

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] **Water: Eighth Circuit Rules Missouri Waived Sovereign Immunity by Joining EPA Enforcement Action**

The Eighth Circuit Court of Appeals has affirmed a district court ruling that Missouri waived its Eleventh Amendment sovereign immunity rights when it joined EPA in filing a Clean Water Act (CWA) enforcement action against Metropolitan St. Louis Sewer District. [*U.S. v. Metro. St. Louis Sewer Dist., No. 08-3399 \(8th Cir. 6/9/09\)*](#).

EPA and the state sued the district in June 2007, alleging that it had illegally discharged raw sewage from 300 sanitary sewer overflows in violation of its NPDES permits. The district filed counterclaims, and the state moved to strike the claims, alleging that they were barred by the doctrine of sovereign immunity under the Eleventh Amendment. The state claimed that it had not waived its sovereign immunity rights because the CWA compelled it to join the lawsuit.

The Eighth Circuit disagreed with the state saying, “[t]here is no indication in the record that Missouri was reluctant to proceed as co-plaintiff since it participated in the original complaint with the United States rather than being forcibly joined in the litigation at a later time.” According to the court, while the CWA mandates that states become parties in federal court, it does not force them to be

plaintiffs per se. States can align as defendants and preserve their immunity, the court said.

Shook, Hardy & Bacon Environmental Partners [Terry Satterlee](#) and [Tom Grever](#) represented the district before the Eighth Circuit.

[2] **Attorney’s Fees: Ninth Circuit Finds Environmental Groups Were Not Prevailing Parties**

The Ninth Circuit Court of Appeals has overturned an award of attorney’s fees to Citizens for Better Forestry and 11 other environmental groups, ruling that they were not “prevailing parties” in their lawsuit against the U.S. Department of Agriculture (USDA). [*Citizens for Better Forestry v. USDA, No. 07-16077 \(9th Cir. 6/9/09\)*](#). In an earlier decision, the same court had held that USDA violated NEPA by depriving the environmental groups of their right to comment on relevant documents related to a 2000 national forest management rule. *Citizens for Better Forestry v. USDA*, 341 F.3d 961 (9th Cir. 2003).

After the court issued its decision, USDA withdrew its rule and issued a new final rule. Petitioners then dismissed their case and moved for attorney’s fees and costs under the Endangered Species Act and the Equal Access to Justice Act (EAJA). A magistrate judge issued a report and recommendation, concluding that petitioners’ motion should be granted under the EAJA, but denied under the ESA. After USDA objected, the district court reviewed the record *de novo* and issued an order adopting the



magistrate's recommendation. The district court awarded fees to petitioners because it held that they were a "prevailing party" on the NEPA claim.

On appeal, USDA argued that the district court incorrectly held that petitioners were a prevailing party because they "did not secure any relief" from either the district court or the Ninth Circuit. Petitioners argued that the Ninth Circuit went beyond a mere jurisdictional ruling to reach the merits of their NEPA claim and that the court's favorable ruling on the merits indicates petitioners were the prevailing party under EAJA.

In a 2-1 decision, the appeals court held that petitioners could not be considered prevailing parties because they never received a formal declaratory judgment or other relief. According to the majority, a "favorable judicial statement of law," which petitioners achieved, could not substitute for a "form of judicial relief." The dissenting judge argued that the NEPA-based holding was functionally equivalent to a declaratory judgment.

[3] International Jurisdiction: Second Circuit Vacates Defense Judgment in Oil-Spill Litigation

The Second Circuit Court of Appeals has vacated and remanded a defense judgment granted to the American Bureau of Shipping, Inc. (ABS) in a lawsuit brought by Spain for damages sustained when the M.T. Prestige sank in 2002 spilling thousands of tons of fuel oil. *Reino De España v. ABSG Consulting, Inc.*, No. 08-0579 (2d Cir. 6/12/09) (summary order). In the lawsuit, Spain accused Houston-based ABS, the classification society of record for the Prestige, of allowing the tanker to continue operating despite alleged defects. The complaint alleged wrongful classification, certification and inspection by ABS. The tanker began

leaking oil on November 13, 2002, and split in half several days later when the Spanish government attempted to drag it to international waters. ABS denied the allegations in a counterclaim, which also asserted that the sinking could have been avoided if Spain had not made matters worse by its handling of the disaster.

