

# Environmental & Chemical Update

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## Litigation and Regulatory Enforcement

### [1] **Water Resources: U.S. Supreme Court Allows Interstate Water Authority and Energy Company to Intervene in State Water Dispute**

The U.S. Supreme Court, in a 5-4 decision, has ruled that an interstate water authority and an energy company may intervene in a water-use dispute between North and South Carolina. [\*South Carolina v. North Carolina, No. 138 Orig. \(U.S. 1/20/10\)\*](#). South Carolina filed the lawsuit in 2007, claiming that North Carolina would unlawfully divert water from South Carolina by following through on a planned interbasin transfer of water from the Catawba River. South Carolina later asked that all three intervenors—the Catawba River Water Supply Project (CRWSP), Duke Energy Carolinas and the City of Charlotte, North Carolina—be dismissed from the lawsuit.

In a decision written by Justice Samuel Alito, joined by Justices John Paul Stevens, Antonin Scalia, Anthony Kennedy, and Stephen Breyer, the Court ruled that CRWSP and Duke Energy had interests distinct from both North and South Carolina, meaning that the states would not adequately represent them. Finding that the City of Charlotte, although it had a strong interest in the lawsuit, would be adequately represented by North Carolina, the majority excluded the city. Chief Justice John Roberts authored a dissenting opinion to argue that

allowing CRWSP and Duke to intervene could turn the system designed to solve interstate disputes into “a forum for airing private interests.”

### [2] **CWA/NEPA: Eleventh Circuit Upholds Order Vacating Everglades Mining Permits**

The Eleventh Circuit Court of Appeals has upheld a trial court decision vacating U.S. Army Corps of Engineers (Corps) issued dredge-and-fill permits that would have allowed companies to mine limestone in wetlands near the Everglades National Park. [\*Sierra Club v. Van Antwerp, No. 03-23427 \(11th Cir. 1/21/10\)\*](#). The district court ruled in January 2009 that the Corps acted arbitrarily and capriciously in issuing the permits and erred when it concluded that the limestone excavation operations were “water dependent” under section 404 of the Clean Water Act (CWA). *Sierra Club v. Van Antwerp*, No. 03-23427 (S.D. Fla. 2/4/09).

The appeals court agreed that the Corps violated the CWA and NEPA and further ruled that the project was not “water-dependent” and that the Corps failed to apply a presumption that practicable alternatives existed to mining in the area. The court noted, however, that the mining companies “will be unable to satisfy their burden and demonstrate that there are no practicable alternatives to mining limestone” in the area. News reports indicate that the mining companies will continue to pursue the permits. See *BNA Daily Environmental Report*, January 25, 2010.



### [3] CWA: Federal Court Finds Flaking Warship Paint in Violation of Law

A federal judge in California has ruled that the U.S. Maritime Administration's maintenance of a fleet of retired warships in Suisan Bay, 40 miles northeast of San Francisco, violates the Clean Water Act (CWA). *ARC Ecology v. U.S. Mar. Admin., No. 07-2320 (E.D. Cal. 1/20/10)*. The ships, nearly 70 in number, have been anchored for decades in the bay. Congress ordered that the ships be scrapped by 2006, but a conflict between the U.S. Maritime Administration and state water regulators over where and how the ships would be cleaned before they were dismantled delayed the order's implementation.

The main issue of contention is flaking paint from the ships. The California Regional Water Quality Control Board and several environmental groups sued seeking an order forcing the agency to begin dismantling the ships. The court found that the U.S. Maritime Administration was breaking the law by allowing paint to continue to flake off into the bay without an NPDES permit. The court also ruled that the flaking paint violated the California Hazardous Waste Control Act and granted plaintiffs' motion for summary judgment.

