

Environmental & Chemical Update

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Issue 306 • January 15, 2010

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Litigation and Regulatory Enforcement

[1] Stormwater: Eighth Circuit Rules EPA Lacks Authority to Penalize Company for Failure to Obtain Stormwater Permit

The Eighth Circuit Court of Appeals has ordered EPA to recalculate a penalty imposed on a company on the basis of its failure to comply with permit application regulations, finding that this remedy is not authorized under the Clean Water Act, which bases penalties instead on unlawful discharges. [*Service Oil, Inc. v. EPA*, No. 08-2819 \(8th Cir. 12/28/09\)](#). So ruling, the court reversed an EPA administrative law judge's decision, which was upheld by the Environmental Appeals Board.

The court vacated a proposed penalty of \$35,460, which EPA had imposed because the company failed to obtain a stormwater discharge permit before beginning construction on more than five acres in Fargo, North Dakota. The court ruled that EPA exceeded its authority by basing the amount of the proposed civil penalty on the company's failure to comply with EPA's permit application regulations rather than on actual unlawful pollutant discharges.

[2] Air: Environmental Groups Seek to Block Long Beach Port Settlement

Environmental groups have sued the City of Long Beach, California, seeking to block an agreement between the Port of Long Beach and the American Trucking Association (ATA) that resolved a dispute

over the port's clean trucks program. [*NRDC, Inc. v. City of Long Beach*, No. B5124293 \(Super. Ct., County of Los Angeles, filed 12/29/09\)](#).

The port agreed to the settlement in October 2009 in return for ATA dropping its lawsuit over a labor component of the clean trucks program that barred independent contractors from the port.

According to the current lawsuit, the settlement left the ATA in charge of port operations and able to dictate the details of an air pollution plan that is designed to phase in the replacement of old trucks with cleaner long-haul diesels. The lawsuit seeks to have the settlement vacated or subject to review under the California Environmental Quality Act.

[3] Env'tl. Crime: Specialty Chemical and Packaging Company Pleads Guilty to CWA Violations

A Connecticut specialty chemical and packaging company has reportedly pleaded guilty in federal court to one count of knowingly discharging a pollutant into the Town of Plymouth's sewer system in violation of the Clean Water Act (CWA). *U.S. v. Phoenix Prods. Co.*, No. 3:10 (D. Conn. *plea entered* 01/04/10). According to court records, the company had a contract with a customer to blend and package a swimming-pool drain-opener product. While carrying out its obligations under the contract, the company generated six 250-gallon containers of a highly acidic, off-specification byproduct. Over a period of weeks, company employees were instructed to dump several gallons of the product down factory drains. Under the CWA,



the company was prohibited from discharging any pollutant into the public sewer system except as allowed by a pretreatment permit. The company never applied for or received such a permit.

Under the terms of a plea agreement, the company agreed to pay up to \$250,000 to settle the matter. The agreement is subject to court approval. *See BNA Daily Environment Report*, January 6, 2010.

[4] Air: Environmental Groups Seek to Intervene in Industry Challenge to EPA Medical Incinerator Rule

Environmental groups have filed a motion to intervene on EPA's behalf in a challenge by industry groups to the agency's air pollution standards for medical-waste incinerators. *Med. Waste Inst. v. EPA*, No. 09-1297 (D.C. Cir. *motion filed* 1/6/10). The Medical Waste Institute and the Energy Recovery Council filed a petition for review challenging the rule on December 7, 2009. A third group, the Coalition for Responsible Waste Incineration, also filed a motion January 6, 2010, to participate in the challenge to the rule.

EPA published its final new source performance standards for new and reconstructed hospital, medical and infectious waste incinerators on October 6, 2009. *74 Fed. Reg.* 51,368. The rule, which was codified at 40 C.F.R. Part 60, set the minimum level of emissions-control technology that must be used at covered incinerators. The standards apply to emissions of hydrogen chloride, carbon monoxide, lead, cadmium, mercury, particulate matter, dioxins, furans, nitrogen oxides, and sulfur dioxide. A previous EPA rule was remanded to the agency in 1999 for correction and additional explanation. *Sierra Club v. EPA*, 48 E.R.C. 1161 (D.C. Cir. 1999). *See BNA Daily Environmental Report*, January 8, 2010.

