

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] NEPA: Ninth Circuit Determines EIS Not Required for Casino Construction

The Ninth Circuit Court of Appeals has ruled that the National Indian Gaming Commission (NIGC) did not violate NEPA by failing to prepare an environmental impact statement (EIS) in connection with the construction of a casino owned by the Nooksack Indian Tribe. *N. County Cmty. Alliance, Inc. v. Salazar*, No. 07-36048 (9th Cir. 7/15/09).

Plaintiff, a nonprofit environmental organization, argued that the NIGC violated the Indian Gaming Regulatory Act (IGRA) by failing to make an “Indian lands” determination before approving the Tribe’s non-site-specific gaming ordinance for the construction project and violated NEPA by failing to prepare an EIS. According to the court, there was no explicit requirement in the IGRA that, as a precondition to the NIGC’s approval, a proposed ordinance must identify the specific sites on which the proposed gaming is to take place. The court also ruled that NIGC’s failure to make an Indian lands determination did not constitute a “major federal action” requiring environmental reviews, including preparation of an EIS, under NEPA.

An appeals panel member concurring in part and dissenting in part disagreed that the law does not require an Indian lands determination and suggested that it is unknown whether the casino has been built on Indian land.

[2] APA: Motorized Rafts Not Barred from Grand Canyon, Rules Ninth Circuit

The Ninth Circuit Court of Appeals has upheld a National Park Service (NPS) decision to continue to allow motorized rafts on the Colorado River in Grand Canyon National Park, rejecting the environmental plaintiffs’ argument that a 2006 management plan for the Colorado River contradicts NPS park governance policies. *River Runners for Wilderness v. Martin*, No. 08-15112 (9th Cir. 7/21/09).

Four conservation groups argued that the use of motorized rafts on the Colorado River and helicopters to make passenger exchanges impaired the park’s wilderness character and that the NPS violated its management plan and federal law by allowing their continued use. Specifically, plaintiffs argued that the Colorado River Management Plan was “arbitrary and capricious” under the Administrative Procedure Act (APA).

Adopting the district court’s opinion, the appeals court ruled that plaintiffs had not met the “high threshold” necessary under the APA and Ninth Circuit precedent to set aside a federal agency’s decision. The court said that the agency’s management policies do not establish binding rules; rather, they provide general guidance that cannot be enforced against the agency by third parties.



[3] **Water: Corps Illegally Provided Lake Lanier Water to Atlanta, Court Stays Action for Parties to Seek Congressional Authorization**

A federal judge in Florida has ruled that the U.S. Army Corps of Engineers (Corps) acted illegally when it diverted water from Lake Lanier for municipal and industrial water supply purposes rather than for hydropower generation, flood control and navigation, the primary purposes authorized by Congress. *In re Tri-State Water Rights Litig., No. 07-01 (M.D. Fla. 7/17/09)*.

According to the court, before the Corps has authority to withdraw water from Lake Lanier to meet Atlanta's water supply needs, Congress must authorize it. The court stayed its ruling, giving the Corps and other interested parties time to seek congressional approval. The court's ruling came after almost two decades of litigation among Alabama, Florida, Georgia, and the Corps over sharing water within the Apalachicola-Chattahooche-Flint river basin. The litigation has focused primarily on the Corps' operation of four Chattahooche River dams, the largest of which forms Lake Lanier, located to the north of Atlanta.

In February 2006, the D.C. Circuit Court of Appeals reversed a district court decision approving a settlement between Georgia, the Corps and federal power customers that would have reallocated one-fifth of Lake Lanier's water to municipal and industrial use. The appellate court held that the settlement agreement created major operational changes in lake water use that must be approved by Congress under the Water Supply Act. *Se. Fed. Power Customers Inc. v. Geren*, No. 06-8280 (D.C. Cir. 2/5/08).

The district court ruling provides a three-year window for either congressional action or "some other resolution." If Congress does not approve a reallocation within three years, however, water withdrawal from Lake Lanier will revert to baseline levels set in the 1970s. That would mean less water for Atlanta, which currently gets 75 percent of its drinking water from Lake Lanier.

