

# Environmental & Chemical Update

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## Litigation and Regulatory Enforcement

### [1] Air: D.C. Circuit Denies Challenge to State Non-Road Engine Emissions Rule

The D.C. Circuit Court of Appeals has denied a petition for review filed by the American Trucking Associations challenging California's rule imposing emissions standards on refrigeration units in trucks. [Am. Trucking Ass'ns, Inc. v. EPA, No. 09-1990 \(D.C. Cir. 04/02/10\)](#). Petitioners argued that the California standards would require compliance by almost all trucks nationwide, thus precluding the other 49 states from exercising their rights under the Clean Air Act. The California Air Resources Board issued the standards in 2008 with EPA approval. They are estimated to reduce diesel particulate matter emissions 75 percent by 2010 and 85 percent by 2020.

The court denied the challenge in a 2-1 decision. The majority ruled that EPA reviewed the California standards as required by the Clean Air Act and did not ignore trucking industry concerns when it conducted that review. The dissenting judge agreed with petitioners that EPA overlooked the industry's concerns.

### [2] Endangered Species Act: Fifth Circuit Denies Challenge to Permit Allowing Rail Link to Limestone Quarry

The Fifth Circuit Court of Appeals has denied the Medina County Environmental Action Committee's (MCEAA) petition for review challenging a U.S.

Surface Transportation Board (STB) decision permitting Southwest Gulf Railroad Co. to construct and operate a seven-mile rail loop to service a proposed limestone quarry. [Medina County Envtl. Action Ass'n v. STB, No. 09-60108 \(5th Cir. 04/06/10\)](#). The MCEAA, composed primarily of individuals who live near the proposed quarry, was formed in 2000 to oppose it. The group alleged that the rail loop could jeopardize the continued existence of the endangered golden-cheeked warbler and certain endangered karst invertebrates.

In response to MCEAA's concerns, the rail company's parent voluntarily consulted with the U.S. Fish and Wildlife Service (FWS) to ensure the quarry's compliance with the Endangered Species Act (ESA), which makes it unlawful for any person to harass, harm, hurt, or collect endangered species. The company conducted intensive surveys of the area near the proposed rail line. In 2003, the rail company petitioned STB for a permit to construct the rail line. Five years later, following a biological assessment considering the cumulative impact of the proposed action, the STB granted the permit. The court denied the petition for review, ruling that the FWS complied with ESA requirements.

### [3] RCRA: Federal Court Allows Citizen Suit to Proceed

A federal judge in Tennessee has ruled that a RCRA citizen suit aimed at cleaning up a state landfill may proceed, rejecting an argument that a state order is an ongoing CERCLA action that may



not be challenged. *NRDC v. County of Dickson*, No. 08-0229 (M.D. Tenn. 04/01/10). The complaint alleged that the landfill was an “imminent and substantial endangerment” and sought an order directing defendants to address trichloroethylene and perchloroethylene contamination at the site. Defendant filed a motion to dismiss, arguing that the citizen suit was barred by 42 U.S.C. § 6972(b)(2)(B), which bars such actions if EPA has issued an order under which a responsible party is remediating the contamination. Defendants argued that the state, under an agreement with EPA, is authorized to act as EPA to enforce the RCRA program, essentially “stepping into the shoes” of the EPA administrator.

The court disagreed with defendants, ruling that the agreement allows the state to step into the shoes of EPA for purposes of 42 U.S.C. § 6926, but that it does not apply to “imminent hazard” allegations under 42 U.S.C. § 6973. According to the court, “[b]ecause the state’s order is not an administrative order issued by the EPA Administrator regarding an imminent hazard for purposes of 42 U.S.C. § 6972(b)(2)(B)(u), there is no bar to the citizen suit.”

#### **[4] CERCLA/RCRA: Federal Court Dismisses Claims for Failure to File Amended Complaint**

A federal judge in Michigan has dismissed several claims after plaintiffs failed to obey a court order to amend the complaint and provide more details about facts and costs related to remediation of contamination and response costs at a food manufacturing facility. *Lozar v. Birds Eye Foods, Inc.*, No. 09-10 (W.D. Mich. 04/06/10). Plaintiffs, who live near the facility, sued defendant in 2009 alleging it had contaminated their drinking water by disposing of wastewater by using it to irrigate

four farm fields. The wastewater allegedly contained organic materials from fruit, including dissolved sugar and suspended solids. The complaint alleged that water in the area smelled foul and formed rust stains on “everything it touches.” Thirty-three additional plaintiffs ultimately joined the lawsuit; they all live in Fennville, Michigan, where the facility is located. The complaint included counts under CERCLA, RCRA, and the Safe Drinking Water Act (SDWA), as well as negligence claims. In an earlier decision, the court dismissed one claim of negligence and SDWA violations.

