

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] **APA: D.C. Circuit Rejects Surface Mining Office's Attempt to Vacate SBZ Rule**

The D.C. Circuit Court of Appeals has rejected an attempt by the Department of Interior's Office of Surface Mining (OSM) to vacate the "stream buffer zone" (SBZ) rule it finalized in December 2008. [*Nat'l Parks Conservation Ass'n v. Salazar, No. 09-115 \(D.C. Cir. 8/12/09\)*](#). OSM had asked the court to remand the rule to the agency so that it could correct its legal deficiencies.

The 1983 SBZ rule required coal operators to keep a 100-foot space between streams and mining operations. The December 2008 changes extended the rule to all bodies of water but exempted certain activities common to mountaintop mining, including permanent spoil fills and coal-waste disposal facilities. The National Parks Conservation Association challenged the rule in January 2009, arguing that the OSM violated several federal statutes in promulgating it. In April 2009, the OSM filed a motion to vacate the rule arguing that serious legal defects in the rulemaking should be corrected and that there was no longer a "case or controversy."

Opposing the agency's motion to remand, intervenor National Mining Association (NMA) argued that the agency should not be permitted to bypass the Administrative Procedure Act (APA) requirements for repealing an agency rule. The court agreed, saying that the APA requires government agencies to follow certain procedures,

including providing for public notice and comment, before enacting, amending or repealing a rule. Accordingly, the court denied OSM's motion to dismiss.

[2] **CWA/Attorney's Fees: Ninth Circuit Clarifies Fee Award Standard**

The Ninth Circuit Court of Appeals has ruled that a federal court may deny attorney's fees to a prevailing plaintiff in a Clean Water Act (CWA) citizen suit only when "special circumstances" exist. [*Saint John's Organic Farm v. Gem County Mosquito Abatement Dist., No. 07-35797 \(9th Cir. 7/16/09\)*](#). Under section 505(d) of the CWA, a court may award attorney's fees "to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." The district court held that attorney's fees were not appropriate, but cited no standard for measuring "appropriateness."

To determine when an award is "appropriate," the appellate court adopted a standard from a Civil Rights Act case, *Newman v. Piggie Park Enterprises, Inc.*, 398 U.S. 400 (1968), which held that "one who succeeds in obtaining an injunction . . . , should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." The court also cited other decisions that applied the standard in environmental cases. *See Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 478 U.S. 546 (1986), and *Marbled Murrelet v. Babbitt*, 182 F.3d 1091 (9th Cir. 1999).



According to the court, many environmental statutes are broad public interest statutes that authorize citizen suits to enforce their substantive provisions, and the language in these statutes “is in all relevant ways identical.” The court remanded the matter to the district court to determine, under the articulated standard, whether attorney’s fees should have been awarded.

[3] NEPA: Federal Court Blocks Timber Harvest Project in Lassen National Forest

A federal judge in California has blocked a timber harvest project in Lassen National Forest until the U.S. Forest Service conducts a new environmental assessment. *Earth Island Inst. v. U.S. Forest Serv.*, No. 08-1897 (E.D. Cal. 8/5/09).

The project involves 10,000 acres earmarked for “fuel treatment” to increase the Forest Service’s ability to suppress fire by reducing available fuel. An environmental group sued, alleging that an environmental assessment, which concluded with a finding of “no significant impact,” was scientifically erroneous and that the plan violated the National Forest Management Act and NEPA. The group claimed that the Forest Service overstated the forest’s density by using erroneous scientific data.

The court agreed that the Forest Service had misinterpreted stand density data and “corrupted the scientific accuracy and integrity” of the NEPA analysis. According to the court, “[a]gencies simply do not have the discretion to arbitrarily and capriciously alter a scientifically set value or deviate from a forest planning directive and still comply with NEPA.” The court enjoined the project pending the preparation of a new and scientifically correct environmental assessment.

