



This Week in Review – June 6-10, 2005

(1) Senate Appropriations Committee Approves FY 2006 Spending Bill (June 9, 2005) – The Senate Appropriations Committee approved legislation that includes EPA's FY 2006 budget. The bill calls for a total of \$7.88 billion for EPA's budget, which is \$312 million above the President's request, but \$141 million less than the amount appropriated in FY 2005. The House's FY 2006 bill calls for \$7.71 billion. Like the House legislation (adopted on May 19, 2005), the Senate Committee's bill calls for \$223.55 million in grants for state and local air pollution control agencies under Sections 103 and 105 of the Clean Air Act. This is \$350,000 more than the amount appropriated in FY 2005 and is equal to the amount requested by the President for FY 2006 (and it includes shifting \$5 million out of the funds for the Regional Planning Organizations into other state and local air grant activities). The Senate bill includes only \$1 million for the Clean School Bus USA Program, which is \$9 million less than the President's request and the House bill. The Senate Committee-approved bill also amends a rider inserted into the Interior and Related Agencies Subcommittee bill by Senator Christopher Bond (R-MO) that would have blocked EPA from proposing or finalizing a small nonroad engine rule until a specific safety study was conducted (see related article). The Senate appropriations bill may go to the floor for a vote during the week of June 13, with House-Senate Conference Committee meetings expected in July. [For further information: thomas.loc.gov/home/approp/app06.html]

(2) Senate Appropriations Committee Approves Compromise Language on Small Nonroad Engine Study (June 9, 2005) – The Senate Appropriations Committee marked up and approved an FY 2006 Interior and Related Agencies appropriations bill that contains an amended rider related to the regulation of small nonroad engines. The Committee-approved rider – which reflects a compromise reached by Senators Christopher Bond (R-MO) and Dianne Feinstein (D-CA) – requires EPA, in coordination with "other appropriate federal agencies," to conduct a technical study "to look at safety issues, including the risk of fire and burn to consumers in use, associated with compliance with the regulations" for new nonroad spark-ignition engines smaller than 50 horsepower (e.g., lawn and garden equipment) before the agency can publish proposed or final regulations; the study is to be completed six months after enactment of the appropriations bill. Although still potentially problematic, this compromise is an improvement over the original rider, inserted by Senator Bond into the Interior and Related Agencies

Subcommittee bill just before its mark up on June 7, 2005, which would have barred EPA from working on a proposed or final rule until the Administrator made a determination that compliance with the rule would not increase the risk of fire or burn to consumers or heighten "other health-related risks." This determination was to be based on the conclusion of a specific scientific evaluation as proposed by the International Consortium for Fire, Safety, Health, and the Environment and to be conducted by the Swedish National Testing and Research Institute's Department of Fire Technology, but paid for (\$650,000) by EPA. Further, the original rider would have required EPA to demonstrate that any final rule would "not require such manufacturing disruption as will lead to loss of employment for assembly workers," irrespective of the significant public health and environmental benefits to result from the rule. Under the amended rider, EPA (not the Swedish National Testing and Research Institute) is to conduct a safety study, the nature of which is not prescribed, and is allowed to continue drafting its rule (but not to publish it) as the study is completed. In addition, the amended rider does not prevent rule promulgation based on adverse employment impacts. Among the most troubling aspects of Senator Bond's rider is the fact that it abrogates a previous compromise agreement he made with Senator Feinstein during the negotiation of the FY 2004 appropriations bill, under which a federal rule applicable to new nonroad spark-ignition engines smaller than 50 hp was promised by the end of 2005 in return for every state in the nation except California being preempted from adopting any standard or other requirements applicable to these engines. Earlier this week, after the original rider was added by the Interior and Related Agencies Subcommittee, STAPPA and ALAPCO sent a letter to all members of the full Appropriations Committee urging that they reject the rider during their markup of the bill. [For further information: Air Web – Mobile Sources and Fuels Committee page]