In this decision, the court also dismissed the CERCLA and RCRA claims, in part because plaintiffs failed to amend their complaint to add additional facts. Plaintiffs offered no reason for failing to obey the court’s order. Remaining in the case are two negligence counts and a Michigan common law claim.

#### **[5] Nuclear Waste: Utilities Challenge DOE Decision Not to Suspend Payments to Nuclear Waste Fund**

Sixteen nuclear power companies and the Nuclear Energy Institute have filed a petition for review challenging the Department of Energy’s (DOE’s) decision not to suspend payments to the Nuclear Waste Fund (NWF). *Nuclear Energy Inst. v. U.S.*, No. 10-1076 (D.C. Cir. filed 04/05/10). Petitioners allege that DOE’s failure to suspend payments to the NWF in light of the government’s decision to terminate the nuclear waste repository at Yucca Mountain, Nevada, was “arbitrary and capricious.” Nuclear power customers pay about \$770 million in fees annually to the NWF to finance the transportation and construction of a repository for nuclear waste. The NWF is currently worth about \$25 billion.



## Legislation, Regulations and Guidance

### [6] Air: EPA Issues Revisions to General Conformity Regulations

EPA has issued [revisions](#) to the General Conformity Regulations in an attempt to prevent the air quality impacts of federal actions from causing or contributing to violations of the national ambient air quality standards (NAAQS) or interfering with the purpose of a state, tribal or federal implementation plan. *75 Fed. Reg.* 17,253 (04/05/10). According to EPA, the revisions clarify the general conformity process, reduce paperwork for federal agencies and delete outdated or unnecessary requirements. They also make the regulations consistent with the revised NAAQS for ozone EPA issued in 2004 and the air standards for fine particles the agency issued in 2007. The revised regulations amend 40 C.F.R. Parts 51 and 93 and are effective July 6, 2010.

### [7] EPCRA: EPA Proposes Adding 16 Chemicals to the Toxics Release Inventory

EPA has issued a [proposed rule](#) that would add 16 chemicals to the Toxics Release Inventory (TRI) under the Emergency Planning and Community Right to Know Act (EPCRA). *75 Fed. Reg.* 17,333 (04/06/10). The TRI was established in 1986 and contains information on nearly 650 chemicals and chemical groups from about 22,000 facilities in the United States. The 16 proposed chemicals were classified by the National Toxicology Program's (NTP's) *11th Report on Carcinogens* as "reasonably anticipated to be a human carcinogen." The chemicals are (i) 1-amino-2, 4-dibromoanthraquinone; (ii) 2, 2-bis (bromomethyl)-1,3- propanediol; (iii) furan; (iv) glycidol; (v) isoprene; (vi) methyleugenol; (vii) 1,6-dinitropyrene; (viii) 1,8-dinitropyrene; (ix)

6-nitrochrysene; (x) 4-nitropyrene; (xi) o-nitroanisole; (xii) nitromethane; (xiii) phenolphthalein; (xiv) tetrafluoroethylene; (xv) tetranitromethane; and, (xvi) vinyl fluoride. EPA will accept comments on the proposed rule until June 7, 2010.

### [8] FIFRA: Expanded Restrictions on Phosphine Fumigants Announced

EPA recently announced that it has expanded restrictions on aluminum and magnesium phosphide products to reduce risks of exposure to children. The new restrictions include the following: (i) use is prohibited around all residential areas, including single and multi-family residential properties, nursing homes, schools, day-care facilities, and hospitals; (ii) the products must be used for control of burrowing pests only and are for use on agricultural areas, orchards, non-crop areas, golf courses, athletic fields, parks and recreational areas, cemeteries, airports, rights-of-way, earthen dams, and other non-recreational institutional or industrial sites only; (iii) products must not be applied in a burrow system that is within 100 feet of a building that is or may be occupied by people or domestic animals; (iv) when used on athletic fields or parks, the applicator must post warnings at entrances; (v) when used out-of-doors in a site frequented by people, the applicator must also post a warning sign; and (vi) fumigant management plans must be written before all applications of phosphine products.

Aluminum and magnesium phosphine fumigants are used primarily to control insects in stored grain and other agricultural commodities. They are also used to control burrowing rodents in outdoor agricultural and other non-domestic areas. *See EPA Press Release*, April 7, 2010.