[5] Safety: OSHA Fines Houston Industrial Waste Facility \$1.5 Million for Alleged Safety Violations

The Occupational Safety and Health Administration (OSHA) is reportedly seeking \$1.5 million from a Houston, Texas-based industrial waste facility for 71 alleged safety violations, 17 of them "willful," which purportedly led to the death of a worker on July 7, 2009. The alleged willful violations involved several pieces of electrical equipment the agency contends were unsafe to use in the midst of flammable and combustible vapors in the facility's wash bays. Other alleged violations include failure to ventilate tanks where employees were working and improper chemical storage. The company, CES Environmental Services, cleans truck trailers, recycles oil and packages waste for transport and disposal. A separate lawsuit by the Texas attorney general against the company alleges 20 violations of state environmental laws. *See Houston Chronicle*, January 4, 2010.

Legislation, Regulations and Guidance

[6] Air: EPA Proposes Ozone NAAQS Revisions

EPA issued a proposed [rule](#) January 7, 2010, that would revise the National Ambient Air Quality Standards (NAAQS) for ground-level ozone. The agency is proposing to set the "primary" standard, which protects public health, at a level between 0.060 and 0.070 parts per million (ppm) measured over eight hours. EPA is also proposing to set a separate "secondary" standard, which is designed to protect sensitive vegetation from adverse effects associated with cumulative ozone exposure based on an annual index of the sum of weighted hourly



concentrations, cumulated over 12 hours per day. EPA has proposed these levels after reconsidering identical primary and secondary ozone standards, which were set at 0.075 ppm in 2008.

New York and 13 other states, as well as several clean air advocacy groups, challenged those standards in the D.C. Circuit Court of Appeals as not being protective enough. Mississippi and a coalition of industry groups also challenged the standards, but argued they were too strict.

EPA will accept comments on the proposed rule for 60 days following its publication in the *Federal Register*. The agency will also hold public hearings on the proposal in Arlington, Virginia, and Houston, Texas, on February 2, and in Sacramento, California, on February 4.

[7] RCRA: Transboundary Shipment Rule Revised to Align with OECD Rules

EPA has revised the RCRA hazardous waste transboundary shipment rule to align it with those of the Organization for Economic Cooperation and Development (OECD), an organization of 30 countries, including the United States. *75 Fed. Reg.* 1,235 (1/8/10). The revisions will affect all persons who export or import hazardous waste, export or import universal waste or export or import lead-acid batteries destined for recovery operations in OECD countries, except for Mexico and Canada. Shipments between the United States and either Mexico or Canada will continue to be governed by existing bilateral agreements and applicable regulations. The revisions are designed to implement changes the OECD made to encourage consistency with the Basel Convention on the Transboundary Movements of Hazardous Waste and their Disposal. The revisions take effect July 7, 2010.

[8] CERCLA/RCRA: EPA Seeks Public Comments on Interim Guidance for Dioxins in Soil Cleanup Goals

EPA issued draft recommended interim preliminary remediation goals for dioxin in soil at CERCCA and RCRA sites for public comment December 31, 2009. The draft guidance would revise preliminary remediation goals (PRGs) for cleanup of dioxins in soil at contaminated sites. The draft guidance would reduce the acceptable level of dioxins in residential soil from 1,000 parts per trillion (ppt) to 72 ppt. It would reduce the goal for dioxins in commercial or industrial soil from 5,000-20,000 ppt to 950 ppt. EPA defines PRGs as chemical-specific concentration goals for soil, sediment, water, or air and land-use combinations at CERCLA, federal facility, Brownfield, and RCRA sites. They function as targets during initial development, analysis and selection of cleanup alternatives. The agency expects to finalize the interim goals by June 30, 2010. EPA will accept public comments on the draft goals until February 26. *75 Fed. Reg.* 984 (1/7/10).

