

National Association of Home Builders

Environmental Issues Committee



EIC Newsletter

In The News

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White House Delays Release of EPA’s Proposal to Regulate Carbon Dioxide Under the Clean Air Act

In what will be a politically charged move, the U.S. Environmental Protection Agency (EPA) plans to issue an advanced notice of proposed rule-making (90 day comment period) as early as next week for regulating greenhouse gas (read carbon dioxide, CO₂) emissions under the Clean Air Act. According to reports that ran in the Wall Street Journal this past Monday, EPA’s CO₂ proposal is being held up by senior staff within the White House’s Office of Budget and Management due to concerns over the scope of EPA’s proposal. In the advanced notice, EPA is expected to present and request comment on the effects of greenhouse gases, whether it should make an endangerment finding and the implications of such a finding on the regulation of mobile and stationary sources. Next week’s expected announcement has been preceded by three key events:

1. The decision by the U.S.

Supreme Court in *Massachusetts v. EPA*, where the Supreme Court disagreed with EPA’s interpretation that CO₂ emissions from motor vehicles cannot be regulated as an “air pollutant,”

2. An open letter from Administrator Johnson to the leadership of both the Senate Environment & Public Works Committee and the House Energy & Commerce Committee that expressed concern over the anticipated economic impacts of regulating CO₂ under the CAA; and

3. President Bush’s strong opposition to regulating CO₂ emissions under existing federal environmental laws.

Despite the concerns voiced by the President and echoed by the EPA Administrator, it seems inevitable that EPA will move forward (albeit at a slower pace) with regulating some sources of greenhouse

gas emissions. From NAHB’s perspective, regulating certain sources of CO₂ will have both short and long-term implications for the housing industry. While it is uncertain which sections of Clean Air Act (CAA) might apply, the Agency could invoke §165, of the CAA which would require controls on stationary sources that have the potential to produce 250 tons of greenhouse gas per year. (According to the Air Conditioning, Heating and Refrigeration Institute (AHRI), a four (4) million BTU furnace can produce 250 tons of CO₂ in just 1,000 hours of use.) While this is far above what any single-family home would produce, it could affect the multi-family sector of the industry.

Undoubtedly any regulation of CO₂ under the CAA will impact those industries that supply the home building industry with construction

For more information about NAHB’s Environmental Issues Committee and activities please contact Lindsay Cather at 202.266.8163 or lcather@nahb.com.

If you would like to contribute to the EIC newsletter we are accepting articles from committee members at lcather@nahb.com or you can fax them to Lindsay Cather at 202.266.8056.

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Carbon Dioxide Continued...

materials such as portland cement, asphalt and concrete plants, fiberglass insulation manufacturing plants, asphalt roofing manufacture, gypsum and plywood manufacturers. EPA first phase of regulation will likely include these and other large stationary sources as well as “new” mobile sources (e.g., cars, trucks, and construction equipment). NAHB is concerned about the

possibility the next Administration could designate greenhouse gases as a criteria air pollutant and establish a national ambient air quality standard (NAAQS). Such a move by EPA could open the home building industry to additional regulation by states and local governments. For more information, please contact Mike Mittelholzer at 202.266.8660 or

mmittelholzer@nahb.com.

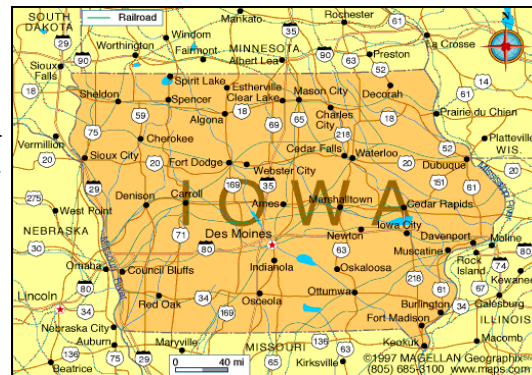


Mapping Process Creates New Areas of Concern

With the recent floods in Iowa, it should be noted that there is residual risk behind levees. Eight years ago, the Federal Emergency Management Agency embarked on modernizing their flood insurance maps. In the process, FEMA decertified or “provisionally accredited” many levees in the U.S. Visit <http://www.fema.gov/library/viewRecord.do?id=2193> to learn more about the decer-

tified levees.

The two-year provisional status is coming to an end for many levees and if decertified, properties behind those decertified structures will be mapped a part of a Special Flood Hazard Area and require mandatory flood insurance. For more information, please contact Matt Watkins at 202.266.8327 or mwatkins@nahb.com.