The district court ruled that under the International Convention on Civil Liability for Oil Pollution Damage, Spain must pursue its claims either in Spanish courts or those of another injured contracting state. The district court therefore dismissed Spain's lawsuit and ABS's counterclaim for lack of subject-matter jurisdiction. Spain argued on appeal to the Second Circuit that the treaty cannot undercut federal jurisdiction because the United States has not ratified it. The appellate court agreed and vacated the judgment. The court said that on remand the district court may consider the matter as a "inconvenient forum" case and determine where it should be tried.

[4] CERCLA: Pre-Enforcement Bar Prevents CWA Citizen Suit, Says Federal District Court

A federal judge in Washington has ruled that the CERCLA bar on pre-enforcement review prevents a Clean Water Act (CWA) citizen suit over mining-related discharges in a national forest because Forest Service (FS) cleanup activities at several abandoned mining sites are being conducted under CERCLA section 104 and not 120. *Washington Env'tl. Council v. Mount Baker-Snoqualmie Nat'l Forest*, No. 06-1249 (W.D. Wash. 6/2/09).

Plaintiff alleged that the FS cleanup was a "remedial action" being conducted under section 120. The issue of which section applied was significant because the Ninth Circuit Court of Appeals has held



that the provision in section 113(h) of CERCLA that bars pre-enforcement challenges to ongoing cleanups does not apply to section 120 remedial actions at federal facilities. *Fort Ord Toxics Project, Inc. v. Cal/EPA*, 189 F.3d 828 (9th Cir. 1999).

Determining that the FS cleanup did not fall under section 120, the court noted that section 120 applies to “federal facilities included on the National Priorities List” only and that the Monte Cristo Mining Area was not such a facility. The court also found it significant that it was the FS and not EPA that was involved in the cleanup. Section 120, the court said, gives authority to EPA only to conduct remedial actions at federal facilities and “requires EPA participation in assessment, evaluation and remediation.” The court also held that the specific actions being taken by the FS in the mining area “are completely consistent with a ‘removal action’ pursuant to section 104.” According to the court, the FS is “already undertaking a removal action,” and the section 113(h) challenge bar applies.

[5] CERCLA: EPA Not Precluded from Seeking Statutory Penalties Despite Consent Order

According to a federal court in New Jersey, EPA did not waive its right to seek maximum civil penalties under CERCLA for order violations when the agency entered into a consent order that included lower stipulated penalties. *U.S. v. SB Bldg. Assoc., L.P., No. 08-5298 (D.N.J. 6/1/09) (unpublished)*.

In 2003, officials in Middlesex County asked EPA to investigate a possible CERCLA removal action on a property in Milltown that defendant owned. An EPA investigation found numerous containers of leaking, bulging or rusted containers of hazardous substances on the property. In 2004, EPA and defendant entered into an administrative order on consent for the cleanup of the property. The order

called for various types of work to be completed and work reports filed by certain deadlines. It also called for defendant to reimburse EPA for its past costs and for various stipulated penalties if the company violated the order.

In October 2008, EPA sued defendant under sections 106 and 107 of CERCLA for allegedly failing to carry out the order’s cleanup requirements. The complaint alleged that defendant failed to file work-related reports in a timely manner and failed to reimburse EPA for its costs. In addition to seeking reimbursement, EPA also sought civil penalties of \$25,000 per day for failure to comply with the order. Defendant argued that EPA should be limited to the lower stipulated penalties agreed to in the consent order.

The court disagreed with defendant’s argument and ruled that EPA did not waive its right to seek maximum penalties by entering into the consent decree. According to the court, “the penalties sought in this action for violation of the [Administrative Order on Consent] are authorized by Section 106 of CERCLA.”

[6] Endangered Species Act: FWS Faulted for Failing to Include Species Reports in Forest Plans

A federal court in California has ruled that the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service violated the Endangered Species Act (ESA) by failing to include species reports in the forest plans they prepared for four southern California forests. *Ctr. for Biological Diversity v. FWS, No. 08-01278 (N.D. Cal. 6/8/09)*.

The plaintiff environmental organizations challenged two biological opinions underlying the forest plans for not containing incidental take statements



(ITS) as required by the ESA. Instead, the opinions concluded that implementation of the plans would not jeopardize any ESA-listed species or adversely modify any designated critical habitat. Each of the opinions indicated that an ITS would be provided as appropriate when site-specific projects were undertaken.

The ESA requires the Departments of Interior and Commerce to promulgate regulations listing plant and animal species that are “threatened” or “endangered” by extinction and to designate “critical habitat” for such species. 16 U.S.C. § 1533. Section 9 of the ESA establishes a blanket prohibition on the “taking” of any member of a listed endangered species. 16 U.S.C. § 1538(a)(1)(B). Section 7 of the ESA allows statutorily-defined “applicants,” including federal agencies, to carve out limited exceptions to the section 9 blanket prohibition under certain circumstances. During the consultation process, the relevant agency “must provide the [action] agency with a written statement (the Biological Opinion) explaining how the proposed action will affect the species or its habitat. *Bennett v. Spear*, 520 U.S. 154 (1997).

