

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] Land Policy/NEPA: Ninth Circuit Rejects Land Exchange for Landfill Construction

The Ninth Circuit Court of Appeals has ruled 2-1 that the U.S. Bureau of Land Management (BLM) failed to comply with the Federal Land Policy and Management Act (FLPMA) in approving a land exchange needed for a large landfill project planned near Joshua Tree National Park, located east of Los Angeles, California. [*Nat'l Parks Conservation Ass'n v. BLM, No. 05-56908 \(9th Cir. 11/10/09\)*](#). BLM's 1999 decision gave Kaiser Ventures 3,481 acres of federal land within the project area in exchange for 2,486 acres of railroad right-of-way the company owned. Plaintiffs challenged the decision in federal court, arguing that BLM failed to comply with the FLPMA and NEPA. The district court agreed with plaintiffs as to all of the FLPMA claims and several of the NEPA claims, and defendants appealed.

Affirming most of the lower court's ruling, the appeals court majority determined that BLM violated the FLPMA because the agency's stated "purpose and need" for the land swap was "unreasonably narrow" and lacked a sufficient range of alternatives. According to the majority, BLM also failed to consider the landfill as a "highest and best use" as required by the FLPMA.

While the appeals court also upheld the district court's decision that the environmental impact statement (EIS) BLM prepared for the proposed

landfill failed to adequately address the introduction of nutrients from the landfill to the local ecosystem, it reversed the district court's ruling that the project's EIS failed to adequately analyze the landfill's impact on bighorn sheep. "Contrary to the district court's decision, we find that the EIS contains extensive analyses of potential impacts on bighorn sheep, including migration patterns, habitat loss and water accessibility."

The dissenting judge penned a 50-page opinion arguing that "[o]ur well-meaning environmental laws have unintentionally made such an endeavor a fool's errand." His point was that under current laws and regulations, which impose nearly insurmountable obstacles, projects such as the landfill at issue are "daunting—if not impossible"—ventures.

[2] Toxic Tort: Federal Court Dismisses Railroad Defendant for Lack of Control over Facility

A federal judge in Mississippi has dismissed from a toxic tort lawsuit a railroad defendant that purchased treated wood from a Grenada, Mississippi, plant, finding that the company did not exercise the requisite control over its operations. [*Hill v. Illinois Cent. R.R. Co., No. 03-60 \(N.D. Miss. 10/20/09\)*](#). The lawsuit was filed by the wife of a man who allegedly died from exposure to creosote and other chemicals from the wood treatment plant. One thousand other individuals have filed separate lawsuits against the plant's operators. Plaintiff argued that the railroad's importance to the



operators as a major customer, the railroad's specifications about chemical use and the presence of its on-site inspectors were enough to find the railroad liable as the "master" of the operations under several state tort-law decisions.

Rejecting plaintiff's arguments, the court ruled as a matter of law that the railroad may have exerted some influence over the plant's operators, but they always had the option of telling the railroad that they would not follow its specifications about how to make railroad ties. The court also said that the operators remained "actually and substantially free of the railroad's control."

[3] Air: EPA Agrees to Set Emission Standards at PVC Plants

EPA has reportedly agreed to settle a lawsuit by proposing emissions limits on a range of hazardous air pollutants from polyvinyl chloride (PVC) plants. *Mossville Env'tl. Action Now v. Jackson*, No. 08-1803 (D.D.C. 10/30/09). EPA had issued national emission standards for hazardous air pollutants (NESHAP) for PVC plants in 2002, but the standards were vacated by a federal appeals court because they failed to limit emissions of pollutants other than vinyl chloride. *Mossville Env'tl. Action Now v. Jackson*, No. 02-1282 (D.C. Cir. 06/18/04). The environmental plaintiffs filed another lawsuit in 2008 when EPA failed to re-promulgate PVC-plant emissions standards.

Plaintiffs alleged in their 2008 lawsuit that PVC plants emit dioxin, a known carcinogen. PVC is a plastic widely used in vinyl siding, plumbing, raincoats, appliances, and other products. The settlement is subject to public comment and court approval. See *BNA Daily Environmental Report*, November 6, 2009.

