel engine particulate matter (PM) emissions, focusing on new and in-use engines greater than 50 horsepower. Key portions of the proposal are expected to draw fierce opposition from several major industry groups, including engine manufacturers. Agribusiness is currently proposed to be exempt from the new air board measures; however, staff has indicated that special rules to reduce emissions from farm equipment are imminent.

A workshop on the proposed Air Resources Board staff airborne toxic control measures (ATCMs) was scheduled to be held April 4 in Sacramento. *A copy of the proposals are available at InsideEPA.com. See page 4 for details.* The ATCMs have been three years in the making, after ARB staff first kicked off its diesel risk

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reduction plan in late 1999. The ATCMs are not expected to be considered by the board for approval until next year. Subsequent air district rules based upon the ATCMs are not likely to take effect until 2004 or 2005, according to an ARB source. Air districts are allowed under the ATCMs to draw up their own, more stringent emission standards.

For new diesel engines greater than 50 horsepower (hp), ARB staff is proposing a 0.01 grams per brake-horsepower-hour (g/bhp-hr) PM standard. New agriculture-related engines are proposed to be exempt from the standard, while ARB staff works with the industry on a compromise rule. New stationary emergency standby diesel-fueled engines are proposed to meet either a 0.15 g/bhp-hr PM standard, or meet an alternate ARB off-road compression-ignition engine regulation, whichever is more stringent.

The proposed ATCM for in-use emergency standby diesel engines, as well as "prime" engines, calls for an 85% reduction in PM emissions, and no increase in non-methane hydrocarbons, nitrogen oxides or carbon monoxide emissions beyond 10% of baseline levels. Compliance for emergency standby engines can alternately be achieved by emitting less than or equal to 0.15 g/bhp-hr of PM. For prime engines (those that are not emergency standby engines), the alternative compliance option calls for a 0.01 g/bhp-hr PM standard.

The in-use diesel engine ATCM calls for the following compliance schedule: all pre-1990 model year engines must be in compliance no later than July 1, 2005; all post-1990 to pre-1996 model year engines must comply by July 1, 2006; and all post-96 engines must comply by July 1, 2007.

Proposed to be exempt from the in-use ATCM are: prime engines under 50 hp; engines always operated in a remote location; engines operated fewer than 50 hours per year; and those operators or owners who cannot afford new engines or retrofit technology. No exemptions would be granted beyond Jan. 1, 2012, under the in-use ATCM. Owners or operators of more than four engines are allowed to submit to the relevant air district an alternative compliance schedule.

While the agriculture industry is not included in the two ATCMs, ARB staff plans to soon propose a crackdown on a variety of agricultural equipment that emits significant amounts of PM. Agribusiness representatives have complained to ARB that much of their equipment is too old to be retrofitted with PM-control technology, and that, more importantly, most farmers cannot afford to clean up their engines. "Staff still doesn't get some of the restraints that sometime make our job more difficult," said an agribusiness source. Forcing equipment makers to meet stringent standards will only increase costs on the industry, the source added. Agriculture representatives said ARB staff recently admitted it had overestimated the industry's contribution to PM emissions, based primarily on miscalculating the amount of farmland that is being developed for urban uses.

ARB and U.S. EPA officials have said for years that the agriculture industry must take some responsibility to reduce pollution from its various equipment, being the only major industry that continues to receive a special exemption from such control measures.

OEHHA PROPOSES TO LIST HERBICIDE DIURON AS CANCEROUS UNDER PROP. 65

After nearly two years, health hazard assessment staff has decided to advance a proposal to list the popular herbicide diuron as cancerous under Proposition 65. The action is expected to be challenged by manufacturers and users of the popular weed killer, because the listing carries with it obligations by users to warn the public and workers of exposure. A public comment period on the latest proposal ends April 29.

The Office of Environmental Health Hazard Assessment initially proposed to list diuron under Prop. 65 on June 2, 2000. Since then, staff collected and reviewed comments from outside stakeholders, including companies that manufacture and use the herbicide. OEHHA is proposing the listing based on a 1997 U.S. EPA review that concludes diuron is a "known/likely" carcinogen. This method falls under Prop. 65's "authoritative bodies" listing option, which means that OEHHA can automatically propose a listing when an authoritative body — such as EPA or the International Agency for Research on Cancer — has concluded a certain chemical is cancerous.

Griffin LLC, a major manufacturer of the herbicide, argued shortly after the 2000 listing proposal that OEHHA should delay a decision until EPA completes newer carcinogenicity studies on diuron, predicted by late 2002 or early 2003. A Griffin LLC representative argued that EPA's categorization procedures are likely to change in this time frame. EPA is no longer using the "known/likely to cause cancer" category for diuron, and OEHHA should wait for the new format, according to the Griffin LLC source.

But OEHHA staffers "determined that they could take action now and they weren't waiting for any other work from U.S. EPA," said an OEHHA source. DuPont is also a major manufacturer of diuron and is also expected to raise objections to the listing.

Late last year, OEHHA staff decided that diuron is not a reproductive toxicant under Prop. 65, despite proposing in 1999 to list it as such.

Diuron is widely used in the state as a weed killer and general herbicide for alfalfa, asparagus, cotton, citrus, fruit orchards, sugarcane, wheat and vineyards.

AUTOMAKERS FAIL TO SLOW VEHICLE CO2 EMISSION-REDUCTION BILL

Despite a litany of objections by automobile manufacturers and industry groups, the Senate Environmental Quality Committee this week passed a bill requiring the air board to draft first-ever regulations aimed at reducing carbon dioxide (CO₂) emissions in passenger vehicles. The bill's author, Assemblywoman Fran Pavley (D-Agoura Hills), will likely amend the bill to more clearly define the phrase "cost effective," and make some minor technical changes.

The committee April 1 passed AB 1058 by a 5-2 partisan vote, with Republican Sens. Tom McClintock (Thousand Oaks) and Bruce McPherson (Santa Cruz) voting no on the measure.