GHG Emissions Reduction: Tax or Cap-&-Trade?

While some may continue to debate the reality of climate change, one fact rings true: local, state and federal agencies are quickly developing regulations to slow its theorized impacts and effects. Of the green house gases (GHG) emitted into the atmosphere, carbon dioxide is the primary GHG released annually. Carbon dioxide from fossil fuel combustion in the transportation sector accounts for 33% of U.S. emissions, exceeded only by electricity generation by the electric power industry

Two major reduction solutions are being proposed across the nation. Carbon tax, a tax on the carbon dioxide emissions from burning fossil fuels, is gaining widespread attention on the federal level while cap-and-trade has shown strength on the local and state level. This is exemplified in California and its partnership with the Western Climate Initiative (WCI). California, in conjunction with the Western Climate Initiative, has begun to design regional greenhouse gas emis-

sion reduction program that includes a cap-and-trade approach. Visit <http://www.westernclimateinitiative.org/> to learn more about the Western Climate Initiative. The resulting program will facilitate the creation of a western regional cap-and-trade market.

Emissions control programs, regardless of the option employed will impact the building industry. Depending on project size, programmatic policies in Washington, California and Massachusetts re-

quire quantification of emissions as part of the state environmental protection acts (SEPA). This quantification requirement is a prelude to additional carbon emission regulations such as a carbon tax or a cap and trade program. For more information please contact Larissa Mark at 202.266.8157 or lmark@nahb.com.

Lead-Based Paint: Rhode Island Supreme Court Throw-out Ruling Which Held Paint Manufacturers Liable for 2.4 Billion Dollars

(Source BNA) The Rhode Island Supreme Court July 1 rejected the state's high-profile public nuisance lawsuit against three former lead-paint makers, overturning a lower court verdict that could have resulted in the manufacturers spending \$2.4 billion to abate lead-paint hazards (*State v. Lead Industries Ass'n*, R.I., No. 2004-63, 7/1/08).

The court in a unanimous ruling said the trial judge erred in failing to dismiss the state's public nuisance claims.

"We agree with defendants that the public nuisance claim should have been dismissed at the outset because the state has not and cannot allege that defendants' conduct interfered with a public right or that defendants were in control of lead pigment at the time it caused harm to children in Rhode Island," the opinion said.

Following a 15-week trial, a six-person jury in state superior court in February 2006 found Sherwin-Williams Co., NL Industries Inc., and Millennium Holdings LLC responsible for the public nuisance posed by lead in buildings. A fourth company, Atlantic Richfield Co., was found not liable.

The jury also found that the defendants should be ordered to abate the nuisance. Silverstein rejected the industry's request for a new trial in February 2007. The state proposed a \$2.4 billion abatement plan in September 2007. Various appeals were filed. The court heard four hours of oral arguments on May 15.

In an 81-page ruling, the state's top court reversed the judgment of abatement against Millennium Holdings, NL Industries, and Sherwin-Williams, upheld the judgment in favor of Atlantic Richfield, vacated contempt citations against Rhode Island Attorney General Patrick C. Lynch, and recognized the validity of certain contingency fee agreements

between the attorney general and outside counsel.

The court said, "In reaching this conclusion, we do not mean to minimize the severity of the harm that thousands of children in Rhode Island have suffered as a result of lead poisoning. Our hearts go out to those children whose lives forever have been changed by the poisonous presence of lead. But, however grave the problem of lead poisoning is in Rhode Island, public nuisance law simply does not provide a remedy for this harm. The state has not and cannot allege facts that would fall within the parameters of what would constitute public nuisance under Rhode Island law."

The Rhode Island action was the first lawsuit filed by a state against the lead paint industry. The first trial in the case ended in a mistrial in 2002 after the jury deadlocked.

Don Scott, counsel for NL Industries, said, "Today's ruling brings Rhode Island back into the mainstream of national law."

He said that appeals courts in New Jersey, Missouri,



and Illinois all have rejected public nuisance claims against former lead pigment manufacturers.

