

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] Water: Ninth Circuit Blocks Mine Expansion

The Ninth Circuit Court of Appeals has stayed logging operations that are needed to expand a phosphate mine in southeastern Idaho, ruling that the district court failed to include these activities in its “irreparable harm analysis.” *Greater Yellowstone Coal. v. Timcbak*, No. 08-36018 (9th Cir. 04/10/09). The court vacated the district court’s December 2008 order refusing to halt the project and remanded the matter for the court to reconsider its decision.

Several environmental groups seeking to stop the mine expansion plan filed the lawsuit in September 2008. The complaint alleged that the plan violated the Clean Water Act and other environmental laws because it relied on “unfounded assumptions and analytical shortcuts.” Plaintiffs sought a preliminary injunction halting implementation of the plan and an order reversing a decision by the U.S. Forest Service and the Bureau of Land Management approving it.

[2] FLPMA: Tenth Circuit Dismisses Challenge to BLM Land-Use Plan for Grand Staircase-Escalante Monument

The Tenth Circuit Court of Appeals has dismissed claims challenging a Bureau of Land Management (BLM) land-use plan for the 1.9-million acre

Grand Staircase-Escalante National Monument as a purported violation of the Federal Land Policy and Management Act (FLPMA) and Administrative Procedure Act. (APA). *Kane County v. Salazar*, No. 07-4207 (10th Cir. 4/13/09).

Plaintiffs, who include the Kane and Garfield County boards of commissioners and the Kane County Water Conservatory District, argued that the BLM plan (i) failed to incorporate historic uses of local roads, (ii) failed to take into account local uses in the monument area, and (3) “trapped” certain district water rights inside the monument area. They also claim that the plan infringes their water rights and certain rights-of-way related to public highways. The district court dismissed the complaint, and plaintiffs appealed.

The appellate court ruled that plaintiffs’ claims were too vague and failed to allege actual harm. For example, the court held that provisions in the BLM plan addressing diversion of water to locations outside the monument “expressly acknowledged the District’s existing water rights.” The court also said that some plan provisions clearly protect and preserve the district’s existing water rights and that the district lacked standing to challenge these plan provisions.

[3] Toxic Tort: Fourth Circuit Dismisses Herbicide Exposure Claim

The Fourth Circuit Court of Appeals has dismissed a herbicide exposure lawsuit, finding no evidence that plaintiff’s leukemia was linked



to exposure to defendant's herbicides. *White v. Dow Chem., No. 08-1165 (4th Cir. 04/08/09)* (unpublished). The wife of a deceased former tree company worker filed the lawsuit in 2005, alleging that her husband's long-term exposure to defendants' herbicides caused her husband to die of chronic myelogenous leukemia. The complaint alleged negligence, strict liability and breach of contract under West Virginia law. The district court dismissed, holding that plaintiff failed to demonstrate that her husband was injured by products that defendants manufactured. Plaintiff appealed.

The appeals court agreed with the district court, ruling that "despite two years worth of discovery, no direct or circumstantial evidence has come to light showing under West Virginia law that the worker had been exposed to any specific herbicides made by the defendants."

[4] Air: Federal Court Denies Summary Judgment in Challenge to Anti-Idling Law

A federal judge in Massachusetts has denied the summary judgment motion filed by a defendant sued for violating the state's anti-idling law. *U.S. v. Paul Revere Transp., LLC, No. 06-12297 (D. Mass. 04/14/09)*. Defendant's motion sought to have the government's proposed civil penalties and a permanent injunction dismissed.

The United States filed its complaint against the defendant in December 2006, alleging that an EPA inspector observed defendant idling its buses for longer than five minutes on more than 100 occasions over a number of visits to the company's garage. Under Massachusetts law, which is part of the federally enforceable state implementation plan approved by EPA, drivers are prohibited from operating a motor vehicle engine unnecessarily when a vehicle is stopped for more than five

minutes. Under the Clean Air Act, courts may impose penalties of up to \$32,500 per day for each violation of a state environmental law after March 15, 2004.

According to the court, because no specific penalty has been assessed against defendant, it could not determine whether a specific fine would be so excessive as to violate the Eighth Amendment, as defendant argued. According to the court, defendant's contention that idling of the vehicles met statutory exemptions "tacitly acknowledges that Paul Revere was engaged in the restricted conduct." Thus, the court found that defendant was not entitled to summary judgment on its void-for-vagueness challenge to the laws.

[5] Air: Federal Court Refuses to Enjoin California Clean-Trucks Program

A federal judge in Washington D.C. has denied a request to enjoin portions of California's "clean-trucks" program. *Fed. Mar. Comm'n v. City of Los Angeles, No. 08-1895 (D.D.C. 04/15/09)*. The ports of Los Angeles and Long Beach jointly developed the program and filed it with the Federal Maritime Commission as required by the federal Shipping Act. Under section 6(g) of that statute, the commission may bring a civil action against a port if a program is likely to cause a decrease in competition, an unreasonable reduction in transportation service or an unreasonable increase in costs. The commission sued in October 2008, arguing that the program violated section 6 of the Act because it might drive some independent operators and licensed carriers out of business.

