

Environmental & Chemical Update

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

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Litigation and Regulatory Enforcement

[1] Air/Greenhouse Gases: Second Circuit Reinstates GHG/Global Warming Lawsuit

The Second Circuit Court of Appeals has reinstated a lawsuit filed by a coalition of states and environmental groups against several power companies for allegedly contributing to global warming by emitting greenhouse gases (GHG). [Connecticut v. Am. Elec. Power Co. Inc., No. 05-5104 \(2d Cir. 09/21/09\)](#).

Eight states and New York City filed the lawsuit in 2004. Three land trusts filed similar claims, and the two suits were consolidated. The complaints alleged common law nuisance, claiming that by contributing to global warming by emitting GHGs, the power companies were harming the environment, the economy and public health. The district court dismissed the suit, finding that it raised a political question—whether GHG emissions should be limited in the interest of curbing global warming—which was properly left to the legislative branch.

The appeals court reversed, ruling that the district court had read plaintiffs' allegations too broadly. According to the appeals court, plaintiffs did not ask the district court to fashion a comprehensive, far-reaching solution, but rather to limit GHG emissions from six power plants on the ground that such emissions constitute a public nuisance. The court also ruled that (i) the states had standing to sue under the doctrine of *parens*

patriae; (ii) plaintiffs had stated claims under the federal common law of nuisance; (iii) their claims were not preempted by federal environmental statutes; and (iv) one defendant was not immune from the claims as a government-created entity.

[2] Toxic Tort: Sixth Circuit Affirms \$4.45 Million Settlement Despite Adequacy Objections

The Sixth Circuit Court of Appeals has affirmed a \$4.45 million class-action settlement between Michigan residents and U.S. Steel Corp. over continuing-nuisance claims from a steel mill near River Rouge, Michigan, despite challenges by class representatives. [Moulton v. U.S. Steel Corp., No. 08-2311 \(6th Cir. 09/22/09\)](#). Although the appeals court affirmed the settlement, it vacated and remanded more than \$1.3 million in attorney's fees for further explanation.

Residents of Ecorse and River Rouge, Michigan, filed the lawsuit in 2005, alleging that the steel mill wrongfully discharged metal-like dust particles that settled on their land. The district court certified a class including all individuals owning property or residing in the two cities. In June 2008, class counsel and defendant filed a joint motion for preliminary approval of a \$4.45 million settlement which was approved by the district court over the objection of some class representatives. On appeal, the objectors argued that the settlement agreement was not fair, reasonable and adequate.



The appeals court rejected the objectors' claims, ruling that the settlement was reasonable and that it did not restrict future enforcement actions based on statutory violations. The court remanded the attorney fee award saying that the district court provided little on-the-record explanation of that ruling.

[3] CERCLA: Federal Court Allows Non-Party to Intervene in Consent Decree

A federal judge in Pennsylvania has ruled that a non-party may intervene in a CERCLA consent decree if it meets the four-part test set out in Federal Rule of Civil Procedure 24(a)(2) and section 113 (i) of CERCLA. [Pennsylvania v. Atl. Richfield Co., No. 9-913 \(M.D. Pa. 09/16/09\)](#). According to the court, to intervene under these provisions, the non-party must show that (i) the application for intervention is timely; (ii) the applicant has a sufficient interest in the litigation; (iii) the interest may be affected or impaired as a practical matter by the action's disposition; and (iv) the interest is not adequately represented by an existing party. The court specifically rejected the government's arguments that the intervenor must prove that it is either an appropriate plaintiff or defendant in the case and that the intervenor's interests would be adequately protected by the notice-and-comment process.

[4] Clean Water Act: Challenge to Nationwide Mining Permit Stayed

A federal judge in Kentucky has stayed a lawsuit challenging a U.S. Army Corps of Engineers (Corps) nationwide permit program issued under the Clean Water Act. [Kentucky Riverkeeper, Inc. v. Midkiff, No. 05-181 \(E.D. Ky. 09/18/09\)](#). The permit, Nationwide Permit 21 (NWP 21), allows surface coal

miners to discharge dredge-and-fill material into waters of the United States in Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia.

