

Environmental & Chemical Update

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

Issue 321 • April 30, 2010

Litigation and Regulatory Enforcement

- [1] **Enforcement:** DOJ's Environmental Division Details FY2009 Litigation Accomplishments 1
- [2] **Greenhouse Gases:** California Appellate Court Rejects Chevron's Refinery Upgrade Plan for Failure to Comply with State Greenhouse Gas Guidelines 1
- [3] **Envtl. Crime:** Mayor, Public Works Superintendent Indicted for Falsifying Water Sample Data 2
- [4] **Air:** Ordinance Favoring Taxis Burning Natural Gas Challenged 2
- [5] **Stormwater:** Large Homebuilder Settles CWA Violations for \$1 Million 2

Legislation, Regulations and Guidance

- [6] **Air:** Mercury NAAQS for Gold Mine Ore Processing and Production Proposed . . . 3
- [7] **RCRA/CERCLA:** EPA Proposes Removal of Saccharin from Hazard Lists 3
- [8] **Air:** EPA Seeks Comments on Whether to Regulate Leaded Avgas 3
- [9] **Energy:** MMS Issues Final Rule on Outer Continental Shelf Oil and Gas Production Requirements 4
- [10] **Biofuels:** USDA Seeks Comments on Proposed Rule to Increase Loans for Advanced Biofuels 4
- [11] **Europe:** Chemicals Agency Publishes List of Substances to Be Registered Under REACH 5
- [12] **Canada:** GHG Emissions Standards for New Vehicles Proposed 5
- [13] **Energy Star:** EPA Establishes New Standards for Energy Star Label 5
- [14] **Chemical Exposure:** EPA IG Recommends Cumulative Perchlorate Risk Assessment . 6

Shook,
Hardy &
Bacon_{L.L.P.}

www.shb.com

Environmental & Chemical Update

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

Litigation and Regulatory Enforcement

[1] Enforcement: DOJ's Environmental Division Details FY2009 Litigation Accomplishments

DOJ's Environmental and Natural Resources Division issued its annual [report](#) titled "Summary of Litigation Accomplishments: Fiscal Year 2009" on April 22, 2010. According to the report, DOJ secured \$69 million in civil penalties for environmental violations and \$2.6 billion in spending on pollution controls and other corrective measures from polluters during the year.

The division also prosecuted 41 criminal cases against 85 defendants, resulting in 42 years of jail sentences and nearly \$73 million in fines. Other accomplishments described in the report include (i) the largest hazardous waste-recovery settlement and the largest case under EPA's audit policy in history; (ii) Asarco's bankruptcy reorganization, which resulted in \$1.79 billion for the environmental restoration of more than 80 sites contaminated by mining operations in 19 states; (iii) enforcement actions targeting petroleum refineries, coal-fired power plants and ship pollution; and (iv) specific criminal enforcement actions.

[2] Greenhouse Gases: California Appellate Court Rejects Chevron's Refinery Upgrade Plan for Failure to Comply with State Greenhouse Gas Guidelines

A California appeals court has rejected Chevron's plan to upgrade a refinery in the Bay Area in the first reported appellate decision in the United States stopping a refinery upgrade on climate change grounds. *Communities for a Better Env't v. Richmond*, No. N/A (Cal. Ct. App., 1st Dist., 4/26/10). Chevron applied for a city permit to upgrade its Richmond refinery. The City of Richmond issued an Environmental Impact Report (EIR) identifying the significant environmental impacts of Chevron's upgrade plan and concluding that the upgrade would reduce those impacts through mitigation measures made as a condition of approving the project. The Richmond Planning Commission certified that the EIR complied with the California Environmental Quality Act (CEQA).

Communities for a Better Environment (CBE) appealed that decision to the city council, which issued the necessary permits for the upgrades. CBE then filed a successful petition for writ of mandate in court, and Chevron appealed the decision. The appellate court affirmed the trial court's ruling in part and reversed in part.