The clean-trucks program was the result of a California Air Resources Board rule mandating restrictive new limits on emissions from diesel trucks at California ports and was intended to both



reduce emissions and improve the port's safety and security. The ports, as part of the program, adopted a "rolling truck ban" under which certain older trucks are gradually prohibited from providing services at the ports beginning with a ban on pre-1989 trucks that commenced October 1, 2008, and culminating January 1, 2012, with a ban on all trucks that fail to meet EPA 2007 truck-emission standards. The ports also adopted fees on older trucks and concession agreements that all licensed motor carriers doing business in the ports must sign.

Refusing to grant a preliminary injunction, the court held that the commission had failed to establish that the program would reduce competition in the trucking industry or force independent operators of smaller licensed carriers out of business. The court also determined that any negative impact of the program would be offset by the benefits associated with cleaner air.

[6] Water: Group Sues EPA over Alleged Failure to Review Florida's Impaired Surface Waters

A Florida environmental group has reportedly sued EPA alleging that the agency violated section 303(d) of the Clean Water Act by failing for six years to review and act on the state's list of impaired surface waters. *Florida Clean Water Network v. EPA*, No. 09-127 (N.D. Fla. filed 04/08/09). Under section 303(d), states, territories and authorized tribes are required to develop lists of impaired waters that do not meet water quality standards, establish priority rankings for waters on the lists and develop total maximum daily loads (TMDLs) for these waters. According to the lawsuit, while primary responsibility to develop a section 303(d)

impaired waters list fell to the Florida Department of Environmental Protection, EPA is required under the CWA to remain actively involved in the process.

According to news reports, the group will file a second lawsuit challenging EPA's approval in February 2008 of the water quality standards portion of Florida's amended impaired waters rule. The group says it will challenge EPA again, because the agency failed to follow proper procedures. See *BNA Daily Environment Report*, April 14, 2009.

[7] EPA Audit Policy: International Fiber and Polymers Company Agrees to Largest Settlement Under EPA's Audit Policy

A large international fiber and polymers manufacturing company has agreed to pay a \$1.7 million fine and spend \$500 million to correct environmental violations in what is reported to be the largest settlement under EPA's audit policy. *U.S. v. Invista S.a.r.l., No. 09-244 (D. Del. Consent Decree lodged 4/13/09)*. The company voluntarily reported 680 violations of air, water, hazardous waste, emergency planning and preparedness, and pesticide regulations at 12 facilities in seven states.

EPA's audit policy, initiated in 1995, provides facility owners with incentives to voluntarily report and correct environmental violations. Under the program, EPA can waive penalties and fines for violations reported by a company. According to EPA, "a large portion" of the company's potential penalties were waived. The consent decree, lodged in U.S. District Court for the District of Delaware, is subject to a 30-day public comment period and approval by the federal court.



Legislation, Regulations and Guidance

[8] Air/Greenhouse Gases: EPA Issues Proposed Endangerment Finding for GHG

On April 17, 2009, EPA proposed a rule which would find that greenhouse gases (GHG) in the atmosphere endanger the public health and welfare. The proposal is the result of a U.S. Supreme Court decision which held that GHGs are air pollutants covered by the Clean Air Act. *Massachusetts v. EPA*, 549 U.S. 497 (2007). The Court ruled that EPA must determine whether GHG emissions from new motor vehicles cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, or whether the science is too uncertain to make a reasoned decision.

EPA proposes to find that (i) the current and projected concentrations of the mix of six key GHGs—carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulfur hexafluoride (SF₆)—in the atmosphere threaten the public health and welfare of current and future generations; and (ii) the combined emissions of CO₂, CH₄, N₂O and HFCs from new motor vehicles and motor-vehicle engines contribute to the atmospheric concentrations of these key GHGs and hence to the threat of climate change. EPA will accept comments on the proposal for 60 days from its publication in the *Federal Register*.

[9] FDCA: EPA Releases List of Pesticide Ingredients to Be Screened for Hormonal Effects

EPA has issued the first list of pesticides for screening as possible endocrine disruptors.

74 Fed. Reg. 17,579 (04/15/09). Section 408(p)

of the Federal Food, Drug, and Cosmetic Act (FDCA) requires EPA to develop a chemical screening program using appropriate validated test systems and other scientifically relevant information to determine whether certain substances may have hormonal effects.