Staff Change at the Corps of Engineers

Mark Sudol, the Corps' Chief of the Regulatory Branch, has recently stepped down to pursue another position within the Corps that is not so controversial. Many of you met with Mark during our Spring Board meetings with the regulators and found his honesty and pragmatism refreshing and supportive. Generally an advocate for efficiency and effectiveness, Mark was willing to discuss the full range of issues and offer and work on solutions

that were beneficial to both the Corps and the regulated community. He was always approachable and the relationship that NAHB built with him was instrumental in convincing him to be a speaker at each of the *Rapanos* workshops that NAHB held last year to gather public input on how *Rapanos* Guidance was actually working in practice. He was also able to solve several of our members' specific issues.

The Corps has appointed an interim Chief and expects to name a permanent successor within 180 days. Once a replacement is found, NAHB will meet with the new Chief to pursue the many necessary improvements needed in the wetlands permitting program. For more information, please contact Glynn Rountree at 202.266.8662 or grountree@nahb.com.

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Regulatory Updates

New Corps' Wetlands Guidance Broadens Use of Preliminary

On June 26, 2008, the Corps published a Regulatory Guidance Letter (RGL) to clarify the difference between approved jurisdictional determinations (JDs) and preliminary JDs, and to state that approved JDs are not always needed. In short, the document makes clear that permit seekers can decline to use an approved JD, but instead obtain an individual or a general permit based on a preliminary JD.

A number of public comments on the implementation of the *Rapanos* Guidance, including NAHB's, encouraged the Corps to find a way to bypass the use of the approved JD process in order to speed up what has come to be an extraordinarily sluggish permitting process. An approved JD requires the Corps to determine whether jurisdictional "waters of the U.S." or "navigable waters of the U.S.," or both, are present on the site. The process is time-consuming and loaded with controversy, often leading to major delays in permit decisions. How-

ever, the guidance notes that both preliminary JDs and approved JDs are to be processed by the Corps within 60 days, so the benefit to the permit seeker of utilizing the preliminary JD is unclear if the Corps can indeed meet its 60-day deadline for issuing all JDs. Further, only approved JDs can be appealed.

The guidance also contains several disincentives to using preliminary JDs, including treating all waters and wetlands that would be affected by the permitted activity as if they are jurisdictional waters of the U.S. for purposes of compensatory mitigation requirements and other protection measures. Furthermore, the use of a preliminary JD cannot be used to determine either that there are no wetlands or other water bodies on a site. NAHB staff are presently analyzing the usefulness of the new guidance and gathering input from other stakeholder organizations. The document can be found on the Corps

webpage for Regulatory Guidance Letters at <http://www.usace.army.mil/cw/cecwo/reg/rglindx.htm>.

Any comments that you may have on the guidance would be appreciated. Please send any comments to Glynn Rountree at 202.266.8662 or grountree@nahb.com.



EPA Proposes to Reissue the CGP for Two Years

In the May 16, 2008 issue of the *Federal Register*, EPA proposed to reissue the Construction General Permit (CGP) for stormwater discharges from construction activities for a period of 2 years. The CGP will expire on July 1, 2008 and some action by the agency is required to maintain permit coverage for stormwater discharges after July 1. EPA has decided not to revise the content of the permit at this time in order to incorporate into the new permit any new stormwater requirements that are mandated for construction activities as a result of the agency's Effluent Limitation Guidelines (ELG) effort.

On June 11, NAHB submitted comments on the EPA proposal. The comments made a number of suggestions including:

- the agency should extend the CGP for a period of 5 years instead of limiting the extension to an arbitrary 2 years,
- withdrawing the proposed approval criteria for "qualifying local programs" because they are duplicative and unnecessary,
- issue a "Single Lot Permit" proposal as soon as possible to streamline permitting requirements for home builders,
- issue a "certification of no pollutant discharge" for use by those home builders that retain all stormwater on their site, and
- expand the existing CGP waivers for small sites (where either low rainfall erosivity or where a TMDL addresses pollutants of concern without requiring controls on small construction sites) to

include large construction sites. Questions regarding this article or stormwater requirements for construction activities can be addressed to Glynn Rountree at (202) 266-8662 or grountree@nahb.com.

Educational Efforts

Stormwater Strategy Summit



On June 12-13, the leadership of the EIC, along

with the High Production Home Builders' Council (HPHBC), hosted a Stormwater Summit to develop a new Stormwater Strategy for the association. The meeting was attended by members from the EIC and the HPHBC (members of the Land Development Committee were invited, but were unable to attend). Over the course of the two days, the participants identified the challenges encountered with stormwater regulations,

including the complexity of permits, and issues with compliance and enforcement. The impending Effluent Limitation Guidelines (ELGs) were also discussed.