Concluding that Chevron's upgrade could not go forward, the appellate court first analyzed the EIR, finding it inadequate as a matter of law because it did not address whether the upgrade included any equipment changes that would facilitate the future processing of heavier crude oil. The EIR also did not establish the necessary environmental baseline (including one for greenhouse gases) at the beginning of the CEQA process. Lastly, the EIR did not require that Chevron submit a plan to address how greenhouse gases would be reduced until one year after the project would begin. According to the court, a greenhouse gas analysis should be done at the beginning of a project and not deferred to a future time, which deferral would undermine the CEQA process. Thus, the court held that project approval must be postponed until a revised EIR addressing greenhouse gases and mitigation measures is issued. Chevron cannot move forward with the refinery upgrade until an acceptable revised EIR is issued or Chevron is successful on appeal.

[3] Envtl. Crime: Mayor, Public Works Superintendent Indicted for Falsifying Water Sample Data

A federal grand jury has reportedly indicted the Stover, Missouri, mayor and public works superintendent for submitting false information about the city's water supply to the Missouri Department of Natural Resources (DNR). *U.S. v. Sparks*, No. 10-04021 (W.D. Mo. issued 04/15/20). Defendants were charged in a 30-count indictment with violations of the Safe Drinking Water Act for filing false records and adulterated samples with DNR.

The indictment charges that the public works superintendent filed records between September 2006 and December 2007, showing that water samples were taken at certain addresses, even

though he knew he had not sampled at those locations. He was also charged with counts of making false statements related to bacteriological water-analysis samples submitted to DNR, despite knowing that the water had been adulterated with chlorine bleach to prevent an accurate laboratory analysis. The mayor was indicted on one count of misprision of a felony for concealing the alleged crime from authorities. He allegedly knew about the false information submitted to DNR, but denied that he knew about it to an EPA agent. See *BNA Daily Environment Report*, April 19, 2010.

[4] Air: Ordinance Favoring Taxis Burning Natural Gas Challenged

A taxi drivers association has challenged as preempted by the Clean Air Act an ordinance recently enacted in Dallas, Texas, allowing taxis that run on compressed natural gas to automatically move to the front of the line in taxi queues at Love Field Airport. *Ass'n of Taxicab Operators USA v. Dallas*, No. 10-769 (N.D. Tex. filed 04/15/10). Plaintiffs argue that the ordinance is preempted because automobile emissions are a matter of federal policy under the CAA. The city argues that the CAA does not preempt the ordinance because it does not establish an emissions standard. A hearing on the preliminary injunction is scheduled for May 4, 2010. Plaintiffs argue that the injunction is necessary because lost revenues caused by the ordinance are not legally compensable.

[5] Stormwater: Large Homebuilder Settles CWA Violations for \$1 Million

A large national residential homebuilder has reportedly settled Clean Water Act (CWA) violations at 591 construction sites in 18 states for a civil penalty of \$1 million. The consent decree, lodged



in the U.S. District Court for the Eastern District of Pennsylvania, is subject to a 30-day public comment period and federal court approval. As part of the settlement, Hovnanian Enterprises, Inc. will also implement a companywide stormwater compliance program designed to improve compliance with stormwater runoff requirements at existing and future construction sites.

The violations included failure to obtain permits until after construction began or failing to obtain them at all. At sites with permits, violations included failure to prevent or minimize the discharge of pollutants, such as silt and debris in stormwater runoff. The CWA requires that construction sites have controls in place to prevent pollution from being discharged with stormwater into nearby waterways. Such controls may include silt fences, phased site grading and settlement basins to prevent common construction contaminants from entering interstate waters.

Legislation, Regulations and Guidance

[6] Air: Mercury NAAQS for Gold Mine Ore Processing and Production Proposed

EPA has proposed new national ambient air quality **standards** (NAAQS) for mercury emissions from gold mining facilities. The proposed rule would establish mercury emissions limits based on existing emissions levels at the best-performing U.S. facilities for three types of processes. For pre-treatment processes, the proposal would limit mercury emissions to 149 pounds per million tons of ore from both new and existing sources. For carbon processes, mercury emissions in existing sources would be limited to 2.6 pounds per ton of concentrate, while new sources would be limited to 0.14

pounds. For non-carbon concentrate processes, emissions from existing sources would be limited to 0.25 pounds per ton of concentrate and emissions from new sources to 0.20 pounds. EPA will accept comments on the proposed rule for 30 days after publication in the *Federal Register*.

