

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] Air: D.C. Circuit Rejects Challenge to EPA Lead Rule

The D.C. Circuit Court of Appeals has rejected an industry challenge to EPA's 2008 revision of air quality standards for lead. *Coal. of Battery Recyclers Ass'n v. EPA*, No. 09-1011 (D.C. Cir. 05/14/10). Petitioners argued that EPA improperly tied its lead national ambient air quality standard (NAAQS) to decreased intelligence quotient (IQ) scores in children, while prior standards were based on blood lead levels. They alleged that such an approach ignored the inherent uncertainty and variability in IQ tests. They also argued that some forms of lead are not readily absorbed by the human body and thus do not pose a health risk.

In revising the lead standards, EPA set primary and secondary standards for lead at 0.15 micrograms per cubic meter, measured on a rolling three-month average that cannot be exceeded over a three-year period. 73 *Fed. Reg.* 66,964 (11/12/08). The previous standards, in place since 1978, were both 1.5 micrograms per cubic meter.

The court held that EPA supported the inference that lead exposure causes IQ loss and that animal studies show that low levels of lead cause neurobehavioral effects. The court also ruled that EPA adequately responded to petitioner's arguments about errors in studies the agency relied on and

rejected their arguments about the differences in absorption among different types of lead. The court said, "Petitioner's assertion that the revised lead NAAQS is overprotective because it is more stringent than necessary to protect the entire population of young U.S. children ignores that the Clean Air Act allows protection of sensitive populations."

[2] NEPA: Federal Court Rules Proposed Beltway Not in Violation

A federal judge in North Carolina has ruled that a proposed beltway in Winston-Salem does not violate NEPA. *N.C. Alliance for Transp. Reform, Inc. v. DOT*, No. 99-134 (M.D.N.C. 05/19/10). The lawsuit was originally filed in 1999 to block the proposed beltway, which was part of a larger \$4 billion highway project approved by the state in 1989. In 2001, the federal court issued an injunction blocking the beltway until defendants completed a new analysis of the project's environmental impacts. *N.C. Alliance for Transp. Reform v. DOT*, 151 F. Supp. 2d 661 (M.D.N.C. 2001). After defendants completed a second environmental analysis, plaintiffs sued again in 2008, alleging that the project would violate NEPA, in part because the analysis failed to evaluate greenhouse gases (GHG).

Because there were no national standards for evaluating the environmental impact of GHG emissions and rules proposed by EPA at the time did not apply to highway projects, the court concluded that the project did not violate NEPA.



[3] Air: Citizen Suit Alleges Cleveland International Airport Violated Clean Air Act

A citizen suit accuses the Cleveland Hopkins International Airport of violating the Clean Air Act (CAA) through its use of deicing fluids and other regulated pollutants. *Nguyen v. City of Cleveland, Ohio, No. 09-492 (N.D. Ohio 05/19/10)*. The complaint alleges that the defendant (i) did not obtain a Title V air permit, (ii) has not paid annual emission fees or environmental penalties, (iii) has not complied with Ohio's State Implementation Plan (SIP), and (iv) falsely told the Federal Aviation Administration that it had complied with environmental laws so it could receive \$103 million in federal funding. The complaint seeks a court declaration that defendant has violated the CAA and civil penalties of up to \$32,500 per day of violation, as well as damages.

[4] NEPA: Conservation Group Sues MMS over Alleged Lax Oversight of Drilling Operations

Defenders of Wildlife has reportedly sued the Minerals Management Service (MMS) over an alleged failure to apply its own regulations on oil and gas drilling in the Gulf of Mexico and continued lax oversight of drilling operations. *Defenders of Wildlife v. MMS, No. 10-254 (S.D. Ala. 05/17/10)*. According to the complaint, MMS has violated NEPA and the Administrative Procedures Act. Plaintiff asks the court to (i) vacate MMS-manual provisions affording categorical exclusions for exploration and the development of production plans, (ii) enjoin the MMS from authorizing further categorical exclusions from NEPA review, (iii) vacate and remand the EIS for all Gulf of Mexico offshore lease sales from 2007-2012, and (iv) enjoin all

future lease sales until supplemental statements are prepared. *See BNA Daily Environment Report*, May 18, 2010.