In July 2009, the Corps proposed a rule that would suspend NWP 21 to provide an interim means of requiring individual permit reviews, while undertaking the longer-term measure of modifying NWP 21 to prohibit its use to authorize the discharges. *74 Fed. Reg.* 34,311 (07/15/09). In a September 10, 2009, notice, the Corps announced that, based on comments received, it would conduct six public hearings on NWP 21's proposed modification. In light of these events, the court ordered the stay and dismissed, without prejudice, the cross motions for summary judgment. The court gave the Corps 15 days to file a status report on an estimated time for completion of the administrative process and final action on NWP 21.

[5] Endangered Species Act: Federal Court Relists Grizzly, Citing Climate Change

A federal judge in Montana has restored the grizzly bear's threatened status under the Endangered Species Act (ESA), citing a decline in food supplies caused by climate change. [Greater Yellowstone Coal, Inc. v. Servheen, No. 07-134 \(D. Mont. 09/21/09\)](#). In a 2007 decision, the U.S. Fish and Wildlife Service (FWS) removed the grizzly bear from its list of "threatened" species. Several environmental groups sued the FWS, alleging that the final rule violated the ESA. Following the 2007 delisting, a comprehensive federal-state management strategy took effect that included monitoring the bears, their habitat and food sources. After the lawsuit was filed, Wyoming and Montana intervened



as defendants. Defendants argued that the 2007 decision was correct, in part because the bear population was too large.

The court disagreed, ruling that the agency decision to delist the species did not demonstrate that the federal grizzly conservation strategy and state management plans for the animals were “adequate regulatory mechanisms to maintain a recovered grizzly bear population.” The court wrote that the 2007 decision did not adequately consider “the impacts of global warming and other factors on whitebark pine nuts,” a major grizzly bear food source. According to the court, “the record shows that whitebark pine declines could jeopardize grizzly bear survival.”

[6] Envtl. Crime: Colorado State Court Sentences Businessman to Prison for State RCRA Criminal Violations

A Colorado state court has reportedly sentenced a Montrose, Colorado, businessman to 135 days in jail and five years of probation after he was convicted of violating the state’s hazardous waste laws. *State v. Ratner*, No. 07-128 (Colo. Dist. Ct. 09/24/09). Defendant pleaded guilty to three felony counts: one count of illegal treatment of a hazardous waste and two counts of illegal storage of a hazardous waste. Defendant ran a former metal extraction operation that extracted heavy metals from used catalytic converters but failed to properly treat, store or dispose of hazardous wastes generated by company activities. See *BNA Daily Environment Report*, September 28, 2009.

[7] FIFRA: EPA Cites Company for Unsubstantiated Antimicrobial Claims

EPA has reportedly issued an administrative complaint to VF Corp., a manufacturer of apparel and sporting goods, for allegedly advertising the antimicrobial properties of its shoes without registering the agents used under FIFRA. The company apparently makes more than 70 styles of footwear under the North Face brand and claims they were made with antimicrobial agents that prevent disease-causing bacteria.

EPA alleges that the company advertised its shoes as having an antimicrobial silver agent that inhibits the growth of disease-causing bacteria and fungi and continuously releases the antimicrobial agents. Under FIFRA, all products that kill or repel bacteria or germs must be registered as pesticides before they go to market. EPA cited the company for 162 violations of FIFRA, each carrying a maximum penalty of \$6,500. See *BNA Daily Environment Report* and *Greenwire*, September 23, 2009.

[8] Carbon Trading: EU Court Finds EC Erred in Forcing Member States to Reduce Carbon Allowances

The European Union’s (EU) Court of First Instance has reportedly ruled that the European Commission (EC) erred when it ordered Estonia and Poland to reduce the number of carbon allowances they distributed to firms participating in the EU’s Emission Trading System (ETS). *Poland v. Commission*, No T-183/07, and *Estonia v. Commission*, No.-263/07. According to the court, by limiting EU member states’ powers to decide on their own carbon caps, the EC had misused powers conferred by EU Directive 2003/87/EC.



Estonia and Poland filed the actions in 2007 after the EC said they should reduce the number of allowances to be given to ETS participants by 48 percent and 27 percent, respectively. Under rules for the 2008-2012 ETS trading period, member states were required to submit national allocation plans to the EC, which reviewed them and required many changes. See *LAW360* and *BNA Daily Environment Report*, September 24, 2009.

