

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] NEPA: Ninth Circuit Upholds Reinstatement of EPA Roadless Rule

The Ninth Circuit Court of Appeals has upheld a district court decision overturning EPA's State Petitions Rule and reinstating the Roadless Rule. [California v. USDA, No. 07-15613 \(9th Cir. 8/5/09\).](#)

The appellate court agreed with four states, a number of environmental groups and the district court that the U.S. Forest Service acted unreasonably when it sought to replace the Roadless Rule with the State Petitions Rule in 2005. 70 *Fed. Reg.* 25,654 (5/13/05).

The Roadless Rule barred the construction of roads in inventoried Forest Service areas. 66 *Fed. Reg.* 3,244 (1/12/01). The State Petitions Rule allowed governors to petition for exemptions from the Roadless Rule, depending on their individual state needs. Several states and environmental groups challenged the State Petitions Rule, arguing that it violated NEPA and the Endangered Species Act (ESA) by allowing for possible reductions in environmental protection without adequate analysis and justification. The district court agreed, holding that the State Petitions Rule effectively repealed the Roadless Rule without considering the environmental impacts required by NEPA and without consulting with the U.S. Fish and Wildlife Service as the ESA mandates. The Forest Service appealed.

The appeals court ruled that the Forest Service's use of a categorical exemption to repeal the nationwide protections of the Roadless Rule and to invite states to pursue varying rules for roadless area management was unreasonable. It was also unreasonable, according to the court, "for the Forest Service to assert that the environment, listed species, and their critical habitats would be unaffected by this regulatory change."

It should be noted that a federal court in Wyoming enjoined the Roadless Rule in 2003. *Wyoming v. USDA*, 277 F. Supp. 2d 1197 (D. Wyo. 2003). That decision is currently on appeal before the Tenth Circuit. *Wyoming v. USDA*, No. 08-8061 (10th Cir.).

[2] RCRA: Second Circuit Rejects Argument That Shooting Range Needs Permit

According to the Second Circuit Court of Appeals, a shooting range operator does not need a RCRA hazardous waste disposal permit because lead bullets fired there are not discarded or abandoned. [Cordiano v. Metacon Gun Club Inc., No. 07-0795 \(2nd Cir. 7/31/09\).](#) The lawsuit was filed by a group of Connecticut homeowners who argued that the nearby gun club violated RCRA by operating its shooting range without a permit to dispose of hazardous waste. They also alleged that the lead at the range amounted to an "imminent and substantial endangerment" under RCRA and that the gun club should have a pollutant discharge permit under the Clean Water Act because some of the lead bullets ended up in wetlands that were



connected to a nearby river after heavy rainfall and flooding. The district court dismissed the complaint, and plaintiffs appealed.

Rejecting plaintiffs' arguments, the appeals court based its decision in part on an EPA *amicus* brief, in which the agency said it has consistently taken the position that the discharge of lead shot as part of the normal use of that product (that is, fired from a gun at a firing range) does not render the materials "discarded" within RCRA's meaning. The brief also asserted that EPA has repeatedly stated that its regulatory jurisdiction under RCRA does not apply to products that are applied to the land in the ordinary manner of use, because such products are being used, not "abandoned."

The court therefore held that the lead bullets were not hazardous waste because they were not "discarded material" and therefore did not meet the definition of solid waste. The court also rejected the plaintiffs' endangerment claim, ruling that plaintiffs failed to conduct a risk assessment and could not provide sufficient evidence that the alleged contamination presented a reasonable prospect of future harm. As to the plaintiffs' Clean Water Act argument, the court held that there was insufficient evidence that surface water runoff constituted a discharge from a point source, as required by EPA NPDES regulations.

[3] Env'tl. Crime: Federal Court Rules Federal Prosecutors May Pursue Criminal Charges for State RCRA Violations

A federal judge in Rhode Island has ruled that federal prosecutors can pursue criminal charges against companies for violations of a state RCRA regulation which requires that even conditionally exempt small quantity generators (CESQGs) obtain a hazardous waste storage permit. [*U.S. v. Southern Union Co., No. 07-134 \(D.R.I. 7/23/09\)*](#).

Defendants argued that their criminal convictions for storing waste without a permit should be overturned because the state regulation, part of the state's RCRA program, was broader than the federal RCRA program.

The court held that the state's tougher treatment for CESQGs does not make the state program, which is in lieu of the federal program and has been authorized by EPA, broader than the federal program. The court drew a distinction between the term "broader" and the term "stricter," saying that the state regulation was stricter but not broader than the federal regulation, making it enforceable as part of the state's authorized RCRA program. The court therefore upheld the federal jury's verdict and rejected defendant's motion for acquittal.