Pavley recently crafted significant amendments to the bill, watering it down in an attempt to garner support from Davis Administration officials, who are unlikely to support a measure that is vehemently opposed by the auto industry, according to some sources (*see March 29 issue, p1*). Pavley pointed to those amendments at the committee meeting to try to alleviate some of the opposition. "I've amended this bill to allow for alternative methods of compliance," said Pavley. She also noted that the new amendments extend by two years (until 2005) the date by which the Air Resources Board must draft the regulations and that they could take effect on vehicles no sooner than 2008.

The bill is necessary because California produces a large amount of CO₂ emissions, and "we have to do our fair share as the [world's] fifth largest economy," Pavley said.

"The stakes we're talking about . . . are very, very high," said AB 1058 supporter Tim Carmichael of the Coalition for Clean Air, alluding to the potential effects of climate change. "It is high time for us to do something about it. . . . It is prudent, it is sound, it is reasonable to take steps . . . to avert a potential catastrophe in the future."

But opponents of AB 1058 cited the vagueness of the bill as a major source of concern. "It is impossible to read this bill and predict what actions and recommendations" ARB will make, said Phil Eisenberg of the Alliance of Automobile Manufacturers. Aspects of the potential ARB regulations could include an increased gas tax and surcharges on more heavily polluting vehicles, which would make driving more expensive and hurt both consumers and manufacturers, Eisenberg said.

Other opponents of the bill objected to the "command-and-control" nature of the bill, arguing it is inappropriate to go that route, "especially when the benefits are not quantifiable," said Jeff Sickenger, lobbyist for the California Manufacturers & Technology Association.

But co-author Sen. Sheila Kuehl (D-Santa Monica) said that though the Legislature can easily quantify costs, it historically has "an enormous problem measuring the benefits" of proposed bills. Driving costs may go up, but the bill will benefit Californians' health, she said. Kuehl also noted that the bill provides for ample flexibility and that as ARB drafts regulations stakeholder comments will be considered.

ACTIVISTS SAY DTSC EQUITY POLICY SKIRTS CUMULATIVE IMPACT, LAND USE

Some activists are grouching that a draft toxics department environmental justice (EJ) policy largely sidesteps the crucial issues of cumulative pollution impact and land-use planning. A department source responded that cross-media policy issues pertaining to EJ will likely be deferred to Cal/EPA.

A group of environmentalists and community activists March 28 met with four Department of Toxic Substances Control officials to discuss the draft EJ policy. "A lot of the conversation" dealt with "land-use planning and cumulative impacts," said an environmental source. *A copy of the draft EJ policy is available at InsideEPA.com. See page 4 for details.*

DTSC "needs to get involved in the land-use planning decision process and provide local governments with information" about facilities and risk impacts, said the source.

But industry representatives have long opposed state agency interference with local government land-use decisions, arguing that local officials are in the best position to gauge the benefits and impacts of proposed developments within their jurisdiction.

Environmentalists counter that they are not arguing "against local governments making land-use decisions," the activist said. "What we're saying is that they should make well-informed decisions." To make those well-informed decisions, local governments need help from DTSC and Cal/EPA, according to the source.

DTSC does plan to involve itself in land-use decisions, though its influence will likely be limited. Land use is not something that DTSC has authority over, said Jim Marxen, DTSC's acting deputy director. "The intent here is to work with local agencies when they have questions about land use."

DTSC should also issue clear guidelines for how officials will assess cumulative impacts in permitting decisions, according to the environmental source. "DTSC, when they're looking at EJ, they have to look more broadly at the issue" and assess "what other air polluters there are" in the community, said the source. DTSC should look beyond the facilities and activities that they regulate when they conduct EJ reviews, the source added.

Marxen said a well-coordinated, cross-media approach is necessary; however, Cal/EPA has yet to craft any type of policy or protocol to assess and react to cumulative impacts. "It's an issue that does need to be defined . . . we're

looking at Cal/EPA to spearhead” those efforts, he said. When it comes to cross-media EJ issues, “a lot of [Cal/EPA] departments are thinking of similar things.”

While at least one activist has requested a public workshop to discuss DTSC’s draft EJ policy, Marxen indicated that an agency-wide public meeting could be the most effective method of addressing cross-media topics. It may be best to “combine public meetings to talk about a unifying policy,” he said.

Cal/EPA Secretary Winston Hickox stressed the importance of cross-media EJ efforts in a March 28 memo sent to all Cal/EPA employees. He said staffers must “continue to seek opportunities to implement environmental justice principles, especially those with a concerted, cross-media approach to ensure the integration of environmental justice into all programs, policies, and activities within our Boards, Departments, and Office.” *A copy of the memo is available at InsideEPA.com. See page 4 for details.*

Activists are also calling on DTSC to strengthen some of the language in the draft EJ policy, specifically requesting that the recurring phrase “to the extent feasible” be stricken from the policy. “Everything we do is to the ‘extent feasible,’” said the environmentalist. “We fully expect them not to come up with proposals that are impossible to achieve.”

CRITICS SAY ETHANOL MANDATE DEPLETES HIGHWAY FUND . . . begins on page one

to 5 billion gallons by 2012. The proposal is expected to be debated on the Senate floor next week.

A political battle has erupted between Midwest lawmakers — who support the ethanol mandate — and the New York and California senators. The Midwest representatives argue the ethanol mandate is a boon to America’s farmers and a logical way to move away from the gasoline oxygenate methyl tertiary butyl ether (MTBE). Iowa Sen. Charles Grassley (R) this week further fueled the debate by saying he plans to propose an amendment that would force California to implement an MTBE ban beginning Jan. 1, 2003. Gov. Gray Davis recently ordered that the state’s planned MTBE ban be delayed from Jan. 1, 2003, to Jan. 1, 2004, based on fears that shortages of ethanol and problems associated with its transport to California would likely cause gasoline shortages and price spikes. Grassley’s proposal, if he indeed follows through with his plan, is not expected to succeed based on constitutionality issues and other grounds. Several sources said Grassley’s comments amount to posturing or grandstanding.

