

Environmental Health & Safety Observations

California Pushes Ahead With Green Chemistry Initiative

By John O'Loughlin

The State of California is moving ahead with its green chemistry initiative, formally known as the California Safer Consumer Products Regulation. Under the program, manufacturers or importers of designated consumer products will be required to evaluate possible alternatives to ingredients that the State has identified as potentially harmful to human health or the environment. Although the Department of Toxic Substances Control (DTSC) has issued two sets of proposed regulations in the last few months and the program could become effective this summer, the full impact of the law will not be known until DTSC decides which consumer products will be on the first short list of products subject to the law.

Background

The regulation includes four basic components. First, DTSC must identify a list of "Candidate Chemicals," drawn mostly from existing lists of state, federal, and international laws and regulations focusing on substances with environmental or toxicological risks, such as carcinogens, reproductive toxins, neurotoxins, endocrine disruptors, or other pollutants. The current list includes approximately 1,200 substances. DTSC may add new chemicals to the list, and companies can petition to have substances removed from the list.

Second, DTSC must identify "Priority Products" that contain the Candidate Chemicals. While the list of 1,200 Candidate Chemicals is not particularly controversial, the process for selecting the Priority Products is of great concern, since the first phase of the initiative can include no more than five consumer products, to be selected from a list of approximately 230 consumer products initially identified. DTSC must issue a work plan to develop the initial list of Priority Products within one year of the effective date of the regulations and must finalize the Priority Products list within three years. DTSC's decision to list a product as a Priority Product is to be based on an evaluation of the potential adverse impacts, exposure risk, and waste and end-of-life effects associated with the product. Once the list of five Priority Products is developed, DTSC must develop a new work plan to assess other consumer products for potential listing as Priority Products, resulting in a rolling product listing process. In short, producers of the first five consumer products to be designated as Priority Products will act as guinea pigs for other consumer products that will become subject to the law in later years.

In This Issue

- 1 California Pushes Ahead With Green Chemistry Initiative
- 3 Drought-Stricken Texas Explores Stricter Water-Use Rules for Fracking
- 4 EPA Draft Vapor Intrusion Guidance Resurfaces
- 5 Nominees to Head EPA, DOE, and DOI Enjoy (Mostly) Smooth Sailing

The third part of the process is largely handled by the private sector. Once a Priority Product is determined to contain one of the Candidate Chemicals, the offending substance in the product is henceforth referred to as a Chemical of Concern (COC). The “Responsible Entity” (usually the manufacturer, but potentially this could mean any party placing a Priority Product into commerce in California) must begin the process of evaluating ways to remove the COC from the product, evaluate possible alternative ingredients to replace the COC, or opt to halt distribution of the product in the state.

The “Alternatives Assessment” process has two phases: the preliminary alternatives analysis (Preliminary AA) and the final alternatives analysis (Final AA). In the Preliminary AA, the Responsible Entity must evaluate possible existing alternatives to the COC, taking into consideration performance, feasibility, and legal requirements. If no alternative exists that is less hazardous than the existing COC, the Responsible Entity must notify consumers of the presence of the COC in the product (similar to California’s existing Proposition 65 law) and must begin research into the development of a safer alternative ingredient. If the Responsible Entity identifies possible alternative substances, it must notify DTSC and complete the Final AA process, which includes full evaluation of product performance, cost effectiveness, and environmental and health impacts of using the alternative substances. The Responsible Entity must develop a work plan for implementing the alternative, subject to DTSC review and approval.

The fourth and final phase of the regulatory process can include so-called regulatory responses by DTSC, such as requiring consumer notification of the presence of a COC or an approved alternative, restrictions on use, administrative controls, requirements for processing and disposal at the end of the product’s useful life, and requirements for additional research and development into safer chemicals.

