

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] Climate Change: Fifth Circuit Dismisses Climate Change Appeal for Lack of Quorum

The Fifth Circuit Court of Appeals has let stand a district court's earlier decision to dismiss a climate-related lawsuit involving Mississippi property owners who claimed that several energy companies should be liable for property damage done by Hurricane Katrina. [*Comer v. Murphy Oil U.S.A.*, No. 07-60756 \(5th Cir. 05/28/10\)](#). In its May 28, 2010, order, the appeals court held that it could not grant full court review to a 2009 opinion issued by three members of the court who found that the plaintiffs could proceed with their lawsuit. According to the order, one of the nine judges who had agreed to grant the *en banc* review had recused himself. As a result, the court did not have a quorum for the total 16-judge court of appeals because seven other members had previously recused themselves. The three judges who signed the 2009 opinion, which had been vacated when the court said it would review the matter *en banc*, dissented to the order, arguing the court had options available other than dismissing the case.

[2] FIFRA: Eighth Circuit Rules Statute Contains No Private Cause of Action

The Eighth Circuit Court of Appeals has upheld a U.S. District Court for the District of Minnesota decision that FIFRA does not provide a private cause of action to those allegedly injured as a result of a manufacturer's violation of FIFRA's labeling requirements. [*Voss v. Saint Martin Coop.*, No. 09-3239 \(8th Cir. 05/25/10\) \(unpublished\)](#). The three-judge panel dismissed "with prejudice" the FIFRA portion of claims brought by a family of organic farmers. The panel also dismissed "without prejudice" a claim brought under state pesticide law. The claims related to the defendant's alleged application of the insecticide Lorsban 4E, which purportedly drifted onto the plaintiffs' adjacent property and caused damage to their land as well as health effects to family members. Plaintiffs alleged that the defendant violated FIFRA's prohibition against using a registered pesticide "in a manner inconsistent with its labeling" and in a manner that causes "unreasonable adverse effects" on humans and the environment.

[3] Envtl. Crime: Shipping Company to Pay \$725,000 for Failure to Report Oily Waste Discharges

A federal judge has ordered a Turkish shipping company to pay a \$725,000 fine for failing to report illegal oil discharges through a "magic pipe" onboard a contracted tanker vessel. *U.S. v. Aksay Denizcilik Ve Ticaret A.S.*, No. 10-116 (M.D. Fla.



plea agreement 05/21/10). The company pleaded guilty to one count of failing to maintain an oil record book. In addition to the fine, the court sentenced the company to three years of probation and ordered the company to participate in an environmental compliance plan.

The Act to Prevent Pollution from Ships requires the ship's crew to record accurately in an oil record book each transfer or disposal of oily wastewater and sludge. The enforcement action resulted from a March 2009 boarding and inspection of the bulk chemical tanker Kevim at the port of Tampa, where inspectors discovered a magic pipe used to bypass the ship's oil pollution-prevention equipment. See *DOJ Press Release*, May 25, 2010.

[4] Endangered Species Act: Homebuilders Sue DOI over Interpretation of Listing Decision

A homebuilders association has sued the Department of the Interior (DOI) and the Fish and Wildlife Service (FWS) over the agencies' interpretation of criteria used to list a species as endangered or threatened under the Endangered Species Act (ESA). *Nat'l Ass'n of Home Builders v. Salazar*, No. 10-00832 (D.D.C. filed 05/19/10). The National Association of Homebuilders is challenging a 2007 DOI solicitor's decision that allows the government to list a species as endangered or threatened throughout its entire range if it is not part of a "distinct population." The complaint alleges that this determination conflicts with the ESA's "plain language," congressional intent and the agency's own policies. Alleging violations of ESA and the Administrative Procedures Act, the lawsuit seeks declaratory and injunctive relief.

[5] NEPA: Groups Sue to Overturn Montana Coal Mine Lease Sale

Environmental groups and a coalition of farmers and ranchers have challenged the coal lease sale of 8,300 acres of state school trust land in south-eastern Montana. *N. Plains Res. Council Inc. v. Montana Bd. of Land Comm'ns*, No. 10-2481 (Mont. Dist. Ct. filed 05/14/10). Approved by a state board in March 2010, the coal lease would sell rights to an anticipated 572 million tons of coal reserves for \$85.8 million and future royalties. The complaint alleges that by approving the sale, the board violated its fiduciary obligation to prevent unreasonable environmental degradation. Also named as defendants are Arch Coal, the state of Montana and Ark Land Co., Inc., a subsidiary of Arch Coal that is the property's lessee. The complaint also alleges the lease should not have been exempted from the Montana Environmental Policy Act (State NEPA).