The California and New York senators are asking their colleagues to defeat the ethanol mandate, based on arguments similar to those made by Davis about gasoline shortages and price spikes (*see March 29 issue, p1*). The senators plan to bolster their arguments by pointing out that subsidies to farmers who produce ethanol deplete the federal Highway Trust Fund, and that an ethanol mandate will severely reduce that fund by increasing the amount of ethanol subject to subsidies. The subsidies are generally seen through a reduction in taxes on gasoline that contains ethanol, versus full taxes paid on gasoline that contains MTBE. The reduction in MTBE-blended gasoline and an increase in ethanol-gasoline produces a loss of taxes that are collected and funneled to the federal Highway Trust Fund.

A Cal/EPA source said that if California is required to blend about 900 million gallons of ethanol into gasoline in the first year of the proposed ethanol mandate, it amounts to about a \$450-million reduction in payments to the federal Highway Trust Fund. “Clearly, the state would get a considerable amount less back from the federal government to build and maintain roads,” the source said.

Sen. James Inhofe (R-OK) has drafted an amendment that would require the current ethanol subsidy to decrease as more ethanol is required to be blended under the mandate’s schedule.

Background Documents For This Issue

Subscribers to InsideEPA.com have access to hundreds of documents, as well as a searchable archive of back issues of *Inside Cal/EPA*. The following are some of the documents available from this issue of *Inside Cal/EPA*. For a full list of documents, go to the latest issue of *Inside Cal/EPA* on InsideEPA.com. For more information about InsideEPA.com, call 1-800-424-9068.

Documents available from this issue of *Inside Cal/EPA*:

- California Air Officials Unveil Stationary Diesel Engine Crackdown Proposal (epa2002_1616)
- California Scientists Propose Cancer Listing For Herbicide Diuron (epa2002_1617)
- California Toxics Officials Unveil Environmental Justice Plan (epa2002_1618)
- Cal/EPA Secretary Issues Memo Encouraging Cross-Media Equity Plans (epa2002_1619)
- California Scientists Advance Risk Thresholds For Key Chemicals (epa2002_1620)
- California Air Officials Modify Distributed Generation Regulation (epa2002_1621)
- California Air Officials Propose Clean Air Product Labeling Program (epa2002_1622)
- Former California State Worker Sues 20 Pesticide Companies Over Alleged Ailments (epa2002_1623)
- L.A. Air District Relaxes Compost Cleanup Rule (epa2002_1624)

OEHHA MAINTAINS TIGHT THRESHOLDS FOR KEY CHEMICALS, DELAYS ARSENIC DECISION

Health hazard assessment officials are proposing to maintain stringent Proposition 65 risk thresholds for seven key chemicals — benzene, cadmium, DEHP, lead, lead acetate, lead phosphate and lead subacetate — despite industry lobbying to relax some of the numbers. Staff, however, is continuing to review its no-observable-effect level (NOEL) for arsenic, based on emerging scientific studies.

The thresholds are important under Prop. 65 to enable companies to show their products or activities do not emit amounts of the chemicals that could either cause cancer or birth defects. If they can make such showings, they are exempt from the law's extensive public-warning requirements. NOELs and no-significant-risk levels (NSRLs) are known as "safe harbor" numbers. The thresholds are also intended to aid businesses that cannot spend the time or money to determine the exposure risks for the chemicals.

In February, Office of Environmental Health Hazard Assessment staff announced it was delaying the adoption of NSRLs for DEHP, lead, lead acetate, lead phosphate and lead subacetate, to review stakeholder comments, some of which raised "complex technical issues." Because the review turned up no reasons to relax or tighten the numbers, staff last week proposed the adoption of the following NSRLs for those chemicals, measured in micrograms per day: DEHP (310); lead (15-oral); lead acetate (23-oral); lead phosphate (58-oral); and lead subacetate (41-oral). The Lead Industries Association, Inc., has opposed the various NSRLs for lead compounds, arguing they are too stringent.

The following NOELs are proposed to be adopted, measured in micrograms per day: benzene (24-oral, 49-inhalation), cadmium (4.1). The oil industry has argued that the proposed NOEL for benzene is too stringent.

OEHHA staff has yet to decide whether to stick with its proposal to set an arsenic NOEL at 220, said a source. *A copy of the latest OEHHA staff proposal is available at InsideEPA.com. See page 4 for details.*

OEHHA is accepting comments on its proposal until April 16.

HEAVY INDUSTRY OPPOSITION FORCES WITHDRAWAL OF EQUITY GRANT BILL

A bill that would establish an ambitious grant program for Cal/EPA environmental justice (EJ) activities was withdrawn from committee consideration this week due to heavy industry opposition. Unless significant changes are made, the bill will likely die before it gets to the Assembly floor, said a legislative source.

Assemblywoman Judy Chu's (D-Alhambra) AB 2312 requires Cal/EPA to deposit 10% of all revenue collected from fines and penalties into an "Environmental Justice Fund" proposed by the bill. The money in the fund would then be awarded to grassroots organizations that work to solve local environmental problems. Environmentalists have praised the bill as a way of getting tools and resources to under-represented community groups to help them gain access to the environmental decision-making process.

The bill was scheduled to be heard April 1 by the Assembly Natural Resources Committee, but was withdrawn at the request of the committee. Committee members instructed the author to work with opponents to seek resolution of their differences.

"Essentially [AB 2312] wasn't ready for prime time," said a legislative source. "From an initial policy perspective," the bill is "innovative" and "has a lot of merit," but the 10% penalty revenue diversion element represents a significant hurdle to its passage. Industry's main objection to the bill is that if 10% of Cal/EPA's penalty revenue goes into the EJ grant fund, other programs will suffer. It appears doubtful that industry's objections can be adequately addressed without striking the 10% revenue diversion provision from the bill, but taking such action would essentially destroy the thrust of the measure, said the legislative source.

