

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] FIFRA: Challenge to EPA Pesticide Decision Filed in Wrong Court; Ninth Circuit Upholds Dismissal for Lack of Jurisdiction

The Ninth Circuit Court of Appeals has upheld the dismissal of a lawsuit challenging EPA's issuance under FIFRA of an Interim Registration Eligibility Decision that allowed some uses of the pesticide azinphos-methyl (AZM). *United Farm Workers of Am., AFL-CIO v. EPA, No. 08-35528 (9th Cir. 1/26/10)*. The appellate court ruled 2-1 that the plaintiffs erred by filing their complaint in federal district court under a FIFRA provision that provides for jurisdiction in the district court when EPA has taken action on a pesticide "not following a hearing."

Under the statute, the issue of whether a hearing has been held determines where review is appropriate. The majority found that a hearing had been held despite the fact that no proceedings that allowed public argument had been conducted and thus, determined that review of any contested decision should be sought in the appeals court. The dissenter argued that no public hearing had been held and that the majority had misconstrued the statute. Based on the majority decision, review in the appeals court is time-barred.

[2] RCRA: Federal Court Rules Endangerment Allegation Must Be Gauged at Time of Filing

A federal judge in Texas has ruled that a RCRA imminent and substantial endangerment claim, under 42 U.S.C. 6972(a)(1)(B), must be evaluated based on conditions existing when the lawsuit is filed. *Am. Int'l Specialty Lines Ins. Co. v. 7-Eleven, Inc., No. 08-807 (N.D. Tex. 1/19/09)*. Defendant argued that the claim should be dismissed because contamination at the site had been remediated to a level that no longer posed an "imminent and substantial endangerment." Rejecting that argument, the court held that the date of filing, May 12, 2008, was the relevant date for determining whether the condition posed a substantial danger.

The property, which housed a Diamond Shamrock gasoline station, was subject to a 2004 Texas Commission on Environmental Quality order and was under remediation. Plaintiff, American International Specialty Lines Insurance Co., had been cleaning up the property which was owned by one of its insureds. The contamination was allegedly caused by leaking underground storage tanks at an adjacent 7-Eleven facility.



[3] **Water: Federal Court Rejects Attempt to Block Delaware River Dredging**

A federal judge in Delaware has rejected the state environmental agency's attempt to stop the U.S. Army Corps of Engineers (Corps) from starting a 102.5 mile dredging project on the Delaware River. *Del. Dep't of Natural Res. & Envtl. Control v. Corps, No. 09-821 (D. Del 1/27/10)*. The court rejected the state agency's arguments that the Corps proceeded without a state permit and that the state would suffer significant and irreparable harm if the dredging occurred.

The Corps plans to deepen the main shipping channel to 45 feet from its current 40-foot depth from the mouth of the river to the ports of Philadelphia and Camden. Under the court's order, the dredging could start within a week. Environmental groups have reportedly opposed the dredging, arguing that it could stir up long-buried toxins and disrupt habitats for some aquatic life. Two other suits challenging the dredging—one by New Jersey and one by the Delaware Riverkeeper Network—are pending. *See The Philadelphia Inquirer*, January 28, 2010.

[4] **Agency Authority: Canadian High Court Rules Government May Not Alter Environmental Assessment Level**

The Canada Supreme Court has determined that federal authorities overseeing environmental assessments in Canada do not have the discretion to change the level of assessment by amending the scope of the project. *Mining Watch Canada v. Minister of Fisheries & Oceans, No. 32797 (Can. 01/21/10)*. The Court overturned a federal court of appeals ruling that had upheld a federal agency's decision to conduct a less rigorous "screening" assessment of a proposed project in British

Columbia. According to the Supreme Court, the Canadian Environmental Assessment Act requires the degree of environmental assessment to be based on the project as proposed. Under the statute, the presumed scope of the project is the project as proposed by the proponent.

The proponent, Red Chris Development Co. Ltd., initially sought approval for a proposed open-pit mining and milling operation for copper and gold in British Columbia. The company also applied to the federal Department of Fisheries and Oceans for permission to construct dams to establish a tailings impoundment area. The department initially indicated that a comprehensive study was required by the statute but subsequently scoped the project to exclude the mine and mill and then determined that the project required a less rigorous screening assessment only. By conducting a screening, the Court said, the agency acted without authority.

