

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] Air: Ozone Emissions Trading Ruled No Substitute for RACT Without More Analysis

The D.C. Circuit Court of Appeals has remanded portions of EPA's rule that allowed regional emissions trading for pollution controls in ozone nonattainment areas. [NRDC v. EPA, No. 061045 \(D.C. Cir. 07/10/09\)](#). In its per curiam ruling, with one judge concurring and dissenting in part, the court unanimously held that allowing the emissions trading program as a substitute for a requirement that emissions sources install reasonably available control technology (RACT) violates section 172 (c) (1) of the Clean Air Act.

EPA issued the ozone standard of 0.08 parts per million, averaged over an eight-hour period, in 1997 and designated ozone nonattainment areas in 2004. In 2005, the agency issued the rule implementing the eight-hour standard and, rather than requiring the installation of RACT controls, allowed emissions sources to purchase credits and offsets through a regional nitrogen oxides budget program. (70 Fed. Reg. 71,612) Environmental organizations, several states and an industry trade group challenged the rule.

The court did not vacate the rule, choosing instead to remand to give EPA the option of declaring that the emissions trading program is equivalent to RACT, if additional analysis shows that the trading produced greater ozone reductions

within individual nonattainment areas than could be achieved through RACT-level pollution controls. The court also vacated and remanded for correction a portion of the implementation rule that eliminated an 18-month limit on interim new source review (NSR) findings. The court rejected other challenges to the rule.

[2] Air: D.C. Circuit Rejects Challenges to EPA Fine Particle Nonattainment Area Designations

In a per curiam opinion, the D.C. Circuit Court of Appeals has rejected challenges to EPA's 2005 designation of fine particle nonattainment areas. [Catawba County v. EPA, No. 05-1064 \(D.C. Cir. 07/07/09\)](#). Several states, counties and power companies challenged the EPA designations, alleging that the agency ignored data from local emissions monitors, used a flawed definition of inter-jurisdictional emissions contribution and inconsistently applied its own guidelines when making the designations.

With one exception—the court remanded the agency's decision to list Rockland County, New York, for a “more coherent explanation”—the three-judge panel found all of the challenges to be without merit. According to the court, EPA “satisfied—indeed, quite often surpassed—its basic obligation of reasoned decisionmaking” when issuing its nonattainment designations.

In January 2005, EPA designated 224 counties in 20 states and the District of Columbia as not in attainment with the air quality standard for fine



particles. EPA later added 21 counties to the list. EPA's fine particles standard is 15 micrograms per cubic meter of air based on an annual average or 65 micrograms per cubic meter based on a 24-hour average. Fine particles include soot from industrial facilities and sulfate particles resulting from combustion of coal and other fossil fuels. Primary emission sources include power plants, motor vehicles, wood-burning stoves, and forest fires.

[3] **Water: Federal Court Establishes Detroit-Area Sewer Repair Schedule**

A federal judge in Michigan has established a schedule for the repair and rehabilitation of sewage infrastructure serving two Detroit-area counties. *U.S. v. City of Detroit*, No. 77-71100 (E.D. Mich. 06/30/09). According to the order, which applies to Oakland and Macomb counties, the repair schedule was imposed on either the city of Detroit, the current owner of the interceptor system or any parties that may eventually own the sewers. The interceptor systems carry waste products to treatment systems and serve about 830,000 people. In 1978, the system experienced its first collapse, resulting in a discharge of sewage into the Clinton River. Two other collapses occurred in 1980 and 2004.

[4] **Air: Georgia Appeals Court Remands Coal-Fired Power Plant Permit Case**

In a unanimous ruling, a three-judge panel of the Georgia Court of Appeals has overturned a Fulton County Superior Court decision that vacated a state permit for the construction of a 1,200-watt coal-fired power plant because it did not limit carbon dioxide emissions. *Longleaf Energy Assocs., LLC v. Friends of Chattahoochee, Inc.*, No. 08-0472 (Ga. Ct. App. 07/07/09). The lower court had ruled that the permit was defective because it contained no carbon dioxide emissions limits, which were

required by *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007). The appeals court wrote, "[t]his ruling was not required by the Clean Air Act or the decision in *Massachusetts v. EPA*, and would impose a regulatory burden on Georgia never imposed elsewhere." The court ordered the case remanded to an administrative law judge to consider the evidence under the correct standard of review set forth in its opinion.