[4] NEPA/CWA: Agency Decisions Allowing Mine Expansion Upheld, Federal Court Rejects Environmental Groups’ Claims

A federal judge in Idaho has approved decisions by the U.S. Forest Service and the Bureau of Land Management (BLM) to allow expansion of the Smoky Canyon phosphate mine near the Idaho-Wyoming border, rejecting arguments that the federal agencies failed to adequately address the expansion’s alleged potential for additional selenium contamination. *Greater Yellowstone Coal. v. Larson*, No. 08-388 (D. Idaho 8/4/09).

Plaintiff claimed that the federal agencies violated NEPA and the Clean Water Act in allowing the expansion. The court disagreed and deferred to EPA findings of no discharge at the mine site and no hydrological link between the mine and nearby streams. The court determined that the agencies had “performed exhaustive studies over several years” and had effectively used the public notice and comment process. The court declined to re-evaluate the agencies’ scientific determinations and found no NEPA violation. According to news reports, plaintiffs will appeal the decision. *See BNA Daily Environment Report*, August 10, 2009.

[5] CERCLA: EPA Has Discretion as to When to Promulgate Financial Responsibility Requirements

A federal judge in California has ruled that EPA has the discretion under CERCLA to decide when to promulgate financial assurance requirements. *Sierra Club v. Johnson*, No. 08-01409 (N.D. Cal. 8/5/09).

Environmental groups sued EPA, alleging that the agency failed to perform a nondiscretionary duty under CERCLA section 108(b), which requires the



promulgation of regulations to ensure that facilities involved in any way with hazardous substances remain financially responsible for cleaning up substances that were improperly disposed. EPA did not dispute that it had a duty to promulgate financial responsibility requirements under CERCLA but argued that it had discretion as to when to perform this duty.

The court agreed with EPA, ruling that “section 108(b) does not include a date-certain deadline for the promulgation of financial responsibility regulations and the legislative history demonstrates that Congress rejected a proposed amendment to add a date-certain deadline. . . .” The court noted that plaintiff could file an Administrative Procedure Act claim in the D.C. Circuit alleging that EPA unreasonably delayed promulgating such requirements.

[6] Prop. 65: California Court Preliminarily Enjoins OEHHA from Adding Styrene to List

A California state superior court has reportedly issued a preliminary injunction preventing Cal/EPA’s Office of Environmental Health Hazard Assessment (OEHHA) from adding styrene to the list of substances that may cause cancer under Proposition 65 (Prop. 65). The Arlington, Virginia-based Styrene Information and Research Center filed the lawsuit to prevent OEHHA from listing the chemical. The court agreed with plaintiffs that no “known” evidence supports a finding that styrene poses human health threats. The court also said that because styrene is common in food packaging, such a listing would have a stigmatizing effect on products.

Styrene is used in milk cartons, egg crates, plastic pipes, automobile parts, and many other products. The International Agency for Research on Cancer has classified it as a suspected carcinogen, and

OSHA says that exposure to the chemical may affect the central nervous system and result in headaches, fatigue and dizziness. *See Greenwire*, August 13, 2009.

[7] RCRA: DOE and Washington State Revise Hanford Nuclear Facility Cleanup Plan

The U.S. Department of Energy (DOE) and Washington State have entered a proposed consent decree modifying the terms of their 1989 agreement that outlined deadlines for cleaning up contamination at the Hanford Nuclear Reservation. [*State v. Cbu*, No. 08-5085 \(E.D. Wash. filed 8/11/09\)](#).

The revised agreement, once approved by the court, will end the state’s lawsuit against DOE over the removal of 53 million gallons of radioactive and chemical waste stored in underground tanks at the facility, which the federal government used during World War II to make plutonium for nuclear weapons.

Under the new agreement, single-shell tanks must be removed by 2040, and all tank waste must be removed between 2028 and 2047. The agreement also stipulates that DOE will clean groundwater beneath the facility to protect the Columbia River from contaminant migration. The proposed consent decree is subject to public comment and court approval.

