

# Environmental & Chemical Update

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## Litigation and Regulatory Enforcement

### [1] NEPA: U.S. Supreme Court Overturns Ban on Biotech Seed Planting

The U.S. Supreme Court has ruled 7-1 that an injunction barring the Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) from partially deregulating herbicide-tolerant alfalfa until the completion of a full environmental impact statement (EIS) under NEPA, was too broad. [\*Monsanto Co. v. Geertson Seed Farms\*, No. 09-475 \(U.S. 6/21/10\)](#). Conventional alfalfa growers and environmental groups filed an action challenging an APHIS decision to deregulate the genetically modified alfalfa unconditionally without preparing a detailed EIS. Plaintiffs alleged that the decision violated NEPA, which requires federal agencies "to the fullest extent possible" to prepare a detailed EIS for "every major Federal action significantly affecting the quality of the human environment."

The district court ruled for plaintiffs and vacated the agency's decision completely deregulating the modified alfalfa and enjoined APHIS from deregulating it, in whole or in part, pending completion of the EIS. The court also issued a nationwide permanent injunction prohibiting almost all future planting of the modified alfalfa during the pendency of the EIS process. The Ninth Circuit Court of Appeals held that NEPA plaintiffs are specifically exempt from the

requirement of showing a likelihood of irreparable harm to obtain an injunction and upheld the nationwide injunction. Defendant petitioned the U.S. Supreme Court to review the matter.

Overturning the nationwide ban, the U.S. Supreme Court, in a decision drafted by Justice Samuel Alito, joined by Chief Justice John Roberts, and Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, Ruth Bader Ginsburg and Sonia Sotomayor, held that contrary to the lower court decisions, NEPA violations, absent unusual circumstances, are not exempt from the standard four-factor test to determine the availability of injunctive relief.

The test requires: (i) plaintiff must have suffered irreparable injury; (ii) adequate alternative remedies are not available; (iii) a remedy of equity is warranted; and (iv) injunctive relief serves the public interest. The Court concluded that plaintiffs were unable to demonstrate that a partial deregulation would pose any appreciable risk of environmental harm if the scope of regulation were sufficiently limited. The decision reverses a 2-1 Ninth Circuit ruling. *Geertson Seed Farms v. Johanns*, 570 F.3d 1130 (9th Cir. 2009). Justice John Paul Stevens dissented and Justice Stephen Breyer did not take part in the decision.

Shook, Hardy & Bacon Tort Partner [Kevin Haroff](#) appeared as counsel of record for the Washington Legal Foundation as *amicus curiae* in support of the petition for review in the case.



## [2] Taking: U.S. Supreme Court Upholds Beach Restoration Program Against Unconstitutional Takings Challenge

The U.S. Supreme Court has ruled 8-0 that a decision by the Florida Supreme Court upholding a state program that adds sand to eroded beaches and turns shorelines into state property was not an unconstitutional taking of private property. *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot., No. 08-1151 (U.S. 6/17/10)*.

The state program, under the Beach and Shore Preservation Act, establishes procedures for depositing sand on eroded beaches (restoration) and maintaining the deposited sand (nourishment). When such a project occurs, the state sets a fixed “erosion control line” to replace the fluctuating mean high-water line as the boundary between the private beach front and state property. Once the new line is recorded, when accretion moves the mean high-water line seaward, the private beach front remains bounded by the permanent erosion control line.

The city of Destin and Walton County sought permits to restore 6.9 miles of beach eroded by hurricanes, adding about 75 feet of dry sand seaward of what would become the erosion central line. A nonprofit corporation, comprising owners of beachfront property bordering the proposed project, brought an unsuccessful administrative challenge, and the Florida DEP approved the permits. The homeowner group challenged the issuance of the permits in the state court of appeals. That court ruled that the DEP’s order had eliminated the homeowner’s private property right and constituted an unconstitutional taking. It set aside the order and certified the proceeding to the Florida Supreme Court. The Florida Supreme Court ruled that the order did not result in an unconstitutional taking without just compensation, concluding that

the homeowners did not own the property allegedly taken. A rehearing request was denied, and the matter was appealed to the U.S. Supreme Court.

In an 8-0 opinion (Justice John Paul Stevens did not participate), the Court affirmed the Florida court’s decision, ruling that the state high court “did not contravene the established property rights of petitioner’s members, Florida has not violated the Fifth and Fourteenth Amendments....” Four members of the Court (Justices Antonin Scalia, Clarence Thomas and Samuel Alito, and Chief Justice John Roberts) agreed that although the facts did not demonstrate that a judicial taking had occurred, a court could be found to have engaged in a taking. Four other justices (Anthony Kennedy, Sonia Sotomayor, Stephen Breyer and Ruth Bader Ginsburg) wrote that the court need not address that issue.