[4] Toxic Tort: Maryland Jury Awards \$2.5 Million in Lead Paint Case

A city-court jury in Baltimore, Maryland, has reportedly awarded two siblings, who had lived in a West Baltimore row house, \$2.5 million in damages for exposure to lead-based paint in the house. The siblings reportedly have permanent cognitive and behavioral disabilities as a result of lead poisoning. According to news reports, the family had been told that the house was "safe" by City Homes Inc., a nonprofit organization that obtains "safe, affordable housing." Experts who testified for plaintiffs at trial said that (i) the home contained lead paint, which was chipped and flaking on several interior surfaces; (ii) one wall became wet in storms; and (iii) rodents gnawed at walls and tracked lead dust throughout the house. See *The Baltimore Sun*, November 4, 2009.

Legislation, Regulations and Guidance

[5] Water: EPA to Reconsider Water Transfer Rule

EPA has reportedly announced that it will reconsider the "water transfer rule" that excluded water transfers from regulation under the Clean Water Act's NPDES permitting program. In its June 2008 final rule, EPA said that CWA permits are not required for water transfers because the transfers do not add pollutants to navigable waters. *73 Fed. Reg.* 33,697. The rule defines a water transfer as an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal or commercial use. 40 C.F.R. Part 122.

Apparently, EPA will reconsider the rule because the agency "has concerns about the water quality impact of some water transfers." A related lawsuit is



currently pending before the Eleventh Circuit Court of Appeals, which in June 2009 reversed a district court determination that pumping polluted water from canals in the Everglades into Lake Okeechobee without a permit violates the CWA. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, No. 07-13829 (11th Cir. 06/04/09). Plaintiff has filed a motion for rehearing before the full appeals court. See *BNA Daily Environment Report*, November 3, 2009.

[6] FIFRA: EPA Issues PR Notice on Pesticide Drift Labeling

EPA has issued a [Pesticide Registration \(PR\) Notice](#) seeking public comment on guidance the agency has developed to help state and tribal governments understand when a drift-related violation of a pesticide label has occurred and what evidence is needed to document the violation. The proposed guidance describes several scenarios warranting additional language on a pesticide label to reduce drift. It also describes timelines for applying new language to labels. According to EPA, the goal of the guidance is to help states and tribal governments develop reasonable enforcement responses when pesticide drift causes, or could cause, adverse effects. The agency will accept comments on the proposed guidance, as well as on proposed pesticide labels, until January 4, 2010.

[7] TSCA/Nanotechnology: EPA Proposes SNURs for Carbon Nanotubes

EPA has proposed significant new use rules (SNURs) under TSCA for two types of carbon nanotubes. [74 Fed. Reg. 57,430 \(11/06/09\)](#). To protect trade secrets or confidential business information, the two types are identified generically as a multi-walled carbon nanotube and a single-

walled carbon nanotube. Under the proposed rule, anyone intending to manufacture, process or import either carbon nanotube substance for an activity designated by EPA as a “significant new use” must notify EPA at least 90 days before any such activity begins, thereby giving the agency the opportunity to determine if any of the intended uses pose unreasonable risks to public health or the environment.

The proposed rule would require worker protection through use of NIOSH-approved full-face respirators with N100 cartridges, skin protection in the form of gloves and other protective clothing impervious to the substance, and a prohibition on any “predictable or purposeful release” of the substance into U.S. waters. EPA will accept comments on the proposed rule until December 7, 2009.

[8] Safe Drinking Water Act: EPA Approves Alternative Test Procedures for Contaminant Analysis

EPA has approved 25 additional [testing methods](#) for measuring levels of contaminants in drinking water and for determining compliance with national primary drinking water standards under the Safe Drinking Water Act (SDWA). [74 Fed. Reg. 57,908 \(11/10/09\)](#). The action is a final rule, effective on the date of publication. Regulated parties required to sample and monitor contaminants may use either the testing methods already approved by the EPA or the additional methods approved in the rule.

