Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] False Claims Act: U.S. Supreme Court Limits Whistleblower Suits

In a 7-2 decision, the U.S. Supreme Court has ruled that whistleblowers are barred from filing suits under the False Claims Act (FCA) if state or local governments have disclosed the alleged wrongdoing in administrative reports. ***Graham County Soil & Water Conservation Dist. v U.S.*, No. 08-304 (U.S. 3/30/10)**. The FCA authorizes both the attorney general and private citizens to recover from persons who make false or fraudulent payment claims to the United States, but it bars citizen actions based on the public disclosure of allegations in "a congressional, administrative, or Government Accounting Office (GAO) report, hearing, audit, or investigation."

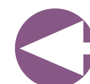
The case involved federal contracts which provided that two North Carolina counties would remediate areas damaged by flooding and that the federal government would pay most of the costs. A local government body employee alerted local and federal officials about possible fraud. Both the county and the state issued reports identifying potential irregularities in the contracts' administration. The employee subsequently filed a whistleblower action alleging that county conservation districts and local and federal officials knowingly submitted false payment claims in violation of the FCA. The district court dismissed the complaint for lack of jurisdiction. The court of appeals reversed, ruling that the lawsuit could proceed even though the allegations were publicly available in county and state reports.

Reversing, the U.S. Supreme Court majority held that the FCA's reference to "administrative" reports, audits and investigations encompasses disclosures made in state and local sources. The Court rejected plaintiff's argument that "administrative" referred to federal sources only. The dissenting justices disagreed with this interpretation.

[2] FIFRA/CWA: Second Circuit Rules County's Mosquito-Control Activities May Have Violated Law

The Second Circuit Court of Appeals has determined that Suffolk County, New York, may have violated the Clean Water Act (CWA) and FIFRA when it sprayed pesticides over water to kill adult mosquitoes in flight. ***Peconic Baykeeper, Inc. v. Suffolk County*, No. 09-0097 (2d Cir. 03/31/10)**. Among other claims was whether the county complied with FIFRA, which requires pesticides to be applied in accordance with federally approved labels that appear on the products. The complaint alleged that the county failed to comply with the FIFRA label by spraying over water, a practice the labels warn against. It also alleged that the county violated the Clean Water Act by not obtaining a permit to discharge the pesticides into the water.

The district court found that the county's spraying conformed to the FIFRA labeling and that the spraying did not violate the CWA because the



application of pesticides via spray jets attached to trucks and helicopters did not amount to discharge from a "point source," as required by the CWA. Plaintiff appealed.

Reversing, the appeals court ruled that spraying pesticides from trucks and helicopters could be considered "point source" pollution and therefore constitute a CWA violation, if done without a permit. Secondly, while the court found that the county largely complied with the FIFRA labels, there were instances—like spraying over creeks—that were questionable. Accordingly, the appeals court remanded the case to the district court for further review.

[3] Wetlands: Federal Court Finds Corps Has Authority to Regulate Non-Tidal Upland Ditches

A federal judge in the District of Columbia has ruled that the U.S. Army Corps of Engineers (Corps) has authority under the Clean Water Act to regulate the discharge of dredged or fill materials into non-tidal upland ditches. ***Nat'l Ass'n of Home Builders v. Corps,*** **No. 07-972 (D.D.C. 03/31/10)**. Plaintiff builder's association challenged the Corp's Nationwide Permit 46, which regulates the discharge of dredged or fill materials into upland ditches, as a violation of the Administrative Procedure Act.

Plaintiffs argued that the Corps' attempt to regulate upland ditches was inconsistent with *Rapanos v. U.S.*, 547 U.S. 715 (2006). In *Rapanos*, the U.S. Supreme Court, in a plurality opinion combined with a concurring opinion, remanded two civil actions to an appellate court, but the lack of agreement between those two opinions left the details of jurisdiction over "navigable waters" unsettled.

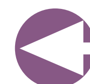
The court granted defendant's summary judgment motion, ruling that, by filing a challenge to a nationwide permit rather than disputing the permit for a specific ditch, plaintiff could prevail only by showing that under no circumstances would the permit be valid. According to the court, plaintiff failed to do that.

[4] Toxic Tort: Federal Court Reverses Punitive Damages Award Against Refinery Owner

A federal judge in Texas has reversed a jury's punitive damages award, ruling that plaintiff failed to prove gross negligence. ***Garner v. BP Amoco Chem. Co.,*** **No. 07-221 (S.D. Tex. 03/16/10)**. Filed in June 2007 by more than 100 individual plaintiffs, the lawsuit alleged that defendant released an unidentified toxic substance into the atmosphere at its refinery causing personal injuries to workers. Scores of workers were transported to local hospitals, where they were examined, treated and released.

