

# Environmental & Chemical Update

AIR • CLIMATE CHANGE • NANOTECHNOLOGY • RENEWABLE FUELS  
SUSTAINABILITY • TOXIC TORT • WASTE • WATER

Issue 320 • April 23, 2010

## Litigation and Regulatory Enforcement

- [1] **Water:** Federal Court Orders EPA and Florida DEP to Comply with CWA in Everglades Case . . . . . 1
- [2] **Waterways Safety:** Federal Law Preempts State Oil-Spill Prevention Law . . . . . 1
- [3] **Endangered Species Act/NEPA:** Federal Court Stops Forest Service Plan to Spray Herbicides from Helicopters . . . . . 2
- [4] **Air:** Industry Interests Challenge EPA's NAAQS for Nitrogen Oxide . . . . . 2
- [5] **Canada:** Environmental Groups Challenge Government over Pollution from Oil Sands . . . . . 3

## Legislation, Regulations and Guidance

- [6] **NEPA:** GAO Report Criticizes MMS for Lack of Guidance on Oil and Gas Development in North Aleutian Basin . . . . . 3
- [7] **Air:** FDA to Phase Out Certain Metered-Dose Inhalers That Contain CFCs . . . . . 4
- [8] **Energy:** Nebraska Enacts Law to Attract Renewable Energy Projects . . . . . 4
- [9] **Canada:** Renewable Fuels Regulations Proposed . . . . . 4
- [10] **Greenhouse Gases:** DOE Issues Guidance on GHG Emissions Reductions in Federal Fleets . . . . . 5
- [11] **Nanotechnology:** OECD Issues Current Developments/Activities Report on Safety of Manufactured Nanomaterials . . . . . 5

## Scientific/Technical Items

- [12] **Climate Change:** State Department Issues Draft Climate Action Report . . . . . 5
- [13] **Biogenetics:** NRC Report Targets Emergence of Herbicide-Resistant Weeds . . . . . 6

Shook,  
Hardy &  
Bacon<sub>L.L.P.</sub>

[www.shb.com](http://www.shb.com)

---

# Environmental & Chemical Update

---

AIR • CLIMATE CHANGE • NANOTECHNOLOGY • RENEWABLE FUELS  
SUSTAINABILITY • TOXIC TORT • WASTE • WATER

## Litigation and Regulatory Enforcement

### [1] **Water: Federal Court Orders EPA and Florida DEP to Comply with CWA in Everglades Case**

A federal judge in Florida has ordered EPA and the Florida Department of Environmental Protection (DEP) to comply with the Clean Water Act (CWA) and court-ordered deadlines with respect to phosphorus pollution in the Everglades. *Miccosukee Tribe of Indians v. U.S., No. 04-21448 (S.D. Fla. 04/14/10)*. The court also threatened the agencies with civil contempt if they failed to meet the deadlines and ordered agency officials to personally appear before the court in October 2010 to report on compliance.

The court took the action in response to plaintiffs' motions to compel the agencies to comply with a prior court order. In July 2008, the court ordered EPA to re-review changes Florida lawmakers made to the state's Everglades Forever Act postponing for 10 years a 2006 statutory deadline that requires the use of a numeric water-quality standard to regulate phosphorus and changed the water-quality standards. According to the court, the statute's amendments violated the "fundamental commitment and promise to protect all the Everglades" under the CWA.

In its April 14, 2010, order, the court required the agencies to take a number of actions. Specifically, the court ordered EPA to direct the state DEP by

September 3, 2010, to correct deficiencies in the Everglades Forever Act and a DEP phosphorus rule. The court also ordered EPA to notify Florida officials that the state is out of compliance with narrative and nutrient standards for the Everglades Protection Area and direct the agency to conform all NPDES permits to the CWA for six stormwater treatment areas used to filter phosphorus from surface water.

### [2] **Waterways Safety: Federal Law Preempts State Oil-Spill Prevention Law**

A federal judge in Massachusetts has ruled that portions of a state oil-spill prevention law are preempted by the federal Ports and Waterways Safety Act. *U.S. v. Massachusetts, No. 05-10112 (D. Mass. 03/31/10)*. The ruling adopted recommendations of a magistrate judge who said the authority to formulate regulations to control vessel safety, to enhance vessel safety and to reduce environmental hazards in Buzzards Bay resided with the U.S. Coast Guard.