[5] **Tax Evasion: Businessman Convicted for Failure to Pay CFC-113 Excise Taxes**

Following a five-week jury trial, a New York businessman has reportedly been convicted on 86 counts of conspiring to defraud the Internal Revenue Service in the collection of approximately \$1.9 million in excise taxes due on sales of the ozone-depleting greenhouse gas known as CFC-113. According to court documents, the defendant represented to manufacturers that he was purchasing CFC-113 for export, allowing the manufacturers to sell it to him tax-free. He then sold the product in the domestic market without notifying the manufacturers or paying the excise taxes. In 1996, the Clean Air Act banned the importation and production of CFCs in the United States, but allowed manufacturers to sell and export CFCs that had been stockpiled before the ban.



Defendant faces a maximum prison term of five years for conspiracy, three years for filing a false corporate tax return, 20 years for wire fraud, and 20 years for money laundering. He also faces a fine of up to \$250,000 for conspiracy, false tax return and wire fraud; \$500,000 for money laundering; and the forfeiture of more than \$1 million involved in money laundering offenses. *See DOJ Press Release*, January 27, 2010.

[6] Greenhouse Gases: Group Sues California DOF in Clear-Cutting Dispute

An Arizona-based environmental group has reportedly filed lawsuits against the California Department of Forestry (DOF) in seven counties to halt logging plans for 5,000 acres across the Sierra Nevada and Cascade regions. *Ctr. for Biological Diversity v. Cal. DOF*, No. 63123 (Cal. Super. Ct. 01/27/10). The complaints allege that DOF approved the projects without properly analyzing and considering carbon emissions and climate consequences under the California Environmental Quality Act (CEQA).

The lawsuits were reportedly filed January 27, 2010, in superior courts in Amador, Calaveras, El Dorado, Modoc, Shasta, Tehama, and Trinity counties. Plaintiffs argue that forest clear-cutting will increase global warming and the failure to consider this consequence violates the CEQA. *See Los Angeles Times*, January 27, 2010.

[7] Air: EPA Sued for Alleged Failure to Act on SIPs for Federal Smog Rules

Environmental groups have sued EPA over allegations that the agency has failed to perform the mandatory duty of approving or denying 21 state implementation plans (SIPs) for compliance with the 1997 ozone standard. *Sierra Club v. Jackson*, No. N/A (D.D.C. filed 1/22/10). EPA determined that each of the states had submitted complete

plans by March 2008, but never approved them. The Clean Air Act requires the agency to approve or deny state plans within one year after they are submitted. 42 U.S.C. § 7410(k)(2). According to the complaint, this requirement imposes a mandatory duty on the agency. Plaintiffs seek an order requiring EPA issue final decisions on the NAAQS Infrastructure SIPs for the 21 states.

[8] Greenhouse Gases: Sixteen States Seek to Intervene in Lawsuit Challenging EPA's GHG Endangerment Finding

A coalition of 16 states and New York City have filed a motion to intervene on behalf of EPA in a lawsuit challenging EPA's finding that greenhouse gas (GHG) emissions are subject to regulation under the Clean Air Act. *Coal. for Responsible Regulation, Inc. v. EPA*, No. 09-1322 (D.D.C. filed 1/22/10). The motion argues that global warming caused by GHG emissions poses a significant threat to the proposed intervenor's residents.

EPA published its final rule, titled "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act," on December 15, 2009. 74 *Fed. Reg.* 66,496. The rule was a response to the U.S. Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), declaring that EPA must exercise CAA authority to regulate GHGs unless the agency could articulate a science-based reason not to do so. A coalition of energy, mining, business, and agricultural industry groups filed the underlying lawsuit challenging EPA's rule on December 23, 2009.



[9] Air: Westar Energy Agrees to Settle CAA NSR Enforcement Action

Westar Energy, Inc., a Topeka, Kansas-based electric utility, has agreed to pay a \$3 million civil penalty, invest \$6 million in environmental mitigation projects and spend nearly \$500 million for pollution-control equipment at a coal-fired power plant, known as the Jeffrey Energy Center, to settle a new source review (NSR) enforcement action. *U.S. v. Westar Energy, Inc., No. 9-2059 (D. Kan. proposed consent decree filed 01/25/10)*. According to a complaint filed in February 2009, Westar allegedly modified three coal-fired generation units at the Jeffrey Energy Center without installing required pollution-control equipment or complying with applicable emissions limits. Under terms of the settlement, Westar denies the allegations and maintains that it is in compliance with the Clean Air Act.

