

Environmental & Chemical Update

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SUSTAINABILITY • TOXIC TORT • WASTE • WATER

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Litigation and Regulatory Enforcement

[1] Toxic Tort/Attorney's Fees: Federal Court Affirms \$1.3 Million Fee Award on Remand

A federal judge in Michigan, on remand from the Sixth Circuit Court of Appeals, has affirmed an award of \$1.3 million in attorney's fees in a class action against a large steel company. *Stanley v. U.S. Steel Co., No. 04-74654 (E.D. Mich. 12/8/09)*. The award was 30 percent of a \$4.45 million settlement. Under the terms of the court's decision, residents of two Detroit suburbs, which have a combined population of 22,000, would receive \$300 per household. Any funds not disbursed would go to the public school system.

After the district court approved the settlement the first time, one class representative appealed the decision to the Sixth Circuit. He argued that the claims which class members released in the settlement were too broad, there was collusion between class counsel and defendant, and \$300 per household was too little compared to the \$1.3 million attorney's fee award. The appeals court rejected those arguments, but remanded the fee issue to the district court to elaborate more fully on why the award was warranted.

Affirming the award, the district court noted that the case was prosecuted on an agreed-to contingency fee basis and that class counsel had performed extensive work identifying and

investigating potential claims during the four years between filing and settlement. The court wrote that counsel "worked for four years without payment, risking recovery of nothing."

[2] NEPA: Federal Court Halts Timber Sale in National Forest

A federal judge in Alaska has halted a timber sale in a roadless area of the state's Tongass National Forest for a reevaluation by the U.S. Forest Service. *Tongass Conservation Soc'y v. Cole, No. 09-00003 (D. Alaska 12/7/09)*. Environmental groups challenged the sale in March 2009, alleging that it would allow logging companies to harvest about 4.4 million board feet of lumber and would involve almost five miles of new road construction, nearly two miles of road reconstruction and one mile of temporary road building. Plaintiffs also argued that the Forest Service failed to prepare an environmental impact statement in violation of NEPA, in deciding to proceed with the sale. Plaintiffs specifically argued that the sale would cost taxpayers nearly \$1.6 million to build roads in the national forest and return about \$141,000 from the timber sale. The court agreed and enjoined the sale until the Forest Service prepares a supplemental EIS.

[3] RCRA/CWA: Lead Bullets May Be Hazardous Waste

Denying a defendant's motion for summary judgment, a federal judge in Oregon has ruled that lead bullets left on a shooting-range site for more than 50 years may be RCRA hazardous waste subject



to permitting requirements. *Benjamin v. Douglas Ridge Rifle Club*, No. 07-1144 (D. Or. 12/1/09). The court rejected defendant's argument that RCRA permitting claims should be dismissed because lead bullets fired from rifles and handguns are used as intended and not "discarded" and are, therefore, not waste. The court allowed claims of improper storage and hazardous waste disposal to proceed.

The court cited *Connecticut Coastal Fishermen's Association v. Remington Arms Co.*, 989 F.2d 1305 (2d Cir. 1993), which held that lead bullets "left to accumulate long after they have served their intended purpose" met the statutory definition of RCRA solid waste. The court also cited *Safe Air for Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004), which set out three factors important to determine whether something is "discarded," that is (i) "whether the material is 'destined for beneficial reuse or recycling in a continuous process by the generating industry itself'; (ii) "whether the materials are being actively reused, or whether they merely have the potential of being reused"; and (iii) "whether the materials are being reused by its original owner, as opposed to use by a salvager or reclaimer." Still to be decided, according to the court, was whether defendant ever "reused" the bullets on the property after they were fired.

Because the court also rejected defendant's challenge to claims that lead was deposited on the land, wetlands and a creek in violation of the Clean Water Act, these claims will also proceed.

