

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] Wetlands: Ninth Circuit Upholds Section 404 Permits for Business Park

The Ninth Circuit Court of Appeals has upheld two dredge-and-fill permits issued to the city of Redding, California, by the U.S. Army Corps of Engineers (Corps) and the U.S. Fish and Wildlife Service (FWS), clearing the way for the construction of a 678-acre business park. [*Butte Envtl. Council v. Corps., No. 09-15363 \(9th Cir. 06//01/10\)*](#). Plaintiff sued the agencies in 2008, alleging violations of the Clean Water and Endangered Species Acts. The permits allow the destruction of seven acres of wetlands on the site, including shallow depressions that fill with rainwater and one critical habitat for protected species of shrimp and grasses. Plaintiffs alleged that the Corps and FWS acted arbitrarily and capriciously in concluding that the site selected for the business park was the least environmentally damaging of the available alternatives.

The court affirmed a district court decision rejecting plaintiff's arguments, ruling that the agencies adequately considered the project's impacts on wetlands and critical habitat before issuing the permits. Doing so, the court reviewed a city-proposed and Corps-approved EIS and an FWS-proposed biological opinion.

[2] CERCLA: Fifth Circuit Reverses District Court on Allocation Formula

The Fifth Circuit Court of Appeals has determined that a district court improperly relied on site valuation reports prepared as part of settlement negotiations in estimating the total volume of waste at a Texas CERCLA site. [*Lyondell Chem. Co. v. Occidental Chem. Corp., No. 08-40060 \(5th Cir. 06/08/10\)*](#). According to the appeals court, the reports were excludable as protected settlement communications that the district court should not have used in allocating liability at the site. They were prepared in 1987 by an Occidental Chemical employee during settlement negotiations with EPA. The appeals court remanded the matter to the district court for an evidentiary hearing on the volume of waste at the site.

[3] Toxic Tort: Third Circuit Dismisses Putative Class Actions Seeking Medical Monitoring

The Third Circuit Court of Appeals has affirmed the dismissal of two putative class actions that sought medical monitoring for workers and nearby residents of Pennsylvania factories that used beryllium. [*Sheridan v. NGK Metals Corp., No. 08-4873 \(3d Cir. 06/07/10\)*](#). The two lawsuits alleged negligence in connection with beryllium exposure and sought to establish a medical monitoring trust fund based on the plaintiffs' alleged increased risk of developing chronic beryllium disease. The district court dismissed the claims on



the ground that plaintiffs had not established an increased risk of contracting the disease, and plaintiffs appealed.

Affirming the district court, the appellate court explained that, to obtain medical monitoring under Pennsylvania law, plaintiffs must prove that because of exposure to chemicals, they have a significantly increased risk of contracting a serious disease. As to beryllium disease, only certain people have the specific genetic marker that can recognize beryllium particles in the lungs as antigens, potentially leading to the formation of granulomas. Expert testimony conflicted over what percentage of the population would become sensitized, and only one of the multiple plaintiffs had developed beryllium sensitivity. The court concluded that the plaintiffs had not shown they were at a significantly increased risk of contracting the disease as a proximate result of their alleged exposure.

[4] Air: D.C. Circuit Refuses to Review California Emissions Rule for Refrigerated Trucks

The full D.C. Circuit Court of Appeals has reportedly declined to reconsider a California emissions standard for refrigerated trucks. *Am. Trucking Ass'ns, Inc. v. EPA*, No. 09-1090 (D.C. Cir. 06/03/10). In April 2010, a three-judge appeals panel, with one judge dissenting in part, denied petitioner's challenge to EPA's approval of a California rule that sets emissions limits on in-use nonroad engines. The 2004 rule requires every transport refrigeration unit (TRU) that enters the state to comply with California's standards. In its petition for rehearing, the American Trucking Associations argued that the rule has a de facto nationwide reach, thereby violating the Clean Air Act, by denying states their statutory right not to follow California's stringent standards. EPA approved the

rule in 2005, concluding that California had shown it needed the rule to address "compelling and extraordinary conditions" in the state—that is, the worst air pollution in the nation. See *San Francisco Chronicle*, June 3, 2010.