[9] Air/Greenhouse Gases: Washington DOE Proposes Reporting Rule

The Washington Department of Ecology (DOE) has proposed a [rule](#) that would require large emitters of greenhouse gases (GHGs) to report their emissions to the state. The proposed rule would



require stationary sources that emit 10,000 metric tons or more per year and fleets of vehicles that emit at least 2,500 tons annually to report emissions beginning October 31, 2010.

Stationary sources covered by the proposed rule include refineries, pulp and paper mills, cement kilns, lumber mills, food processors, and some entities using fossil fuels to generate power or heat. Vehicle fleets covered by the rule include trucking and delivery fleets; rental car companies; large customer service fleets operated by telephone, cable, or power companies; and large government agency fleets. Also covered are large fleets of aircraft, marine vessels and rail equipment that emit at least 10,000 metric tons of GHGs per year. The Washington State Legislature in 2008 directed DOE to develop the reporting rule.

[10] Air/Climate Change: Portland, Oregon, Adopts Climate Action Plan

The City of Portland, Oregon, has reportedly adopted a climate action plan to reduce carbon dioxide emissions 40 percent below 1990 levels by 2030 and 80 percent by 2050. Among the plan's initiatives are to (i) obtain zero net greenhouse gas emissions in all new buildings, (ii) recover 90 percent of all generated solid waste, (iii) improve the efficiency of freight movement within the city, (iv) expand the urban forestry canopy to cover one-third of the city, and (v) establish a tax credit for businesses that install "ecoroofs" and solar panels. Multnomah County, the county in which Portland is located, has also reportedly adopted the plan. *See BNA Daily Environment Report*, November 3, 2009.

[11] Enforcement: EPA Makes Compliance Data Available Online

EPA has released new information on agency enforcement of RCRA and Clean Air Act regulations, and has posted data online that allow comparisons of toxic releases with facility compliance data. The agency also updated its Enforcement and Compliance Online (ECHO) Web site to allow users to view current information on facility compliance with water, air and hazardous waste requirements in relation to pollutant release data from EPA's Toxics Release Inventory and National Emissions Inventory databases.

According to EPA, ECHO allows users to find permit, compliance monitoring, violation, enforcement action, and penalty information over the past three years. Information on access to this data can be found at EPA's Web site. *See EPA Press Release*, November 6, 2009.

Scientific/Technical Items

[12] Nanotechnology: Nanomaterials Listed in Hazardous Data Bank

According to press reports, at least seven nanomaterials have been added to the Hazardous Substances Data Bank® of the National Library of Medicine. The data bank includes peer-reviewed toxicological data on more than 5,000 chemicals.

Among the nanomaterials added to the databank are (i) silver nanoparticles, (ii) titanium oxide nanoparticles, (iii) fullerenes (hollow, spherical or ellipsoidal carbon nanostructures, and not tubular or lattice materials), (iv) iron nanoparticles, (v) zinc oxide nanoparticles, (vi) cerium oxide nanoparticles, and (vii) carbon nanotubes. A committee of 16 experts, known as the Scientific Review Panel, peer reviews information in the data bank. *See BNA Daily Environment Report*, November 4, 2009.



**[13] Chemical Exposure: NIH Study Claims
Arsenic Exposure Can Transform Human
Stem Cells into Cancer Cells**

Researchers from the National Institutes of Health (NIH) have published a study that claims exposure to arsenic can cause human stem cells to transform into cancer cells. *E.J. Tokar, et al., "Arsenic Exposure Transforms Human Epithelial Stem/Progenitor Cells into a Cancer Stem-Like Phenotype," Environmental Health Perspectives, 10.1289 (2009).*

The researchers exposed human adult stem cells from the prostate gland to arsenic in the laboratory for up to 18 weeks. They also injected some of the exposed cells into mice and monitored them for cancer development during the next six weeks.

According to the study, by 18 weeks of exposure to arsenic, the stem cells rapidly transformed into malignant cancerous stem cells. When transplanted into mice, the arsenic-exposed cells rapidly developed into invasive and aggressive tumors in as little as two to three weeks. More than 40 percent of the mice developed cancer within six months. Cancer did not develop in mice injected with untreated stem cells.



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

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