### [4] CWA: Southern California Pipeline to Pay \$1.3 Million to Settle Clean Water Violations

According to the Department of Justice, Pacific Pipeline Systems LLP, a Long Beach, California-based oil transport company, has agreed to pay a \$1.3 million civil penalty and discontinue use of a section of pipeline through an unstable mountain area to resolve a Clean Water Act violation. The settlement agreement resolves a complaint filed in federal court in Los Angeles alleging the

discharge of crude oil into Pyramid Lake, located about 60 miles northwest of downtown Los Angeles. The March 2005 discharge resulted from a landslide which caused the failure of a portion of the company's Line 63, an underground pipeline that runs from Bakersfield to Los Angeles. The resulting break discharged approximately 3,393 barrels of oil, much of which flowed into Pyramid Lake, part of the state's aqueduct and a potential drinking-water supply. The settlement is subject to a 30-day comment period and approval by the federal court. *See DOJ Press Release*, January 20, 2010.

### [5] RCRA: EPA Seeks Civil Penalty for Attempt to Export Electronic Waste

EPA is reportedly seeking a civil fine of up to \$37,500 per day of violation from a California-based company for attempting to illegally export cathode ray tubes (CRTs) to Hong Kong and refusing to comply with a federal order to manage the electronic waste legally. The waste was part of a shipment of approximately 31,993 pounds of CRTs that had been rejected in Hong Kong and returned to the Port of Long Beach.

The company, ZKW Trading Ltd., allegedly failed to provide notice to EPA or to the receiving country as required by RCRA. It also allegedly failed to comply with a September 2009 EPA order requiring the company to remove its cargo from the Port of Long Beach and to submit a plan for management of the waste. Regulations at 40 C.F.R. Parts 260, 261, and 271, which took effect in January 2007, require exporters shipping CRTs to another country for recycling to notify EPA and receive written consent from the receiving country before shipments can be made. *See BNA Daily Environmental Report*, January 21, 2010.



## [6] NEPA/Envtl. Justice: NAACP Sues DOT over Decision to Construct Rail System Through Minority Neighborhood

A group of community organizations has sued the U.S. Department of Transportation (DOT), Federal Transit Administration (FTA) and the local Saint Paul Metropolitan Council over plans to construct a light rail system through a historically black community, alleging that the plans violate NEPA. *The Saint Paul Branch of the NAACP v. DOT, No. 10-cv-147 (D. Minn. filed 1/19/10)*. Plaintiffs include the NAACP and 11 local businesses and residents who allege they will be directly affected by the proposed plan, which involves the construction of an 11-mile light-rail transit line through the city's Rondo community.

The complaint seeks declaratory and injunctive relief from the agency's alleged failure to "adequately identify the adverse impacts of the project," which is estimated to cost \$1 billion and be completed in 2014. In addition to alleged NEPA violations, the complaint alleges violations of the Administrative Procedures Act and Declaratory Judgment Act. Specifically, the complaint alleges that the agencies "failed to prepare an adequate environmental impact statement that adequately addresses the direct, indirect and cumulative adverse impact of the . . . project or adequately consider mitigation of the adverse impacts of the . . . project."

## Legislation, Regulations and Guidance

### [7] TSCA: EPA Announces Increased Transparency on Chemical Risk Information

EPA announced January 21, 2010, a new policy designed to increase the public's access to information on chemicals. As part of the new policy, EPA will reject certain Confidential Business Information

(CBI) claims on the identity of chemicals. The chemicals affected by the policy are those submitted to EPA with studies showing a substantial risk to the public health and the environment and having been previously disclosed on the TSCA chemical inventory.

Under TSCA, companies may claim a range of sensitive, proprietary information as CBI. Under Section 8(e), companies that manufacture, process or distribute chemicals are required to immediately provide notice to EPA if they learn that a chemical presents a substantial risk of injury to health or the environment. Under the old policy, companies would routinely claim confidentiality for the actual identity of the chemical covered by the Section 8(e) submission. Under the new policy, effective January 21, 2010, this practice is no longer tolerated. EPA will publish the new policy in the *Federal Register*.

### [8] Health & Safety: OSHA Plans Public Meeting to Solicit Comments on Key Issues

The Department of Labor's Occupational Safety and Health Administration (OSHA) has announced a public meeting February 10, 2010, in Washington, D.C., to solicit comments and suggestions from stakeholders on key issues facing the agency. OSHA invites public input on how the agency can (i) enhance and encourage efforts of employers, workers and unions to identify and address workplace hazards; (ii) identify and address the most important emerging workplace health and safety issues; (iii) improve efforts to engage stakeholders in programs and initiatives; (iv) improve current compliance assistance efforts and onsite consultation program to ensure small businesses have the information needed to provide safe workplaces; (v) implement specific actions to enhance workers'



voices, particularly those who are hard to reach, do not have ready access to information about hazards or their rights, or are afraid to exercise their rights.