As part of the settlement, Westar will spend \$6 million on environmental mitigation projects including (i) retrofitting diesel engines on vehicles owned or operated for public entities in Kansas with emission-control equipment; (ii) constructing new wind turbines; (iii) installing infrastructure for use by plug-in hybrid vehicles; and (iv) installing advanced truck-stop electrifications systems to reduce idling truck emissions. The improvements called for at the Jeffrey Energy Center are designed to reduce combined sulfur dioxide and nitrogen oxide emissions by roughly 78,000 tons per year. According to EPA, the company also agreed to surrender surplus sulfur dioxide allowances and rebuild and optimize controls to reduce particulate matter emissions. The proposed settlement is subject to public comment and court approval.

Legislation, Regulations and Guidance

[10] Air: EPA Issues NAAQS for NO₂

EPA has issued a final rule establishing a one-hour air quality standard for nitrogen dioxide (NO₂) at 0.10 parts per million (ppm) while retaining the annual standard for the pollutant. The primary national ambient air quality standard (NAAQS) is the first one-hour air quality standard for NO₂. The rule will also expand the air-monitoring network for the pollutant, requiring additional monitors near roadways and in urban areas. The agency will not change the 0.053 ppm annual standard.

EPA had until January 22, 2010, to finalize the rule as part of a 2007 consent decree with the Center for Biological Diversity. *Ctr. for Biological Diversity v. Johnson*, No. 05-1814 (D.D.C. 11/19/07). The rule will be effective 60 days after publication in the *Federal Register*.

[11] Water: EPA Publishes Proposed Water Quality Standards for Florida Fresh Water

EPA has published a proposed rule that sets nutrient limits on phosphorus and nitrogen pollution in Florida lakes, rivers, streams, springs, and canals. *75 Fed. Reg.* 4,173 (1/26/10). The proposed rule is part of a phased rulemaking process for nutrients in Florida waters. The agency will take final action by October 2010 on numeric criteria for lakes and flowing waters and issue a final rule for estuarine and coastal waters by October 2011. Comments on the proposed rule will be accepted by EPA until March 29, 2010.



[12] Climate Change: SEC Approves Interpretative Guidance on Disclosure Policies and Climate Change

The Securities and Exchange Commission (SEC) has approved interpretative guidance for public companies that will focus on existing disclosure requirements as they apply to business or legal developments related to climate change. Slated for publication on the SEC Web site, the forthcoming guidance will address the impact of climate change legislation, regulation and international accords, as well as physical and indirect climate change effects, on company compliance with SEC requirements.

The guidance will not alter or create any rules, but will clarify current disclosure policies covering company risk factors, business description, legal proceedings, and management discussion and analysis, as they relate to climate change. In particular, SEC will highlight areas such as (i) the materiality of climate change legislation and regulation, (ii) the risks or effects of international climate change accords and treaties on business, (iii) the indirect legal, technological, political and scientific developments regarding climate change that may create business opportunity or risk, and (iv) the actual and potential material impacts of environmental matters on business. The guidance will be effective when it is published in the *Federal Register*. See *The Wall Street Journal*, *The Washington Post* and *The New York Times*, January 28, 2010.

Scientific/Technical Items

[13] Chemical Exposure: Study Claims Exposure to PBDEs Linked to Reduced Human Fertility

A recent study by University of California at Berkeley researchers alleges a link between exposure to certain flame retardants and reduced human fertility. Kim Harley, *et al.*, "PBDE Concentration in Women's Serum and Fecundability," *Environmental Health Perspectives*, 10:1289, 1/26/10. The chemicals studied—polybrominated diphenyl ethers (PBDEs) flame retardants—are used in furniture cushions, carpet padding and other household items.

The researchers studied 223 pregnant women in California's Salina Valley. More than 97 percent had PBDEs in their blood and those with high levels were half as likely to conceive in any given month as the women with low levels. The study recommends future studies to replicate and confirm the findings.



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