[5] Marine Mammal Protection Act/ESA: Environmental Group Files Notice of Intent to Sue over Alleged Oil Drilling Violations

The Center for Biological Diversity, an environmental group, has filed a **notice** of its intent to sue the Secretary of the Interior for allegedly allowing oil and gas drilling in the Gulf of Mexico in violation of the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA). The May 14, 2010, notice letter alleges that seismic exploration surveys and drilling operations can harm marine mammals, including endangered species, such as sperm whales, and consequently require approvals, under the MMPA and ESA, from the National Marine Fisheries Service (NMFS) or the U.S. Fish and Wildlife Service. The group also argues that the ESA requires an "incidental take permit" approved by NMFS, if harm to threatened or endangered species is anticipated by the activity. None of the required approvals has been obtained, according to the notice letter. The agency has 60 days to respond before the group can pursue litigation against it in federal court.

[6] Clean Water Act: City in New York to Settle Sewer Overflow Issues

The city of Oswego, New York, has agreed to pay a civil penalty of \$99,000 and invest an estimated \$87 million in improvements to its west-side sewer system to settle U.S. and state claims regarding unpermitted sewer overflows. *U.S. v. City of Oswego, No. N/A (N.D.N.Y. lodged 05/13/10)*. Under the settlement, the city agrees to undertake



a comprehensive, system-wide program that will bring it into compliance with the Clean Water Act. Specifically, the city agrees to include (i) at least 75-percent separation of the combined system into sanitary and stormwater components to prevent high volumes of rainwater from overwhelming the treatment plant, (ii) a 50-percent expansion of the west-side waste water treatment plant's treatment capacity, (iii) disconnection of catch basins to reduce the inflow of rain water into the existing sanitary sewer system, (iv) major improvements to its operation and maintenance program, and (v) sewer financing reforms. The settlement is subject to a 30-day public comment period and approval by the federal court.

[7] **Air: Ohio Utility to Settle Alleged NSR Violations**

An Ohio non-profit utility has agreed to settle alleged Clean Air Act New Source Review (NSR) violations by paying a civil penalty of \$850,000 and spending \$15 million on an environmental mitigation project. [*U.S. v. Am. Mun. Power, No. N/A \(S.D. Ohio lodged 05/18/10\)*](#). As part of the settlement, the company has agreed to permanently retire its Richard H. Gorsuch Station coal-fired power plant near Marietta, Ohio. Until the plant is closed on December 3, 2012, the company will implement interim sulfur dioxide and nitrogen oxide limits at the plant. The company will also enhance pollution controls to reduce particulate matter emissions.

The \$15 million will be spent on an energy efficiency project to benefit the environment and mitigate the adverse effects of the alleged violations. The project will provide energy efficiency services in lighting, refrigerator replacement and removal, and installation of building heating and cooling systems to all of the municipalities and their customers

served by the Gorsuch Station. The settlement is subject to a 30-day public comment period and final court approval. *See DOJ Press Release*, May 18, 2010.

Legislation, Regulations and Guidance

[8] **TSCA: EPA Adds 6,300 Chemicals to Public Database**

EPA has reportedly added more than 6,300 chemicals and 3,800 chemical facilities regulated by TSCA to a public database called "Envirofacts." According to the agency, the Envirofacts database is EPA's single point of Internet access for information about environmental activities that may affect air, water and land in the United States, and it provides tools for analyzing the data. The database includes facility name or address, aerial image of the facility and surrounding area, map location of the facility, and links to other information about the facility, such as EPA's inspection and compliance reports, available through the Enforcement Compliance History Online (ECHO) database. *See EPA Press Release*, May 17, 2010.