Enforcement Options

For anyone who has experience with California’s existing Proposition 65, DTSC’s enforcement

powers will appear familiar. DTSC plans to enforce the regulation primarily through publication of noncompliant Responsible Entities and products on the Internet. In addition, DTSC can also initiate enforcement actions under the California Health and Safety Code, which can include criminal and civil penalties of up to \$25,000 per violation. In many ways, the Safer Consumer Products Regulation is designed to work like Prop 65 by forcing manufacturers of consumer products to eliminate potentially hazardous chemicals from their products or be forced to inform consumers of the presence of the hazard. In this case, however, the more particular notice requirement is likely to stigmatize products if competing products are available that do not contain a COC.

What’s Next?

The most recent draft of the proposed final regulation was published with a short comment period, suggesting that DTSC intends to issue a final regulation as early as July 2013. Since the list of approximately 1,200 chemicals is reasonably well established and will be finalized along with the regulation, the DTSC and industry will be focusing in the coming months on the question of which products are to be selected for the first short list of five proposed Priority Products, which should be published by DTSC within six months of the regulation becoming effective. Once the Priority Products list is issued, Responsible Entities will have 60 days to notify DTSC that their covered product contains a COC and six months to conduct the Preliminary AA. A Responsible Entity then will have one year from the date it receives notice from DTSC that its Preliminary AA is compliant to conduct the Final AA.

Impact on Industry

Many companies that manufacture products for sale in the California market can take a wait-and-see approach if they are lucky enough not to have their products included in the initial Priority Products list. For those that manufacture any of the five initial Priority Products, however, the process of conducting alternative assessments could prove costly and difficult. Those manufacturers also will face commercial decisions flowing from this

regulatory scheme. For example, if alternatives are identified that result in inferior product performance or increased production costs, manufacturers could decide to produce one version of the product for the California market and continue with the existing formulation for other states or the rest of the world. There is precedent for this approach. In the 1990s, California was ahead of the federal Environmental Protection Agency in implementing limits on volatile organic compounds (VOCs) in consumer products, such as deodorants, antiperspirants, hairsprays, and cleaning products. At the time, some companies switched formulations for the California market or simply stopped distributing in the California market until the federal regulations went into effect or until new alternatives could be identified. These days, manufacturers that distribute through nationwide retailers may discover that they do not have the option of market selection and may be required by their customers to meet California's standards globally.

Drought-Stricken Texas Explores Stricter Water-Use Rules for Fracking

By Matthew Morton

As Texas suffers through a seemingly endless drought that has strained aquifers and affected much of the state, concern is growing regarding the increased use of scarce freshwater for oil and gas production. Texas lawmakers recently have responded by proposing several bills aimed at imposing more stringent regulation of the use of freshwater in drilling and fracking. If enacted, it is likely that the costs associated with using freshwater for oil and gas production will increase.

The ultimate impact of drilling and fracking on water demand in Texas is subject to some debate. As of 2011, fracking accounted for less than 1 percent of the state's overall water usage (as compared with 56 percent for agricultural purposes); however, withdrawal impacts generally are more pronounced in the areas where drilling and fracking is concentrated. For example, in parts of the Eagle Ford Formation

in south Texas, water used for fracking and drilling accounted for more than 50 percent of total water use. High usage rates are amplified by the fact that most drilling and fracking activity is concentrated in arid areas of the state that are most affected by the drought: the Panhandle region as well as south and west portions of Texas. Moreover, freshwater withdrawals for fracking clearly are increasing: up 125 percent from 2008 to 2011 and expected to continually rise for approximately a decade before leveling off.

The proposed laws attempt to address the use of freshwater in several different manners. H.B. 3595, by Rep. Lon Burnam (D-Fort Worth), calls for a 20-cent-per-1,000-gallon fee per well on freshwater used in a hydraulic fracturing job. Money raised by the law would be directed to a fund that is to be used to help pay for future water reconstruction projects, part of a proposed multi-decade statewide water plan. Two other bills focus on flowback water treatment or recycling. H.B. 3537, proposed by Rep. Roland Gutierrez (D-San Antonio), would direct the Railroad Commission of Texas (which oversees the drilling industry) to create rules that would require recycling or reuse of flowback and produced water from an oil or gas well on which fracking has been conducted.² Likewise, H.B. 2992, which was introduced by Rep. Tracy King (D-Batesville), would prohibit companies from injecting produced and flowback water into the state's injection wells unless the water cannot be treated to standards allowable for reuse or safe discharge. Republican lawmakers have also taken an interest in the issue, introducing bills that would subject all process water wells used for fracking purposes to local groundwater district permitting requirements³ and mandate that fracking well operators require process water well operators to comply with limitations established by local groundwater districts, such as limits on how much water can be pumped.⁴