[4] CERCLA: Five Companies Pay \$21 Million to Settle NRD Claims

According to a recently filed proposed consent decree, five companies would pay \$21 million to settle natural resource damage (NRD) claims under CERCLA for damages allegedly caused by the operation of zinc smelting facilities at the Palmerton Zinc Pile CERCLA Site in Pennsylvania. [*U.S. v. Horsehead Indus., Inc., No. 98-00654 \(M.D. Pa. filed 8/3/09\)*](#). The settlement, subject to a 60-day comment period and final court approval, is reportedly the largest NRD settlement to date in Pennsylvania.

Under the settlement's terms, the companies will pay \$9.875 million and transfer 1,200 acres of property valued at \$8.72 million to the Pennsylvania Game Commission. They will also pay \$2.5 million for damage assessment costs and discharge a mortgage worth \$300,000 on the Wildlife Information Center, a nonprofit conservation and environmental education organization. For more than 90 years, the former New Jersey Zinc Co. operated



the Palmerton site, which was contaminated with arsenic, cadmium, chromium, copper, lead, manganese, and zinc through air emissions and the release of solid wastes. The site was placed on the National Priorities List in 1983.

[5] Air: Bus Company to Pay Penalty for Violations of Anti-Idling Regulations

A Boston-based bus company has reportedly agreed to pay a \$650,000 civil penalty after being found liable by a federal jury for 234 violations of state and federal anti-idling regulations. The regulations prohibit unnecessary operation of a motor vehicle's engine while the vehicle is stopped for a foreseeable period of time in excess of five minutes. The regulations are required by Massachusetts' Clean Air Act State Implementation Plan (SIP).

Court records reveal that the company operates a large fleet of buses out of its bus yard in Roxbury. In 2006, an EPA inspector observed buses idling at the yard for extended periods. Inspections were then conducted once a week for several weeks. During the inspections, numerous buses were observed idling for up to two hours. During seven separate inspections, EPA witnessed more than 100 illegal idling hours. A stipulation and order was filed in the U.S. District Court for the District of Massachusetts on August 4, 2009. It is subject to a 30-day public comment period and approval by the court. *See DOJ Press Release*, August 4, 2009.

Legislation, Regulations and Guidance

[6] Air: EPA Proposes NESHAPs for Chemical Preparations Industry

EPA has proposed national emissions standards for hazardous air pollutants (NESHAPs) for new and existing chemical preparations facilities that are considered area sources. 74 *Fed. Reg.* 39,013 (8/5/09). Chemical preparations facilities conduct industrial operations that mix, mill, blend, and/or extrude chemicals.

The proposed standards, which would constitute generally available control technology for chemical preparations facilities, would limit emissions of particulate matter that contain chromium, lead, manganese, or nickel compounds. They would require facilities to control particulate matter emissions to 0.03 grains per dry standard cubic foot or otherwise reduce emissions by 95 percent. The proposed rule would exempt chemical preparations facilities from the need to obtain a Title V operating permit. EPA will accept comments on the proposed rule, which would amend 40 C.F.R. Part 63, Subpart BBBB, until September 4, 2009.

[7] Water: EPA Seeks Comments on Proposed Changes to Missouri's Impaired Waters List

EPA is seeking public comments on its proposed changes to Missouri's 2008 list of impaired waters. The Missouri Department of Natural Resources (MDNR) submitted its 2008 impaired waters list to EPA for review as required by the Clean Water Act and federal regulations. In its proposed decision, EPA is relisting 17 water bodies that MDNR excluded or removed from Missouri's list. The proposed additions include waters that EPA found impaired by bacteria,



chloride, metals, sediments, and other pollutants. EPA will consider comments on its proposed relisting until October 5, 2009.

[8] Alternative Energy: MMS/FERC Issue Joint Guidance on Regulation of Hydrokinetic Energy Projects on the Outer Continental Shelf

The Department of Interior's Minerals Management Service (MMS), which has authority over leases on the Outer Continental Shelf (OCS), and the Department of Energy's Federal Energy Regulatory Commission (FERC), which has jurisdiction over operating licenses, have issued [joint guidance](#) on obtaining approvals for offshore wave, tide and ocean-current energy projects on the OCS.

The guidance explains general requirements, lease and license procedures, lease and license terms, financial assurance requirements, and fee structures, and provides other information. The guidance indicates that the two agencies will combine their NEPA processes, where possible, when NEPA reviews and environmental consultations are required. The document also contains a Memorandum of Understanding (MOU) between the two agencies setting out their commitments.