Industry groups argue that when violators are assessed fines, the money collected generally is used for a program or service related to the violation. A nexus exists between the penalty and what that penalty money gets used for, said a source with the California Chamber of Commerce (Chamber). For instance, if a fine is issued to a discharger for illegal dumping, the fine money would be used to either clean up that site or a similar site. Chu's bill would, to an extent, eliminate that nexus and divert funds away from cleanup projects, according to the Chamber source.

Some industry groups would still oppose the measure even if there were extra money available to finance the grant program. The bill is written so broadly that state funds could conceivably be used to fund grassroots organization's litigation and advocacy efforts, said a source with the California Council for Environmental & Economic Balance (CCEEB). "We don't think state money should be used to fund a special interest group's litigation efforts," said the source. If there was extra money it would be better spent on monitoring cumulative impacts in certain communities so that Cal/EPA would know where to focus its efforts, said the CCEEB source.

Both the Chamber and CCEEB sources said they are willing to work with Chu on the bill, but could not point to any potential amendments that would lead them to support the legislation.

SOUTH COAST STAFF RECOMMENDS EASING COMPOST RULE TO REDUCE COSTS

Responding to heavy opposition to a proposed rule to reduce toxic emissions from compost facilities, South Coast air district staff is recommending to water down the regulation to reduce compliance costs. The South Coast air district was scheduled April 5 to hold a pre-hearing on its controversial Proposed Rule (PR) 1133. The rule infuriated composters when it was first released, with green waste recyclers claiming the composting industry would dry up due to outrageously high compliance costs.

Staff's estimated compliance costs for PR 1133 triggered a district rule that states that whenever the cost-effectiveness of a regulation exceeds \$13,500 per ton of volatile organic compound (VOC) pollution reduced, a report must be presented to the board 90 days prior to the rule's adoption. That report will be presented at the scheduled April 5 pre-hearing. *A copy of the report is available at InsideEPA.com. See page 4 for details.*

The district's PR 1133 specifically targets VOC and ammonia emissions from compost and compost-related operations. The initial draft of the rule suggested that all composting facilities be enclosed to capture toxic emissions before they are released into the air. But organics recyclers argued that the costs to enclose their facilities would be so high that composters would sooner close down than comply with the rule. Environmentalists believed the rule was misguided in targeting composters — who recycle green waste and help the state in its diversion efforts — and ignoring landfills that produce far more harmful emissions with none of the recycling benefits.

Recommendations made by the district staff in the report are split into three categories: co-composting facilities, green waste facilities and chipping and grinding operations.

Staff advises that existing co-composting facilities be exempt from enclosure requirements, but recommends they be required to control visible particulate matter (PM)₁₀ emissions "over the property line during operations and from compost piles," the report states. New facilities handling more than 100,000 tons of waste per year, however, would have to enclose the active phase of the composting process and vent the emissions to a control system, such as biofilters.

District staff is proposing minimal requirements for green waste operations, recognizing the environmental benefits of those facilities. "If costs [of compliance] were sufficiently high and the private operators chose not to continue operations, green waste composting could not be used to the extent it is used today as a waste diversion option," the report states. Staff is recommending one-time registration, annual reporting requirements and controls to prevent visible PM₁₀ emissions over the property line and during operations of compost piles.

Chipping and grinding facilities would also be required to implement controls for PM₁₀ emissions and would face restrictions on holding times for green material piles, according to the report.

Staffers are also recommending that the district seek "special funding from the state legislature . . . to implement state-of-the-art composting methods." They will also continue to work with the California Integrated Waste Management Board and the Air Resources Board to seek additional funding for compost-related emission controls.

PESTICIDE COMPANIES TARGETED IN BOLD LAWSUIT . . . begins on page one

sides of highways and roads, the plaintiff "has been hospitalized and undergone surgery and other treatments and will require organ transplantation as medically necessary and lifesaving treatment," according to an amended complaint. *A copy of the amended complaint is available at InsideEPA.com. See page 4 for details.*

The worker's lawyer, Raphael Metzger, says that an August 2001 Los Angeles Court of Appeals ruling in a separate lawsuit of which he is the plaintiffs' lawyer opened the door for the Caltrans lawsuit. A trial date for that lawsuit — *Arnold, et al. v. Dow Chemical Co., et al.* — has been set for Oct. 28. In that case, the Arnold family claims their two children are gravely ill due to exposure to pesticides sprayed in their home and yard. The plaintiffs — Chad and Michelle Arnold — claim that pesticides used in and around their home caused their unborn child to suffer a stroke in the womb. As a result the child suffers from mental retardation and partial paralysis. The married couple's elder child, who was an infant when the spraying took place, has pancreatitis and hepatitis, according to the suit.

The appellate court ruled in the Arnold case that liability is not preempted by Federal Insecticide, Fungicide & Rodenticide Act (FIFRA) provisions, thereby allowing the case to proceed to trial. However, the judge also noted that the plaintiffs had yet to prove that the pesticides are what caused the children's health problems. Regardless of the ruling in the Arnold case, the mere fact that the case has been allowed to go to court could open the door for similar cases to be tried, such as the Caltrans worker case.

Pesticide manufacturers have, in the past, been protected by the FIFRA preemption provisions. Historically, rule of law stated that U.S. EPA only approves pesticides after rigorous testing determined that the benefits of the chemical outweigh the negatives, said Jim Wright, an attorney who is not involved in the case, but specializes in pesticide regulatory law. Because pesticides are federally approved and labeled, the manufacturers were generally found to be exempt from liability claims. But, "over the last five years or so, the doctrine of federal preemption has been chipped away," said Wright.

"FIFRA preemption has been a major impediment to the assertion of claims by people who have been injured

by pesticides,” Metzger said. “One cannot sue a pesticide manufacturer for injuries or losses where the claim is based upon the labeling or the packaging.” But the plaintiffs are not arguing that the label is inadequate. “Our claim is that [the pesticide manufacturers] produced a defective product. . . . The defect is that it causes damage that would not be reasonably expected,” said Metzger. “My clients expected the pesticides to kill their bugs, not their children.”