The prospects for bills of this type becoming law in Texas are unclear; however, given that some of the most oil-and-gas-rich parts of Texas are also the driest, we expect continued legislative and regulatory scrutiny of the volumes of freshwater used in drilling

and fracking activities. Moreover, Texas appears committed to taking action to address its water shortages. For example, on March 27, the Texas House approved legislation that would use \$2 billion to start funding water projects in the state. H.B. 4, by state Rep. Allan Ritter (R-Nederland), aims to create a water bank that would offer loans for projects like new water reservoirs, pipelines, and conservation projects. For more on the state's efforts to address its water supply crunch, see our article in the last edition of EH&S Observations.⁵

EPA Draft Vapor Intrusion Guidance Resurfaces

By Thomas Goslin

Eleven years after first issuing draft guidance on methods of addressing indoor vapor intrusion (VI) from contaminated soil and groundwater, the US Environmental Protection Agency (EPA) in April reissued its much-anticipated revised draft VI guidance for public notice and comment. The revised draft guidance, issued in two documents – one addressing VI generally and one specifically addressing VI from leaking underground storage tanks – seeks to provide EPA and property owners with a framework for assessing and addressing VI risk. While it has taken EPA more than a decade to reissue its draft guidance, property owners should not make the mistake of assuming this means VI is a low priority for the agency. EPA and state environmental regulators already are assessing VI risk at sites where known contamination exists, even at those that have already been through an approved cleanup process. As such, owners of property where there is a high risk of VI should begin to consider, if they have not already, whether and how to undertake VI assessment and mitigation VI consistent with the revised EPA guidance.

VI can occur when there is contaminated soil or groundwater located beneath an overlying building. Certain contaminants emit vapors that may rise through soils and into indoor air spaces, where they can pose both short- and long-term safety risks. In the short term, a buildup of vapor in an enclosed structure can create risk of explosion, hazardous exposure

levels, or aesthetic problems (e.g., odors). Typically, however, the chemical concentration levels are low. In these cases, there is a concern that VI may pose an unacceptable risk of chronic health effects due to long-term exposure to these low contaminant levels.

EPA's draft VI guidance provides step-by-step recommendations for identifying, assessing, and mitigating short- and long-term risk associated with VI in both commercial and residential buildings. The guidance documents are technical in nature and total nearly 300 pages combined. In general, though, the guidance recommends that a detailed VI investigation, including both indoor and subsurface sampling, take place when available information suggests that volatile chemicals may be present in soil and groundwater beneath an existing or proposed structure.

For property owners with known or suspected contamination beneath existing or proposed structures, it will be important to understand the VI guidance, once finalized, to determine what steps, if any, might be necessary to assess VI risk. This is true for at least two reasons. First, EPA (or concerned state regulators) unilaterally may determine that a VI risk assessment is necessary if certain conditions exist, raising the prospect of regulatory action, even at locations where contamination previously had been addressed to the satisfaction of the regulator. In fact, EPA has announced that it plans to assess VI risk through the Superfund five-year review process, where EPA evaluates the implementation and performance of an existing remedy to determine whether it remains protective of human health and the environment. Because many Superfund consent decrees contain "re-opener" clauses that allow EPA or the relevant state agency to impose new remedies if previously unknown conditions or information is identified, there is concern that reexamination of VI risk at sites with consent decrees in place could result in new investigative or remedial requirements, and possibly litigation. This "re-opener" risk is greatest at those sites where a remedy was approved that allowed elevated concentrations of volatile contaminants to remain in the ground based on the theory that there was little risk of people coming into contact with contaminated soil or groundwater. While it may

remain true that there is little risk of people coming into contact with contaminated soil or groundwater, EPA or a state agency may be able to set aside an approved remedy if it determines that there is an unacceptable risk of people coming into contact with the vapors emitted from the contaminants left in place. This can potentially give rise to significant unanticipated remediation costs and delay development on brownfields sites where risk-based remedies that did not address VI (which means most of them) were approved.