### [9] TSCA: EPA Seeks Feedback on PCB Reassessment Plan

EPA has issued an advance notice of proposed rulemaking (ANPRM) to solicit public feedback on the agency's plan to reassess the current authorizations for the use and distribution of polychlorinated biphenyls (PCBs) in commerce. *75 Fed. Reg. 17,645 (04/07/10)*. EPA will reassess (i) the use, distribution in commerce, marking, and storage for reuse of liquid PCBs in electric and non-electric equipment; (ii) the use of the 50 parts per million (ppm) level for excluded PCB products; (iii) the use of non-liquid PCBs; (iv) the use and distribution in commerce of PCBs in porous surfaces; and (v) the marking of PCB articles in use.

According to the ANPRM, EPA will also reassess several definitions in current PCB regulations. EPA is soliciting comments by July 6, 2010. Public meetings will take place May 4, 2010, in New York; May 18 in Chicago; May 25 in Atlanta; and May 27 in Washington, D.C.

### [10] Air: EPA Science Advisors Support Stricter PM<sub>2.5</sub> Standards

According to EPA's Clean Air Scientific Advisory Committee, recent research on the adverse health effects of airborne fine particles supports EPA's recommendation that the agency's air quality standards for fine particles be strengthened. The science advisors reviewed EPA's draft policy assessment, titled "Policy Assessment for the Review of the Particulate Matter National Ambient Air Quality Standards: First External Review Draft," which recommends that the agency strengthen those standards. The March 2010 draft policy was prepared as part of a periodic review of the national ambient air quality standards (NAAQS) for particulates.

The draft policy recommends that the agency revise the annual standard in a range between 12 micrograms per cubic meter ( $\text{ug}/\text{m}^3$ ) and  $13 \text{ ug}/\text{m}^3$  while retaining the existing 24-hour standard of  $35 \text{ ug}/\text{m}^3$  or revising it in a range between  $30 \text{ ug}/\text{m}^3$  and  $35 \text{ ug}/\text{m}^3$ . The current annual standard is  $15 \text{ ug}/\text{m}^3$ . An alternative scenario recommends that EPA consider setting the annual standard in a range between  $10 \text{ ug}/\text{m}^3$  and  $11 \text{ ug}/\text{m}^3$ , and revise the 24-hour standard to between  $25 \text{ ug}/\text{m}^3$  and  $30 \text{ ug}/\text{m}^3$ . EPA last revised the standard in 2006.

### [11] HAZMAT: IG Memo Criticizes PMHSA Oversight of Explosives Classification

A recent Department of Transportation (DOT) Inspector General (IG) memorandum has criticized how the agency's Pipeline and Hazardous Materials Safety Administration (PHMSA) processes explosive classification approvals. According to the memo, DOT lacks an "effective evaluation process for reviewing and authorizing explosive classification approvals" and has "ineffective oversight of the four laboratories authorized to examine and test explosives."

One problem identified is that under its regulations, PHMSA must test and classify new explosives but does not have "uniform, formalized guidance" for doing so. The memo recommends that PHMSA conduct a baseline assessment to reconfigure operations and procedures to ensure that the agency has an effective process to evaluate explosive classification procedures and oversee authorized testing labs. It also recommends that the agency take a more proactive approach to resolving safety issues.



## Scientific/Technical Items

### [12] Insurance Coverage: Insurance Company Announces Coverage for Nanomaterials

Lexington Insurance has **announced** that it will provide integrated liability coverage for medium to small companies in the United States manufacturing or distributing nanoparticles and/or nanomaterials. Coverage highlights include general liability, products liability, products pollution liability, and product recall liability. The company also provides an array of risk management services related to nanoparticles and nanomaterials.

### [13] Renewable Energy: Report Claims Increase in Wind Energy

A recent American Wind Energy Association **report**, titled “U.S. Wind Industry Annual Market Report Year Ending 2009,” claims that the U.S. wind energy industry expanded substantially in 2009. Specifically, the report states that in 2009 (i) the U.S. wind industry installed more than 10,000 megawatts (MW) of new wind power-generating capacity; (ii) 36 states had utility-scale wind projects and 14 states had more than 1,000 MW of wind capacity installed; (iii) 10 new manufacturing facilities came online; (iv) all states had jobs in the wind industry; (v) approximately 85,000 people were employed in the wind industry; (vi) 205 educational programs offered a certificate, degree or course work related to wind energy; (vii) offshore wind power gained momentum; and (viii) the demand for small wind systems for residential and small business use grew 15 percent.



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please contact Dave Erickson ([derickson@shb.com](mailto:derickson@shb.com); 816-474-6550) or

Jim Neet ([jneet@shb.com](mailto:jneet@shb.com); 816-474-6550).

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