

Environmental & Chemical Update

AIR • CLIMATE CHANGE • NANOTECHNOLOGY • RENEWABLE FUELS
SUSTAINABILITY • TOXIC TORT • WASTE • WATER

Issue 294 • September 25, 2009

Litigation and Regulatory Enforcement

- [1] **NEPA:** Ninth Circuit Rules BLM Erred in Approving Land Exchange 1
- [2] **Standing:** Recyclers Lack Standing to Challenge Land Application of Biosolids. . . 1
- [3] **CERCLA:** Federal Court Rules City Sewer May Be "Facility" 2
- [4] **CERCLA:** Costs of Erosion Control Are Not Recoverable 2
- [5] **Envtl. Crime:** Former Wastewater Treatment Plant Superintendent Sentenced to Prison for Falsifying Discharge Monitoring Reports 3
- [6] **Water:** Indiana City Agrees to Upgrade Sewer Systems 3

Legislation, Regulations and Guidance

- [7] **Air/Carbon Capture:** DOE Awards \$62 Million in Carbon Capture Research Funding 3
- [8] **Air/Greenhouse Gases:** California Climate Action Reserve Adopts Forest Project Protocol. 4
- [9] **Air:** EPA Issues Emission Standards for Medical Waste Incinerators. 4
- [10] **Air:** United States, Mexico and Canada Propose Amendment of Montreal Protocol to Phase Down Use of HFCs. 4
- [11] **Air:** EPA to Reconsider 2008 National Smog Standards. 5
- [12] **Air/Greenhouse Gases:** EPA Finalizes Reporting System 5
- [13] **OSHA:** Personal Protective Equipment Standards Updated 5
- [14] **Water:** EPA IG Report Criticizes Agency Cleanup Plan for Great Lakes. 5

Scientific/Technical Items

- [15] **Water:** Study Finds High Antibiotic Levels from Pharmaceutical Production in India Waters. 6

Shook,
Hardy &
Bacon_{LLP}

www.shb.com

Environmental & Chemical Update

AIR • CLIMATE CHANGE • NANOTECHNOLOGY • RENEWABLE FUELS
SUSTAINABILITY • TOXIC TORT • WASTE • WATER

Litigation and Regulatory Enforcement

[1] NEPA: Ninth Circuit Rules BLM Erred in Approving Land Exchange

The Ninth Circuit Court of Appeals has ruled that the Department of Interior's Bureau of Land Management (BLM) erred when it approved a land swap that would have allowed Asarco LLC to acquire almost 11,000 acres of federal land in Arizona's Pinal and Gila counties for copper mining. [Ctr. for Biological Diversity v. DOI, No. 07-16423 \(9th Cir. 9/14/09\)](#). The appeals court reversed a district court ruling that approved the proposed land exchange. The proposal would have given ownership of the land to Asarco, thus enabling the company to avoid compliance with the Mining Law of 1872.

The appeals court ruled that BLM ignored problems with its environmental impact statement despite "strong objections" from EPA. Avoiding coverage under the Mining Law, according to the court, would have allowed Asarco to conduct new mining without submitting a mining plan to BLM for approval. By failing to take a "hard look" at the environmental consequences of the proposed action, BLM violated NEPA and the Federal Land Policy and Management Act, the court held. A dissenting judge wrote that the majority was interfering with a "congressionally authorized land exchange" and that the court should have deferred to the agency under *Land Council v. McNair*, 537 F.3d 981 (9th Cir. 2008).

[2] Standing: Recyclers Lack Standing to Challenge Land Application of Biosolids

The Ninth Circuit Court of Appeals has ruled that recyclers lack standing to challenge, as a violation of the dormant Commerce Clause, a local ordinance that prohibits the land application of biosolids. [City of Los Angeles v. Kern County Water Agency, No. 07-56564 \(9th Cir. 09/09/09\)](#). Voters in Kern County, California, adopted an ordinance by ballot initiative in 2006 making it "unlawful for any person to Land Apply Biosolids within the unincorporated area of the County." Violations are misdemeanors punishable by "a fine of not more than \$500 or by imprisonment of not more than six months." Before the ordinance was adopted, in-state, out-of-county waste generators frequently disposed of their biosolids by land application at various farms throughout the unincorporated area of the county.