MMS has been leasing offshore oil and gas projects for decades and will lease offshore wind and power projects as well as hydrokinetic projects. The agency will also regulate easements for transmission lines to bring electrical power ashore. FERC has been in charge of operating licenses for hydroelectric dams for several years. Under the guidance and MOU, the two agencies will cooperate on OCS projects.

[9] Safe Drinking Water Act: EPA to Re-evaluate Perchlorate Regulation

EPA announced August 5, 2009, that it will seek public comment on its re-evaluation of the scientific evidence regarding perchlorate in drinking water. In 2008, EPA made a preliminary decision not to regulate perchlorate. After the decision, the agency received more than 32,000 individual and organizational comments. EPA will consider those comments and new ones received during the 30-day comment period following publication in the *Federal Register*. EPA will then determine whether to regulate perchlorate under the Safe Drinking Water Act. See *EPA Press Release*, August 5, 2009.

[10] Chemical Exposure: OSHA Issues Guidance on Combustible Dust Hazards

The Occupational Safety and Health Administration (OSHA) has issued [guidance](#) on the hazards of combustible dusts. Combustible dusts are solids that have been finely ground into particles, fibers, chips, chunks, or flakes that can cause a fire or explosion when suspended in air under certain conditions. The dusts can come from many sources, including metals such as aluminum and manganese; wood, plastic or rubber; biosolids; coal; organics such as flour, sugar and paper; and certain textiles.

The guidance aims to help chemical manufacturers and importers recognize the potential for dust explosions, identify protective measures and comply with requirements to disseminate the information on material safety data sheets and labels. It discusses the hazards of combustible dusts in relation to the Hazard Communication Standard, which is designed to ensure that chemical hazards are evaluated and information concerning them transmitted to employers and workers.



[11] Air/Greenhouse Gases: Michigan Executive Order Commits to GHG Emissions Reductions

Michigan Governor Jennifer Granholm (D) recently signed an [executive order](#) committing the state to reduce its greenhouse gas (GHG) emissions 20 percent from 2005 levels by 2020 and 80 percent by 2050. The executive order does not implement specific programs but rather directs various state agencies to establish programs to increase building-energy efficiency, decrease vehicle emissions, develop and implement carbon sequestration, and facilitate several joint initiatives with other states and tribal governments.

Vehicle initiatives include a “truck idling program” and an “eco-driver program” that instruct state employees on how technology, maintenance and driving patterns can affect fuel efficiency, and an expansion of the state Department of Transportation’s program to reduce traffic congestion. The order instructs the state Department of Environmental Quality to work with the Michigan Economic Development Corp. to analyze recommendations made in a state action plan to reduce GHG emissions.

[12] Waste Disposal: New Illinois Law Establishes Program to Manage Household Wastes Including Pharmaceuticals

Illinois Governor Pat Quinn (D) signed legislation ([S.B. 178](#)) August 4, 2009, requiring the state to create programs to better manage household wastes such as trace amounts of pharmaceuticals and other chemical substances that are entering the state’s drinking water systems. The new law directs the Illinois Environmental Protection Agency (IEPA) to develop systems for managing household wastes,

including pharmaceutical products, personal-care products, batteries, paints, automotive fluids, compact fluorescent light bulbs, mercury thermometers, and mercury thermostats.

IEPA is expected to accomplish its goals through enhanced programming at state-sponsored waste drop-off centers. The law also directs IEPA to cooperate with the Department of Public Health and the state Board of Education to create a public education program related to waste drop-off points that accept pharmaceutical products.

[13] Hazardous Waste: Ontario Proposes to Expand Hazardous Waste Program

In Canada, Ontario’s Ministry of the Environment has issued a [proposed notice](#) that would expand the province’s hazardous waste disposal program to include rechargeable batteries, aerosol containers, pharmaceuticals, syringes, fluorescent lamps, mercury-containing measuring devices, mercury switches, and portable fire extinguishers. The proposed expansion would take effect July 1, 2010.

In a prior expansion of the program, the agency added paints and coatings, solvents, oil containers and filters, single-use dry cell batteries, antifreeze, pressurized containers, fertilizers, fungicides, herbicides, insecticides, and pesticides to its list of hazardous wastes. The proposed notice was published in the *Environmental Registry* on July 31, 2009, and is open to public comment until August 30, 2009.



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please contact Dave Erickson (derickson@shb.com; 816-474-6550) or
Jim Neet (jneet@shb.com; 816-474-6550).
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