[5] **Envtl. Crime: Soil Treatment Company Executive Pleads Guilty to Fraud and Money Laundering**

The former sales and marketing executive of a Canadian soil treatment firm has reportedly pleaded guilty in federal court to conspiring to pay kickbacks and defraud EPA, participating in a money-laundering conspiracy and impeding a proceeding before the Securities and Exchange Commission (SEC). *U.S. v. Griffiths*, No. N/A (D.N.J. 07/06/06). Seven individuals and three companies have entered guilty pleas in the government's ongoing investigation into bid rigging, bribery, fraud, and tax-related offenses at the Federal Creosote and Diamond Alkali CERCLA sites in New Jersey.

The former executive admitted to conspiring to defraud EPA by inflating prices he charged to a prime contractor and providing kickbacks to the contractor's employees. He faces a maximum penalty of five years in prison and a \$250,000 fine for the fraud conspiracy charge, 20 years in prison and a \$250,000 fine for the obstruction of justice charge, and 20 years in prison and a \$500,000 fine for the money-laundering charge. *See DOJ Press Release*, July 6, 2009.



[6] NEPA: Federal Agencies Challenged over Electricity Transmission Corridors

A number of environmental and conservation groups and a Colorado county have sued several federal agencies over 6,000 miles of electricity corridors, alleging that the agencies “created a sprawling, hopscotch network of 6,000 miles of rights-of-way” without considering environmental impacts, analyzing alternatives, weighing federal policies that support renewable energy, ensuring the corridors’ consistency with federal and local land-use plans, or consulting other federal agencies or state and local governments. *The Wilderness Soc’y v. U.S. Department of Interior*, No. N/A (N.D. Cal. 07/07/09).

The complaint alleges that the agencies violated the Energy Policy Act of 2005, NEPA, the Federal Land and Policy Management Act, and the Endangered Species Act. Defendants include the Department of Interior, Bureau of Land Management, U.S. Department of Agriculture, U.S. Forest Service, and Department of Energy.

The Energy Policy Act of 2005 required several agencies to develop and designate corridors for the development of pipelines and electricity transmission facilities on public lands in the 11 western states and to “perform any environmental reviews that may be required.” According to the plaintiffs, the agencies not only violated a host of laws, but, through their actions, “perpetuate the use of coal-fired power plants throughout the West.”

[7] Toxic Tort: Mississippi Jury Awards \$7 Million in Lead-Paint Exposure Case

A Jefferson County, Mississippi, jury has reportedly awarded \$7 million in compensatory damages to a teenager who allegedly developed lead poisoning from paint in his home. *Gaines v.*

Sherwin-Williams Co., No. 00-604 (Miss. Cir. Ct., Jefferson County, verdict 06/25/09). Plaintiff sued defendant in 2000, alleging that he ingested paint chips and was exposed to lead debris that resulted from removal of lead paint from the house in preparation for application of non-lead paint.

Defendants argued that they stopped manufacturing paint containing lead in 1972 and that it was impossible to buy such paint after 1978. Plaintiff argued that the home was painted in the early 1930s with defendants’ paint and that debris recovered after a house fire in 1994 showed the presence of lead paint. According to a news source, defendant intends to file an appeal. See *BNA Daily Environment Report*, July 9, 2009.

[8] CERCLA/Toxic Tort: Aerospace Contractors Sued over Groundwater Contamination Near Defense Facilities

Sacramento County, California, has sued two large aerospace contractors alleging CERCLA violations and common law causes of action; the county seeks damages and costs for past, current and future expenses of remediating contaminated groundwater near a defense-related manufacturing facility previously used by the companies. *County of Sacramento v. Aerojet-General Corp.*, No. 09-1041 (E.D. Cal. filed 07/01/09). The 5,500-acre manufacturing facility has extensive soil and groundwater contamination linked to its historical use of volatile organic compounds, such as trichloroethylene and perchloroethylene, and other industrial chemicals, such as perchlorate.

Liquid and solid rocket-propulsion systems and pharmaceuticals for government and commercial uses were manufactured at the plant. The complaint seeks a declaration that defendants are responsible for the contamination under CERCLA and the state Hazardous Substances Account Act. It also alleges



that the continued leaching of chemicals into groundwater is an “ongoing nuisance” that presents “an imminent and substantial endangerment to health or the environment” in violation of RCRA.