Several out-of-county generators, along with waste transporters and in-county farmers, filed suit alleging that the ordinance violated the dormant Commerce Clause and the Equal Protection Clause and was preempted by the Clean Water Act and several state statutes. They also argued that it constituted an invalid exercise of the county's police power. "The district court granted [the county's] motion for summary judgment on the recyclers' equal protection claim, and denied summary judgment on the police power claim, citing the existence of disputed facts." As to the Commerce Clause, the district court concluded that the ordinance discriminated against interstate commerce and



granted summary judgment to plaintiffs. The district court also held that state law preempted the ordinance. The county appealed, challenging only the district court's rulings on the dormant Commerce Clause and state-law preemption claims.

Although the county did not raise standing as an issue before the district court, the appeals court decided to exercise its discretion to rule on the standing issue. The court found that the recyclers were seeking to secure their ability to exploit a portion of the *intrastate* waste market—that is, they wanted to be able to ship their waste from one portion of the state to another. Because the “chief purpose underlying [the dormant Commerce] Clause is to limit the power of States to erect barriers against *interstate* trade,” and thus their injury was not even “marginally related” to the interests the clause seeks to protect, the court ruled that plaintiffs lacked standing to bring their federal constitutional claim.

[3] CERCLA: Federal Court Rules City Sewer May Be “Facility”

A federal judge in California has ruled that a city sewer may be a “facility” under CERCLA. [*Adobe Lumber Inc. v. Hellman*, No. 05-1510 \(E.D. Cal. 09/08/09\)](#). The court therefore allowed the owner of a contaminated site to pursue a municipality for the cost of cleaning up contaminants that leaked from a city sewer pipe. The city, moving to dismiss the complaint, had argued that CERCLA’s “express terms” exempt the sewer from the definition of “facility.” The court disagreed, citing section 101(a) of CERCLA, which defines “facility” as follows:

The term “facility” means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well,

pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

The city had argued that by specifically mentioning “sewer” in the subpart (A) parenthetical and neglecting to include it in the preceding enumerated facilities, Congress deliberately kept sewers off the list. According to the court, “[t]here is no dispute that sewers could easily be encompassed within the meaning of ‘structure,’ ‘equipment,’ ‘pipe,’ or ‘pipeline’ and that CERCLA’s legislative history demonstrates that the language defining ‘facility’ was intended to be broad and inclusive.”

[4] CERCLA: Costs of Erosion Control Are Not Recoverable

A federal judge in Michigan has ruled that the cost of constructing a retaining wall to address erosion allegedly caused by the disposal of hazardous substances is not a response cost recoverable under CERCLA. [*Dunn v. Savage*, No. 04-75061 \(E.D. Mich. 8/27/09\)](#). The court dismissed a claim brought by homeowners who alleged that a neighbor’s deposit of hazardous substances in a creek dividing their properties caused the creek to shift course, resulting in a “significant risk” that the plaintiffs’ home would fall into the creek.

According to the court, “erosion control is not a ‘necessary’ cleanup cost, which is a prerequisite for recovery under CERCLA.” In their claim, plaintiffs sought to recover \$135,000 for “damage and response costs . . . to respond to and protect



their property from destruction resulting from these deposits/releases,” as well as attorney’s fees and future response costs. The court said that the claimed response costs were not incurred “in response to a threat to human health or the environment.”

[5] Env'tl. Crime: Former Wastewater Treatment Plant Superintendent Sentenced to Prison for Falsifying Discharge Monitoring Reports

The former superintendent of a wastewater treatment plant in Rochester, Indiana, was reportedly sentenced September 15, 2009, in federal court to serve one year in prison for falsifying discharge monitoring reports that concealed Clean Water Act violations. Following the prison sentence, the defendant must serve one year of supervised release, including three months of home detention.

On June 16, 2009, defendant pleaded guilty to a five-count felony information charging him with making false reports to the Indiana Department of Environmental Management. He admitted that from September 2004 through May 2007, he submitted at least five reports containing false data for treated water discharged from the Rochester Plant into Mill Creek, a Tippecanoe River tributary. At sentencing, the court found that the defendant made as many as 55 separate false statements in the reports, where he claimed that purported levels of *E. coli*, Ammonia NH₃-N and CBOD-5 were in compliance with the plant’s permit when he knew the levels were higher. See *DOJ Press Release*, September 15, 2009.

[6] Water: Indiana City Agrees to Upgrade Sewer Systems

The city of Jeffersonville, Indiana, has entered a proposed consent decree, agreeing to invest between \$100 million and \$150 million to upgrade its sewer systems and prevent sewage overflows into the Ohio River. *U.S. v. Jeffersonville, Ind., No. 09-0125 (S.D. Ind. proposed consent decree filed 9/17/09).*

The consent decree will require the city to carry out a plan to reduce overflows from its combined sewers by 2020 or 2025, depending on its financial health. The city will also be required to improve the capacity, management, operation, and maintenance of its sanitary sewer system with the goal of eliminating overflows of untreated sewage and to eliminate all discharge points within the sanitary sewer system.

