

World Health Organization Declares Diesel Exhaust a Known Human Carcinogen

Diesel exhaust contains particulate matter (PM) or soot, nitrogen oxides (NOx), hydrocarbons (HC), and toxic air pollutants, which are a category of pollutants the Environmental Protection Agency (EPA) has determined are known or expected to cause cancer or other serious health effects. Various studies have noted an association between these pollutants and adverse health effects, including cancer. The World Health Organization (WHO) has categorized diesel exhaust as a "probable" carcinogen since 1989. (According to the National Human Genome Research Institute, a carcinogen is an agent, natural or manmade, that has the capacity to cause cancer in humans.)

In June, the International Agency for Research on Cancer (IARC), an agency of the WHO, became the first to recategorize diesel exhaust to be a "known" human carcinogen. The decision was announced following a week-long meeting of independent experts in Lyon, France. According to IARC, the classification was based on analysis of published studies, animal research, and limited human research that established diesel exhaust as a cause of lung cancer. IARC also noted a positive association, based on more limited evidence, between diesel exhaust and an increased risk of bladder cancer.

A key study analyzed by the IARC working group was a scientific study conducted by the U.S. National Cancer Institute and the National Institute for Occupational Safety and Health (NIOSH) that evaluated cancer risk from diesel exhaust in over 12,000 workers at non-metal underground mining facilities in Missouri, New Mexico, Ohio, and Wyoming. The study, which was published in March, included two components: a retrospective cohort mortality study and a nested case-control study of lung cancer deaths in the cohort after taking into account smoking and other lung cancer risk factors. The researchers observed an increased risk of lung cancer death coinciding with increasing levels of exposure to diesel exhaust.

EPA currently classifies diesel exhaust as "likely to pose a lung cancer hazard to humans." See Health Assessment Document for Diesel Exhaust, EPA/600/8-90/057F (May 2002), available at www.epa.gov/ttn/atw/dieselfinal.pdf. This determination was based on a comprehensive review of the potential health effects from ambient exposure to diesel exhaust conducted by EPA over ten years ago. Since that time, EPA has implemented various programs as part of its National Clean Diesel Campaign. According to EPA, these programs have resulted in a 95% decrease in major emissions from new diesel engines (as compared to older engines) as well as a decrease in emissions from older engines through voluntary programs involving switching fuels, retrofitting and repairing equipment, and reducing idling.

Therefore, while increased regulation of diesel emissions is possible in light of IARC's pronouncement, EPA may argue that its current programs, which provide strict controls and have dramatically reduced diesel emissions, provide adequate protection from potential health effects. Although EPA will probably continue its efforts to reduce exposure to diesel emissions in light of the most recent evidence of potential health effects, it is not clear that major changes in the agency's approach to diesel exhaust regulation are necessarily warranted.

ADDITIONAL ITEMS OF INTEREST:

Environmental: Civil Enforcement

Suzuki to Pay \$885,000 Penalty for Violations of Vehicle Emission Standards

In September, EPA announced an \$885,000 settlement with American Suzuki Motor Corporation and Suzuki Motor Corporation for alleged violations of Clean Air Act vehicle emission standards. According to EPA, Suzuki imported and sold over 25,000 all-terrain vehicles and off-road motorcycles that were not covered by valid certificates of conformity indicating that they complied with Clean Air Act emission standards. The vehicles at issue were manufactured with an electronic emission control configuration that was not disclosed in the certificate application and could result in increased emissions of hydrocarbons and nitrogen oxides. In addition to payment of the \$885,000 penalty, Suzuki is required to complete three mitigation projects aimed at reducing hydrocarbon emissions.

Environmental: Criminal Enforcement

U.S. Defers Prosecution of Gibson Guitar for Alleged Lacey Act Violations

In August, Gibson Guitar Corp. entered into a criminal enforcement agreement to resolve alleged violations of Lacey Act illegal logging provisions based on purchases of ebony wood from Madagascar and rosewood and ebony from India. In exchange for deferred prosecution, Gibson agreed to pay a \$300,000 penalty, make a \$50,000 community service payment for conservation of protected tree species used in musical instruments, and will withdraw claim to the wood seized by the government during the investigation.