Legislation, Regulations and Guidance

[9] Air/Greenhouse Gases: Boxer-Kerry Climate Legislation Introduced

Senators Barbara Boxer (D-Calif.) and John Kerry (D-Mass.) have introduced the Senate's first climate change legislation, the "Clean Energy Jobs & American Power Act." For the most part, the Senate bill mirrors the "American Clean Energy and Climate Act of 2009," which was passed by the House of Representatives in June 2009. Major differences include the Senate's proposal to raise the target level for emission cuts by 2020 from 17 percent to 20 percent. Many bill proponents say that the increase was necessary because the recent economic recession made it too simple to achieve the previous target of 17 percent. Opponents argue that the increase to 20 percent will result in electricity rate spikes because many utility companies will be unable to meet the new target.

In addition to the emission target increase, the Senate bill would give the EPA significantly more power to regulate greenhouse gases under the Clean Air Act. The agency would have the power to set emission standards when issuing permits for existing plants. Under the House bill, EPA would have power to set emission standards for new

coal-fired power plants only. Some say this provision was necessary to prevent existing power plants from "building out" to avoid the standards set for new power plants. Opponents argue that giving EPA this power would effectively allow it to set emission limits below market cap-and-trade plan requirements.

The new bill also includes natural gas incentives. Natural gas companies could qualify for the incentives as a fuel that emits 50 percent less carbon dioxide than coal plants and 30 percent less than oil. Natural gas would be considered a backup power source for wind, solar and other renewable energy sources. Other provisions of the bill would fund certain nuclear technology by authorizing grants to develop new technologies for nuclear waste management and to train workers to ensure the growth of safe, domestic nuclear industries.

Two other differences in the Senate's climate bill would (i) allow states to maintain their own cap-and-trade system through 2017 if a national system is not created, and (ii) create a government agency that would oversee the criminalization of offsets. This new agency, operating under the supervision of the Environment and Natural Resources Division, would conduct investigations and enforce any law related to carbon offsets.

Many questions left unanswered by this proposal include how exactly the carbon trading market would operate. Currently, the bill calls for the U.S. Commodity Futures Trading Commission (CFTC) to oversee the carbon allowance market. CFTC would have the power to develop regulations necessary for market oversight. Many critics of the cap-and-trade system believe that without stronger oversight, the system would be subject to excessive speculation and trading abuses. Despite these uncertainties, Senators Boxer and Kerry will reportedly push for



a vote on the bill by the December 12 International Environmental Summit in Copenhagen. See *Environment & Energy Daily*, September 30, 2009.

[10] Safe Drinking Water Act: EPA Identifies Candidate Contaminants for Possible Regulation

EPA has issued a list of 116 drinking water contaminants as candidates for regulation in public water systems. The contaminant candidate list includes 104 chemical contaminants or groups and 12 microbes. Among them are pesticides, disinfection byproducts, pharmaceuticals, chemicals used in commerce, waterborne pathogens, and algae toxins. The Safe Drinking Water Act requires EPA to publish a contaminant candidate list every five years. EPA said that it evaluated approximately 7,500 chemicals and microbes before narrowing the list to 116. Among the most common listed chemicals are formaldehyde, aniline, methanol, ethylene glycol, hexane, and urethane. Several estrogens made the list, including equilenin, equilin, estradiol, estrone, ethinyl estradiol, and mestranol. The antibiotic erythromycin is also listed.

According to EPA, the agency will continue to collect and evaluate data on the chemicals and microbes and will determine by 2013 whether to propose drinking water standards for at least five of them. See *EPA Press Release* and *Chemical & Engineering News*, September 23, 2009.

[11] Air: Final Report on NOX and SOX Available

EPA has announced the availability of a **final report** on the risks of exposure to oxides of nitrogen (NOX) and oxides of sulfur (SOX). *74 Fed. Reg.* 48,543 (09/23/09). EPA is currently conducting

a review of the existing secondary national ambient air quality standards (NAAQS) for NOX and SOX because their associated transformation products are linked and because the National Research Council recommended in 2004 that multiple pollutants be considered when “forming the scientific basis for the NAAQS.” As part of its review, EPA is preparing an assessment of exposures and characterization of risks for adverse ecological effects associated with atmospheric NOX and SOX deposition. EPA obtained comments from the Clean Air Act Advisory Committee before issuing the final report.