[8] Wetlands: State Levee Board Sues EPA over Decision to Halt Flood-Control Project

The Board of Mississippi Levee Commissions (BMLC) has filed a lawsuit in federal court against EPA over the agency’s decision to halt a \$220 million flood-control project on the Mississippi Delta because of environmental concerns. [*BMLC v. EPA*, No. 09-081 \(N.D. Miss. filed 8/11/09\)](#).

According to plaintiffs, Congress approved the Yazoo Backwater Project as early as 1941, and



plaintiffs allege that EPA cannot veto it. The agency allegedly decided to veto the project after determining it would harm fishery areas and wildlife on more than 67,000 acres of wetlands and other water resources. According to plaintiffs, under section 404(r) of the Clean Water Act, EPA cannot veto the project because it had prior congressional approval. Plaintiffs seek a declaratory judgment that EPA's veto is null and void.

[9] Wetlands: Group Sues Corps over Dredge and Fill Permit

An environmental group has sued the U.S. Army Corps of Engineers (Corps) and Waste Management Inc. over a dredge and fill permit the agency granted the company in 2008 to build a landfill on wetlands near St. Louis. *American Bottom Conservancy v. Corps, No. 09-603 S.D. Ill. filed 8/6/09*.

According to the complaint, the permit allows the company to destroy 18.4 acres of wetlands to build a landfill on a 100-year floodplain in violation of the Clean Water Act and NEPA.

The complaint alleges that when the company applied for the permit, there was nothing in the application about a landfill, but only about excavating soil to use as cover material for an existing landfill. It further alleges that when the Corps issued the permit, it authorized landfill construction despite a failure to obtain a finding from the Illinois EPA that the project would not harm water quality. Plaintiff also asserts that Illinois law prohibits construction of landfills on 100-year floodplains and seeks an order vacating the permit.

[10] Water: EPA Begins Enforcement Initiative Against New England Municipal Storm Sewer Systems

EPA has reportedly filed enforcement actions against one New Hampshire and eight Massachusetts municipalities alleging that they failed to meet permit requirements designed to ensure that sewage and other pollutants stay out of storm sewers that drain into rivers, ponds and coastal waters. According to EPA, since 2003, 297 urbanized municipalities have been subject to a general permit, which sets requirements for reducing discharges from storm sewers. Among other requirements, the municipalities must produce maps of their storm sewers, pass an ordinance or bylaw prohibiting non-stormwater discharges to the storm sewers and implement a plan to find and remove improper connections to the storm sewers.

The EPA enforcement actions allege that the nine municipalities have failed to meet some or all of these requirements and seek penalties ranging from \$40,000 to \$70,000 from each municipality depending on the size of the municipality and the seriousness of the alleged violations. The agency is also issuing compliance orders to the nine municipalities requiring each to implement a plan to identify and eliminate illegal sewage connections. *See EPA Press Release, August 12, 2009.*

[11] Renewable Fuels/Air: Ohio Edison Agrees to Repower Coal-Fired Power Plant with Biomass Fuel

Ohio Edison Co. has agreed to retrofit a coal-fired power plant in Shadyside, Ohio, to burn biomass fuels such as wood from tree trimming and dedicated



sustainable nurseries, agricultural crops, grasses, and other vegetation. *U.S. v. Ohio Edison Co.*, No. 99-1181 (S.D. Ohio *consent decree modified* 8/11/09). According to the terms of a modified consent decree, the new process will reduce greenhouse gas (GHG) emissions by 1.3 million tons annually. The company agreed in a 2005 consent decree to spend \$1.1 billion to reduce emissions of sulfur dioxide and nitrogen oxide at several power plants to settle allegations that it violated the Clean Air Act's new source review provisions.