[7] RCRA/CERCLA: EPA Proposes Removal of Saccharin from Hazard Lists

EPA has issued a **proposed rule** that would remove “saccharin and its salts from the lists of hazardous constituents and commercial chemical products which are hazardous wastes when discarded or intended to be discarded.” *75 Fed. Reg. 20,942 (04/22/10)*. The proposed removal was prompted by a Calorie Control Council petition which argued that the National Toxicology Program and the International Agency for Research on Cancer no longer support classifying saccharin as a potential human carcinogen and that, in 2002, California removed saccharin and its salts from its list of chemicals known to cause cancer and reproductive toxicity. In the proposed rule, EPA says it believes saccharin and its salts do not “pose a present or potential risk of causing toxic, carcinogenic, mutagenic, or teratogenic effects in humans or other life forms,” and should therefore not be listed as hazardous wastes under RCRA or CERCLA. EPA will accept comments on the proposed rule until June 21, 2010.

[8] Air: EPA Seeks Comments on Whether to Regulate Leaded Avgas

EPA has **issued** an advanced notice of proposed rulemaking (ANPR) seeking public comments on whether the agency should issue rules to limit air emissions from the use of leaded aviation gasoline (avgas). The action is the agency’s response to a



petition submitted by Friends of Earth requesting that EPA find endangerment from and regulate lead emitted from piston-engine aircraft.

EPA's next step is to consider information presented in the ANPR and comments received to determine whether emissions from aircraft using leaded avgas cause or contribute to air pollution that may endanger public health or welfare. According to the ANPR, leaded avgas is used at almost 20,000 U.S. airports, and lead concentrations increase with proximity to airports where piston-engine aircraft operate. EPA estimates that approximately 14.6 billion gallons of leaded avgas were consumed between 1970 and 2007, emitting nearly 34,000 tons of lead. EPA will accept comments on the ANPR for 60 days after it is published in the *Federal Register*.

[9] Energy: MMS Issues Final Rule on Outer Continental Shelf Oil and Gas Production Requirements

The U.S. Department of Interior's Minerals Management Service (MMS) has issued a **final rule** amending regulatory requirements for oil and natural gas production in the Outer Continental Shelf (OCS). 75 *Fed Reg.* 20,271 (04/19/10). The amended regulations, effective May 19, 2010, eliminate most restrictions on production rates and set limits on the amount of natural gas that can be flared or vented. The amendments are consistent with recommendations set out in a July 2004 U.S. Government Accountability Office (GAO) report which reviewed available flaring and venting data, the extent of flaring and venting, their contribution to greenhouse gas (GHG) emissions, and opportunities for the government to reduce flaring and venting.

The report concluded that more information is needed on flaring and venting and recommended that MMS consider the cost and benefit of requiring that companies (i) flare natural gas when flaring or venting is necessary, and (ii) use flaring and venting meters to improve oversight. MMS conducted an analysis to assess costs and benefits of requiring flare/vent meters and of requiring flaring rather than venting. The agency concluded that requiring flaring rather than venting may be appropriate, but that the cost of implementing such a requirement could be high, so further information is necessary. MMS will announce in the near future when it will hold a workshop to discuss these matters.

[10] Biofuels: USDA Seeks Comments on Proposed Rule to Increase Loans for Advanced Biofuels

The U.S. Department of Agriculture (USDA) has issued a **notice** calling for public comment on proposed loan and grant programs that would increase production of advanced biofuels. 75 *Fed. Reg.* 20,043 (04/16/10). The notice actually proposes three separate rules establishing (i) a rolling application process that would consider loan guarantee requests up to \$250 million; (ii) procedures for eligible biorefineries to receive payment for installing new systems that encourage renewable biomass use and replace fossil fuels; and (iii) a payment program for eligible advanced biofuel producers who produce biofuels from renewable biomass, excluding corn kernel starch. USDA requests comments by June 15, 2010.