[9] TSCA: Phthalates and Other Chemicals to Be Listed as "Chemicals of Concern"

EPA has announced that it will establish a "Chemicals of Concern" list under TSCA and that it has prepared action plans for four potentially dangerous chemicals: phthalates, long-chain perfluorinated chemical (PFCs), polybrominated diphenyl ethers (PBDEs), and short-chain chlorinated paraffins. The action plans reportedly summarize available hazard, exposure and use information, outline the risks each chemical might pose and describe regulatory measures the agency plans to take or explore. *See EPA Press Release*, December 30, 2009.



[10] Enforcement: Public Comments Sought on Proposed Enforcement Priorities

EPA has issued a [notice](#) seeking public comments and recommendations on proposed enforcement priorities for fiscal years 2011-2013. *75 Fed. Reg.* 146 (01/04/10). The notice solicits comments on a [preliminary set](#) of national priority candidates listed on EPA's Web site. EPA will release its final list of priorities in April 2010. Comments on the preliminary list must be received by EPA before January 16, 2010.

[11] Stormwater: EPA to Hold Public Listening Sessions on Potential Stormwater Rule

EPA has announced five "listening sessions" to provide information to the public about a potential new rule that would strengthen stormwater regulations and establish a program to reduce stormwater discharges from new development and redevelopment.

EPA also seeks public input on preliminary regulatory considerations concerning whether to (i) expand areas subject to federal stormwater regulations, (ii) establish specific requirements to control stormwater discharges from new development and redevelopment, (iii) develop a single set of consistent stormwater requirements for all municipal separate stormsewer systems, (iv) require those sewer systems to address stormwater discharges in areas of existing development through retrofitting the sewer system or drainage area with improved stormwater-control measures, and (v) explore stormwater provisions to protect sensitive areas.

The sessions will be held January 19 in Chicago, January 20 in San Francisco, January 25 in Denver, January 26 in Dallas, and January 28 in Washington, D.C. See *EPA Press Release*, January 5, 2010.

[12] Air/Greenhouse Gases: California Adopts Guidelines for Analyzing GHG Impacts of New Projects

The California Natural Resources Agency has adopted [guidelines](#) for analyzing the greenhouse gas (GHG) impacts of new policies and development projects. The new guidelines implement portions of the California Environmental Quality Act (CEQA) that require public agencies to review proposed policies and projects to determine if measures are needed to offset harmful environmental impacts.

The guidelines advise agencies to describe or estimate GHG emissions associated with a project to determine its impact on (i) forests, (ii) the consumption of fuels or other energy sources, and (iii) all modes of transportation including public transit, bicycle and pedestrian facilities. They amend 14 sections of previously existing CEQA guidelines by addressing issues in which analysis of GHG emissions may differ from more traditional CEQA analysis.

[13] Europe/Recycling: EU Regulations for Battery Disposal Effective January 2010

Regulations that require retailers to provide collection and recycling facilities for the eventual disposal of batteries that they sell became effective January 2010 in the European Union (EU). The regulations, which are part of EU's [batteries directive](#), will "affect any business that uses, produces, supplies, or disposes of batteries, as well as any business that manufactures or designs battery-powered products," according to the UK's Environment Agency.



The regulations require anyone selling more than one ton of portable batteries per year to arrange for the collection, recycling and disposal of waste batteries in proportion to their market share. They also require consumers to separate from their household waste all batteries, including AAA cells, mobile phone batteries and the button cells used in hearing aids and watches, for placement in designated recycling bins in shops or other recycling points.

The European Commission enacted the directive to address the approximately 800,000 tons of automotive batteries, 190,000 tons of industrial batteries and 160,000 tons of consumer batteries placed on the EU market every year. The metals used in these batteries include lead, mercury, nickel, cadmium, zinc, lithium, and manganese—some of which are classified as hazardous waste when disposed. *See The Guardian*, January 4, 2010.



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Shook, Hardy & Bacon's Environmental Law Practice.

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