Second, to the extent that property owners are subject to litigation alleging personal injuries from VI, the VI guidance may serve as a benchmark against which property owners will be measured. Plaintiffs' claims may be buoyed if a property-owner defendant fails to follow EPA's guidance on VI risk assessments and mitigation. That said, the guidance makes clear that addressing VI is highly site-specific, suggesting that plaintiffs will need to demonstrate much more than failure to follow VI guidance to be successful.

In addition, the VI guidance states that there may be situations where a property owner or developer may wish to implement mitigation or control measures for VI, even though only limited evidence of VI exists. As an example of such situations, the guidance identifies new construction in an area near known subsurface contamination. This guidance has concerned some, as it suggests that EPA is recommending VI mitigation for new construction in areas where VI risk has not been established. That said, it is clear that the guidance recommends conducting a detailed VI investigation when vapor-forming chemicals are known to exist in the subsurface, so new building developers adhering to the VI guidance presumably will have the results from such investigation to inform any decision on the need for VI mitigation in building design.

Finally, it is likely that the VI guidance will serve as an updated reference point in the context of conducting environmental due diligence on a property or business. Where the potential for VI exists, sellers may need to either demonstrate that they have complied with EPA guidance on investigating and remediating VI, or be able to explain why they have

not. Moreover, since VI assessment and mitigation costs can be substantial, both parties to a transaction would be wise to understand the VI risk associated with the underlying property, and what additional assessment or mitigation may be required, before finalizing the sale agreement.

While the EPA draft VI guidance is just that – draft guidance – it is important for property owners and potential purchasers to be familiar with its recommendations. EPA spent over a decade updating and refining its earlier VI guidance, and though it is likely that additional changes will be made before the guidance is finalized, it is just as likely that the final guidance will look quite similar to the draft just released. Moreover, because the legal regime with respect to VI is still emerging, guidance from the federal EPA is likely to carry substantial weight. As such, it would be prudent for those with VI risk exposure to study closely EPA's draft guidance and submit comments as appropriate. Comments on the guidance will be accepted through May 24 at <http://www.regulations.gov> under Docket ID No. EPA-HQ-RCRA-2002-0033-0090.

Nominees to Head EPA, DOE, and DOI Enjoy (Mostly) Smooth Sailing

By Thomas Goslin

President Obama's nominees to head the Environmental Protection Agency (EPA) and two other key environmental-related agencies – the Department of the Interior (DOI) and the Department of Energy (DOE) – have faced relatively little resistance as they have moved their way through the nomination process. In fact, Sally Jewell, nominated to run DOI, was confirmed by the Senate in April with the support of 87 senators, representing a display of bipartisan agreement practically unseen in Washington these days.

Ernest Moniz, nominated to run DOE, so far also has received overwhelming bipartisan support. In April, the Senate Energy and Natural Resources Committee voted to approve his nomination by a vote of 21 to 1. The only vote against his nomination

came from Republican Senator Tim Scott from South Carolina, who stated that he was not satisfied with the nominee's answers to questions concerning Moniz's commitment to a DOE-proposed facility in South Carolina that would make mixed-oxide (MOX) fuel from surplus weapons-grade plutonium. Senator Scott and fellow South Carolina Republican Senator Lindsay Graham support the construction of the MOX facility in their home state, mostly for economic development reasons. Senator Graham went so far as to put a hold on Moniz's nomination until DOE gives an explicit commitment to build the MOX plant in South Carolina, even while commending Moniz as a "highly qualified candidate." Such are the ways of Washington. Despite this delay, there is no reason to believe that Ernest Moniz will not soon be sworn in as the next Secretary of Energy.