"Operation Crash" Results in Guilty Pleas for Trafficking of Rhinoceros Horn

In September, three members of a smuggling ring pleaded guilty to felony violations of various laws enacted to protect endangered species based on their admitted smuggling of white and black rhinoceros horn with knowledge that the animals were protected by federal law. These pleas were a direct result of "Operation Crash," an investigation involving a nationwide task force of U.S. Fish and Wildlife Service special agents focused on rhino trafficking. According to U.S. Attorney Andre Briotte, Jr., "The rhino horn smuggling ring dismantled by Operation Crash contributed to the soaring increase in the trade of rhino horns both domestically and internationally and this illegal trade leads directly to increased poaching of the species in the wild. Operation Crash represents a giant step forward in the global fight to save a beautiful species like the Black Rhino from extinction."

U.S. District Court Orders Notice to Nearby Residents of Restitution Rights for Clean Air Act Violations

U.S. District Court Judge John D. Rainey has ordered the government to provide notice to persons living near a Texas refinery owned by CITGO Petroleum Corporation of their rights under the Crime Victim Rights Act to seek restitution for negative health effects caused by emissions from tanks at the refinery. Under federal law, a defendant convicted of a federal offense may be required by the court to pay restitution to victims of the offense. The September 14th order followed CITGO's conviction for illegal operation of tanks in violation of the Clean Air Act.

Jury Convicts Landowner and Waste Management Company for Asbestos Contamination

In October, Cross Nicastro, Mazza & Sons, Inc., and Dominick Mazza were convicted by a federal jury of conspiracy, violations of the Clean Water Act and Superfund, obstruction of justice, and making false statements based on the dumping of thousands of tons of asbestos-contaminated construction and demolition debris into wetlands on property owned by Nicastro without a permit. The defendants also attempted to conceal their crime by creating a fake permit and forging the name of a New York State Department of Environmental Conservation official.

Individuals Receive Prison Time for Clean Air Act Conspiracy

David Wood, James Mathis, and Donald Fillers were sentenced in October for conspiracy and Clean Air Act violations resulting from their demolition activities at a Chattanooga, Tennessee factory. The defendants conspired to violate the Clean Air Act by performing demolition work without regard for proper removal and containment of asbestos, by endangering the workers retained to do the work, and by falsifying documents to cover up the scheme. Wood was sentenced to 48 months in federal prison, Mathis was sentenced to 18 months, and Wood was sentenced to 20 months. All were also required to pay fines and restitution.

Environmental: Other Court Rulings

Biotechnology: Lawsuit Challenging Partial Deregulation of Genetically Modified Beets Dismissed in Light of USDA's Full Deregulation

In September, U.S. District Court Judge John D. Bates dismissed a suit filed by plaintiffs following U.S. Department of Agriculture's Animal and Plant Health Inspection Service's ("APHIS") partial deregulation of Roundup Ready sugar beets in 2011. The suit sought to enjoin the USDA's decision to partially deregulate by allowing Roundup Ready beets, which are genetically engineered to withstand glyphosate-based herbicides like Roundup, to be produced under certain conditions. Plaintiffs claimed that APHIS failed to comply with the National Environmental Policy Act (NEPA) requirements in reaching its decision. The court held that the suit was moot in light of APHIS's full deregulation of Roundup Ready sugar beets in July. See *Grant v. Vilsack*, Nos. 11-308 (JDB), 11-586 (JDF), 2012 WL 4361435 (D.D.C. September 25, 2012).

Toxic Tort: Nuclear Exposure Plaintiffs' Claims Limited by Failure to Comply with Discovery Order

Plaintiffs in *McMunn v. Babcock & Wilcox Power General Group Inc. et al*, pending in the U.S. District Court for the Western District of Pennsylvania failed to comply with a court order requiring that they produce to defendants evidence supporting their claims of liability. Plaintiffs produced six expert reports, but these reports only supported claims of airborne exposure to uranium from a single facility. Therefore, the court in September held that plaintiffs are prohibited from presenting evidence at trial to support any of the other allegations in the complaint including exposure to various other radionuclides, exposure from other facilities, and exposure through other exposure pathways including surface water, ground water, and soils. The judge did side with the plaintiffs on the issue of dose by holding that the plaintiffs were not required to present *prima facie* evidence of the numerical dose for each plaintiff's alleged exposure because they presented evidence that there is no level of ionizing radiation that is non-carcinogenic.