[5] Greenhouse Gases: New Mexico Supreme Court Rules State Board May Consider GHG Cap

The New Mexico Supreme Court has reportedly vacated a lower court's preliminary injunction, issued in April 2010, halting the New Mexico Environmental Improvement Board's process for gathering expert testimony and public comments on a petition to establish a cap on greenhouse gas (GHG) emissions in the state. The petition, which was filed by an environmental group in December 2008, would set up a cap affecting any business that emitted more than 10,000 metric tons of carbon emissions per year. A revised plan submitted in March 2010 specified a phased-in program that would apply only to electricity generators and businesses in the oil and gas industry that emit more than 25,000 metric tons per year. It would seek to reduce GHG emissions from those sources by 3 percent each year from levels set in 2010. According to news reports, the New Mexico Public Service Co. and the state Oil and Gas Association oppose the plan. See *San Francisco Chronicle* and *Greenwire*, June 7, 2010.

[6] Env'tl. Crime: Former Business Owner Pleads Guilty to Illegal Storage of Hazardous Waste

The former owner of a Beckley, West Virginia, electro-plating shop has reportedly pleaded guilty in federal court to illegally storing hazardous waste material without a permit. Defendant and his



business partner admitted to cleaning out plating tanks at the shop and storing the waste in open containers and vats from October 2006 to February 2007, when it was discovered by the West Virginia Department of Environmental Protection. U.S. EPA subsequently cleaned up the site. Defendant will be sentenced on September 22, 2010, and faces up to five years in prison and a \$50,000 fine for each day of violation. His business partner pleaded guilty in April 2010 and will be sentenced August 18. *See EPA Press Release*, June 3, 2010.

[7] Env'tl. Crime: Three Sentenced to Prison for Illegal Asbestos Disposal

Three men from Syracuse, New York, have reportedly been sentenced to prison terms of 36 to 78 months for violations of the Clean Air Act and other crimes related to the illegal disposal of asbestos. *U.S. v. Mancuso*, No. 08-611 (N.D.N.Y. 06/09/10). A federal jury found defendants guilty in 2009 of conspiring to defraud the United States, violating Clean Air Act asbestos regulations, illegally dumping asbestos, and mail fraud. They allegedly produced false and fraudulent documents and then submitted them to clients and regulators to conceal their non-compliance with the law. They also submitted false partnership agreements, invoices and other records to clients, requesting payment for work that was not performed. *See BNA Daily Environment Report*, June 10, 2010.

[8] Energy: Offshore Transport Company Challenges Moratorium on Deep-Water Drilling

A Louisiana offshore transport company that services deep-water drilling rigs has filed a complaint in federal court seeking to obtain an injunction lifting the recently imposed six-month

moratorium on drilling in the Gulf of Mexico at depths greater than 500 feet. *Hornbeck Offshore Servs., L.L.C. v. Salazar*, No 10-1663 (E.D. La filed 06/07/10). The complaint contends that the drilling moratorium is invalid and unenforceable and a violation of the Outer Continental Shelf Lands Act and regulations. It claims that the documents explaining the moratorium and notices to lessees and operators are "arbitrary and capricious." The moratorium requires offshore lease holders and operators drilling deep-water wells to cease all drilling. It also prohibits the "spudding" of any new deep-water wells and requires operators to cease drilling at "the first safe and controlled stopping point" and "take all necessary steps to close the well."

Legislation, Regulations and Guidance

[9] Air: EPA Proposes Revisions to Performance Standards for New Stationary Internal Combustion Engines

EPA has published proposed [revisions](#) to the standards of performance for new stationary compression ignition internal combustion engines under section 111(b) of the Clean Air Act. *75 Fed. Reg.* 32,611 (06/08/10). According to the agency, the proposed rule would implement more stringent standards for such engines with displacement greater than or equal to 10 liters per cylinder and less than 30 liters per cylinder, making them consistent with recent revisions to standards for similar mobile source marine engines. The proposal would also revise requirements for engines with displacement at or above 30 liters per cylinder to align more closely with recent standards for similar mobile source marine engines and for engines in rural portions of Alaska. EPA will accept comments on the proposal until August 9, 2010.