Under the terms of the original consent decree, the company had until March 2009 to decide whether two units at the Shadyside plant would be shut down, have sulfur dioxide scrubbers installed or be converted to burn natural gas. The proposed modifications would allow the company to burn biomass fuels instead. The modified consent decree is subject to a 30-day comment period and court approval. See *DOJ Press Release*, August 11, 2009.

Legislation, Regulations and Guidance

[12] Air: EPA Issues Final Rule Clarifying "Reasonable Further Progress" Toward Ozone Standard

EPA has issued a **final rule** that will amend 40 C.F.R. Parts 50 and 51 and provide states with a new interpretation for implementing the eight-hour national ambient air quality standard (NAAQS) for ozone. *74 Fed. Reg.* 40,074 (8/11/09).

The rule will allow states to claim reductions in emissions of nitrogen oxides and volatile organic compounds from areas that currently meet the ozone standard when they calculate "reasonable further progress" toward achieving the standard in nonattainment areas.

To claim reductions from outside a designated nonattainment area, states must include emissions from all sources providing reductions in the area when they calculate the emissions baseline used to measure "reasonable further progress" toward compliance. The rule replaces EPA's prior interpretation, which a federal appeals court vacated and remanded to the agency in 2007. *NRDC v. EPA*, No. 06-1045 (D.C. Cir. 11/2/07).

[13] TSCA/Nanotechnology: EPA's ITC Issues 64th Report and Requests Information on Nanoscale Material Risks

EPA's TSCA Interagency Testing Committee (ITC) has issued its 64th report to the EPA administrator listing data needed to understand the potential risk of nanoscale materials. *74 Fed. Reg.* 38,877 (8/4/09). The report states that EPA intends to develop a proposed test rule to gather needed new environmental, health and safety data for nanomaterials and that it will issue TSCA section 8(a) data collection rules to obtain existing exposure and use data.

The ITC was established under TSCA section 4 to recommend the chemical substances and mixtures that should be given priority consideration for the promulgation of testing rules. It is composed of officials from EPA and several other federal agencies.

Scientific/Technical Items

[14] Nanotechnology: Study Claims Iron Nanoparticles Can Damage Human Lung Cells

A recent study by researchers from the University of California at Berkeley and the Lawrence Berkeley National Laboratory claims that iron nanoparticles used to remediate large-scale pollution, such as chlorinated organic solvents, pesticides and metals



found in groundwater, may be toxic to human lung cells. Christina R. Keenan, et al., "Oxidative Stress Induced by Zero-Valent Iron Nanoparticles and Fe (II) in Human Bronchial Epithelial Cells," *Environmental Science & Technology*, Vol. 43, No. 12 (2009). The researchers exposed lung cells to different levels of iron nanoparticles to test how the nanoparticles might affect human lung cells if they were inhaled. The study claims that when the nanoparticles contact oxygen their form changes, releasing oxygen radicals that can damage lung cells.

[15] Chemical Exposure: Study Suggests Possible Link Between Certain Pesticides and ALL

A recent study by researchers from Georgetown University suggests a possible link between organophosphate household pesticides and acute lymphoblastic lymphoma (ALL). Offie Soldin, et al., "Pediatric Acute Lymphoblastic Leukemia and Exposure to Pesticides," *Therapeutic Drug Monitoring*, Vol. 31, No. 4 (August 2009). The study was conducted between January 2005 and January 2008 at the Lombardi Comprehensive Cancer Center in Washington, D.C. It included 41 "case" pairs of children with ALL and their mothers, and 41 mother-and-child pairs in a control group of equal age, sex and county of residence.

Environmental exposures were determined by questionnaire and by urinalysis of pesticide metabolites. Pesticides were detected in the urine of more than one-half of the participants, but levels of two common organophosphate metabolites, diethylthiophosphate and diethyldithiophosphate, were higher in the children with ALL compared to the control children. The researchers suggested additional research to more precisely define the link between the pesticides and ALL.



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