

# Environmental & Chemical Update

AIR • CLIMATE CHANGE • NANOTECHNOLOGY • RENEWABLE FUELS  
SUSTAINABILITY • TOXIC TORT • WASTE • WATER

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## Litigation and Regulatory Enforcement

### [1] **Water: U.S. Supreme Court Rules CWA Authorizes Cost-Benefit Analysis to Determine Best Technology Available in Design of Cooling Water Intakes**

The U.S. Supreme Court has ruled that section 316(b) of the Clean Water Act (CWA) authorizes EPA to use a cost-benefit analysis to determine the best technology available for minimizing adverse environmental impacts from cooling water intake structures that draw water into power plants to offset heat created during power generation. [\*Entergy Corp. v. Riverkeeper, Inc.\*, No. 07-588 \(U.S. 4/1/09\)](#).

The Second Circuit Court of Appeals had ruled in favor of various environmental advocacy groups and stated that no such balancing test may be used and that companies must adopt the best technology available. The U.S. Supreme Court reversed in a 6-3 opinion.

For the majority, Justice Antonin Scalia wrote:

We conclude that EPA permissibly relied on cost benefit analysis in setting the national performance standards and in providing for cost-benefit variances from those standards as part of the Phase II regulations. The Court of Appeals' reliance in part on the agency's use of cost-benefit analysis in invalidating the site-specific cost-benefit variance provision was therefore in error, as

was its remand of the national performance standards for clarification of whether cost-benefit analysis was impermissibly used.

Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas and Samuel Alito joined the majority opinion. Justice Stephen Breyer concurred in part and dissented in part. Justice John Paul Stevens filed a dissenting opinion, joined by Justices Ruth Bader Ginsberg and David Souter. According to the dissent:

Like the Court of Appeals, I am convinced that the EPA has misinterpreted the plain text of § 316(b). Unless costs are so high that the best technology is not 'available', Congress has decided that they are outweighed by the benefits of minimizing adverse environmental impact. Section 316(b) neither expressly nor implicitly authorizes the EPA to use cost-benefit analysis when setting regulatory standards; fairly read, it prohibits such use.

The case consolidated issues in three cases: *Entergy v. EPA*, 07-588; *PSEG Fossil LLC v. Riverkeeper, Inc.*, 07-589; and *Utility Water Act Group v. Riverkeeper, Inc.*, 07-597.

### [2] **Air: D.C. Circuit Upholds EPA Exceptional Events Exclusion Under CAA**

The D.C. Circuit Court of Appeals, rejecting an NRDC challenge, has upheld an "exceptional events" EPA rule governing state-submitted air



pollution data. *NRDC v. EPA, No. 07-1151 (D.C. Cir. 3/20/09)*. The Clean Air Act requires EPA to promulgate national air quality standards for certain air pollutants, and the states submit air pollution emissions data to EPA so that it may evaluate compliance with national air-pollution standards.

In 2007, EPA promulgated a regulation governing the exclusion of emissions data during “exceptional events” such as natural disasters. The rule defined “natural event” as one in which “human activity plays little or no direct causal role.” It defined “exceptional events” as those that affect air quality but were either not “reasonably controllable or preventable” or were “caused by human activity that is unlikely to recur at a particular location or a natural event.” NRDC filed a petition for review of the rule, seeking to set aside the agency’s definition of “natural events” and to vacate several statements in the rule’s preamble about types of events that may qualify as “exceptional.” NRDC argued that “natural events” are those occurring without the slightest human influence.

The three-judge panel, with one judge dissenting in part, ruled that NRDC’s comments on the proposed rule, because they did not set forth NRDC’s objection with reasonable specificity, did not preserve the issue for judicial review. The court said that “rule-making proceedings and the legal doctrines that have grown up around them are intricate and cumbersome enough, that agency officials should not have to wade through reams of documents searching for ‘implied’ challenges.”