(3) Alabama Power Corporation Prevails in NSR Case (June 3, 2005) – The U.S. District Court for the Northern District of Alabama handed the government a defeat in its case against Alabama Power Corporation (APC), one of the original New Source Review (NSR) enforcement cases filed in 1999. Siding with the reasoning of the *Duke Energy* decision, the Court held that the modifications made by APC were not subject to NSR provisions for Prevention of Significant Deterioration (PSD) permitting and installation of Best Available Control Technology. The Court further concluded that the modifications constituted "routine maintenance" when compared to projects that are routine within the industry, and that emission increases, for purposes of NSR/PSD analysis, should be calculated on the basis of maximum hourly emission rates, rather than annual actual emissions. Moreover, the Court held that EPA's interpretation of the "routine maintenance" exception is not entitled to the deference usually given by courts to agencies' interpretations of ambiguous statutory language because EPA's interpretations have been inconsistent. In the Court's words, "[g]iven the EPA's zigs and zags represented by its contradictory post-WEPCO statements and rules, followed by the 2003 amendments [the Equipment Replacement Rule], and now the 2005 CAIR, the court cannot say that EPA's interpretation of its rules is due to be afforded *Chevron* deference." The Court noted in a footnote that EPA

has indicated that it will only bring additional enforcement cases against utilities for projects that violate the 2003 NSR Rule, concluding that “[t]his leaves the anomaly of utilities, like APC, being prosecuted for conduct that, if engaged in now, would not be prosecuted.” [For further information: Air Web – Enforcement and Compliance Committee page]

(4) Equipment Replacement Rule Reconsideration Leads to No Changes (June 6, 2005) -- EPA has concluded its reconsideration of the New Source Review Equipment Replacement Provision (ERP) with a determination that the ERP should be maintained as adopted in 2003. In its press release the agency states, “EPA continues to believe that the October 2003 ERP rulemaking is fully justified and will provide much needed clarification to the NSR program while still ensuring environmental protection.” The ERP redefined routine maintenance so as to exempt from NSR/PSD review any replacement of existing component(s) of a process unit as long as the cost does not exceed 20 percent of the replacement value of the process unit. Fourteen states and numerous localities sued EPA in the U.S. Court of Appeals for the District of Columbia immediately upon promulgation. The Court subsequently stayed the rule on December 24, 2003. On the same date, environmental groups joined together to petition EPA for administrative reconsideration of the rule. STAPPA and ALAPCO opposed the rule at the public hearing held pursuant to the reconsideration, and suggested development of a list of “routine” and “non-routine” activities as a solution to the definitional problem. The affirmation by the agency of its original rule now paves the way for renewal of the judicial action. Also addressed in the reconsideration was a related issue raised by a group of petitioners who alleged that the ERP provisions should not have been automatically incorporated by reference in the Federal Implementation Plans (FIPs) for states lacking approved State Implementation Plans for PSD. EPA, however, upheld the “automatic update function” in FIPs. [For further information: Air Web – NSR and Enforcement and Compliance Committee pages]

(5) Businesses Testify on Their Actions to Reduce GHG Emissions (June 8, 2005) – Representatives of four large companies testified before the House Science Committee on steps they are taking to reduce greenhouse gas (GHG) emissions and their motivations for doing so. The Chairman of the Science Committee, Sherwood Boehlert (R-NY), noted that there is clearly scientific consensus that global warming is happening. James Rogers, CEO of Cinergy, said that Cinergy is taking action today to prepare to live in a carbon-constrained world tomorrow, and, even if it turns out that “we were wrong” on global warming, Cinergy is discovering environmentally friendly technologies that save energy more efficiently and thus decrease U.S. dependence on foreign oil, leading to a cleaner and more self-reliant economy. Rogers noted that the world needs leadership from the U.S. on climate change; he said that the Kyoto Protocol is not the right path, “but we [the U.S.] need to do something.” When asked about developing countries like India and China, Rogers responded that the industrialized countries should take the lead on reducing emissions, see if India and China then join, and if they do not join the effort, “we stop -- but we need to

go first.” Mack McFarland, Environmental Manager of the Fluorochemicals Business at E.I. DuPont de Nemours and Company, said that dramatic action is needed to stabilize concentration of GHGs in the atmosphere: over the next 75 to 100 years, the average per capita GHG emissions will need to be one-tenth of what they currently are in the U.S., and the more we emit now, the less we will be able to emit in the future. The companies expressed concern that any future regulatory program in the U.S. not penalize early reductions, and two of them expressed concern about state actions, as they prefer a uniform framework and timeframe for reducing GHG emissions. Also testifying were representatives of Baxter International and United Technologies Corporation. [For further information: www.house.gov/science/hearings/full05/june8/index.htm]