According to the court, the agencies acted “not in accordance with the law,” when they failed to issue ITSs with their biological opinions. The court granted the parties 21 days to provide additional briefing on the appropriate relief.

[7] Safe Drinking Water Act: Federal Court Dismisses Citizen Suit Citing Jurisdiction

A federal court in Texas has dismissed a Safe Drinking Water Act (SDWA) citizen suit brought by a Texas county against a uranium mining company, saying the county had an administrative remedy available for the company’s alleged groundwater contamination. *Goliad County v. Uranium*

Energy Corp., No. 08-18 (S.D. Tex. 6/5/09).

According to the complaint, defendant drilled more than 70 exploratory boreholes in the county and failed to close them properly, allowing storm runoff to flow into the boreholes and enter the county’s groundwater. Plaintiff alleged that by leaving the boreholes open, defendant improperly converted them into injection wells without a permit from the Texas Commission on Environmental Quality (TCEQ). Defendant is currently applying to the TCEQ for a permit. Plaintiffs sought an order barring defendant from obtaining a permit, or, alternatively, requiring it first to clean up the groundwater.

The court rejected plaintiff’s arguments, ruling that because the TCEQ is still considering defendant’s permit application, plaintiff’s claim is not ripe. The court also ruled that even if the claim were ripe, it would fail because defendant neither injected anything into the boreholes nor actively converted them into injection wells, thus placing the defendant beyond the reach of the SDWA, which does not regulate “passive violations.”

[8] Water: Illinois AG Sues Village of Crestwood Officials Alleging Knowing Distribution of Contaminated Water

Illinois Attorney General Lisa Madigan (D) has reportedly filed a lawsuit against the Village of Crestwood, its current and former mayors and the village’s former certified water supply operator for knowingly providing false information to village residents and the Illinois Environmental Protection Agency (IEPA) about the safety of the water supply and knowingly distributing contaminated water to village residents. *Illinois v. Crestwood*, No. 09-118361 (Ill. Cir. Ct. filed 6/9/09).

According to the complaint, Crestwood offi-



cials became aware in late 1985 that the village's "Well #1" was contaminated with volatile organic chemicals. The suit alleges that, despite knowing of the contamination, the village continued adding water from the well to the public water supply until 2007, while regularly reporting to residents and the IEPA that the village's only source of water was Lake Michigan water purchased from another Chicago suburb. The complaint further alleges that the village allowed the well to be contaminated and failed to conduct required testing of the public water system for inorganic chemicals, volatile organic chemicals and synthetic organic chemicals.

In each of the complaint's nine counts, the state asks the court to order the defendants to pay the statutory maximum civil penalties of \$50,000 for each violation of the Illinois Environmental Protection Act and the Illinois Pollution Control Board regulations and an additional \$10,000 for each day the violation occurred. See *Illinois Attorney General Press Release*, June 9, 2009; *Chicago Tribune*, June 10, 2009.

[9] FOIA: Former DOI Economist Sues Agency for Release of Oil-Bid Records

A former senior economist with the Department of Interior's (DOI's) Office of Policy Analysis has filed a lawsuit against DOI under the Freedom of Information Act (FOIA), alleging that the agency improperly denied his request for records showing how much companies paid the government for oil as part of an offshore royalty program. He is represented by a public-employee environmental organization. [*Berman v. DOI*, No. N/A \(D.D.C. filed 6/9/09\)](#).

Plaintiff requested records under FOIA in February 2009 on the sale of oil through the Mineral Management Service's (MMS) royalty-in-kind

program, which allows companies to pay royalties in oil instead of cash. The request sought documents showing the winning bid and second highest offer for all offshore crude oil offerings since 2005. Denying the request, MMS cited disclosure exemptions for information related solely to the internal personnel rules and practices of the agency and for trade secrets and privileged or confidential information. Plaintiff argues that the oil-bid sheets do not qualify as trade secrets and are not privileged or confidential.