[4] Endangered Species Act: Federal Court Blocks Wind Farm Project

A federal judge in Maryland has ruled that a wind farm project under construction in West Virginia may not operate most of the year without a U.S. Fish and Wildlife Service (Service) permit because it

poses a risk to an endangered species, the Indiana bat. *Animal Welfare Inst. v. Beech Ridge Energy, LLC*, No. 09-1519 (D. Md. 12/8/09). According to the court, if the defendant wants to operate the wind farm during times of the year other than the winter hibernation season, it will need to apply to the Service for an "incidental take permit" under the Endangered Species Act (ESA). An incidental take permit allows the harming or killing of an endangered species during lawful operations. The court also ruled that defendant cannot install more than the 40 turbines currently under construction at the site. The developer had planned to build 124 turbines, each about 400 feet tall, along 23 miles of ridgelines in the Allegheny Mountains.

[5] Envtl. Crime: Ship Management Company to Pay \$2.7 Million to Settle Ocean Dumping and Other Violations

A federal judge in Louisiana has sentenced a ship management company headquartered in Greece to pay a \$2.7 million criminal fine for (i) violating the Act to Prevent Pollution from Ships, the Nonindigenous Aquatic Nuisance Prevention and Control Act (NANPCA) and the Ports of Waterways Safety Act; and (ii) making false statements to the U.S. Coast Guard. *U.S. v. Polembros Shipping Ltd.*, No. 09-252 (E.D. La. 12/9/09). The company pleaded guilty September 30, 2009, to the charges. The court also ordered the company to serve three years' probation and to make a separate \$100,000 community service payment to the Smithsonian Environmental Research Center. The court awarded a total of \$540,000 to nine former crew members of the cargo vessel *M/V Theotokos*, who cooperated in the investigation and provided information to prosecutors leading to the company's conviction.



According to court records, the company failed to maintain an accurate oil record book for the Theotokos, carried fuel oil in a tank forward of its collision barrier, failed to maintain accurate ballast water records, and failed to report hazardous conditions related to a crack on the ship's rudder stern. The company also pleaded guilty to making false statements to the Coast Guard. According to the Department of Justice, the prosecution was the first brought under the NANPCA.

[6] Air: Groups Challenge NSPS Rule for Coal Preparation and Processing Facilities

A coalition of environmental groups has reportedly challenged EPA's final rule establishing new source performance standards (NSPS) for coal preparation and processing facilities, issued October 8, 2009 (74 *Fed. Reg.* 51, 950). *Sierra Club v. EPA*, No. n/a (D.C. Cir. *filed* 12/7/09). The petition for review alleges that EPA failed to require coal processing facilities to take additional steps to prevent fugitive dust emissions from roadways, as required by the Clean Air Act. It also challenges EPA's decision not to require that the facilities' fugitive dust-control plans be reviewed and approved by state or federal permitting authorities.

Petitioners also filed an administrative petition with EPA asking EPA to voluntarily reconsider the rule and add more dust controls. According to the petition, "significant gaps" exist in the final rule's requirement that coal processing facilities maintain fugitive dust-control plans. The proposed rule required the plans to be reviewed and approved, but the final rule did not.

Legislation, Regulations and Guidance

[7] Stormwater: EPA Issues Guidance to Federal Agencies on Minimizing Stormwater Runoff

EPA issued [guidance](#) December 8, 2009, to assist federal government agencies minimize the impact of stormwater runoff from federal development projects. The guidance was issued in response to a change in the Energy Independence and Security Act of 2007 establishing strict stormwater requirements for federal development and redevelopment projects and Executive Order No. 13514.

Section 438 of the Act requires the sponsor of any development or redevelopment project involving a federal facility with a footprint that exceeds 5,000 square feet to use site planning, design, construction, and maintenance strategies for the property. These must, to the maximum extent feasible, maintain or restore the property's predevelopment hydrology with regard to the temperature, rate, volume, and duration of flow. According to the guidance, agencies may use sustainable techniques for reducing the effects of stormwater runoff to meet these requirements.

The guidance provides two options for meeting "performance-based objectives" of preserving and restoring a site's hydrology: (i) retaining the 95th percentile rainfall event by using stormwater management practices that manage rainfall on site and prevent the off-site discharge of all rainfall events less than or equal to the 95th percentile rainfall event; and (ii) using a site-specific hydrologic analysis to determine predevelopment runoff conditions.