[4] **Air: Federal Court Dismisses Asbestos Suit for Lack of Standing**

A federal judge in Missouri has dismissed claims against the City of St. Louis filed by citizens who alleged that the city exposed the public to asbestos contamination when buildings were torn down to build a new runway at the Lambert St. Louis International Airport between 1999 and 2004. *Families for Asbestos Compliance Testing & Safety v. City of St. Louis, No. 05-719 (E.D. Mo. 7/21/09)*. The court determined that plaintiffs lacked standing to sue.

In September 2008, the court granted plaintiffs' motion for partial summary judgment after finding that St. Louis violated the National Emission Standards for Hazardous Air Pollutants (NESHAP) for asbestos by approving the mass "wet demolition" of asbestos-laden buildings. The case went to trial to determine civil penalties and injunctive relief, but the city filed a post-trial brief arguing for the first time that plaintiffs lacked standing. The court agreed, finding that wet demolition ceased in 2004, nearly a year before the complaint was filed, and the city ultimately secured EPA approval to use the wet demolition method in the future. Under these circumstances, the court concluded that plaintiff could not establish standing's "redressability" element.



[5] CERCLA/Natural Resource Damages: Oklahoma AG's NRD Claims Against Poultry Companies Dismissed

A federal judge in Oklahoma has dismissed all claims for natural resource damages (NRD) under CERCLA in a lawsuit by the state attorney general (AG) against poultry companies over alleged pollution of the Illinois River Watershed. *Oklahoma v. Tyson Foods, Inc., No. 05-329 (N.D. Okla. 7/22/09)*. The court did so after concluding that the Cherokee Nation, which had a substantial interest in the watershed, was a "required party" to the litigation. The court rejected an agreement between the AG and the Cherokee Nation attorney general retroactively assigning the Nation's rights to Oklahoma for purposes of the litigation, ruling that it failed to meet state or tribal requirements for such agreements. The ruling did not affect the state's request for injunctive relief.

[6] Waste: Industry Groups Challenge New York City Electronics Recycling Law

The Consumer Electronics Association and Information Technology Council have reportedly filed a lawsuit in a Manhattan federal court seeking to block New York City's electronics recycling law, which takes effect July 31, 2009. Passed by the City Council in March 2008, the law requires manufacturers to take back their electronics products and provide pick-up service for items weighing 15 pounds or more. Starting in 2010, consumers will face a \$100 fine for discarding computers, TVs and other gadgets in the trash. Manufacturers failing to recycle products returned to them could be fined for each violation.

The complaint contends that the law would improperly affect products made before it takes effect, the pick-up requirement would be overly

burdensome, and it would force companies to collect products they may not have manufactured. It also raises constitutional issues, asserting that the City Council's action amounts to an illegal attempt to regulate interstate commerce. *See The New York Times*, July 24, 2009.

[7] Proposition 65: Trade Group Sues to Stop Cal/EPA from Adding Styrene to Toxic Chemicals List

An industry trade group has reportedly sued Cal/EPA's Office of Environmental Health Hazard Assessment (OEHHA), seeking to stop the agency from listing styrene as a carcinogen under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65). *Styrene Info. & Research Ctr. v. OEHHA*, No. 09-53089 (Cal. Super. Ct. filed 07/15/09). According to the complaint, styrene does not cause cancer, and its proposed Prop. 65 listing would cause the \$28-billion-a-year industry "irreparable harm." It also alleges that OEHHA is interpreting and implementing Prop. 65 in secret and that the agency refuses to consider new scientific evidence indicating that styrene is not a human carcinogen.

Styrene is used in milk cartons, egg crates, plastic pipes, automobile parts, and many other products. EPA has classified it as a suspected carcinogen, and OSHA says that exposure to styrene may affect the central nervous system and result in headaches, fatigue and dizziness. *See Sacramento Bee and Greenwire*, July 22, 2009.

[8] Env'tl. Crime: Former Manufacturing Company VP Pleads Guilty to CWA Criminal Violations

The former vice president of a now-defunct Connecticut manufacturing company has pleaded guilty in federal court to two counts of violating



the Clean Water Act and could face up to two years in prison. *U.S. v. Meyer*, No. 09-00133 (D. Conn. 7/21/09). Court records show that the company, Atlantic Wire, collected and treated wastewater at an on-site wastewater treatment system before discharging it into the Bradford River under an NPDES permit.

When the defendant was acting as the company's principal contact with the state environmental agency that issued the permit, the company violated it several times and failed to report the violations to the Connecticut Department of Environmental Protection as required. Atlantic Wire agreed to pay the state \$1.5 million in January 2009 to settle charges that it repeatedly discharged toxic wastewater into the river over a nearly three-year period. Sentencing for the former vice president is scheduled for later this year. See *BNA Daily Environment Report*, July 22, 2009.