Calls to Dow Chemical’s attorneys were not returned by press time.

Legally establishing a direct link between toxic chemical exposure and certain illnesses is very difficult, said Wright, especially in the Arnold and Caltrans cases, where the symptoms are chronic rather than acute. Chronic symptoms are ailments that tend to develop due to long periods of exposure to low levels of toxic substances. Acute symptoms occur immediately following exposure, such as if a rash were to develop soon after a toxic material was touched. It is far less complicated to prove causation in cases involving acute symptoms because the ailments develop so quickly following exposure that there is greater certainty that the toxic chemical is indeed the source of the illness, said Wright.

Chronic illnesses could stem from a variety of sources, according to Wright. It could be a genetic disease, or the result of secondhand smoke, he said. To prove causation in cases involving chronic symptoms, plaintiff attorneys “typically try and . . . find a series of symptoms that are very unique,” Wright said.

The use of animal testing data is also common in cases involving chronic illnesses, said Joe Hollingsworth, an expert in pesticide litigation who is not involved in the case. Plaintiff lawyers will try to prove to the court that the same pesticides that allegedly caused illnesses in their clients have been proven to cause similar illnesses in animals. Hollingsworth contends that this argument is oftentimes ineffective in court because “it is not based on reliable scientific data.” It is difficult to persuade the court to legally recognize human health extrapolations from animal testing data, said Hollingsworth. Lawyers typically find that there are “immense hurdles” in even introducing the evidence.

EPA last year withdrew its approval for home use of Dursban, one of the pesticides used around the Arnold home, based on animal testing data. Metzger has stated that he will use the results of animal testing to “show the harmful effects of the pesticides at trial.”

SENATE PANEL ADVANCES BILLS EXPANDING CIWMB GRANT PROGRAMS

Two bills that expand waste board grant programs this week passed the Senate Environmental Quality Committee. One measure broadens the scope of the board’s tire recycling program and the other increases funds the waste board is authorized to grant to clean up trash illegally dumped on farm and ranch property.

SB 1346 (Sen. Sheila Kuehl, D-Santa Monica) broadens the 1989 California Tire Recycling Act to require the California Integrated Waste Management Board to include grants to local agencies for partial funding for public works projects that use rubberized asphalt concrete (RAC) in roads and highways. The bill will help further divert tires from disposal sites as well as reduce traffic noise, according to Kuehl. Using RAC in public works projects is environmentally preferable to using regular concrete, but it is also more expensive; a grant program is therefore necessary to make up the difference in costs, said Kuehl.

Some minor changes to SB 1346 are likely as Kuehl will work with CIWMB to resolve technical problems. The bill passed 5-1 with only Sen. Tom McClintock (R-Thousand Oaks) voting no.

SB 1328 (Sen. Wesley Chesbro, D-Arcata) also passed 5-1, with McClintock again casting the only no vote. The bill increases the amount of funds granted under CIWMB’s Farm & Ranch Solid Waste Clean-up & Abatement Program, which helps innocent parties clean up trash that is illegally dumped on their property.

The bill proposes to raise the current limit CIWMB can grant farmers for any single cleanup or abatement program from \$10,000 to \$50,000. It would also raise the current cap on annual spending per jurisdiction from \$50,000 to \$200,000. However, Chesbro’s measure will not change the overall \$1-million annual statewide limit for funding disbursement established by a 1997 law.

Chesbro will likely amend the bill to allow local agencies to spend up to 5% of the grant money on administrative costs, raising the 3% cap on those costs currently proposed.

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AIR OFFICIALS SAY STATES' ADOPTION OF ARB DIESEL RULE CREATES *DE FACTO* NATIONAL STANDARD

A nationwide organization of state and local air officials says the adoption by 11 states of California's 2005 heavy-duty diesel engine rule amounts to a *de facto* national regulation more stringent than federal requirements. The air officials say the states make up 40% of the diesel engine market, which will provide notable emission reductions beginning in 2005.

The State & Territorial Air Pollution Program Administrators & Association of Local Air Pollution Control Officials (STAPPA/ALAPCO) consider the collaborative work a major achievement, and may signal the beginning of similar efforts in which a group of states voluntarily follows California's lead, a STAPPA/ALAPCO source said. However, state officials said last year that they expected up to 20 states to adopt the Air Resources Board regulation.

"This marks the first time ever that states from regions across the country have joined together in such a multi-state regulatory initiative, said Bill Becker, STAPPA/ALAPCO's executive director, in a statement. "To the extent that this effort dissuades diesel engine [makers] from manufacturing separate, dirtier engines for the rest of the country, the nation could reap the benefits of over 800,000 tons of additional reductions in emissions of nitrogen oxides over the lifetime of the engines — the equivalent of removing nearly 30 million cars from the road nationwide. This initiative will serve as a model for future cooperative state efforts to tackle tough air pollution problems that pose serious threats to public health and the environment."

STAPPA/ALAPCO last year began touting the ARB not-to-exceed emission test standards for heavy-duty diesel engines, in an effort to convince other states to adopt an identical rule. Eleven states have adopted the rule, and more are preparing to follow, according to the source. The states that have adopted ARB's rule are: Delaware, the District of Columbia, Georgia, Maine, Maryland, Massachusetts, New Jersey, New York, North Carolina, Rhode Island and Texas.

DOJ ARGUES FEDERAL STATUTE PREEMPTS STATE TOXICS LABELING LAW

The U.S. Department of Justice (DOJ) is arguing that federally required health labels preempt the warnings required under the state's toxic labeling law, Proposition 65. The argument marks the first time DOJ has asserted that federal law preempts state labeling laws enacted before 1997, when Congress passed a law establishing federal preeminence.

DOJ outlines its argument in a March 22 *amicus* brief, arguing that labeling requirements issued by the Food & Drug Administration (FDA) for over-the-counter smoking cessation devices preempt the warnings required under Prop. 65. Under Prop. 65, manufacturers are required to label products that contain certain chemicals listed as either carcinogens or reproductive toxins.