[8] Food Quality Protection Act: EPA Seeks Comments on Revised Risk Assessment Methods for Pesticides with No Food Uses

EPA is seeking comments on its [“Revised Risk Assessment Methods for Workers, Children of Workers in Agricultural Field, and Pesticides with No Food Uses.”](#) EPA’s Office of Pesticide Programs published the revised methods on December 7, 2009; they will be used to conduct risk assessments for pesticides and pesticide risks that are not governed by the Federal Food, Drug, and Cosmetic Act

According to EPA, the agency intends to apply risk assessment techniques developed through the Food Quality Protection Act of 1966 (FQPA) to evaluate risks from pesticides with no food use rather than FIFRA, which requires a risk-benefit standard for pesticide registration. Under the FQPA, a risk-only standard is required. The new policy includes reporting risks for agricultural workers ages 12-17 and children taken into agricultural fields. Comments on the methods should be submitted to EPA by February 8, 2010.

[9] Air/Greenhouse Gases: Environment Canada Proposes Limits on Vehicle GHG Emissions

Environment Canada has proposed [regulations](#) that would limit greenhouse gas (GHG) emissions from new vehicles starting with the 2011 model year. The proposed regulations would be promulgated under the Canadian Environmental Protection Act and will be published in the *Canada Gazette* for a 60-day formal public comment period.

Under the proposed regulations, motor vehicle manufactures would be required to comply with fleet average standards for passenger cars and light trucks that would be aligned with applicable U.S. fuel economy standards for the 2011 model year. For 2012 and subsequent years, the regulations would establish a comprehensive regulatory program for reducing GHGs in step with a program proposed by U.S. EPA under the Clean Air Act. Manufacturers would be required to comply with updated standards for each model year, based on applicable U.S. standards.

The proposed regulations would also establish a system of emission credits that would allow manufacturers to meet the standards using flexible approaches. Companies exceeding the standard for a specific model year would receive credit that could offset deficits for underachieving in another year. The credits, with a five-year life span, could be traded between companies, and emission deficits incurred during a specific model year would have to be offset by an equivalent number of emission credits within the next three model years.

[10] Open Gov’t: OMB Issues Open Government Directive

Following a January 2009 order from President Barack Obama (D), the director of the White House Office of Management and Budget (OMB) issued an [Open Government Directive](#) to heads of executive agencies on December 8, ordering them to develop detailed plans for boosting access to government information and increasing public participation in policy-making. Specifically, the directive orders agency heads to detail how they plan to expand transparency, participation and collaboration.



[11] Air/Greenhouse Gases: California Air Board Adopts Rule Limiting GHG Emissions from Large Refrigeration Systems

California EPA's Air Resources Board (ARB) has adopted a [regulation](#) to reduce greenhouse gases (GHGs) from commercial and industrial refrigeration systems. The regulations apply to large commercial and industrial systems that use more than 50 pounds of refrigerant for a single unit, roughly the equivalent of the refrigerant found in 100 household refrigerators. It will apply primarily to supermarkets, food and beverage processors, cold storage warehouses, and industrial cooling processes. It will not apply to most bars, restaurants, liquor stores, and office buildings or to systems that use ammonia or carbon dioxide as the refrigerant.

Beginning in 2011, the rule will require leak inspection, repairs, service practices, and record keeping. Leak inspections will vary from continuous leak monitoring to quarterly or annual inspections, depending on the type and size of the refrigeration system. Starting in 2012, registration, reporting and fee requirements will be phased in for smaller systems. According to ARB, "the regulation will reduce GHG emissions by 8.1 million metric tons of carbon dioxide by 2020." The regulation is part of a state program created by the California Global Warming Solution Act of 2006, to reduce GHG emissions in the state. See *ARB Press Release*, December 9, 2009.

