

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] Toxic Tort/Climate Change: District Court in Ninth Circuit Dismisses Climate-Change Lawsuit

A federal judge in California has dismissed a global climate-change lawsuit filed by Inupiat Eskimos from Kivalina, Alaska, against 24 oil and energy companies for lack of subject matter jurisdiction, ruling that the question of how to address global warming was a political issue and not appropriate for federal courts to decide. [Native Vill. of Kivalina v. Exxon Mobil Corp., No. 08-1138 \(N.D. Cal. 09/30/09\)](#).

The lawsuit alleged that, as a result of global warming, the Arctic sea ice that protects the village's coast from storms has diminished and that the resulting erosion will require relocation of the 400 residents at a cost of \$95 million to \$400 million. Plaintiffs sought damages under a federal common law claim of nuisance, alleging that the defendants were partly responsible for excessive emissions of carbon dioxide and other greenhouse gases, which plaintiffs claimed caused global warming.

Defendants argued that the issues plaintiffs raised were inherently political and that no judicial standards were available to adjudicate them. They also argued that plaintiffs lacked Article III standing under the U.S. Constitution because the alleged injury was not "fairly traceable" to the defendants' conduct. Dismissing the complaint,

the court agreed with defendants on both issues. The court also dismissed state law claims as moot. According to press reports, an appeal is likely. Two federal appeals courts have recently ruled to the contrary that the courts have jurisdiction to hear climate-change lawsuits. *Comer v. Murphy Oil Co.*, No. 07-60756 (5th Cir. 10/16/09); *Connecticut v. Am. Elec. Power Co.*, No. 05-5104 (2d Cir. 9/21/09). See *BNA Daily Environment Report*, October 16 and 20, 2009.

[2] Water: Federal Court Orders EPA to Re-evaluate Montana's Water Standards

A federal judge in Wyoming has ordered EPA to re-evaluate Montana's water quality standards following a successful challenge by coal bed methane producers and Wyoming. [Pennaco Energy, Inc. v. EPA, No. 06-100 \(D. Wyo. 10/13/09\)](#). Plaintiffs sued in 2006, alleging that EPA had failed to carry out a proper review of Montana's standards and violated the APA and the Clean Water Act by approving those standards. The court remanded the standards to EPA, ordering the agency to lay out clearly its rationale for approval, especially as to why Montana needed stringent standards for salinity and sodium content in its rivers.

The standards imposed numerical limits on electrical conductivity, which increases with salinity and sodium absorption ratio. The latter indicates the amount of sodium relative to calcium and magnesium. According to the court, "the administrative record is



replete with a range of opinions and conclusions the EPA has not thoroughly reviewed, including the conclusion that the water is not substantially harmful.”

[3] Toxic Tort: Punitive Damages Barred in MTBE Case

A federal judge in New York has reportedly ruled that Exxon Mobil Corp. will not be liable for punitive damages in a lawsuit brought by New York City over drinking water contaminated with the gasoline additive methyl tertiary butyl ether (MTBE). *In Re: MTBE Prod. Liab. Litig.*, No. 00-1898 (S.D. N.Y. 10/14/09). According to the court, plaintiff “has not presented significant evidence to allow this jury to conclude that Exxon Mobil’s conduct in this bellwether trial manifested a wanton, reckless, and highly immoral disregard for the rights of others.” The court noted that MTBE concentrations in the contaminated area will reach a peak of 10 parts per million in 2033, but when the problem occurred, water providers in New York were permitted to offer water containing 50 ppb of MTBE. *See BNA Daily Environment Report*, October 16, 2009.

[4] Envtl. Crime: Man Sentenced to 20 Years in Prison for Illegal Dumping and Weapons Violations

A federal judge in Florida has reportedly sentenced a Utah man to 20 years in prison for illegally dumping industrial waste in violation of RCRA and for weapons violations occurring during his March 2009 arrest. *U.S. v. Baggett*, No. 09-10025 (S.D. Fla. *sentencing* 10/14/09). Defendant Larkin Baggett pleaded guilty to weapons, assault and environmental charges in July.