In the case, *Paul A. Dowhal v. SmithKline Beecham Consumer Healthcare, et al.*, a private individual sued several drug companies, including the company now known as GlaxoSmithKline Consumer Healthcare, L.P., for not using pregnancy warnings on smoking-cessation products that the plaintiff maintains are required by Prop. 65.

In an appeal now pending before a California appeals court, Dowhal challenges a state superior court holding that federal law trumped the state-labeling requirement for nicotine replacement products. Dowhal's suit argued that Prop. 65 required the drug companies to use a broader warning than the one mandated by FDA requirements.

State Attorney General Bill Lockyer (D) in December 2001 filed an *amicus* brief supporting Dowhal, arguing that FDA could not block the drug companies from using the pregnancy warnings. But DOJ argues that federal law preempts state law where compliance with both is impossible, or where state law poses an obstacle to accomplishing the full purposes and objectives of Congress as expressed in a statute.

"State law must be applied here in a way that preserves the latitude necessary for the federal regulatory scheme to operate as Congress intended," DOJ argues in the brief. "Applying Proposition 65 to require defendants to use Dowhal's proposed warning labeling would thwart the attainment of the goals Congress sought to achieve under" the Food, Drug & Cosmetic Act (FDCA).

FDA had repeatedly warned the companies that adopting Dowhal's proposed warning — the one he claimed was required by Prop. 65 — could misbrand products, which would be a violation of the FDCA.

DOJ's brief represents the first time the government has interpreted a 1997 FDA Modernization Act (FDAMA) provision on over-the-counter preemption to cover Prop. 65 and other state laws passed before 1997, according to a food and drug lawyer. FDAMA includes a provision that expressly preempts any state requirements for over-the-

counter products that are different from FDA regulations. That provision, however, also includes an exception from such federal preemption for state laws adopted by public initiative or referendum enacted prior to Sept. 1, 1997, including Prop. 65.

Countering arguments offered by the attorney general and Dowhal that the FDAMA provision exempts Prop. 65 from pre-emption, DOJ maintains that just because the provision granting express preemption does not apply to Prop. 65, conflict pre-emption still applies. In other words, DOJ argues that although state laws passed prior to 1997 are not automatically pre-empted, federal law still trumps state law if there is a conflict between the two laws and the state law obstructs the goal of the federal legislation.

L.A. ASBESTOS CASE MAY EXPAND INSURANCE CLEANUP COVERAGE

A recent Los Angeles trial court decision could set a national precedent for environmental insurance coverage by holding insurers responsible for both present and future damages caused by asbestos exposure, even when claims have yet to be filed, attorneys involved in the case say.

Los Angeles County Superior Court held Feb. 26 that numerous insurance companies were required to provide coverage for present and future damages stemming from asbestos exposure, based on the court's analysis of state statutes and a new bankruptcy code promulgated to deal with asbestos liability claims.

In *Fuller-Austin Insulation Co. v. Fireman's Fund Insurance Co., et al.*, the court determined that a provision of California law requiring that damages may be awarded "for detriment resulting after the commencement thereof [of an action], or certain to result in the future," the insurance companies were responsible to pay both pending and future asbestos claims, even if specific claims had yet to be filed. "The right to establish and recover future damages in a contract or tort action is a fundamental tenet of California law," the court says.

At issue is the liability of Fuller-Austin, a Texas insulation company that installed and later removed asbestos from buildings in several states from the 1950s until the 1970s. The company filed for bankruptcy, and sought indemnification from several insurance policies it had from 1944 until 1985. Because the company is undergoing bankruptcy proceedings, the court used a new provision of the Bankruptcy Code, Section 524(g), in order to determine what the company's liability is and would be. The provision allows courts to determine present and future liability and set up a trust fund to pay all present and future claims.

The court found that in order to have a sufficient fund to pay out all claims and a provision of California law calling for aggregate asbestos claims, Fuller-Austin could get indemnification for present and future claims for damages if expert witnesses could prove such claims during the damages phase of the trial. "Fuller-Austin will be entitled to present evidence to a jury regarding its aggregate asbestos liability — i.e., the present liability of Fuller-Austin to pay pending and future asbestos claims," the court held.

According to an attorney representing the company, defendants in other cases will be able to use the *Fuller-Austin* decision as a basis for getting full benefits of insurance coverage for environmental liability today for costs that may be incurred in the future, especially where there is a long latency period between exposure and the development of symptoms. The source says that all states have aggregate liability provisions as part of their state codes and defendants can use such provisions as a basis for obtaining recovery for future costs, such as future harm caused by present groundwater contamination.

While the bankruptcy proceeding served as the vehicle to determine Fuller-Austin's liability, in other cases a consent decree with U.S. EPA or an administrative order on consent could be used as the basis for proving a party's liability to recover for aggregate damages, the source says. The source adds that such an approach is already used in personal injury cases throughout the country where a defendant is liable for present and future medical claims based on a present injury. "It's not a novel concept," the source says.

An insurance company attorney familiar with the case agrees that, if upheld, the *Fuller-Austin* decision could fundamentally change insurance law, including environmental insurance in California and throughout the country. The decision "would radically change California insurance law," the source says, and "could have an effect on virtually every insurance case" in the state.

But the source argues that the decision will ultimately be overturned on appeal because it misinterprets the law. According to the source, an insurance company is not required to indemnify a defendant until claims have been filed. Using the bankruptcy trust as an example, the source says that while a trust is required in asbestos claims, a claim is required to be filed before the insurer must provide funding, which did not happen in this case.

The source adds that if *Fuller-Austin* is upheld it could have a devastating effect on insurance companies, especially in asbestos recovery cases. Policyholder's attorneys "want insurance policies to be blank checks" without providing claims, the source says, leaving insurers with insufficient funds left over when legitimate claims are eventually filed.

An insurance company representative says they will appeal the decision, with a motion possibly coming as early as the end of April.