The court entered an order in November 2009 designating 10 plaintiffs as the first trial group, and a jury thereafter found that, due to defendant's negligence, a toxic substance had been released at its refinery and that defendant's negligence was the proximate cause of plaintiffs' injuries. The jury also awarded punitive damages of $10 million per plaintiff. Defendants then argued that plaintiffs were not entitled to punitive damages because they did not prove "gross negligence" as required by state law. Plaintiffs countered that defendant's maintenance and investigative practices proved "gross negligence."

Ruling for the defendant, the court held that its maintenance of the refinery did not lead to a conclusion that the workers were at risk of being exposed to severe hazards by working there and that plaintiffs failed to prove that the defendant ignored obvious or known risks and took no precautions that would minimize or arrest the harm anticipated. The court concluded "as a matter of law, that gross negligence was not proved by clear



and convincing evidence and that the jury's exemplary damage award must be set aside."

[5] Renewable Fuels: Groups Challenge Rule's Retroactive Requirements

Oil industry groups have reportedly challenged provisions of EPA's final rule requiring motor fuel producers to include certain percentages of renewable fuels in their products. *Nat'l Petrochemical & Refiners Ass'n v. EPA*, No. 10-10070 (D.C. Cir. *filed* 03/29/10). Published March 26, 2010 (75 *Fed. Reg.* 14,670), the rule changes EPA regulations to include the renewable motor fuels requirements established by Congress in the Energy Independence and Security Act of 2007. Petitioners challenge provisions that are retroactive to 2009. *See BNA Daily Environment Report*, March 30, 2010.

Legislation, Regulations and Guidance

[6] Greenhouse Gases: EPA Issues Rule on Emissions from Stationary Sources

EPA issued a **final rule**, March 29, 2010, that will phase in greenhouse gas (GHG) emission-control requirements for new and modified stationary sources beginning January 2, 2011, under the prevention of significant deterioration (PSD) program. EPA had originally proposed that PSD requirements for stationary sources take effect March 31, 2010, when the agency planned to finalize proposed car and light truck standards. In February 2010, however, the EPA administrator announced that the agency would delay the application of PSD requirements until January 2011, the earliest date that 2012 model-year vehicles can be sold in the United States. According to the final rule, EPA will also delay until January 2011 requirements that GHG emission sources obtain operating permits under Title V of the Clean Air Act. The rule will be published in the *Federal Register*.

[7] Air: EPA Proposes to Revoke NSR Aggregation Rule

EPA has issued a **proposed rule** that would revoke the final New Source Review (NSR) Permitting Rule on Aggregation, which was promulgated on January 15, 2009. 74 *Fed. Reg.* 2,376. The rule directed facilities and permitting authorities to combine emissions from plant modifications only when those activities were "substantially related." The proposal responds to a Natural Resources Defense Council petition for reconsideration; it requests public comments on the range of legal and policy issues presented by the petition. EPA is proposing to return to its original policy, which required combining projects based on a broader range of factors. The proposed rule would also extend the effective date of the NSR Aggregation rule for six months to allow time to complete the proceeding. EPA will accept comments on the proposed rule for 30 days after it is published in the *Federal Register*.

[8] Mining: EPA Issues Guidance on Mountaintop Mining; Minimal Valley Fill Specified

EPA issued **guidance** on April 1, 2010, to agency regional offices detailing tightened requirements for surface coal mining in Appalachia. According to EPA, it should be applied immediately as a framework for all pending and future permit reviews, including permit renewal. It does not apply to existing permits. The guidance will require the coal industry to adopt a practice of minimal or zero filling of valleys with mining debris. It covers requirements under the Clean Water Act, NEPA and

the Environmental Justice Executive Order (E.O. 12898). EPA will publish a notice in the *Federal Register* announcing a 120-day comment period.

[9] Prop. 65: California Plans to Add Chemicals to List of Reproductive Toxicants

The California Office of Environmental Health Hazard Assessment reportedly plans to add the DDT breakdown products DDE and nitrobenzene to the state's Proposition 65 list of chemicals linked to reproductive toxicity pursuant to the Safe Drinking Water Toxic Enforcement Act of 1986, known as Prop. 65. Under Prop. 65, companies must warn the public of exposure to chemicals on the state's reproductive toxicants list.