[6] Renewable Fuels: Environmentalists Challenge EPA Rule Setting Criteria for Renewable Fuel Standard

Environmental groups have challenged an EPA final rule that established criteria for determining which biofuels meet the renewable standard. *Friends of Earth v. EPA*, No. N/A (D.C. Cir. petition filed 05/25/10). Petitioners have also filed an administrative petition with EPA, seeking reconsideration.

The final rule implements the Energy Independence and Security Act enacted by Congress in 2007. It requires the U.S. fuel supply to include 36 billion gallons of ethanol or other renewable fuel by 2022, including 21 billion gallons from cellulosic sources or biomass, such as switchgrass or crop residues. Petitioners have argued that EPA relied



on overly optimistic projections of emissions from biofuel use and that the rule would actually increase greenhouse gas (GHG) emissions.

[7] CERCLA: U.S. Sued over Contaminated Former Kansas Air Force Base

Several public entities including the City of Salina, Kansas, have sued the federal government over alleged trichloroethylene (TCE) and vinyl chloride contamination at the former Schilling Air Force Base. [*City of Salina v. U.S., No. 10-2298 \(D. Kan. filed 05/27/10\)*](#). The complaint alleges that, from 1942 to 1965, the government disposed of TCE and other hazardous substances while maintaining heavy bombers and their armaments at the military base. It also claims that since at least 1994, the U.S. Army Corps of Engineers has been sampling at the facility but done nothing for more than a decade to prevent off-site contamination in soil and migrating groundwater or to implement a permanent remedy. Plaintiffs seek declaratory and injunctive relief under CERCLA Section 107 and an award of costs incurred in response to releases or threatened releases of hazardous substances at or from the facility.

[8] Greenhouse Gases: Industry Groups Challenge EPA Rule on GHG Emissions from Major Stationary Sources

Industry groups have reportedly challenged an EPA final rule that set January 2, 2011, as the date when the agency will begin to enforce emission-control requirements for greenhouse gas (GHG) emissions at major stationary sources. *75 Fed. Reg.* 17,004 (04/02/10). The rule clarifies EPA's interpretation of the scope of the phrase "subject to regulation" found in the definition of "regulated NSR pollutant." Numerous groups and organizations

filed [*petitions for review*](#) in the D.C. Circuit Court of Appeals by the June 1, 2010, deadline for challenging the rule. According to news sources, they are expected to argue in part that the Clean Air Act is not designed to control GHG emissions. *See BNA Daily Environment Report*, June 3, 2010.

[9] CWA/RCRA: Groups Announce Intent to Sue Power Plant Owner over Alleged Discharges

Environmental groups recently announced plans to sue the owner of a western Pennsylvania power plant over discharges from a coal-ash and coal-refuse disposal site that allegedly violated state and federal statutes, including the Clean Water Act (CWA), RCRA and the state Clean Streams Law. In a [*letter*](#) dated May 21, 2010, the groups provided 60 days' notice of their intent to file a citizen suit in federal court. According to the notice letter, discharges from the Seward Generating Station in New Florence, Pennsylvania, have violated permit limits for iron, manganese, aluminum, and pH every month for the past five years, in violation of the Pennsylvania Clean Steams Law and the CWA. The letter also alleges that at least 23 pollutants linked to the coal-combustion waste-disposal site are seeping into groundwater and ultimately flowing into the Conemaugh River. It further alleges that high levels of toxic metals and other contaminants pose an imminent and substantial threat to the environment, in violation of RCRA. The source of the alleged discharges is an unlined coal-refuse pile next to the Conemaugh River, a tributary of the Allegheny River. *See BNA Daily Environment Report*, May 25, 2010.