The meeting will be held at the Francis Perkins Building auditorium at the U.S. Department of Labor, 200 Constitution Ave., NW, from 9:00 a.m. to 5:00 p.m. EST. Those unable to attend can send written comments to the OSHA Docket Office. See *OSHA Press Release*, January 15, 2010.

### [9] **Alternative Energy: MMS Seeks Comments on Proposed Offshore Wind Project**

The Department of Interiors' Minerals Management Service (MMS) is seeking [public comments](#) on a revised finding of adverse effects based on new information regarding the proposed Cape Wind offshore wind farm in federal waters near Massachusetts. *75 Fed. Reg. 3,922 (1/25/10)*. The revised finding incorporates new information that five additional properties within the affected area have been found eligible for inclusion in the National Register of Historic Places.

The proposed project calls for 130 wind turbines, each with a 3.6 megawatt capacity, to be set on Horseshoe Shoal in Nantucket Sound. It was proposed in 2001 by Cape Wind Associates, LLC and soon faced local opposition. The revised document describes the adverse impacts as “unobstructed views of the altered visual setting” from onshore sites that have historic value. The agency will accept comments on the revised proposal until February 12, 2010.

Section 106 of the National Historic Preservation Act requires the consideration of project impacts on places deemed to have historic value, and Nantucket Sound itself has been found by the Federal Advisory

Council on Historic Preservation to have protection under the Act. MMS has regulatory authority over offshore wind energy projects in federal waters.

### [10] **Greenhouse Gases: France to Impose Temporary Tax on Carbon Emissions**

France's Minister of Ecology, Energy, Sustainable Development and the Sea has reportedly announced that a [temporary tax](#) will be imposed on the country's largest carbon dioxide emitters until 2013, when the European Union (EU) Emission Trading System starts to charge for emissions allowances. Beginning in February 2010, the government plans to launch a consultation phase with businesses, unions, environmental organizations, and parliamentary commissions to shape the final tax proposal. The consultations would determine how the tax will affect each sector's competitiveness and ability to operate. The French government also reportedly plans to argue for a carbon tax at the EU level. See *BNA Daily Environmental Report*, January 22, 2010.

## Scientific/Technical Items

### [11] **Alternative Energy: DOE Study Claims Eastern U.S. May Obtain 20 Percent of Energy from Wind**

The Department of Energy has released a [study](#) which concludes that shifting 20 percent of the Eastern Interconnection's energy load to wind energy is technically feasible and can be achieved by 2024, but a “significant expansion” of transmission infrastructure and other changes will be necessary.

According to the study, achieving the 20 percent goal would require approximately 225,000 megawatts of wind energy capacity—a tenfold increase over contemporary levels—and would require transmission



infrastructure expansion and system operational changes, and could cost as much as \$175 billion. The Eastern Interconnection is one of the nation's three transmission grids and serves more than 70 percent of the country's population. The scenarios examined in the study used land-based wind in the Midwest, offshore wind in the East or a combination of both.

**[12] Chemical Exposure: Study Claims  
Exposure to Flame Retardants May Affect  
Neurodevelopment**

A recent study by researchers at Columbia University and the Centers for Disease Control and Prevention claims that children exposed in the womb to high concentrations of certain polybrominated diphenyl ethers (PBDEs) used as flame retardants are more likely to have neurodevelopmental problems than children exposed to lower concentrations. Julie Herbstman, et al., "Prenatal Exposure to PBDEs and Neurodevelopment," *Environmental Health Perspectives*, January 4, 2010.

The researchers examined umbilical cord samples from more than 100 babies and evaluated children at 1, 2, 3, 4, and 6 years of age. They found that children with the highest 20 percent cord blood concentrations of three PBDEs were more likely to have lower developmental scores compared to children with the lowest 80 percent concentrations.



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