## [3] NEPA: D.C. Circuit Rules Sierra Club Lacks Standing to Challenge Rail Merger

The D.C. Circuit Court of Appeals has upheld a Surface Transportation Board decision that a merger between the Canadian Pacific Railway Corp. and Dakota Minnesota & Eastern Railroad Corp. (DM&E) may proceed despite the lack of an environmental impact study (EIS) under NEPA. *Commuter Rail Div. of the Reg’l Transp. Auth. v. Surface Transp. Bd., No. 08-1346 (D.C. Cir. 6/15/10)*. The Sierra Club challenged the board’s decision to allow Canadian Pacific to defer an EIS until it moves forward with a construction project to connect DM&E’s track in South Dakota to coal mines in Wyoming. The proposed rail extension was approved in 2006, and the EIS for that project was found to meet NEPA’s requirements at the time. The Sierra Club argued that the failure to consider the effects of the DM&E acquisition together with



the proposed rail extension violated NEPA because the coal train traffic would cause noise and air pollution and disturb wildlife in South Dakota.

The three-judge panel disagreed, ruling that the Sierra Club lacked standing because it was unable to demonstrate how its members would be injured by the board's decision. The court noted that the decision prohibits Canadian Pacific from transporting coal from the proposed rail extension over lines operated by DM&E until the company performs an EIS.

**[4] Jurisdiction: Tenth Circuit Reverses EPA Designation of New Mexico Mine as Indian Country**

The Tenth Circuit Court of Appeals has ruled *en banc* that EPA erred when it designated a New Mexico mine as "Indian country," wrongly subjecting it to federal rather than state law. [\*Hydro Res., Inc. v. EPA\*, No. 07-9506 \(10th Cir. 6/15/10\)](#). The decision vacated EPA's final land status for the site as well as a three-judge Tenth Circuit panel that upheld EPA's 2007 decision. *Hydro Res., Inc. v. EPA*, 562 F.3d 1249 (10th Cir. 2009).

The *en banc* court ruled that the test for whether a land qualifies as Indian Country was established by the U.S. Supreme Court in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). That decision established a two-pronged test to define "Indian lands": (i) whether Congress has explicitly set the land aside for Indian use; and (ii) whether the land is superintended by the federal government. EPA and the earlier Tenth Circuit ruling had improperly used what is known as "the community of reference" test, i.e., that because a significant percentage of neighboring lands are Indian country, the mining site must be considered Indian country too. The decision means that the New Mexico Environment Department, rather than

EPA, has authority to issue the mine a Safe Drinking Water Permit. Two judges on the panel dissented in support of "the community of reference" test.

**[5] Clean Water Act: Federal Court Rules Injunctive Relief Appropriate for Selenium Discharges**

A federal judge in West Virginia has ruled that injunctive relief is appropriate in a citizens suit by a coalition of environmental groups over alleged selenium discharges from a mountaintop removal operation. [\*Ohio Valley Envtl. Coal., Inc. v. Hobet Mining, LLC\*, No. 09-1167 \(S.D. W.Va. 6/14/10\)](#). The suit, brought under the citizens suit provision of the Clean Water Act and the Surface Mine Control and Reclamation Act (SMCRA), alleges persistent violations of the mine's permits and seeks injunctive as well as declaratory relief.

Defendant had entered into a settlement in 2008 with the West Virginia Department of Environmental Protection, but the court found that the company continued to violate the terms of its discharge permit in spite of the settlement. According to the court, the particular facts warrant injunctive relief, notably the fact that government enforcement has failed to bring defendant into compliance "and a realistic prospect of continuing violations exists." The court scheduled a hearing for August 9, 2010, to determine the scope and terms of the injunctive relief.

**[6] Oil Pollution Act: Federal Court Allows Environmental Claims Against Owner of Gulf Drilling Rig to Proceed**

A federal judge in Texas has reportedly ruled that any environmental claims brought against the owner of the Deepwater Horizon rig that exploded and sank in the Gulf of Mexico in April 2010, may proceed. *In re Transocean Holdings LLC*,



No. 10-1721 (S.D. Tex. *order signed* 6/14/10). In its order, the court said that all legitimate Oil Pollution Act claims involving environmental damage brought by governments and states may proceed in court. It also allows claims under the Park Systems Resource Protection Act, National Marine Sanctuaries Act, Rivers and Harbors Act, and CERCLA. Under an order signed by the court in May 2010, personal injury claims are subject to a stay. *See BNA Daily Environment Report*, June 16, 2010.