GAS MARKETERS SAY RENEWABLE FUELS STANDARD NOT 'DONE DEAL'

When the U.S. Senate broke for spring recess and suspended debate on the first comprehensive energy legislation the country has seen in a decade, gasoline-station lobbyists were stressing that a provision contained in the bill that would require up to 5 billion gallons of ethanol or other renewable fuels to be used annually by 2012 is far from a "done deal."

The Society of Independent Gasoline Marketers of America (SIGMA) stated last week that several factors remain that put the fate of the Senate energy bill (S.517) renewable-fuels mandate (RFS) — which SIGMA opposes — in jeopardy.

While being tightlipped on which lawmakers it has been in contact with, SIGMA says it is working with several senators on amendments that would either strike the RFS from the bill altogether or significantly alter it. In recent weeks there has been talk of a number of amendments from both Republicans and Democrats which would eliminate or change the RFS proposal.

Democratic Sens. Dianne Feinstein and Barbara Boxer drafted an amendment that would eliminate a provision in the RFS that protects refiners from liability if a fuel they deem renewable turns out to be toxic in the future. Feinstein, a staunch RFS opponent, also recently publicly brandished a General Accounting Office report predicting potentially dire fuel shortages and steep price spikes if the RFS, which also calls for a four-year phaseout of methyl tertiary butyl ether, is enacted.

Republican Sens. James Inhofe (OK) and Bob Smith (NH) were expected to offer an amendment that would eliminate the current 5.3-cents-per-gallon ethanol tax incentive.

SIGMA said in its statement that the RFS could be removed from S.517 if the House and Senate work out the differences between their two versions of energy legislation during a conference committee. SIGMA opposes the RFS because it says the ethanol industry is not nearly prepared to meet the demand such a mandate would create. Currently, the industry produces about 1.7-billion gallons of ethanol a year and it would have to increase production to 5-billion gallons 10 years from now, SIGMA believes.

The Senate is scheduled to reconvene on April 9.

SIGMA officials expressed a not-too-veiled hope that the entire energy bill may be scrapped because of controversial partisan provisions such as the Republican-driven effort to drill for oil in the Alaska National Wildlife Refuge (ANWR) and the recently defeated bipartisan drive to dramatically increase fleet average fuel economies for trucks and automobiles. "From a marketers' perspective, worse things could happen," SIGMA said.

An overall energy bill without ANWR may not get enough Republican votes and Democrats are unlikely to vote for an energy package that includes ANWR drilling, said SIGMA. The association was encouraged by the defeat of an amendment offered by Sen. Jon Kyl (R-AZ), which would have weakened a mandate for 10% of electricity to be generated through renewable fuels such as wind and solar power by 2020. Kyl wanted to place such a decision on individual states rather than the federal government. He failed to get three versions of his amendment passed.

OIL COMPANIES LINE UP FOR MEXICO POWER DEALS . . . begins on page one

fully approved by the federal government. Once a terminal is built in Mexico, the power plants are expected to use NG from the terminals, and use the pipeline to sell and move NG to southern California.

Imperial Valley air officials are concerned that an abundance of NG on the Mexico side of the California border will encourage more power plants to be built in the area. Mexico's pollution controls are not nearly as stringent as California's, which means the plants would send considerable pollution into Imperial Valley and the greater San Diego region.

Shell Gas & Power last week became the fourth company to pursue a liquefied NG platform in Baja California to provide fuel to the expected surge in power plants along the border, as well as sell additional NG to southern California facilities. Currently, in addition to Shell, Marathon Oil Co., Phillips Petroleum Co., and Sempra Energy have separately begun plans to build NG terminals in the area. ChevronTexaco and BP may soon join the race as well, an oil company source said.

Mexico officials cannot permit any terminal plans until regulations governing liquefied NG are in place, an Imperial Valley source said. Mexico is expected to release regulations by the end of the month; however, southern California officials may not have any opportunity to comment on the rules because Mexico does not have the same public participation requirements imposed on U.S. regulators.

"We might have to live with what they put out," the oil industry source said.

Not all of the proposed terminals will be approved, but stakeholders expect two to three projects will be completed. The proposed Shell terminal alone is capable of fueling 15 mid-sized power plants, according to the oil industry source. Imperial Valley stakeholders say they have heard some companies are working with Mexico officials to ensure their projects are approved, and they hope southern California officials will also be included in talks.

County officials hope the competition for terminal project approval heats up enough that some companies voluntarily offer to use the best available control technology at the terminals to strengthen their proposals, a source said.

DTSC, DHS DEVELOP PROTOCOL TO RESPOND TO CHEMICAL TERRORISM ATTACKS

The toxics department is working with the Department of Health Services (DHS) to develop a protocol that will help guide state authorities in the event of terrorism attacks that involve chemical releases.

The Department of Toxics Substances Control and DHS are mainly tasked with developing a standard procedure to analyze chemical samples, said a DTSC source. Samples would first be checked for radioactivity and anthrax at DHS's microbial diseases lab. Other potentially toxic chemical substances would be analyzed by both DTSC and DHS, the source said.

It is unclear when the two departments will complete the protocol — there is no specific timetable for this project, said a DHS source. When completed, the plan will be reviewed by the governor's Office of Emergency Services, which is the lead agency on all terrorism-related issues, according to the DHS source.

ARB PROPOSES VOLUNTARY CLEAN AIR LABELING PROGRAM

Air Resources Board staff plans to draft a voluntary clean air labeling program that would offer products with very low or no emissions an ARB-registered logo as a marketing aid. Staff plans to draft the program as part of its Clean Air Plan, scheduled to be approved later this year.

The clean air labeling program is intended to give manufacturers a financial incentive to develop and utilize ultra-low and zero-emission technology that goes beyond regulatory requirements. "Labeling would help consumers identify the products or processes that cause the least damage to the environment," according to ARB staff. "This could potentially shift the market toward products that minimize environmental impacts. Manufacturers could choose to develop a 'next generation' technology or project that qualifies" for a clean air

product label.