[11] Europe: Chemicals Agency Publishes List of Substances to Be Registered Under REACH

The European Chemicals Agency (ECHA) has published a [list](#) of 4,415 substances that will be registered by November 30, 2010, under the European Union's registration, evaluation and authorization of chemicals (REACH). The agency compiled the list from information supplied by companies concerning their plans to register substances. The November deadline is the first major deadline for substance registrations under REACH. It applies to substances manufactured in, or imported into, EU member states in annual volumes of 1,000 metric tons or more and to some toxic substances at lower volumes. According to the agency, after the November 30 deadline, "it will be illegal to manufacture or sell [nonregistered substances] within the EU." See *ECHA Press Release*, April 16, 2010.

[12] Canada: GHG Emissions Standards for New Vehicles Proposed

Environment Canada has published [draft regulations](#) that would make Canada's greenhouse gas (GHG) emission standards for new vehicles compatible with those implemented by the U.S. EPA. The proposed regulations would establish mandatory emission standards for new vehicles beginning with the 2011 model year. They would require that vehicle manufacturers and importers meet fleet average GHG emission standards for their passenger cars and light trucks for the 2011 and late model years.

According to the agency, the proposals also include provisions to establish compliance flexibilities designed to provide appropriate lead-time for technological improvements and a transition to a more stringent regulatory program. These include a system for generating, banking and trading emission credits that could be used to offset any emission deficits incurred; allowance for making GHG-reducing improvements to vehicle air conditioning systems and innovative technologies to reduce GHG emissions. A 60-day public comment period began when the proposal was published on March 25, 2010; objectors can request that a board of review be established. When finalized, the standards will be published in the *Canada Gazette, Part II*.

[13] Energy Star: EPA Establishes New Standards for Energy Star Label

EPA has announced new, more vigorous guidelines for new homes that earn the Energy Star label. According to the agency, the new requirements will make qualified homes at least 20 percent more efficient than homes built to International Energy Conservation Code (IECC) 2009 edition standards.

Elements of the new guidelines include (i) a complete thermal enclosure system consisting of comprehensive air sealing, properly insulated assemblies and high-performance windows; (ii) high-efficiency heating and cooling systems equipped with fresh-air ventilation; (iii) a complete water management system; (iv) efficient lighting and appliances; and (v) verification by independent professionals who conduct a comprehensive series of detailed inspections using specialized diagnostic equipment to test system performance. See *EPA Press Release*, April 19, 2010.



[14] Chemical Exposure: EPA IG Recommends Cumulative Perchlorate Risk Assessment

EPA's Inspector General (IG) has issued a [report](#) recommending that the agency conduct a cumulative risk assessment of perchlorate rather than studying the chemical's potential health effects in isolation.

In 2005, EPA issued a "reference dose" for perchlorate of 0.0007 milligrams per kilogram of body weight per day, corresponding to a drinking water equivalent of 24.5 parts per billion (ppb). A reference dose is an estimate of daily exposure that is unlikely to pose an appreciable risk of harm during a lifetime. In 2008, EPA made a preliminary determination not to regulate perchlorate under the Safe Drinking Water Act based on a determination that the contaminant is not enough of a problem to warrant national regulation. The agency has said it will make a final determination by the middle of 2010 on whether to regulate the chemical in drinking water.

According to the April 19, 2010, IG report, assuming that the purported human health risk associated with perchlorate arises from exposure to this chemical alone is a mistake. That approach leads to the "mistaken conclusion" that the health issue can be eliminated by lowering perchlorate to a "safe level." The report recommends a cumulative risk assessment that would evaluate the effect of perchlorate, which may inhibit the thyroid's uptake of iodine, in combination with dietary iodine deficiency and two other iodine inhibitors, thiocyanate and nitrate.



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; 816-474-6550) or

Jim Neet (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** L.L.P.®