Takings: Supreme Court to Rule on Federally Created Floods

In October, the U.S. Supreme Court heard oral arguments in *Arkansas Game & Fish Commission v. United States*, No. 11-597, a case involving the issue of whether the federal government must pay damages to riverfront property owners when it releases water from a river dam that repeatedly causes flooding. The case involves flooding caused by releases from the Clearwater Dam in Missouri authorized by the U.S. Army Corps of Engineers that caused flooding to the Dave Donaldson River Wildlife Management Area. The trial judge awarded over \$5,000,000 in damages, but the U.S. Federal Circuit Court of Appeals overturned the award holding that the flooding did not require compensation because it was temporary, rather than permanent.

Agency News

TRI Data Now Available in TRI Explorer

The 2011 Toxics Release Inventory (TRI) preliminary dataset is now available through Envirofacts, downloadable TRI data files, and TRI Explorer. The TRI dataset reflects toxic chemical releases and pollution prevention activities that occurred in 2011. The dataset is available at www.epa.gov/tri/tridata/preliminarydataset/index.html. The TRI National Analysis, which is EPA's annual analysis and interpretation of the TRI dataset, is expected to be published later this year.

Alabama Water Agencies Working Group Provides Report to Governor Bentley

In August, the Alabama Water Agencies Working Group provided a report to Governor Bentley which set out various policy issues for consideration in the development of a statewide water management plan. The report, titled "Water Management Issues in Alabama" discussed twelve issue areas and policy options: (1) water resources management, (2) enhanced certificates of use/permitting, (3) economic development, (4) surface water and groundwater availability, (5) drought planning, (6) water conservation and reuse, (7) interbasin transfers, (8) instream flows, (9) water resources data, (10) interstate coordination, (11) key stakeholder education, and (12) public education and outreach. The group has been directed by Governor Bentley to develop a recommended statewide water management plan by December 2013. Additional information regarding the Alabama Water Agencies Working Group, including a timeline of the group's progress, is available at www.adeca.alabama.gov/Divisions/owr/awawg/Pages/default.aspx.

ATTORNEY PROFILES

Richard E. Davis is a senior partner with Starnes Davis Florie LLP. He represents clients in federal and state courts in Alabama as well as in matters involving federal and state regulatory agencies. Richard's environmental practice includes Clean Water Act, Clean Air Act, and CERCLA litigation; natural resource and property damage claims; land use and water use issues; and the defense of corporations and individuals accused of environmental crimes as well as regulatory enforcement and compliance matters. Richard also defends personal injury actions based on alleged chemical exposure (so-called "toxic torts"). Richard is a Fellow in the Litigation Counsel of America Trial Lawyer Honorary; was listed in the 2008 - 2012 editions of *Alabama Super Lawyers*[®] magazine for Environmental Litigation, was selected for inclusion in the 2011, 2012, and 2013 editions of *Best Lawyers in America*[®]—in 2011 for both Environmental Law and Natural Resources Law and in 2012 and 2013 for both Litigation-Environmental and Natural Resources Law; was included by ALM (publisher of *The American Lawyer*, *Corporate Counsel*, and law.com) as a Top Rated-AV Preeminent Lawyer in Mass Tort Litigation; was selected by peer review as one of Birmingham Magazine's Top Attorneys in Environmental Law in 2012; and served as Chair of the Alabama State Bar Environmental Law Section for 2010-2011.

J. Scott Dickens is a partner with Starnes Davis Florie LLP. Scott's practice is primarily devoted to environmental and construction litigation. He has represented clients in all State and Federal Courts in Alabama, in arbitration proceedings before the American Arbitration Association and Alabama Building Commission, and in the United States Court of Federal Claims. Scott's practice includes CERCLA and RCRA litigation; architect and engineer liability claims, particularly relating to environmental issues; and construction related matters. He also frequently speaks at environmental and construction seminars. Scott is a 1996 graduate of Cumberland School of Law where he was a member of the *Cumberland Law Review*.

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