The 2004 state oil-spill prevention law and its subsequent revisions were intended to prevent a reoccurrence of a 2003 incident in which nearly 100,000 gallons of oil were spilled into the bay after a tanker struck a rocky outcropping. The lawsuit, brought by the government and the American Waterways Operators, alleged that federal law preempted the 2004 state spill legislation. The court granted summary judgment for plaintiffs, ruling that Congress explicitly authorized the Coast Guard to regulate vessel safety.



On April 7, 2010, tanker owners reportedly filed another complaint, seeking to have the 2008 and 2009 versions of the law declared invalid as well. *Am. Waterway Operators v. Patrick*, No. 10-10584 (D. Mass. filed 04/07/10). The complaint argues that those revisions “are preempted and void under the U.S. Constitution, the federal Ports and Waterways Safety Act, and other [federal] statutes and regulations.” The revisions direct that the owners or operators of tank vessels carrying 6,000 or more barrels of oil in Buzzards Bay be assessed triple the applicable fine in the event of an oil spill if they have not provided 24-hour notice to the state before operating a vessel in the bay. They also contain provisions concerning pilotage and tug escorts. See *BNA Daily Environment Report*, April 13, 2010.

### **[3] Endangered Species Act/NEPA: Federal Court Stops Forest Service Plan to Spray Herbicides from Helicopters**

A federal judge in Montana has halted a U.S. Forest Service (FS) plan to spray herbicides from helicopters over parts of the Kootenai National Forest because the spraying was likely to harm grizzly bears inhabiting the forest. *Alliance for the Wild Rockies v. Tidwell*, No. 08-168 (D. Mont. 03/31/10). The decision, affirming a magistrate judge’s recommendation, concluded that the FS herbicide plan failed to address “critical issues,” including how many flights were allowed over treatment areas per day and whether the intrusions and toxic chemicals would have long-term impact on grizzlies, listed as threatened under the Endangered Species Act (ESA).

The lawsuit, filed in 2008, alleged that the spraying plan violated the National Forest Management Act, NEPA, APA, and ESA. The plan authorized spraying herbicides, such as 2, 4-D, on

up to 55,000 acres from the ground and on 35,000 acres from helicopters. The court remanded the matter to the FS, ruling that the plan’s conclusion that aerial spraying was not likely to affect the grizzly bear was “arbitrary and capricious.” The court directed the agency to determine the specific number of allowable fly-overs and address their potential harm to grizzlies. The court allowed ground application and other aspects of the plan to proceed.

### **[4] Air: Industry Interests Challenge EPA’s NAAQS for Nitrogen Oxide**

Two industry groups have reportedly challenged EPA’s national ambient air quality standards (NAAQS) for nitrogen oxide. *Am. Petroleum Inst. v. EPA*, No. 10-1079 (D.C. Cir. filed 04/12/10). EPA issued the NAAQS for nitrogen oxide on February 9, 2010 (75 *Fed. Reg.* 6,473), setting the first hourly standard for nitrogen oxide at 0.10 parts per million (100 parts per billion). In the rule, EPA retained the existing annual standard of 0.053 ppm. The rule also requires states to expand their monitoring network for the pollutant. As part of a consent decree, EPA agreed to finalize the rule by January 2010. *Ctr. for Biological Diversity v. Johnson*, No. 05-0814 (D.D.C. 11/19/07).

According to news sources, the challengers allege that the hourly standard “was based on a faulty science record” and “EPA rushed to a decision without completing a thorough review of the science in a manner that allowed proper public participation.”

Nitrogen oxide exposures have been linked to respiratory problems such as asthma and increased emergency room visits, according to EPA. This chemical compound also reacts with ammonia, moisture and other compounds to form fine particulate matter and with volatile organic compounds in the presence of sunlight to form ozone. See *BNA Daily Environment Report*, April 14, 2010.



### [5] **Canada: Environmental Groups Challenge Government over Pollution from Oil Sands**

Environmental groups have filed a [submission](#) with the North American Free Trade Agreement's Commission for Environmental Cooperation (CEC), alleging that the Canadian government has failed to address pollution from oil sands development in western Canada. Specifically, the submission argues that the government, by allowing tailings ponds operated by oil sands producers to leak contaminants into surface waters and groundwater in the Athabasca watershed in Alberta, has failed to enforce the Fisheries Act.

According to the submission, tailings ponds, formed by the extraction of bitumen from mined oil sands deposits, "contain a large variety of substances that are deleterious to fish," such as naphthenic acids, ammonia, benzene, cyanide, oil and grease, phenols, toluene and polycyclic aromatic hydrocarbons, arsenic, copper, and iron. It also alleges that the tailings ponds are not lined, allowing these pollutants to leak into surface and groundwater. If the CEC accepts the submission, it could recommend to the CEC Council, consisting of environmental ministers from the United States, Canada and Mexico, that a detailed investigation be conducted to develop a factual record. The CEC can recommend action by a government to address conclusions in a federal record, but has no power to enforce the findings.