The court also rejected NRDC’s objections to comments EPA had included in the preamble, finding that preamble statements are not statements of final agency action and, as such, were outside the court’s jurisdiction. The partial dissent found that NRDC had provided enough information for EPA to

identify the definitions the organization sought to challenge but that the group’s claim failed on the merits because EPA had authority under the CAA to define the terms as it did.

### **[3] Preemption/Air: Ninth Circuit Remands California Clean-Trucks Program Lawsuit on Preemption Grounds**

The Ninth Circuit Court of Appeals has found that some provisions of California’s clean trucks program are likely preempted by the Federal Aviation Administration Authorization Act (FAAA Act). *Am. Trucking Ass’ns, Inc. v. City of Los Angeles, No. 08-56503 (9th Cir. 3/20/09)*.

The program, which took effect in October 2008, banned trucks manufactured before 1989 from certain ports and imposed concession and container fees on operators. It also prohibited truck drivers from being independent contractors and required trucking companies to disclose their financial data and adhere to certain parking restrictions.

Trucking industry officials filed a challenge to the program, arguing that it imposes an unfair economic burden and violates federal laws that prohibit local governments from regulating the price, route or service of motor vehicles. The district court refused to issue the preliminary injunction they requested and ruled that the program fell within a statutory exception to the FAAA Act, that of “preserving the safety regulatory authority of a state with respect to motor vehicles.” Plaintiffs appealed.

Reversing and remanding, the appeals court stated, “the district court erred when it refused a preliminary injunction to American Trucking Associations, Inc. and needs to scrutinize the program closely to determine if any of its measures in fact qualify for statutory exemptions from the FAAA.” According to the court, because “many of the



program's provisions are unrelated to vehicle safety and [are] motivated by economic and environmental factors, the district court incorrectly allowed the port to escape preemption by the FAAA." On remand, the district court was ordered to inspect the specific terms of the clean trucks program before issuing an appropriate preliminary injunction.

#### [4] Toxic Tort: Florida AG Opens Criminal Investigation into Chinese Drywall

Florida Attorney General (AG) Bill McCollum (R) has reportedly launched a criminal investigation into potentially contaminated Chinese drywall. The investigation is focused on whether two companies—Knauf Plasterboard Tiajian and L&W Supply Corp.—committed deceptive sales and marketing practices in distributing the allegedly contaminated drywall to home builders in the state.

According to the Florida Department of Health, strontium sulfide, a material that can emit corrosive gases, was found at trace levels in Chinese drywall samples. Homeowners' lawsuits against the drywall manufacturers and suppliers contend that it has caused health problems such as headaches and sore throats and left them facing huge repair bills. The drywall is alleged to emit sulfur-based gases that smell of rotten eggs and corrode piping and wiring, causing electronics and appliances to fail. The Florida Department of Health said most of the drywall was installed in homes built between 2004 and 2007. See *Time*, March 23, 2009; *Bradenton Herald* and *CNN.com*, March 24, 2009.

#### [5] Wetlands: Groups Sue Corps/EPA over South Carolina Wetlands Issue

A coalition of environmental groups has reportedly sued the U.S. Army Corps of Engineers (Corps) and EPA over the Corps' decision to declare a South Carolina wetland "isolated" and thus unprotected by section 404 of the Clean Water Act. The lawsuit, which was filed in federal court in South Carolina, seeks to stop a developer from filling wetlands near Murrells Inlet in Horry County and to force the developer to obtain a state permit before proceeding. The groups allege that the wetlands are not isolated because they are connected to the Waccamaw River and that the Corps' decision is "erroneous." See *Greenwire*, March 24, 2009.

## Legislation, Regulations and Guidance

#### [6] Air: IG Report Criticizes EPA's Regulation of Air Emissions at U.S. Ports

EPA's Inspector General (IG) issued a [report](#) on March 23, 2009, criticizing EPA for not regulating ship emissions at U.S. ports. According to the report, although EPA has CAA authority to regulate emissions from oceangoing vessels if their emissions threaten health, the agency has only regulated nitrogen oxide emissions from U.S. ships.