(6) South Coast Modifies Regulations to Include Agricultural Sources of Air Pollution (June 6, 2005) – The governing board of the South Coast Air Quality Management District approved modifications to three of its air pollution regulations to include agricultural sources. These modifications were required in order to implement S.B. 700, which eliminated the exemption from the California permit system for agricultural operations. South Coast’s fugitive dust regulation is amended to require Best Available Control Measures for fugitive dust sources at confined animal facilities no later than January 1, 2006. South Coast also is subjecting stationary non-emergency, agricultural internal combustion engines, except for orchard wind machines, to the same requirements as other stationary engines to reduce VOC and NO_x emissions and is requiring them to comply on a tiered compliance schedule. Finally, South Coast is requiring gasoline transfer and dispensing operations at agricultural facilities to adopt Best Available Retrofit Control Technology, which is the same requirement all other gasoline transfer and dispensing operations must meet. [For further information: www.aqmd.gov/hb/2005/0506ag.html (scroll to items #39, 40 and 41)]

(7) Science Academies of Eleven Countries Issue Joint Statement on Global Warming (June 7, 2005) – The national academies of science of 11 countries issued a joint statement declaring that the “scientific understanding of climate change is now sufficiently clear to justify nations taking prompt action” and calling for specific action on global warming by world leaders, including leaders of the G-8 countries meeting in July 2005. The actions include 1) an international study to explore scientifically informed targets for atmospheric greenhouse gas (GHG) concentrations, and their associated emissions scenarios, that will enable nations to avoid impacts deemed unacceptable; 2) identification of cost-effective steps that can be taken immediately to contribute to long-term and substantial reductions in GHG emissions; 3) working with developing countries to build scientific and technological capacity; and 4) leadership in developing and deploying clean energy technologies and approaches to energy efficiency. The statement notes that the G-8 nations – Canada, France, Germany, Italy, Japan, Russia, the United Kingdom and the United States -- have been responsible for most of the past GHG emissions. The 11 nations signing the statement include Brazil, Canada, China, France, Germany, India, Italy, Japan, Russia, the United

Kingdom and the U.S. [For further information: Air Web – Global Warming Committee page]

(8) Fifty Cities Sign Agreements on World Environment Day with Commitments to Improve Air Quality and Reduce GHG Emissions (June 5, 2005) – Fifty cities commemorated World Environment Day by signing Urban Environmental Accords that include commitments to reduce greenhouse gas (GHG) emissions and improve air quality. The accord lists 21 actions with cities committing to implement as many of them as possible between now and World Environment Day 2012 and to strive to implement three actions per year. Actions include, among others, adopting a city-wide GHG reduction plan that reduces the jurisdiction's emissions by 25 percent by 2030 and that includes a system for accounting and auditing GHG emissions; establishing an Air Quality Index (AQI) to measure the level of air pollution and set the goal of reducing by ten percent in seven years the number of days categorized in the AQI range as "unhealthy" or "hazardous"; and implementing a policy to reduce the percentage of commute trips by single occupancy vehicles by ten percent in seven years. [For further information: www.wed2005.org/3.1.php and www.wed2005.org/5.1.php?news_id=30]

The Week Ahead

- STAPPA/ALAPCO Enforcement Workshop, in Charleston, South Carolina – June 15-16, 2005
- Meeting of the Air Quality Management Subcommittee of the Clean Air Act Advisory Committee, in Ann Arbor, Michigan – June 16-17, 2005

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