[10] CWA: EPA to Settle Challenge to CAFO Rule

To settle a challenge to EPA's final rule on concentrated animal feeding operations (CAFOs), *73 Fed. Reg.* 70,418 (11/20/08), the agency has **agreed** to propose a rule within a year to require all CAFOs to submit details about their operations and to update the information every five years. *NRDC v. EPA*, No. 08-61093 (5th Cir. *final settlement* 05/25/10). EPA also agreed to release a guidance document to help authorities implement NPDES permit rules and effluent limitations guidelines and standards for CAFOs. The 2008 rule required only CAFOs that discharge or propose to discharge to apply for permits. Under the agreement, the new rule will apply to all CAFOs. Among other things, they will be required to report (i) the quantity of manure, wastewater and litter they generate; (ii) whether they use any of the material as fertilizer on fields; (iii) whether such material is moved offsite; and (iv) other data that will allow EPA to determine the need for a wastewater discharge permit under Section 308 of the Clean Water Act.

Legislation, Regulations and Guidance

[11] Greenhouse Gases: Final GHG Tailoring Rule Published

EPA has issued its final greenhouse gas (GHG) tailoring **rule**. *75 Fed. Reg.* 31,513 (06/03/10). Publication in the June 3, 2010, *Federal Register* initiates a 60-day period during which the rule can be challenged in the D.C. Circuit Court of Appeals. According to press reports, numerous challenges to the rule are expected.

The rule sets the GHG emissions threshold that defines when Clean Air Act permits are required for new and existing industrial facilities. The rule requires only the largest new and modified sources of GHG, such as power plants and refineries, to control their GHG emissions. It shields small businesses, schools, hospitals, and other small entities from GHG emission control requirements effective January 2, 2011. For six months, only new and existing sources already required to control emissions of other air pollutants will be required to control GHG emissions. After that period, only new sources with emissions exceeding 100,000 tons per year will be required to do so. Modified existing sources with emissions above 75,000 tons per year will also be required to control emissions. *See BNA Daily Environment Report*, June 3, 2010.

[12] Air: EPA Issues Final NAAQS for SO₂

EPA plans to issue a **final rule** establishing national ambient air quality standards (NAAQS) for oxides of sulfur as measured by sulfur dioxide (SO₂). The rule sets an SO₂ standard of 75 parts per billion (ppb) averaged over one hour. The current limits are 140 ppb measured over 24 hours and 30 ppb measured over a year. The rule sets the first one-hour standard for SO₂ and is the first update to the standard since 1971.

EPA's action in developing the new standard was required by *American Lung Association v. EPA*, 134 F.3d 388 (D.C. Cir. 1998), which held that EPA had failed to adequately explain a decision not to revise the SO₂ NAAQs, remanded a challenge to that decision to the agency and ordered the agency to explain its decision or otherwise take action in accordance with the opinion. The rule will take effect 60 days after it is published in the *Federal Register*.



[13] Air: EPA Seeks Comment on Draft Transportation Conformity Guidance

EPA has released [draft guidance](#) on how to use the agency's model for analyzing particulate matter "hot spots" to determine whether proposed transportation projects would conform with the Clean Air Act (CAA). *75 Fed. Reg.* 29,537 (05/26/10). Transportation conformity is a CAA requirement under which state and local transportation agencies must ensure that federally supported highway and transit projects are consistent with, or conform to, state implementation plans (SIPs) to control air pollution. If emissions from a project and other nearby sources do not push the area into nonattainment with air quality standards, the project conforms to the CAA. EPA will accept comments on the draft guidance until July 19, 2010.

[14] Waste: New York Law Requires Manufacturers to Accept Electronic Waste

New York Governor David Paterson (D) has signed [legislation](#) that requires electronic equipment manufacturers to accept electronic waste for reuse or recycling beginning April 2011. The new law prohibits the disposal of electronic waste by 2015 and establishes a program under which manufacturers may bank, trade and sell credits beginning in 2014 for any e-waste collected in excess of their annual obligations. Under the law, manufacturers must accept one piece of electronic waste from manufacturers with the purchase of a similar piece of equipment, effective April 1, 2011. Manufacturers are also required to take back their market share of e-waste, based on a formula developed by the New York Department of Environmental Conservation. Manufacturers who fail to comply with the recycling requirements will be subject to a recycling surcharge. All electronics manufacturers must register with the state by January 1, 2011, and pay a \$5,000 registration fee.



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