[12] Indoor Air: EPA Issues Warning on Caulk in Buildings

EPA has issued a warning to building owners and school administrators claiming that many U.S. buildings constructed or renovated between 1950 and 1978 may have polychlorinated biphenyls (PCBs) at high levels in the caulk around windows and door frames, between masonry columns and in other masonry building materials.

In the warning, which was issued as guidance, EPA recommends that building owners implement steps to minimize exposure to potentially contaminated caulk by (i) cleaning air vents, (ii) improving ventilation by opening windows and using or installing exhaust fans where possible, (iii) cleaning frequently to reduce dust and residue inside buildings, (iv) using a wet or damp cloth or mop to clean surfaces, (v) avoiding sweeping with dry brooms and minimizing the use of dusters in areas near potential PCB-containing caulk, (vi) using vacuums with high-efficiency particulate air filters, (vii) washing hands often with soap and water, and (viii) washing children’s toys often. The agency also recommends testing brittle, peeling, cracking, or deteriorating caulk directly for the presence of PCBs



and removing the caulk if PCBs are present at significant levels. *See EPA Press Release*, September 25, 2009.

[13] Air/GHG: Cal/EPA Air Resources Board Approves GHG Fees to Fund A.B. 32

In an effort to fund the state's climate change law (A.B. 32), California/EPA's Air Resources Board (ARB) has unanimously approved [regulations](#) that would impose fees on greenhouse gas (GHG) emitters. Slated to take effect in 2010, the regulations would reportedly establish the first GHG emissions fee in the United States.

The approved version calls for fee collection at the point electricity is delivered into the state, affecting utilities as well as producers and users of natural gas, gasoline and diesel fuels, electricity, coal, and cement. ARB will base fee amounts on the entity's previous annual emissions, which must be submitted to the board each year as part of the regulations' mandatory reporting requirement.

ARB apparently adopted the measure despite ongoing litigation threats that resulted in two previous postponements. The fees are expected to yield \$63 million in their first year. *See San Francisco Chronicle*, September 26, 2009.

[14] Air: New VOC Limits for Consumer Products Adopted in California

California EPA's Air Resources Board (ARB) has reportedly adopted new volatile organic compound (VOC) limits for consumer-grade paint thinners, multipurpose solvents and air fresheners. The new standards limit VOC content in paint thinners and multipurpose solvents to 300 grams per liter (30 percent by weight) by December 31, 2010, and require a decrease to 25 grams per liter (3 percent by weight) by December 31, 2013. Double-phase

aerosol air fresheners must meet a VOC limit of 20 percent by December 31, 2012. The new standards for paint thinners and multipurpose solvents are the same as those adopted by the South Coast Air Quality Management District earlier in 2009. *See BNA Daily Environment Report*, September 25, 2009.

Scientific/Technical Items

[15] Chemical Exposure: Study Allegedly Links PERC to Birth Defects

Boston University School of Public Health researchers recently published a study that claims to have found a link between expectant mothers' exposure to high levels of tetrachloroethylene (PERC) around the time of conception to birth defects such as oral clefts and neural tube defects. Ann Aschengrau, et al., "Prenatal Exposure to Tetrachloroethylene-Contaminated Drinking Water and the Risk of Congenital Anomalies: A Retrospective Cohort Study," *Environmental Health* (September 24, 2009).

The researchers examined 1,658 children whose mothers were exposed to drinking water from piping that had been lined with a vinyl coating containing PERC. The mothers' exposures were estimated based on recall and water-distribution computer software. The study found that the offspring of women who were exposed to PERC-contaminated drinking water around the time of conception had a greater risk of congenital birth defects. PERC is an industrial degreaser and solvent that is also used as a dry-cleaning fluid.



[16] Indoor Air/Radon: WHO Publishes New Handbook on Indoor Radon

The World Health Organization (WHO) has published new **guidance** titled “Handbook on Indoor Radon,” which provides public health guidance and detailed recommendations and policy options on reducing radon risks.

The guidance is the product of the WHO International Radon Project initiated in 2005. The guidance includes chapters on radon health effects, radon measurements, radon prevention and mitigation, cost-effectiveness of radon control, radon risk communication, and national radon programs.

Radon, a colorless, odorless radioactive gas that can be present at dangerous levels in the home, is released from rock or soil, seeps through foundation cracks and can be trapped indoors. EPA has endorsed the WHO guidance document. *See EPA Press Release, September 21, 2009.*



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