[12] Air/Greenhouse Gases: New Mexico Executive Order to Reduce GHG Emissions

New Mexico Governor Bill Richardson (D) signed [Executive Order 2009-047](#) on December 4, 2009, requiring the New Mexico Environment Department

and other state agencies to work toward reducing greenhouse gas (GHG) emissions that stem from coal-fired power plants and mining operations in the state.

The executive order follows issuance of an executive order (2006-069) that directed state agencies to follow recommendations made by the state's Climate Change Advisory Group, which developed a plan in 2006 to reduce GHG emissions by the equivalent of 267 million metric tons and create a projected \$2 billion net economic savings for the state's economy.

In the latest order, the state government implementation team assigned to carry out climate change policies is mandated to work with the state's electric utilities and stakeholders to develop recommendations for reducing GHG emissions from existing coal-fired plants. The order calls for (i) the continued participation in the Western Climate Initiative to develop a regional GHG emission reduction program, (ii) the development of recommendations for establishing an emission performance standard for new fossil-fuel generating facilities and new long-term power purchase agreements, (iii) the development of recommendations for offset protocols that are consistent with the Western Climate Initiative, and (iv) the strengthening of state government efforts to reduce emissions associated with energy use and transportation in state government operations. The goals set forth in the order are to be overseen by the Clean Energy Development Council, made up of various state agencies, such as the Energy, Minerals and Natural Resources Department.



Scientific/Technical Items

[13] Chemical Exposure: Study Claims Association Between WTC Dust Exposure and Bronchiolar and Interstitial Lung Disease

A recent [study](#) by Mount Sinai School of Medicine researchers claims to have found an association between exposure to dust from the World Trade Center (WTC) on September 11, 2001, and bronchiolar and interstitial lung disease. Maoxin Wu, et al., "Lung Disease in World Trade Center Responders Exposed to Dust and Smoke—Carbon Nanotubes Found in the Lungs of WTC Patients and Dust Samples," *Environmental Health Perspectives*, 12/04/09. The study reviewed the clinical, pathological and mineralogical findings in seven previously healthy responders exposed to dust on either September 11 or 12, 2001, developed severe respiratory impairment or unexplained radiological findings, and underwent Video Assisted Thoracoscopic Surgical (VATS) lung procedures at Mount Sinai Medical Center.

Examinations found that three of the seven responders had clinically severe or moderate restrictive disease. Histopathology showed interstitial lung disease consistent with small airways disease, brochiolocentric parenchymal disease and a non-necrotizing granulomatous condition. Carbon nanotubes were identified in four out of seven WTC dust samples. The study recommends long-term monitoring of the responders and further study on the presence of carbon nanotubes in WTC dust and lung tissues.

[14] Indoor Air Quality: Report Addresses IAQ in Newer Single-Family Homes

A recent [report](#) funded by the California Air Resources Board (ARB) and the California Energy Commission and prepared by Indoor Environmental

Engineering addresses ventilation and indoor air quality (IAQ) in 108 new homes in California. The field study involved single-family detached California homes built between 2002 and 2004, owner-occupied for at least one year, and excluded homes occupied by smokers who smoked indoors. The homes were located in both northern and southern parts of the state and included a subset of 26 homes with mechanical outdoor-air ventilation systems.

The researchers measured home ventilation and indoor contaminant source characteristics, including the amount of composite wood, indoor contaminant concentrations, the residents' ventilation practices, IAQ perceptions, and decision factors regarding ventilation and IAQ-related actions. The researchers found that most of the homes were built relatively airtight and had very low outdoor exchange rates. The median 24-hour outdoor air exchange rate was 0.26 air changes per hour, and 67 percent of the homes were below the California building code requirement of 0.35 air changes per hour. The median indoor formaldehyde concentration was 36 micrograms per cubic meter. Nearly all homes contained formaldehyde concentrations that exceeded guidelines for cancer and chronic irritation, while 59 percent exceeded guidelines for acute irritation.

The report recommends the installation and use of mechanical ventilation systems. As a result of the report, the California Energy Commission reportedly approved a regulation requiring all new homes starting in 2010 to have mechanical ventilation systems. See *California ARB Press Release*, December 9, 2009.



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