[10] Air: Western U.S. Environmentalists Sue EPA over Soot and Smog Crossing State Lines

An environmental group has sued EPA over allegations that the agency failed to limit soot and smog drifting across state lines in the western United States. [*WildEarth Guardians v. Jackson*, No. N/A \(N.D. Cal. filed 6/2/09\)](#). The complaint accuses EPA of failing to force seven western states to limit interstate transport of air pollution, as required by the Clean Air Act. It claims that although EPA was required by 2007 to force California, Colorado, Idaho, New Mexico, North Dakota, Oklahoma, and Oregon to limit drifting emissions, it failed to do so. The complaint asks the court to find that EPA violated a non-discretionary duty to issue a federal implementation plan for the seven states and issue an injunction ordering EPA to establish plans to limit those states' ozone and fine particle emissions.

[11] Envtl. Crime: Louisiana Grand Jury Indicts Executive and Wastewater Treatment Business for CWA Criminal Violations

A federal grand jury in Louisiana has reportedly indicted an executive and his public water and wastewater treatment businesses for illegally



operating and maintaining the facilities and failing to report monitoring results to state regulators. *U.S. v. Pruett*, No. 09-00112 (W.D. La. 6/4/09). In the 17-page criminal indictment, defendant and his companies are charged with failing to properly operate the facilities in seven residential Ouachita Parish subdivisions from January 2006 to the present.

Defendants allegedly (i) allowed a wastewater treatment facility to overflow in several residential subdivisions, discharging effluent on the ground without proper tertiary treatment; (ii) allowed suspended solids and fecal coliform to exceed effluent limits in state discharge permits; and (iii) discharged raw sewage into several residential neighborhoods. Defendant will be arraigned June 25, 2009. See *BNA Daily Environment Report*, June 9, 2009.

Legislation, Regulations and Guidance

[12] Air/Greenhouse Gases: CBO Report Claims Cap-and-Trade Bill Would Net \$24 Billion to Government over 10 Years

A [report](#) published June 5, 2009, by the Congressional Budget Office (CBO) estimates that climate-change legislation, the American Clean Energy and Security Act of 2009 (H.R. 2454), would raise \$845.6 billion by 2019—netting the federal government about \$24 billion in surplus funds. The funds would be raised by auctioning emissions allowances and would more than offset the bill's total proposed spending of \$821 billion for new technologies, such as carbon capture and storage, and clean energy research.

The legislation, introduced by House Energy and Commerce Committee Chair Henry Waxman (D)

and Representative Edward Markey (D), would cut U.S. greenhouse gas (GHG) emissions 17 percent by 2020 from 2005 levels, establish more stringent energy efficiency standards and set a renewable electricity standard for states. According to the CBO report, the bill would require industries to hold allowances for the GHGs they emit and would generate more than \$60 billion in new revenue in 2012, when U.S. emissions would first be capped. Power plants would need to acquire emissions allowances beginning in 2012, while industrial facilities would be covered beginning in 2014. Natural gas distributors would have to comply beginning in 2016.

House Democrats reportedly want to move the bill to the House floor for a vote during summer 2009, while House Republicans are drafting an alternative to H.R. 2454. See *BNA Daily Environment Report*, June 9, 2009.

[13] RCRA: GAO Issues Report Critical of DOE on Work Stoppages at Hanford

The Government Accountability Office (GAO) has issued a [report](#) that criticizes the Department of Energy (DOE) for failing to collect adequate information about work stoppages at the Hanford Site in southeastern Washington. The report examines 31 work stoppages at the site, which contains 56 million gallons of hazardous waste from nuclear-weapons production in 177 large underground storage tanks clustered in areas known as tank farms. The tanks are more than 40 years old and, according to the report, 67 of the single-walled tanks have leaked or are presumed to have leaked into soil and groundwater.

DOE and its contractors are treating and permanently disposing of the waste. Of the 31 work stoppages, DOE had oversight information on only



two, and itemized costs were available for only one. DOE also allegedly failed to collect supporting documentation as to why problems occurred that led to work stoppages. The GAO report recommends that DOE (i) establish criteria for when the agency should direct contractors to track work and report reasons for work stoppages and their costs, (ii) specify the types of costs to be tracked, and (iii) increase transparency in the collection of cost information while balancing worker and public safety.

[14] Recycling: San Francisco Enacts Strict Recycling Ordinance

San Francisco's Board of Supervisors has reportedly enacted new recycling and composting rules that add even more strength to what some residents boast is "one of the most aggressive recycling programs in the country." Under the new ordinance passed on June 9, 2009, residents will be issued three mandatory garbage bins—a black one for trash, a blue one for recyclables and a green one for compost. Garbage collectors who spot orange peels or aluminum cans in a black trash bin will leave a note reminding the owner how to separate trash properly. Repeat violations could result in fines of \$100 for small businesses and single-family homes, and up to \$1,000 for large businesses and multi-unit buildings. See *The New York Times*, June 11, 2009.



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