In September 2005, EPA published its approval for selecting the initial list of chemicals for which testing will be required under the agency's Endocrine Disruption Screening Program, and in June 2007, EPA published a draft list of proposed chemicals for screening. The final list includes the chemicals EPA believes should be tested first, based on exposure potential. In its notice, EPA cautions, "This list should not be construed as a list of known or likely endocrine disruptors. Nothing in the approach for generating the initial list provides a basis to infer that by simply being on this list these chemicals are suspected to interfere with the endocrine systems of humans or other species, and it would be inappropriate to do so."

[10] CERCLA: GAO Report Contends That Congress Should Expand EPA Authority over DOD Sites

A U.S. Government Accountability Office (GAO) report released April 16, 2009, contends that Congress should consider amending CERCLA to expand EPA's enforcement authority over contaminated Department of Defense (DOD) facilities.

According to the report, 140 DOD sites are listed on EPA's National Priorities List (NPL), although 985 sites require remedial action. EPA and DOD have agreements covering 129 of the 140 sites on the NPL, but have been unable to agree on the remaining 11 because the Pentagon has reportedly refused to sign the federal facility agreements required by CERCLA. EPA has issued cleanup orders



for several of those sites, but the Pentagon has asked the White House Office of Management and Budget and the Department of Justice (DOJ) to countermand those orders, arguing that they are overly burdensome.

Under CERCLA section 120, EPA must work with DOD to evaluate the nature and extent of site contamination, select a remedy, track the cleanup, and monitor the remedy's effectiveness in protecting human health and the environment. Section 120 requires that EPA and DOD enter into interagency agreements (IAGs) within 180 days of EPA's review of the remedial investigation and feasibility study at a site. Disputes have reportedly arisen between EPA and DOD about the IAG terms and whether EPA had a sufficient basis for enforcement actions.

The report recommends that Congress consider amending CERCLA section 120 to grant EPA the authority to impose administrative penalties at NPL federal facilities that lack IAGs and the authority to require agencies to complete preliminary assessments within specific time frames. EPA agreed with GAO's recommendations, but DOD did not.

[11] Alternative Energy: EPA to Take Public Comments on Petition to Increase Ethanol Content of Motor Fuels

The Environmental Protection Agency (EPA) has issued a [notice](#) seeking public comments on a petition by 54 ethanol manufacturers for a waiver of the prohibition on ethanol-gasoline blends above 10 percent by volume and a waiver on ethanol blends of up to 15 percent. *74 Fed. Reg.* 18,228 (04/21/09). According to the petition, higher levels of ethanol are necessary to allow compliance with the renewable fuels standard enacted by Congress in 2007 and will not have adverse effects on vehicle-emission controls.

Under the current Clean Air Act, the limit for ethanol is 10 percent, but EPA may waive that limit if it decides that increasing the ethanol content will not cause or contribute to the failure of emissions control equipment. EPA will accept comments on the petition until May 21, 2009.

[12] HAZMAT: DOT Pipeline Agency Adopts API Safety Standards

The U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) has announced a direct final [rule](#) incorporating by reference the most recent editions of American Petroleum Institute (API) Standards 5L and 1104. *74 Fed. Reg.* 17,099 (04/14/09). The two API standards, 5L—"Specification for Line Pipe" and 1104—"Welding of Pipelines and Related Facilities," are consensus standards that, according to PHMSA, will improve clarity, consistency and accuracy; reduce unnecessary burdens on the regulated community; and provide, at a minimum, an equivalent level of safety. The standards provide specifications for pipeline pipe and welding to ensure integrity and safety.

Scientific/Technical Items

[13] Water: New University of Arizona Laboratory to Research Contaminants in Water Supplies

The new Arizona Laboratory for Emerging Contaminants at the University of Arizona in Tucson will reportedly study chemicals, including pharmaceuticals, that purportedly contaminate the nation's water supplies. The lab will also focus on other contaminants, including pesticides, metals and personal-care products, such as antibacterial soap.



Among the lab's reported goals are (i) improving methods to detect trace amounts of contaminants, (ii) better understanding of what happens to trace compounds during treatment processes, and (iii) learning the effects of what happens when compounds are released into the environment and ingested by people. See *Arizona Daily Star*, April 13, 2009.

[14] Air/Greenhouse Gases: RGGI to Hold Fourth Carbon Dioxide Emissions Auction

The Regional Greenhouse Gas Initiative (RGGI) recently announced that it will offer 33 million carbon dioxide emissions allowances for sale in its fourth auction on June 17, 2009. The auction will include 30.8 million allowances available for immediate use by electricity generators and 2.1 million available for use after 2012. The minimum reserve price for each allowance is \$1.86.

The RGGI is a cooperative effort by 10 Northeast and Mid-Atlantic states to limit greenhouse gas emissions. The participating states are Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont. These states have agreed to cap carbon dioxide emissions from the power sector and require a 10 percent reduction in those emissions by 2018. See *RGGI Press Release*, April 13, 2009; *BNA Daily Environment Report*, April 15, 2009.



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