## Legislation, Regulations and Guidance

### [6] **NEPA: GAO Report Criticizes MMS for Lack of Guidance on Oil and Gas Development in North Aleutian Basin**

A recent U.S. Government Accountability Office (GAO) [report](#) criticizes the U.S. Department of Interior's Minerals Management Service (MMS) for lack of guidance on environmental assessments governing oil and gas leasing in the North Aleutian Basin off Alaska's coast. According to the report, as a result, oil and gas development in the area "could be delayed by ten years or more." The report also finds that agency staff members have been hindered in their ability to complete environmental analyses because information is not always shared with those who need it. NEPA requires MMS to evaluate the environmental impacts of proposed actions, but because MMS has failed to develop a NEPA guidance handbook, the assessment process for oil and gas development has stalled.

The report recommends that MMS take steps to "control the quality and integrity" of its environmental analyses. It suggests that the agency prepare guidance handbooks on meeting NEPA requirements and fully implement a 2008 information-sharing policy which will assure that information is passed on to those who need it. The report was prepared at the request of U.S. Representative Norman Dicks (D-Wash.), chair of the House Appropriations Subcommittee on Interior, Environment and Related Agencies.



### [7] Air: FDA to Phase Out Certain Metered-Dose Inhalers That Contain CFCs

The Food and Drug Administration (FDA) announced April 13, 2010, that seven metered-dose inhalers, which are used to treat asthma and chronic obstructive pulmonary disease (COPD), will be gradually removed from the U.S. marketplace in accordance with obligations under the Montreal Protocol on Substances that Deplete the Ozone Layer because they contain ozone-depleting chlorofluorocarbons (CFCs). In a press release, the agency said that alternative medications not containing CFCs are available. The affected products and their phase-out dates are (i) Tilade Inhaler (nedocromil) and Alupent Inhalation Aerosol, June 14, 2010; (ii) Azmacort Inhalation Aerosol (triamcinolone) and Intal Inhaler (cromolyn), December 31, 2010; (iii) Aerobid Inhaler System (flunisolide), June 30, 2011; and (iv) Combivent Inhalation Aerosol (albuterol and ipratropium in combination) and Maxair Autohaler (pirbuterol), December 13, 2013. *See FDA Press Release*, April 13, 2010.

### [8] Energy: Nebraska Enacts Law to Attract Renewable Energy Projects

Nebraska Governor Dave Heineman (R) signed a [measure](#) (LB 1048) into law April 12, 2010, designed, according to press reports, to “encourage and allow opportunities for private developers to develop, own and operate renewable energy facilities for export of wind energy from the state, while at the same time preserving the benefits Nebraskans receive as a result of the state’s unique public power system.” Nebraska is the only state where publicly owned utilities serve all electric customers.

The new law creates a mechanism for the Nebraska Power Review Board to consider and approve of renewable energy facilities for the

purpose of energy export. It also provides an exemption from the use of eminent domain for export projects and creates a new method for taxing projects that will benefit local communities as an alternative to the five-year accelerated depreciation of personal property schedule that previously existed. The law also sets forth a process by which the Power Review Board may approve eligible facilities. *See Law 360*, April 12, 2010.

### [9] Canada: Renewable Fuels Regulations Proposed

Environment Canada has [proposed](#) new regulations that would require an average of 5 percent renewable fuel content, by volume, in gasoline sold in Canada after September 1, 2010. The April 10 proposed regulations, to be issued under the Canadian Environmental Protection Act, would reduce greenhouse gas emissions by 23.8 million metric tons of carbon dioxide-equivalent over the next 25 years, according to the agency. Compliance with the proposed regulations would be based on average renewable content over the calendar year.

Renewable fuel content from any liquid petroleum-based fuel would be recognized in meeting the requirement, including fuels produced from corn, wheat, barley, or forestry and wood waste. Fuels produced from municipal solid wastes would be eligible if they do not contain undesirable materials, such as pesticides, paints, petroleum oils, or tire materials.

The proposed regulations would establish a system of treatable compliance units under which companies can obtain, through trading, compliance units from others participating in the trading system when they cannot blend renewable fuels in their gasoline, or



they may use the compliance units that they have created by blending renewable fuel in gasoline, diesel or other petroleum fuels. The proposed regulations are open for public comment for 60 days.