The program would apply to regulated stationary, area, and mobile sources, such as motor vehicles, fuels, architectural coatings, combustion sources, consumer products, and vapor recovery equipment.

BAYKEEPER REACHES \$3-MILLION SETTLEMENT WITH DOW OVER BAY POLLUTION

Dow Chemical must pay \$3 million to help fund San Francisco Bay-area protection and restoration projects while cleaning up groundwater contamination near one of its facilities, under the terms of an April 3 settlement with the environmental group San Francisco BayKeeper, activists said.

San Francisco BayKeeper sued Dow Chemical in 1997 for allegedly discharging contaminated groundwater into a slough that flows past the company's Pittsburg facility. In accordance with the settlement agreement, Dow has implemented bioremediation cleanup technology at the Pittsburg site. The technology stimulates naturally occurring bacteria to degrade groundwater contaminants to less harmful byproducts, such as salt and methane gas. Dow is required to exhibit a 90% contaminant-destruction rate and ensure that water reaching the slough meets discharge standards by 2005.

"This is a long overdue win for the bay," said BayKeeper member Jonathan Kaplan. "This deal transforms a contaminated industrial facility into a demonstration site for a state-of-the-art cleanup technology — and pays big dividends for Bay Area wetlands restoration."

The \$3 million in settlement money will be split as follows: \$1.75 million to the Coastal Conservancy through Ducks Unlimited, Inc., to win state matching funds for acquiring wetlands at Bel Marin Keys; \$500,000 to Ducks Unlimited to be used for restoring wetlands in Sonoma, Solano and Napa counties; and \$750,000 to a bay protection fund to be administered by BayKeeper.

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ENERGY COMPANIES, ACTIVISTS BATTLE OVER DISTRIBUTED GENERATION REG

Competing energy companies and environmentalists are urging air board staff to make further changes to its distributed generation (DG) certification regulation, indicating the importance of what many believe will become a booming source of energy in the coming years. Though the air board regulation was approved late last year, staff recently released modifications ordered by the board chairman. Last week, a 15-day comment period on the March 11 modifications ended.

At issue is the Air Resources Board's "Distributed Generation Certification Program and Guidance for the Permitting of Electrical Generation Technologies." The proposal sets new emission limits for nitrogen oxide (NOx) and carbon monoxide from new DG units beginning in 2003 and a tighter standard in 2007. The proposal also includes permitting guidance to air districts for smaller DG units. *The amended rule is available at InsideEPA.com. See page 4 for details.* It is unclear when ARB staff plans to move forward with final approval of the regulation.

DG is power that is produced at smaller units near the source of use and is considered a supplement to grid-supplied electricity. DG includes small engines and microturbines powered by natural gas, fuel cells, solar and wind technology. Some DG units are fueled by gasoline and diesel.

ARB Chairman Alan Lloyd late last year directed staff to determine whether exemptions contained in the regulation for portable and emergency backup generators could be manipulated to allow stationary DG units to skirt the rule. For example, critics said that the current exemption for portable generators only requires that units be moved once annually to qualify. They also speculated that an owner of a stationary DG unit could merely install wheels to the unit to qualify for the exemption. Staff was directed to amend the rule to beef up enforcement mechanisms to ensure that emergency backup generators exempt from the rule are actually used in emergencies and not merely as a way for businesses to produce their own cheaper energy. Most stakeholders agree that such enforcement assurance is very difficult to provide.

Environmentalists and companies that produce cleaner-burning alternative DG turbines and generators are calling on ARB staff to further tighten the regulation by ensuring dirtier generators are not allowed to receive certification. For example, Capstone Turbine Corp. says that staff failed in its follow-up modifications to ensure that DG owners or manufacturers cannot circumvent the new regulations by passing off their units as portable or emergency generators.

But competing DG companies, such as IR Energy Systems of North Carolina, argue that the modifications fail to provide a fair regulation that includes reasonable emission standards. IR Energy Systems argues that the 2007 emission standards impose "severe stringency on premixed natural gas combustion systems," according to a March 27 letter from the company to ARB staff. The standard exceeds current best available control technology, the company asserts. Staff should reevaluate the emission standard during a 2005 technology review built into the rule and loosen it at that point, the company suggests.

Environmentalists are extremely fearful that the technology review will serve to gut the rule's integrity, resulting in a plethora of DG units being certified that pollute the air beyond levels now intended by the board. The American Lung Association (ALA), Natural Resources Defense Council (NRDC) and Physicians for Social Responsibility (PSR) are calling on ARB to tighten the regulation before it is sent to the Office of Administrative Law for final approval. "Based on the experience of technology reviews related to the Zero-Emission Vehicle (ZEV) [regulation], we urge the board and the staff to avoid the kind of erosion that occurred as a result of three technology reviews," states a March 27 letter from ALA and PSR to the staff. "The ZEV program has been greatly eroded by aggressive industry actions over the past six years. We urge the board and the staff to be sure they hold to the 2007 deadline for achieving central power station equivalency based on natural gas, combined-cycle efficiency, and resist any attempt by industry to slow that progress."

NRDC is even more critical of the technology review concept, commenting that "with only the initial and final [emission] standard levels established, the technology review becomes, not a check-in on advancing technology and markets, but rather an almost automatic delay in the final standards. Presumably, if the technology in the market has not shown adequate advancement by 2005 toward the 2007 standard, the deadline will be extended. This approach creates little incentive to aggressively develop units that will comply."

Lloyd also asked staff to potentially further relax some standards for DG units that use "combined heat and power" systems. The combination systems could be allowed to meet less stringent pollution limits because they are more energy efficient and recycle waste heat to help conserve other energy used in buildings.

Environmentalists are urging staff to enhance this modified area of the regulation, as well as provide more credits and incentives for the purchase and implementation of the cleanest types of DG. "Short of such action, it may be necessary to seek statutory direction to improve the credits and incentives to advance solar, fuel cell and other 'good DG' for future implementation," ALA and PSR wrote.