Legislation, Regulation and Guidance

[9] Air: EPA Issues Proposed NESHAP for Asphalt Processing, Roofing Manufacturing

EPA has issued a [proposed rule](#) to establish national emissions standards for hazardous air pollutants (NESHAP) for area source asphalt refining and asphalt roofing manufacturing facilities. *74 Fed. Reg. 32,822 (07/09/09)*. The proposed rule would give the regulated facilities the option of either limiting emissions of polycyclic aromatic hydrocarbons or meeting an emissions standard for particulate matter. It would require facilities to comply with an emission limit using either process changes or add-on controls.

EPA will accept comments on the proposed rule until August 10, 2009, unless a public hearing is requested by July 20. If a hearing is requested, written comments must be received by August 24.

[10] EU/Recycling: UK Electronic Waste Recyclers Attempt to Circumvent EU Directive

According to news reports, organized crime has moved into the UK’s electronic recycling industry in a scheme to circumvent the European Union’s electronic waste directive by exporting scrap to Africa. The EU’s electronic waste directive prohibits the export of waste and places the burden of

electronics recycling on manufacturers.

Police and the UK’s Environmental Agency have conducted a series of raids over the past few months to enforce the EU’s Waste Electrical and Electronic Equipment (WEEE) directive. Once the waste reaches Africa, it is reportedly stripped for raw materials. In a recent raid, investigators found 500 containers full of computers, monitors, refrigerators, and assorted electrical waste about to be shipped abroad. *See The Guardian*, July 8, 2009.

[11] Stormwater: District of Columbia Enacts Stormwater Law Banning Coal Tar Pavement Dressings, Sealants

The District of Columbia has [revised](#) the Environment Establishment Act of 2005 to prohibit the use of coal tar pavement dressings and sealants, effective July 1, 2009. The ban is part of the Comprehensive Stormwater Management Enhancement Amendment Act of 2008. The ban is apparently intended to keep toxic chemicals in coal out of local streams, rivers and the Chesapeake Bay. Violators could be fined up to \$2,500 for each day of violation. *See BNA Daily Environment Report*, July 6, 2009.

[12] Air/GHG: Massachusetts Issues GHG Reporting Rules

Massachusetts recently issued greenhouse gas (GHG) [reporting rules](#) and emissions figures required under the state’s Global Warming Solutions Act of 2008. The Act mandates emissions reductions of up to 25 percent from 1990 levels by 2020 and 80 percent by 2050. The Massachusetts Department of Environmental Protection set the 1990 baseline against which those reductions will



be measured at 94 million metric tons.

Under the new rules, the state agency said it anticipates that approximately 300 facilities will be required to report their GHG emissions annually. Most regulated facilities will be required to report “direct emissions,” such as those from factory-fuel burning, manufacturing processes and vents, and motor vehicle emissions. Regulated facilities will be required to report only carbon dioxide emissions for calendar year 2009. Starting in 2010, they will also be required to report emissions of methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. The rules apply to sources of GHG emissions “from a generator of electricity or a commercial or industrial site, including but not limited to a transportation fleet.”

Scientific/Technical Items

[13] Air: Study Alleges Ship Emissions Linked to 87,000 Deaths Each Year by 2012

A recent study by Rochester Institute of Technology researchers claims a link between sulfur emissions from oceangoing vessels and 87,000 deaths worldwide each year by 2012.

J. J. Winebrake, et al. “Mitigating the Health Impacts of Pollution From Oceangoing Shipping: An Assessment of Low-Sulfur Fuel Mandates,” *Environmental Science & Technology*, 43 (2009).

According to the study, the sulfur content of diesel fuel used in oceangoing ships averages 2.7 percent or 27,000 parts per million. The estimate of 87,000 deaths per year assumes no emission controls will be placed on ships.

EPA proposed a rule July 1, 2009, that would set a maximum sulfur level of 1,000 parts per million for fuel used in U.S.-flagged or registered ships.

The study projects reductions in the 87,000 death

forecast based on hypothetical regulatory provisions.



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We welcome any leads on new developments in environmental law or toxic tort litigation.

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