Gina McCarthy, the President's nominee to head EPA, has experienced a slightly more turbulent path to confirmation, though she too is expected to be confirmed in the near future. Early last month, the Senate Environment and Public Works Committee held a hearing on her nomination that turned into an airing of grievances against the EPA, with mostly Republican senators complaining of unanswered letters and overly burdensome regulation. Notably, few raised any issues concerning the nominee, but the EPA has become a political punching bag, and the McCarthy nomination has provided an opportunity for EPA opponents to take their shots. The Senate committee is scheduled to hold a vote on the nomination on May 8; however, the Republican committee members recently requested that Chairwoman Barbara Boxer (D-CA) delay the vote until EPA officials provide answers to several

outstanding questions raised by senators during the hearing. Currently, it is unclear whether the committee confirmation vote will take place as scheduled. In any event, Senator Roy Blunt (R-MO) has placed a hold on the nomination until EPA releases a study of a flood project in his state, so even if the committee votes to approve McCarthy as the next EPA Administrator (as it is widely expected to do), the full Senate will not vote on the nomination until Senator Blunt removes the hold.

The President hopes to have his full team in place before Congress takes its July Fourth recess. Whether that will happen remains to be seen, but in any event, we fully expect that Gina McCarthy and Ernest Moniz will be confirmed by the full Senate when their nominations come to the floor. For more information about the nominees' backgrounds, see our article in the most recent Climate Change Update.⁶

1 <http://legiscan.com/TX/text/HB3595/id/780341>

2 <http://legiscan.com/TX/text/HB3537/id/780233>

3 S.B 873, by state Sen. Glenn Hegar (R-Katy), <http://www.capitol.state.tx.us/Search/DocViewer.aspx?K2DocKey=odbc%3a%2f%2fTLO%2fTLO.dbo.vwCurrBillDocs%2f83%2fR%2fS%2fB%2f00873%2f1%2fB%40TloCurrBillDocs&QueryText=SB+873&HighlightType=1>

4 H.B. 3317 filed by state Rep. James Keffer (R-Eastland), <http://www.capitol.state.tx.us/tlodocs/83R/billtext/pdf/HB03317I.pdf#navpanes=0>

5 http://www.weil.com/files/upload/Weil_Alert_Environmental_Observations_February_2013.pdf

6 http://www.weil.com/files/upload/Climate_Change_Update_%20March%202013.pdf

Environmental, Health & Safety Observations is published by the Environmental practice group of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com.

If you have questions concerning the contents of this issue, or would like more information about Weil's Environmental practice and various specialty areas, please speak to your regular contact at Weil, to the editorial board, or to the contributing authors:

Editorial Board:

David Berz	Bio Page	david.berz@weil.com	+1 202 682 7190
Annemargaret Connolly	Bio Page	annemargaret.connolly@weil.com	+1 202 682 7037
David Hird	Bio Page	david.hird@weil.com	+1 202 682 7175
John O'Loughlin	Bio Page	john.oloughlin@weil.com	+1 202 682 7050

Contributing Authors:

Thomas Goslin	Bio Page	thomas.goslin@weil.com	+1 202 682 7508
Matthew Morton	Bio Page	matthew.morton@weil.com	+1 202 682 7053
John O'Loughlin	Bio Page	john.oloughlin@weil.com	+1 202 682 7050

©2013 Weil, Gotshal & Manges LLP. All rights reserved. Quotation with attribution is permitted. This publication provides general information and should not be used or taken as legal advice for specific situations that depends on the evaluation of precise factual circumstances. The views expressed in these articles reflect those of the authors and not necessarily the views of Weil, Gotshal & Manges LLP. If you would like to add a colleague to our mailing list or if you need to change or remove your name from our mailing list, please log on to www.weil.com/weil/subscribe.html, or send an email to subscriptions@weil.com.