The agency has deferred taking a position on whether it has authority to regulate foreign ships, which account for about 90 percent of all U.S. port calls. The report also criticizes EPA for failing to implement some key elements of its effort to cut air emissions at U.S. ports. For example, the report claims that the agency has failed to develop regulations to reduce emissions from oceangoing vessel engines, relying instead on voluntary emissions reduction programs, which have largely been ineffectual.



The report recommends that EPA (i) assess its authority and responsibility to regulate foreign-flagged vessels, (ii) consider which coastal areas should be designated as emission-control areas, and (iii) revise its ports strategy to include a transformation plan to ensure that key environmental goals are realized.

#### **[7] Air: EPA Issues Final Rule Establishing PEMS Verification Procedures**

EPA has issued a final rule promulgating Performance Specification 16 for predictive emissions monitoring systems (PEMS) under the Clean Air Act. [74 Fed. Reg.](#) 12,575 (3/25/09). The rule amends 40 C.F.R. Parts 60 and 63, establishing procedures that must be used to verify that PEMS are acceptable substitutes for current monitoring systems such as continuous emissions monitors. The rule allows industrial, commercial and institutional steam-gathering units and stationary gas turbines to use PEMS. The final rule is effective April 24, 2009.

#### **[8] Toxicity: Strategic Plan for Evaluating Toxicity of Chemicals Released**

EPA published a Notice of Document Availability on March 25, 2009, informing the public that the agency's "[Strategic Plan for Evaluating the Toxicity of Chemicals](#)" is available. [74 Fed. Reg.](#) 12,847. According to EPA, the purpose of the Plan "is to serve as a blueprint for EPA incorporating advances in molecular biology and computational sciences into the toxicity testing and risk assessment practices across the agency."

The Plan has three components: (i) toxicity pathways identification and use of this information in screening and prioritization of chemicals for further testing, (ii) the use of toxicity pathway information in risk assessment, and (iii) the institutional transition necessary to implement such practices

across EPA. A cross-agency workgroup under the auspices of EPA's Science Policy Council developed the Plan, which has been peer reviewed.

#### **[9] Air/Greenhouse Gases: EPA Submits GHG Regulation Proposal to OMB**

According to press reports, EPA has submitted a "Proposal for Endangerment Finding for Greenhouse Gases Under the Clean Air Act" to the Office of Management and Budget (OMB) for review. The proposal, which has not been made public, is expected to lead to EPA's regulation of greenhouse gases (GHG) under the Clean Air Act. Submission of a proposal to OMB is typically the first step in the federal administrative rulemaking process.

GHG regulation has been the subject of considerable controversy and litigation in recent years. In April 2007, the U.S. Supreme Court ruled that EPA had the authority under the Clean Air Act to regulate the emission of automobile GHGs. *Massachusetts v. EPA*, No. 05-1120 (U.S. April 2, 2007). EPA denied California's request to regulate GHGs from automobiles in 2008, but recently held a hearing to consider the state's request to regulate automobile GHGs. *See Jurist*, March 25, 2009.

#### **[10] Water: EPA Sends Drinking Water Infrastructure Needs Survey and Assessment to Congress**

EPA recently sent Congress its fourth "[Drinking Water Infrastructure Needs Survey and Assessment](#)" report, which is based on information and data gathered during 2007.

EPA relied primarily on a random sample survey that was sent to 3,250 public water systems in preparing the report. The results indicate a 20-year capital investment need of \$334.8 billion for public water systems that are eligible to receive



funding from Drinking Water State Revolving Fund programs—approximately 52,000 community water systems and 21,400 not-for-profit non-community water systems (including schools and churches). The report covers costs for repairs and replacement of transmission pipes, storage and treatment equipment and other projects required to protect public health and ensure compliance with the Safe Drinking Water Act.