[9] **FIFRA: EPA Seeks Public Comment on Misleading Pesticide Brand Names Guidance**

EPA is seeking public comment on [draft guidance](#) regarding false or misleading pesticide product brand names and product labels. *75 Fed. Reg. 28,012 (05/19/10)*. The draft guidance clarifies how statutory and regulatory provisions that prohibit pesticide labeling from being false or misleading apply to product brand names.

According to EPA, false and misleading claims can include assertions about a product's effectiveness or safety, such as "100 percent pure," "Natural"



and “Earth Friendly.” Pesticide labeling rules also prohibit (i) label disclaimers on warranty statements that negate or detract from FIFRA-required labeling statements, (ii) false or misleading statements about the product’s value for purposes other than as a pesticide, and (iii) false or misleading comparison with other pesticides or devices. EPA will accept comments on the draft guidance until June 18, 2010.

[10] Risk Assessment: EPA Seeks Public Comments on Draft Dioxin Reanalysis

EPA recently [announced](#) a 90-day public comment period for an external review draft titled “EPA’s Reanalysis of Key Issues Related to Dioxin Toxicity and Response to NAS Comments.” *75 Fed. Reg.* 28,610 (05/21/10). The draft responds to National Academy of Sciences comments and includes new analyses on potential human health effects that may result from exposure to 2, 3, 7, 8-tetrachlorodibenzo-p-dioxin (TCDD). The National Center for Environmental Assessment within the EPA Office of Research and Development prepared the draft, which has been provided to EPA’s Science Advisory Board. The board will hold a public teleconference on June 24, 2010, and a public meeting on July 13-15. The public comment period begins May 21 and ends August 19. The draft is available on the [NCEA Website](#).

[11] Water: Washington State Agency Proposes Reclaimed Water Rule

The Washington State Department of Ecology has issued a [proposed rule](#) that would require entities such as counties and water districts that seek to use reclaimed water to have a permit from the agency or the State Department of Health depending on the

water’s use. Reclaimed water is treated and re-used for non-drinking purposes to irrigate landscapes, public parks and golf courses. It may also be used for industrial uses, toilet flushing, fire hydrants, construction activities, and creating wetlands and ponds.

The proposed rule deals with (i) procedures and responsibilities for regulatory review; (ii) planning, design and construction; (iii) permitting and enforcement; (iv) technical standards for treatment; (v) storage; and (vi) distribution. The agency will hold workshops on the proposal in late May and issue a final rule by the end of the year. *See Department of Ecology News Release*, May 13, 2010.

[12] Air/Greenhouse Gases: New Mexico State Board Proposes Cap-and-Trade Program

New Mexico’s Environmental Improvement Board (EIB) has released a [proposed rule](#) that would establish a cap-and-trade program aimed at reducing greenhouse gas (GHG) emissions in the state. The proposed rule would initially apply to sources that emit 25,000 metric tons or more of carbon dioxide per year and would define conditions under which the state would implement a GHG emissions cap-and-trade program as part of the Western Climate Initiative regional program. The Western Climate Initiative states include Arizona, California, Montana, New Mexico, Oregon, Utah, Washington, and the Canadian provinces of British Columbia, Manitoba, Ontario, and Quebec. The proposed rule is subject to public comment, revisions and then approval by the EIB. If approved, it would be effective January 1, 2011.



**[13] Air: Oklahoma AG Seeks EPA Action
Against Texas Power Plants**

Oklahoma Attorney General (AG) W.A. Drew Edmondson (D) has sent a [letter](#) to EPA Region 6 Administrator Alfredo Armandariz requesting that EPA take enforcement or other action regarding several Texas coal-fired power plants that “have, at a minimum, the potential to adversely affect air quality in Oklahoma.” According to the letter, six permit applications for coal-fired power plants were pending at the Texas Commission on Environmental Quality (TCEQ) on April 1, 2010, and seven additional plants have already received permits and are in various stages of construction. The letter threatens that unless TCEQ reviews its procedures for issuing permits, Oklahoma may be forced to file a petition with EPA under section 126 of the Clean Air Act alleging that Texas sources are contributing significantly to nonattainment in Oklahoma.



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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).

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