In addition to improving its sewer system, the city agreed to pay the United States a fine of \$49,500 and the state a fine of \$8,250 and spend \$248,000 on two specified environmental projects. Jeffersonville, located across the Ohio River from Louisville, Kentucky, has a population of approximately 30,000. The proposed consent decree is subject to a 30-day comment period and approval by the court.



Legislation, Regulations and Guidance

[7] Air/Carbon Capture: DOE Awards \$62 Million in Carbon Capture Research Funding

The Department of Energy (DOE) has awarded \$62 million to support the development and expansion of carbon capture and storage research. These awards were made available through the American Recovery and Reinvestment Act. About \$50 million will be used to explore the utility of geological formations for carbon dioxide storage, with the University of Wyoming receiving the largest award to conduct surveys and assessments on two sites in the Rocky Mountain region. The remaining funds will be used to conduct research and train undergraduate and graduate students in the development of carbon capture technology.

DOE Secretary Steven Chu reportedly stated that it is important to develop carbon capture technology due to the nation's likely dependence on coal energy in the future. Altogether, the funding will support research at some 35 universities and geological sites spanning more than 14 states. See *DOE Press Release*, September 20, 2009.

[8] Air/Greenhouse Gases: California Climate Action Reserve Adopts Forest Project Protocol

The California Climate Action Reserve, a state-funded carbon-offset registry that credits forest projects achieving greenhouse gas emission reductions, has reportedly adopted an updated "Forest Project Protocol," which was released September 10, 2009. Among the protocol's revisions are baseline approach updates to account for

actual forest management practices and permitting public land participation for the first time. To ensure permanence, the plan requires participants to monitor and annually report onsite carbon stocks. As a substitute to the current requirement that a forest owner account for carbon from all of its land, the new protocol calls for mandatory leakage risk assessments and corresponding leakage risk penalties. The protocol also adds accounting methodologies for harvested wood products as a required element for both the baseline and project activity calculations for all project types.

While the updated protocol is set for California Air Resources Board adoption at its September 24-25 meeting, a group of lawmakers and environmental organizations announced their plans to challenge the harvested wood products portion of the protocol, which may delay the process. See *Cal/EPA Press Release*, September 10, 2009.

[9] Air: EPA Issues Emission Standards for Medical Waste Incinerators

EPA released a [final rule](#) on September 15, 2009, revising new source performance standards (NSPS) and emissions guidelines for hospital, medical and infectious waste incinerators. The new standards, which impose tighter limits, apply to emissions of hydrogen chloride, carbon monoxide, lead, cadmium, mercury, particulate matter, dioxins, nitrogen oxides, and sulfur dioxide. EPA recalculated the maximum achievable control-technology levels that will apply to control the emissions. The revised standards will take effect 60 days after they are published in the *Federal Register*.



[10] Air: United States, Mexico and Canada Propose Amendment of Montreal Protocol to Phase Down Use of HFCs

The United States, Mexico and Canada have proposed to amend the Montreal Protocol to phase down the use of hydrofluorocarbons (HFCs) by requiring member countries of the Montreal Protocol on Substances that Deplete the Ozone Layer to reduce production and consumption of HFCs beginning in 2013. Using an average of production and consumption of HFCs from 2004 through 2006 as a baseline, the proposal would require member nations to phase down the use of HFCs by 10 percent in 2013, 20 percent in 2017, 30 percent in 2020, 50 percent in 2025, 70 percent in 2029, and 85 percent in 2033.

[11] Air: EPA to Reconsider 2008 National Smog Standards

EPA announced on September 16, 2009, that it will reconsider the 2008 national smog standards to ensure they are scientifically sound and protective of human health. Smog, also known as ground-level ozone, has been linked to asthma and other respiratory illnesses. In a notice filed in a federal appeals court, EPA said there were concerns with whether the 2008 standards adhered to the federal Clean Air Act. Eleven states and a number of health and environmental organizations have challenged the current standards, arguing that they ignored the recommendations of EPA's own panel of scientists. Ground-level ozone forms when emissions from industrial facilities, power plants, landfills, and motor vehicles react in the presence of sunlight. See *EPA Press Release* and *Jurist*, September 17, 2009.