Court records show that defendant owned and operated Chemical Consultants, Inc. in North Salt Lake City, Utah, in 2004 and 2005. He instructed his

employees to dispose of industrial wastes, including sulfuric, hydrofluoric and hydrochloric acids, by dumping them onto the ground and into a sanitary sewer drain. The sewage treatment plant discharged treated effluent into the Jordan River, which flows into Great Salt Lake. According to EPA, the actions of defendant and his employees caused the plant to violate permit limits 22 times. When defendant was arrested in Florida, he confronted police officers with an assault rifle and was shot several times during an ensuing shoot-out. *See DOJ Press Release* and *BNA Daily Environment Report*, October 15, 2009.

[5] Envtl. Crime: Federal Court Dismisses Criminal Charges Based on Government Errors in Asbestos Sampling

A federal judge in California has reportedly dismissed all criminal charges against San Diego Gas & Electric and two of its employees after ruling that 27 samples of pipe-wrap allegedly containing asbestos were inadmissible because of the manner in which the government collected, documented and tested the samples. *U.S. v. San Diego Gas & Electric Co.*, No. 06-00065 (S.D. Cal. 10/08/09).

According to the court, the government attempted to present scientific test results “based upon samples that are: (a) not representative of what was on the pipe; or (b) improperly tested, or both . . .” In 2007, the company and the two employees were convicted of violating asbestos work-practice standards contained in section 42 U.S.C. §§ 7412 and 7413, and for making false statements in violation of 18 U.S.C. § 1001. In March 2009, the Ninth Circuit Court of Appeals affirmed an earlier district court order granting defendants a new trial. *U.S. v. San Diego Gas & Electric*, No. 08-50072 (9th Cir. 03/17/09). *See BNA Daily Environmental Report*, October 14, 2009.



[6] Water: EPA Announces CWA Enforcement Initiative

EPA announced October 15, 2009, that the agency will “retool and reinvigorate” its Clean Water Act enforcement over the next few months. As a first step, the agency is developing a Clean Water Act Enforcement plan that will (i) “[d]evelop more comprehensive approaches to ensure enforcement is targeted to the most serious violators and the most significant sources of pollution”; (ii) coordinate “with states to ensure greater consistency throughout the country with respect to compliance and water quality”; (iii) “[e]nsure that states are issuing protective permits and taking enforcement to achieve compliance and remove incentives to violate the law”; and (iv) “[u]se 21st century information technology to collect, analyze and use information in new, more efficient ways and to make that information readily accessible to the public.” EPA Administrator Lisa Jackson outlined the initiative in testimony before the House Transportation and Infrastructure Committee. See *EPA Press Release*, October 15, 2009.

Legislation, Regulations and Guidance

[7] Air: EPA Issues Flexible Permitting Rule

EPA has published a **final rule** allowing emissions sources, such as power plants and refineries, to switch fuels and make other changes to their operations without additional review by state or local permitting agencies. *74 Fed. Reg.* 51,417 (10/06/09). According to EPA, the rule revises regulations governing state and federal operating permit programs, required by title V of the Clean Air Act (CAA), and is designed to promote flexible air permitting approaches that provide

greater operations flexibility and, at the same time, ensure environmental protection and compliance with applicable laws. Title V of the CAA requires major sources to obtain operating permits that describe their obligations under the CAA and are typically issued by state environmental agencies. The rule amends 40 C.F.R. Parts 70 and 71 and becomes effective November 5, 2009.

[8] Air: Comments on Emissions Factors Program Improvements Sought

EPA has **issued** an Advanced Notice of Proposed Rulemaking that seeks comments on options for improving its use of emissions factors, which various industries apply to calculate a stationary source’s air emissions. *74 Fed. Reg.* 52,723 (10/14/09). EPA is in the process of a multi-part review of its emissions factors program, set forth at 40 C.F.R. Parts 60, 61 and 63, that will result in upgrades to the current system of compiling emissions factors and in new development procedures.

The notice solicits comments on how EPA’s electronic reporting system can be improved, how often the emissions factors should be updated, and how to improve public review of the emissions factors development process and the timely development of new and revised emissions factors. Emissions factors are used to estimate a source’s air emissions by calculating the amount of pollution produced from the new material processed. Many emissions factors are based on averages of data collected through performance testing at various sources. According to a 2006 report from EPA’s Office of Inspector General, most emissions factors are unreliable and have led to under-reporting of emissions.