The problems and recommendations discussed at the meeting have been incorporated into a draft comprehensive strategy for addressing the issues through all venues (i.e., regulatory, legal, legislative, research, public affairs). The draft focuses on working with the government agencies at all levels (federal, state, local) to advocate for permit streamlining and taking various actions to improve overall compliance rates. The draft also highlights the need to

continue to participate in the development of the ELGs to ensure a workable outcome.

Once the participants have reviewed the draft strategy, it will be forwarded to the members of the EIC for input, comment, and approval. It is expected that staff will host a conference call to discuss the draft strategy sometime in late July. For more information, please contact Ty Asfaw at 202.266.8124 or easfaw@nahb.com.

Nation's Largest Home Builders Settle Stormwater Violations



As you may have heard, a 4.3 million dollar settlement has been issued by EPA for four homebuilders who violated NPDES Stormwater requirements. EPA conducted inspections on over 2000 construction sites in several states. Under the settlement, the companies will now have to implement company-wide compliance programs, including hiring three tiers of stormwater management experts, conducting pre-construction inspection reports, educating contractors and subcontractors, and submitting periodic reports to EPA.

The alleged violations include not obtaining permits until after construction had begun or failing to obtain the required permits at all. At the sites that did have permits, violations included failure to prevent or minimize the discharge of pollutants such as silt and debris in

stormwater runoff. Some of the problems identified in the consent decrees are failure to properly design or implement BMPs, failure to prepare an adequate SWPPP, and failure to conduct inspections as required by the permits.

NAHB staff are reviewing the content of the consent decrees for each of the homebuilders involved and considering using some of the content to bolster existing educational programs and potentially use it in future efforts. There will be a 30-day comment period associated with the consent decrees. For more information, visit EPA's website at <http://www.epa.gov/compliance/resources/cases/civil/cwa/homebuilders.html>

and US DOJ's website at http://www.usdoj.gov/enrd/Consent_Decrees.html

or contact Ty Asfaw at 202.266.8124 or easfaw@nahb.com. The public comment period ends July 24, 2008.

Construction and Development Effluent Limitation Guidelines (ELG)

NAHB met with Mr. Benjamin Grumbles, Assistant Administrator for the Office of Water at EPA on June 27. This meeting was scheduled at the request of Mr. Grumbles to discuss the impending proposal on Effluent Limitation Guidelines for the Construction and Development Industry. NAHB recommended that the Agency follow the court ordered deadline to issue ELGs and take into consideration several issues including the enormous costs associated with Active Treatment System prior to issuing a proposal this summer. At the meeting EPA staff stated that they still intended to propose and finalize before the end of this calendar year. Therefore, we are expecting and are planning to submit comments on a proposal which may be issued in July 2008. NAHB is advocating for a BMP based approach in the

final ELG in lieu of numeric limits with active treatment systems requirements. NAHB worked with members on developing underlying principles and a list of BMPs that could be the basis for developing a prescriptive BMP based ELG.

EPA's ELG proposal is currently being reviewed by Office of Management and Budget and Small Business Administration. NAHB is also in the process of scheduling a meeting with Deputy Administrator, Marcus Peacock at Environmental Protection Agency to advocate for a reasonable ELG for the Construction and Development Industry. However, since Mr. Grumbles will meet with Peacock on this issue it was not clear whether we will be able to meet with him as well.

Meanwhile, NAHB is working on identifying the key technical, legal and economic studies that will be needed to advocate for a BMP based ELG. At the Stormwater Summit (read above), everyone agreed that ELG was an important issue that the association should be working on with other allies and members to avoid an end of pipe numeric limit for the construction industry.

EPA is planning to issue the proposal in July of 2008. If you have any questions, please contact Ty Asfaw at 202.266.8124 or easfaw@nahb.com.

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Environmental Issues Committee*

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Important Dates

- June 30, 2008: Final Federal CGP released
- July 21– 25, 2008: 2008 Summer Executive Board Meeting in Quebec, Canada
- July 24, 2008: Summer Executive Board Meeting
- September 22-26, 2008: 2008 Fall Board of Directors Meeting in San Diego, CA.
- September 24, 2008: Environmental Issues Subcommittee Meeting
- September 25, 2008: Environmental Issues Full Committee Meeting

NOTE: If you are not a member of the Environmental Issues Committee (EIC) or if you know someone who is not a member of the EIC but would like to receive this newsletter, then please contact Lindsay Cather at 202.266.8163 or lcather@nahb.com.