[12] Air/Greenhouse Gases: EPA Finalizes Reporting System

The White House recently completed its review of EPA's final reporting rule for a national registry of greenhouse gas (GHG) emissions. Known as the "Title V Greenhouse Tailoring Rule," the new rule will cover sources that emit 25,000 metric tons of CO² per year instead of the previous threshold of 250 metric tons. The rule will require industry data collection to begin in January 2010, and first reports are due to the EPA in March 2011. The new threshold will cover approximately 10,000 facilities, encompassing some 85 percent of the economy. EPA has stated that increasing the threshold level from 250 metric tons to 25,000 metric tons was required to exclude small businesses from the reporting rule.

Many environmental groups support the rule, claiming it will create a precedent for establishing a national policy on curbing climate change. Many industry groups claim, however, that the rule will impose more regulatory burdens and costs on businesses and that it does not include a mechanism to challenge emissions data reliability. Even though the debate is ongoing, EPA elected to finalize the reporting system when the White House completed its review on September 16, 2009. Please click [here](#) for more information about the reporting rule.

[13] OSHA: Personal Protective Equipment Standards Updated

The Department of Labor's Occupational Safety and Health Administration (OSHA) has updated the personal protective equipment sections of its general industry, shipyard employment, longshoring, and marine terminals standards for eye and face-protective devices and head and foot



protection. 74 *Fed. Reg.* 46,350 (9/9/09).

The updates incorporate recent editions of applicable national consensus and industry standards that account for advances in technology. The final rule will become effective October 9, 2009.

[14] Water: EPA IG Report Criticizes Agency Cleanup Plan for Great Lakes

EPA's Inspector General (IG) recently issued a **report** critical of the agency's efforts to clean up contaminated sediment in the Great Lakes. According to the report, although EPA is the designated lead agency responsible for cleaning up areas of concern in the Great Lakes, it "does not have a regime for coordinating remediation activities across its program offices," or with state and local interests. "Overlapping program responsibilities and unclear lines of authority between EPA program offices and others, combined with a lack of accountability, result in an ineffective program" for the cleanup of these areas.

The report also says that without improved management, coordination and accountability, EPA will not succeed in achieving the results intended. The report recommends that the EPA Great Lakes National Program Manager (i) establish an area-of-concern management plan that includes written designations of authority and responsibility for each EPA program office with regard to remediating contaminated sediment; (ii) assign a lead EPA office to each Sediment Remediation Site and determine the volume of contaminated sediment at each site; and (iii) annually measure and publish estimates of Sediment Remediation Site sediment volumes, clean-up costs and stakeholder progress for each site.

Scientific/Technical Items

[15] Water: Study Finds High Antibiotic Levels from Pharmaceutical Production in India Waters

A recent study by Swedish researchers purportedly found that levels of antibiotics measured in streams, lakes and well water near pharmaceutical factories in India are 100,000 to 1 million times higher than levels measured in waters that receive sewage effluent in the United States or China. J. Fick, et al., "Contamination of Surface, Ground, and Drinking Water from Pharmaceutical Production," *Environmental Toxicology & Chemistry*, 10.1897/09-073.1 (2009).

The researchers analyzed water samples from six villages near Hyderabad, India, for 12 common antibiotics, including ciprofloxacin, enoacin, cetirizine, terbinafine, and citalopram. They apparently found high concentrations of antibiotics and reported that levels of ciprofloxacin (2.5 mg/L) and cetirizine (20 ug/L) in one lake are higher than previously measured in the blood of people taking the medications. The researchers also reported that effluent from a wastewater treatment plant had concentrations of ciprofloxacin of 14 mg/L and cetirizine as high as 1.2 mg/L. According to the study, these concentrations approach therapeutic doses (that is, concentrations that would kill some microorganisms).



Environmental & Chemical Update

AIR • CLIMATE CHANGE • NANOTECHNOLOGY • RENEWABLE FUELS
SUSTAINABILITY • TOXIC TORT • WASTE • WATER

This Update is distributed by
Shook, Hardy & Bacon's Environmental Law Practice.
If you have questions about this issue or would like to receive supporting documentation,
please contact Dave Erickson (derickson@shb.com; 816-474-6550) or
Jim Neet (jneet@shb.com; 816-474-6550).
We welcome any leads on new developments in environmental law or toxic tort litigation.

Geneva, Switzerland

Houston, Texas

Kansas City, Missouri

London, United Kingdom

Miami, Florida

Orange County, California

San Francisco, California

Tampa, Florida

Washington, D.C.

Shook,
Hardy &
Bacon LLP.®