#### **[10] Greenhouse Gases: DOE Issues Guidance on GHG Emissions Reductions in Federal Fleets**

The U.S. Department of Energy (DOE) has issued [guidance](#) for federal agencies on reducing greenhouse gas (GHG) emissions from federally operated vehicle fleets. The guidance was issued to help federal agencies comply with Executive Order 13514, which instructed federal agencies to set GHG emissions targets by 2020 and to reduce vehicle fleets' petroleum use 30 percent by 2020.

The guidance provides a framework for agencies to develop a three-part plan that includes collecting information, formulating an emissions reduction strategy and implementing the strategy. The guidance focuses on the planning stage. A forthcoming handbook will help agencies with the three-stage process, according to DOE.

#### **[11] Nanotechnology: OECD Issues Current Developments/Activities Report on Safety of Manufactured Nanomaterials**

The Organization for Economic Cooperation and Development (OECD) has released a [report](#) summarizing current and planned activities related to the safety of manufactured nanomaterials based on the sixth meeting of the Working Party on Manufactured Nanomaterials, held in October 2009. The meeting was attended by 110 participants representing OECD member countries; the European Commission (EC); the International Organization for Standardization; United Nations agencies; non-OECD countries; and business, industry and nongovernmental organizations.

OECD is an intergovernmental organization with representatives from 30 industrialized countries in North America, Europe and the Asia and Pacific region, as well as the EC. The organization hosts periodic meetings to discuss solutions to international issues and conducts its work through more than 200 specialized committees and working groups composed of member country delegates.

### **Scientific/Technical Items**

#### **[12] Climate Change: State Department Issues Draft Climate Action Report**

The U.S. State Department has released a [draft](#), titled "U.S. Climate Action Report 2010," that details the efforts to reduce greenhouse gas (GHG) emissions in 2009 at the federal, regional and local levels of government. The document will be submitted to the Secretariat of the United Nations Framework Convention on Climate Change, as required by the convention.

Efforts highlighted by the report include (i) an executive order requiring federal agencies to reduce their GHG emissions, (ii) EPA's endangerment finding, (iii) funds made available by the American Recovery and Reinvestment Act for renewable energy and energy efficiency projects, (iv) the U.S. commitment under the Copenhagen Accord to reduced GHG emissions 17 percent from 2005 levels by 2020, (v) pending legislation that would institute a program to achieve those reductions, and (vi) agreements reached at the September 2009 G-20 negotiations and commitments made through the Major Economies Forum on Energy and Climate. The State Department will accept comments on the report until noon on May 6, 2010.



### **[13] Biogenetics: NRC Report Targets Emergence of Herbicide-Resistant Weeds**

The National Research Council (NRC) has issued a report that calls for action to counteract the emergence of herbicide-resistant weeds. Titled “The Impact of Genetically Engineered Crops on Farm Sustainability in the United States,” the report recommends better monitoring of the economic, environmental and social factors of genetically engineered (GE) agriculture to understand “what the impacts are on all aspects of [farm] sustainability.” The report also calls for a public-private effort to develop traits beneficial to society, such as drought resistance, climate change adaptability and improved nutrition.

The report addresses the problem of farm practices that promote herbicide-resistant weeds through a single weed-management method and recommends instead use of a herbicide mix and planting conventional crops in “refuge” areas alongside GE crop fields. It recommends that federal and state governments, private-sector technology developers, universities, farmer organizations, and other relevant stakeholders “collaborate to document emerging weed-resistance programs and to develop cost-effective resistance-management programs and practices that preserve effective weed control” in herbicide-resistant crops. The report is available for purchase on the NRC Website. *See BNA Daily Environment Report*, April 14, 2010.



---

# Environmental & Chemical Update

---

AIR • CLIMATE CHANGE • NANOTECHNOLOGY • RENEWABLE FUELS  
SUSTAINABILITY • TOXIC TORT • WASTE • WATER

This Update is distributed by  
Shook, Hardy & Bacon's Environmental Law Practice.

If you have questions about this issue or would like to receive supporting documentation,  
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).

We welcome any leads on new developments in environmental law or toxic tort litigation.

**Geneva, Switzerland**

**Houston, Texas**

**Kansas City, Missouri**

**London, United Kingdom**

**Miami, Florida**

**Orange County, California**

**San Francisco, California**

**Tampa, Florida**

**Washington, D.C.**

**Shook,  
Hardy &  
Bacon** LLP.®