### **[11] Water/CAFOs: EPA Region 6 Proposes Reissuance of Clean Water Act General Permit in Oklahoma**

EPA Region 6 in Dallas, Texas, has proposed reissuing a Clean Water Act (CWA) [general permit](#) for discharges from Concentrated Animal Feeding Operations (CAFOs) on state lands in Oklahoma. The original permit was issued in March 1993 (Permit No. OKG010000). The new proposed permit adds requirements contained in revised CAFO regulations at 40 C.F.R. 122 and 412, which were published in the *Federal Register* on November 20, 2008. *73 Fed. Reg.* 70,418. EPA will accept comments on the proposed general permit for 30 days after it is published in the *Federal Register*.

### **[12] Chemical Exposure: Report Summarizes State Laws Protecting Children from Toxic Exposures**

A recent [report](#) by scientists at Mount Sinai School of Medicine summarizes state laws and regulations designed to protect children from toxic exposures, including exposures that could trigger asthma attacks or harm neurological development.

Lauren Zajac, et al., “A Systematic Review of US State Environmental Legislation and Regulation with Regard to the Prevention of Neuro-developmental Disabilities and Asthma,” *8 Environmental Health* (2009).

The laws and regulations discussed include (i) regulations that reduce mercury emissions from coal-fired power plants, (ii) a California ban on the incineration of materials containing PCBs, (iii) dioxin reduction or monitoring programs, and (iv) requirements that public schools use cleaning products with reduced levels of volatile organic chemicals. The researchers reviewed environmental legislation and regulations in 50 states and the District of Columbia. The report concludes that differences in state environmental legislation and regulations lead to differences in exposure and affect children’s health. The report encourages state and federal governments to consider “model” regulations and legislation discussed in the report.

## **Scientific/Technical Items**

### **[13] Water: Pilot Study Finds Pharmaceuticals in Fish Caught Near Wastewater Treatment Plants**

A recent pilot study conducted under an EPA grant has found that fish caught near wastewater treatment plants serving five major U.S. cities contained pharmaceutical residues, including medicines used to treat high cholesterol, allergies, high blood pressure, bipolar disorder, and depression. Alejandro Ramirez, et al., “Occurrence of Pharmaceuticals and Personal Care Products (PPCPs) in Fish: Results of a National Pilot Study in the U.S.,” *Environmental Toxicology & Chemistry* (March 25, 2009).

EPA initiated the study to assess the accumulation of PPCPs in fish sampled from five effluent-dominated rivers that receive direct discharges from wastewater treatment facilities near Chicago, Illinois; Dallas, Texas; Orlando, Florida; Phoenix, Arizona; and West Chester, Pennsylvania. Analysis of the fish tissue revealed



concentrations of norfluoxetine, sertraline, diphenhydramine, diltiazem, and carbamazepine. Fluoxetine and gemfibrozil were found in liver tissue. According to reports, the pilot study—the first nationwide examination of human drugs in fish tissue—has prompted EPA to expand its research of contaminated fish by taking samples in 150 locations. *See E &E News PM*, March 25, 2009.

#### **[14] Water: U.S. Geological Survey Study Finds Contamination in Private Water Wells**

A [study](#) of 2,167 private water wells by the U.S. Geological Survey (USGS) released March 27, 2009, found that 23 percent of the wells sampled contained at least one contaminant at levels exceeding health benchmarks. The study used data gathered throughout a 13-year period from 30 of the nation's principal aquifers. It considered as many as 219 properties and contaminants, including nutrients, radionuclides, trace elements, pesticides, volatile organic compounds, and microbial contaminants.

The study used the maximum contaminant levels set by EPA under the Safe Drinking Water Act and health-based screening levels set by USGS. According to the study, the most common contaminants detected at levels of potential health concern were naturally occurring inorganic substances: (i) radon, (ii) strontium, (iii) arsenic, and (iv) manganese, in that order. The next three contaminants found at levels of potential health concern were uranium, boron and fluoride, primarily from natural geologic sources. Other contaminants found were man-made organics, including herbicides, insecticides, solvents, disinfection by-products, and gasoline-related chemicals.



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