[9] Air/Greenhouse Gases: Executive Order Requires Federal Agencies to Set Greenhouse Gas Emissions Targets for 2020

President Barack Obama (D) issued an [executive order](#) on October 5, 2009, that requires federal agencies to set greenhouse gas emissions reduction targets for 2020 within 90 days. The order also requires a 30 percent reduction in vehicle fleet petroleum use by 2020, a 26 percent improvement in water efficiency at federal agencies by 2020, a 50 percent recycling and waste diversion rate by 2015, and a requirement that federal buildings achieve a net-zero energy use by 2030. Agencies must also use federal contracts to promote environmentally responsible products and technologies and follow forthcoming guidelines for locating federal buildings in or near central business districts and close to public transit.

[10] Air: EPA Report Criticizes EPA/State Air Enforcement

According to a recent [report](#) by EPA's Office of Inspector General (IG), EPA and state environmental agencies have failed to aggressively pursue high-priority violations of the Clean Air Act (CAA). The report claims that EPA failed to take formal enforcement actions in a timely manner under its own policy in 46 percent of high-priority CAA violations. The report also concludes that EPA headquarters and regional offices failed to properly oversee state-led high-priority violation cases. Several states, according to the report, violated EPA's high-priority violation policy by addressing violations informally rather than with formal enforcement actions.

The IG reviewed high-priority violation cases from October 1, 2005, through December 31, 2007, from EPA Regions 1, 5, 7, and 8. The IG also reviewed cases from Region 6 and from Texas. The reviewed regions represent 57 percent of the high-priority violation cases EPA brought and 47 percent of the cases that states pursued.

The report recommends that EPA (i) direct its regional offices to comply with the agency's high-priority violation policy and monitor and report on regional compliance; (ii) revise the policy to require specific oversight steps and remedies for cases that are unaddressed after 270 days and detail the roles and responsibilities of EPA headquarters and regions, and state and local agencies; and (iii) implement detailed management controls over high-priority violation cases.

[11] Animal Waste: Maryland DE to Issue Animal Waste General Permit

The Maryland Department of the Environment (Maryland DE) will reportedly issue a general discharge permit, effective December 1, 2009, for Maryland Animal Feeding Operations (MAFOs) and Concentrated Animal Feeding Operations (CAFOs). The general permit would impose restrictions on the operation of animal waste storage and distribution systems and require the adoption of nutrient management plans to manage nutrient runoff.

Under the permit, medium and large farms with specified numbers of animals would be classified as CAFOs if they discharge or propose to discharge animal waste or related pollutants to surface waters. Feeding operations that do not discharge the surface waters would be classified as MAFOs. Both CAFOs and MAFOs would have to apply for coverage under the general permit, but requirements would be less stringent for MAFOs.



An environmental group has challenged the general permit, and the case is now on appeal in circuit court after an administrative law judge upheld it. *Assateague Coastkeeper v. MDE*, No. 09-6417 (Md. Cir. Ct. 10/01/09).

Scientific/Technical Items

[12] Chemical Exposure: Drinking Water Study Claims Exposure to Prescribed Estrogens Is Not Causing Adverse Health Impacts

A recent study funded by the pharmaceutical industry claims that exposure to prescribed estrogens in drinking water is not causing adverse health effects in U.S. residents. Daniel Caldwell, et al., "An Assessment of Exposure to Prescribed Estrogen in Drinking Water," *Environmental Health Perspectives* (October 12, 2009). The study compared exposures to prescribed and naturally occurring estrogens in drinking water with exposures to naturally occurring background levels of estrogen in the diets of children and adults and to four independently derived acceptable daily intakes (ADIs) to determine whether drinking water intakes are larger or smaller than dietary intake or ADIs.

The researchers used the Pharmaceutical Assessment and Transport Evaluation model to predict concentrations of estrogens in drinking water. The study concluded that for both children and adults, exposures to estrogens in drinking water were significantly lower than exposures to estrogens from dietary intake.



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

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