According to reports, as DDT breaks down in the environment, its metabolite byproducts, including DDE, are absorbed by soils, water and air. DDE has chemical and physical properties similar to DDT and is reportedly toxic to fish, birds and other wildlife. Based on animal studies, EPA has concluded that the chemical causes developmental and male reproductive toxicity.

Nitrobenzene is used to produce aniline, which is found in shoe and metal polishes, dyes, synthetic rubber, and soaps. EPA concluded in 2009 that nitrobenzene exhibits reproductive toxicity in male rodents. *See BNA Daily Environment Report*, March 30, 2010.

[10] Climate Change: ASTM Releases Climate Change Financial Disclosure Standard

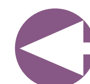
ASTM International recently released standard **E2718-10**, *Standard Guide for Financial Disclosures Attributed to Climate Change*. The guide is intended for "use on a voluntary basis by a reporting entity that provides disclosure in its financial statement regarding financial impacts attributed to climate change." It applies to U.S. and international operations.

The guide incorporates these principles: (i) "Uncertainty Not Eliminated," which recognizes that although a reporting entity may have evaluated the existence and extent of financial impacts attributed to climate change when it prepares its financial statements, uncertainties concerning scientific, technological, regulatory, legislative, and judicial matters cannot be eliminated; (ii) "Comparison with Subsequent Disclosures," which recognizes that "subsequent disclosures that convey different information regarding the extent or magnitude of the reporting entity's financial impacts attributed to climate change should not be construed as indicating the initial disclosures were inappropriate" and that disclosures should be evaluated based on the reasonableness of judgments made at the time; and (iii) "Not Exhaustive," which recognizes that "appropriate disclosure does not necessarily mean exhaustive disclosure."

[11] Water: Report Assesses State-Based Nonpoint Source Regulation

A recent Environmental Law & Policy Center **report**, titled "Cultivating Clean Water: State-Based Regulation of Agricultural Runoff Pollution," assesses state regulatory programs that focus on comprehensive management of nonpoint source pollution. The states are California, Delaware, Iowa, Kentucky, Maryland, Oregon, and Wisconsin.

According to the report, the state programs fall short in enforcement and monitoring largely because of limited funding and "political resistance to regulation of agriculture." The report says that many states engage in little or no compliance monitoring. It recommends that states promulgate regulations which apply broadly to all agricultural operations and



that implementing agencies be funded sufficiently to oversee compliance. It further recommends that states develop monitoring programs specifically designed to document water quality improvements resulting from their programs.

The report examines several specific types of state-based regulations on agricultural runoff and focuses on management practices to control nitrogen and phosphorus. Part I discusses the state programs while Part II discusses best management practices.

[12] Climate Change: GAO Issues Report on Cap-and-Trade Options

The Government Accountability Office (GAO) has issued a **report**, titled "Climate Change: Observations on Options for Selling Emissions Allowances in a Cap-and-Trade Program." Prepared at the request of the Senate Finance Committee chair, the report does not offer any specific recommendations but summarizes existing cap-and-trade programs and discusses options for the development of a U.S. program. The report suggests that a program's goals be identified before selecting a sales method and that options include selling allowances, exchanges or auctions. It reviews the European Union's Emissions Trading Scheme and the U.S. Regional Greenhouse Gas Initiative as examples of existing programs.

Scientific/Technical Items

[13] Chemical Exposure: Study Identifies Hundreds of Chemicals That May Bioaccumulate

A recent study identifies commercial chemicals that may persist and bioaccumulate and were not considered in existing contaminant measurement programs. Philip Howard, et al., "Identifying New Persistent and Bioaccumulative Organics Among Chemicals in Commerce," *Environmental Science & Technology,* Vol. 44, No. 7 (2010). The authors collected data from U.S. and Canadian government databases on more than 22,000 chemicals used in commerce from 1986 to 2006.

Using a computer software system, the authors screened the chemicals and some of their degradation products for their ability to persist and bioaccumulate based on chemical properties and structures. The authors separately evaluated those chemicals identified as high priority for other important properties the computer system could not distinguish.

The assessment identified 610 chemicals as potentially persistent and bioaccumulative in the environment. The list includes flame retardant chemicals used in furniture and electronic products, anti-microbial chemicals used in lotions and soaps and stain-and grease repellant chemicals used in a variety of products. Of those identified, 62 percent were "halogenerated," meaning they contained either fluorine, chlorine, bromine, or iodine atoms. The study did not attempt to identify the chemicals' adverse health effects.

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