[10] RCRA: ECF Exclusion Withdrawn; Certain Hazardous Wastes No Longer Exempted

EPA has issued a [final rule](#) withdrawing the Emission-Comparable Fuel (ECF) exclusion that allows companies to burn certain hazardous wastes as fuel by exempting the waste from RCRA. *75 Fed. Reg.* 33,712 (6/15/10). The withdrawal became effective June 15, 2010.

The withdrawn ECF rule took effect January 20, 2009, and expanded 40 C.F.R. Part 261.38 to exclude from the definition of solid waste certain secondary material fuels in which hazardous constituents and physical properties are comparable to those found in fossil fuels. According to EPA, the rule was withdrawn because of difficulty in ensuring that the emissions would be comparable to emissions from burning fuel oil.

[11] Energy: DOI Issues Directive to Offshore Lessees and Operators on Increased Safety Measures

The Department of Interior (DOI) has issued a [directive](#) to lessees and operators of oil-drilling operations on the Outer Continental Shelf (OCS) regarding increased safety measures for energy development. The directive offers detailed requirements, many of which focus on the readiness of blowout preventers.

The requirements include the following: (i) all operators must certify that they are in compliance with all operating regulations for oil, gas and sulfur operations on the OCS; (ii) operators must adhere to a rigorous system of inspection and maintenance for blowout preventers, with documentation to show compliance; (iii) independent third-party verification is needed for blowout preventer operation and compatibility with specific well locations,

borehole designs and drilling plans; (iv) operators must have secondary control systems for blowout preventers with remotely operated vehicle intervention capabilities; (v) a subsea blowout preventer must have an emergency shut-in system in the event of power loss, unplanned disconnection of the riser pipe or other emergency; and (vi) an engineer must certify well-casing designs and cementing procedures. DOI prepared the directive in response to a request by President Barack Obama (D) after the explosion and fire at the Deepwater Horizon on April 20, 2010.

[12] Energy: Wyoming Commission Approves Hydraulic Fracturing Rules

The Wyoming Oil and Gas Commission has approved [rules](#) that require drilling companies to report to the state the chemicals they inject underground to stimulate natural gas production. Under the rules, approved June 8, 2010, drilling companies must provide the names of chemical additives, compounds and concentrations or rates proposed to be mixed and injected as part of the hydraulic fracturing process. The rules also prevent state regulators from disclosing the information to the public if operators can prove it is proprietary.

Hydraulic fracturing, or “fracking,” is the pumping of pressurized water and other chemicals into deep formations underground to open fissures in the rock. EPA announced in March 2010 that it is conducting a comprehensive study to investigate the potential adverse effects of fracking on water quality and public health. See *BNA Daily Environmental Report*, June 10, 2010.



[13] Renewable Fuels: Colorado Enacts Law Promoting Biomass Energy Development

Colorado Governor Bill Ritter (D) recently signed into law a bill ([S.B. 10-177](#)) creating a property tax incentive to promote biomass energy development. The new law, effective August 11, 2010, defines a biomass energy facility as one where energy is produced from the combustion of “only biomass or biosolids derived from the treatment of wastewater.” The facility must also be designed to supply electricity for off-site consumption and must have begun energy production after January 1, 2010. For property tax purposes, such facilities will be valued based on their projected gross revenue, the same manner in which wind and solar facilities are valued under state law.

[14] Nanotechnology: OECD Revises Guidance on Testing of Manufactured Nanomaterials

The Organization for Economic Co-operation and Development (OECD) has revised a [guidance document](#) on safety testing of manufactured nanomaterials. The revised document was prepared by the organization’s Working Party on Manufactured Nanomaterials and revises an initial version of a document released in 2009.

OECD’s manufactured nanomaterials safety program “aims to generate safety information through testing for human health and environmental effects based on OECD test guidelines and other internationally agreed methods.” Program testing focuses on nanomaterial information/identification, physical-chemical properties and material characterization, environmental fate, environmental toxicology, mammalian toxicology, and material safety, according to OECD. The guidance will be regularly updated and amended based on

comments received from delegations. OECD is an intergovernmental organization in which representatives of 31 industrialized countries in North America, Europe, Asia, and the Pacific region meet to coordinate and harmonize policies and respond to international problems.



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

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