Legislation, Regulations and Guidance

[9] Air: EPA Proposes Rule Setting NESHAP for Prepared Animal Feed Manufacturing

EPA has proposed a [rule](#) to establish national emissions standards for hazardous air pollutants (NESHAPs) for all new and existing prepared feed manufacturing facilities, other than those making cat and dog food, that qualify as area sources under the Clean Air Act. The proposed rule would amend 40 C.F.R. Part 63, Subpart DDDDDDD 74 *Fed. Reg.* 36,980 (07/27/09). It would establish a mixture of workplace practices and particulate matter emission controls as the generally available control technology (GACT) standard for feed manufacturers.

Specifically, the proposal would require work practices to minimize dust containing chromium and manganese compounds and require manufacturers to store raw materials containing the toxic metals in closed containers. It would also require mixing machinery to be covered when operating and the use of filter drop sacks during bulk-loading operations. Feed manufacturers that produce more than 50 tons per year would also be required to install a cyclone to reduce emissions during palleting and pallet-cooling operations. Covered manufacturing facilities would be required to route particulate matter emissions containing chromium or manganese compounds through a cyclone capable of capturing 95 percent of particles that are smaller than 10 microns in diameter. Feed manufacturers would have two years to comply with the emissions standard once the rule is finalized. EPA will accept comments on the proposed rule for 30 days after publication.

[10] RCRA: EPA to Re-Examine Solid Waste Rule

EPA reportedly plans to re-examine a rule issued in October 2008 that revised the definition of solid waste by excluding several categories of material, including those legitimately recycled, from classification as hazardous waste. At that time, EPA claimed that the rule was designed to streamline recycling requirements. Soon after the rule was adopted, Earthjustice filed a petition with EPA on behalf of the Sierra Club, seeking to overturn the rule and claiming that while it would minimally affect recycling, it would disproportionately harm low-income and minority communities. At a June 30, 2009, hearing, community representatives, academics and civil and environmental rights groups argued



that the rule would put low-income and minority community residents at risk because those groups are purportedly more likely to live near hazardous waste facilities and bear the brunt of toxic spills. See *Environmental Law* 360, July 24, 2009.

[11] Air: EPA Announces Reconsideration of Monitoring Requirements for Airborne Lead

EPA announced July 22, 2009, that it will reconsider some of its monitoring requirements for airborne lead. According to the announcement, the agency will consider whether additional air monitoring near industrial sources of lead is warranted. EPA will also reconsider the monitoring requirements for urban areas as part of its review. EPA said its reconsideration will not delay implementation of the 2008 lead standards. EPA will issue a proposal and take public comments before deciding whether to revise the lead monitoring requirements. See EPA *Press Release*, July 22, 2009.

[12] EU/Ecodesign: EC Adopts Energy Efficiency Standards for Power-Consuming Products

The European Commission (EC) has adopted energy efficiency standards for a range of power-consuming devices. The standards apply to industrial motors, circulators (small pumps used mainly in hot-water boilers for circulating water), TVs, and domestic appliances such as refrigerators. Only high-efficiency industrial motors, which are used to drive pumps and fans in machinery, will be allowed into the EU market starting in 2017. Circulators that do not meet the standards must be phased out by 2014. Inefficient TVs and appliances must be phased out between 2010 and 2014.

[13] EU/Air: EU Adopts Regulations Setting Tighter Standards for Emissions from Trucks and Buses

The European Union (EU) has adopted regulations setting tighter standards for truck and bus pollutant emissions, including nitrogen oxides, carbon monoxide and particulate matter. Under the regulations, new vehicle makes and models weighing 2,610 kilograms (5,754 pounds) or more must conform with the standards by 2013 to be sold in the EU. All new vehicles must conform by 2014.

The European Parliament approved the standard, known as Euro VI, in December 2008. It includes a limit of 400 milligrams per kilowatt-hour, a measure of emissions relative to engine power, for nitrogen oxides and a 10 mg/kwh limit for fine particles. The regulation requires the 27 EU member states to put in place “effective, proportionate, and dissuasive” penalties against non-compliance and to report these to the European Commission by February 7, 2011.



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

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