**[7] Toxic Tort: Florida Supreme Court Rules Fishermen May Claim Damages for Loss of Income Due to Pollution**

The Florida Supreme Court has ruled 5-1 that fishermen are entitled under state law to recover damages for economic loss and income caused by the negligent release of pollutants despite the fact that they do not own any property damaged by the pollution. *Curd v. Mosaic Fertilizer, LLC, No. 08-190 (Fla. S. Ct. 6/17/10)*. The case involved a 2004 spill into Tampa Bay from a Mosaic Fertilizer waste water storage pond which plaintiffs alleged resulted in a loss of underwater plant life, fish, bait fish, crabs, and other marine life. Several fishermen sued seeking economic damages allegedly caused by the spill. A lower court and then a state appellate court dismissed plaintiffs' proposed class action because under traditional principles of negligence, the fishermen failed to state a cause of action. According to the lower court, an action in common law either through strict liability or negligence was not permitted because the fishermen did not sustain bodily injury or property damages—their claims sought purely economic damages unrelated to any damage to their property. The fisherman appealed to the state supreme court.

The Florida Supreme Court reversed, ruling that both under state common law and a state statute, the fishermen can recover for economic losses proximately caused by the negligent release of pollutants. According to the court, the discharge of pollutants “constituted a tortious invasion that interfered with the special interest of the commercial fishermen to use the public waters to earn their livelihood.” The court also stated, “the potential class consists of approximately 200 fishermen, who say defendants’ waste water flooded the bay after repeated warnings from local and state environmental agencies, releasing pollutants that killed marine life and damaged the reputation of the fishery products.” One justice dissented in part, arguing that it was improper to hold that plaintiffs could recover under the common law theory.

**[8] Greenhouse Gases: Group Sues EPA Seeking Regulation of GHG Emissions from Aircraft, Ships and Nonroad Engines**

A coalition of environmental groups has sued EPA in federal court seeking an order requiring the agency to regulate greenhouse gas (GHG) emissions from aircraft, ships and nonroad engines. *Ctr. for Biological Diversity v. EPA, No. N/A (D.D.C. filed 6/11/10)*. The complaint alleges that EPA is violating the Clean Air Act by failing to respond within the 180-day statutory time frame to three petitions: one from October 2007 seeking to regulate GHGs and black carbon from marine vessels, one from December 2007 to regulate GHG emissions from aircraft, and one from January 2008 to regulate GHG emissions from other nonroad engines and vehicles. It asks the court to find that EPA is “unreasonably” delaying action on the petition and to give the agency 90 days in which to make findings on



whether GHG emissions and black carbon from the named sources may reasonably be anticipated to endanger public health and safety.

## Legislation, Regulations and Guidance

### [9] FIFRA: EPA Announces Action to Bar Insecticide Endosulfan

EPA announced June 9, 2010, that it is taking action to bar the insecticide endosulfan in the United States based on a finding that it is unsafe for farm workers. According to the announcement, endosulfan, which is used in growing vegetables, fruits and cotton, can “pose unacceptable neurological and reproductive risks to farm workers and wildlife and can persist in the environment.” Endosulfan is a chlorinated insecticide that is chemically similar to DDT. Under FIFRA, EPA must consider the risks and benefits of insecticides like endosulfan. In 2002, EPA allowed the continued use of endosulfan with some restrictions, but in 2007, the agency updated its assessment of endosulfan’s risks based largely on new research showing farm worker exposure was greater than previously believed. In 2010, the agency conducted a revised ecological risk assessment of endosulfan using all available exposure and ecological effects information available. EPA is reportedly negotiating a voluntary ban with the sole U.S. manufacturer of endosulfan. See *EPA Press Release*, June 9, 2010; *Environmental Health News*, June 10, 2010.

### [10] Radioactive Waste: NRC Proposes Amendments to Regulations on Transport of Radioactive Byproducts

The U.S. Nuclear Regulatory Commission (NRC) has issued a [proposed rule](#) amending its regulations to establish security requirements for the

use and transport of category 1 and 2 quantities of radioactive material. *75 Fed. Reg.* 33,901 (06/15/10). Category 1 and 2 thresholds are based on those established by the International Atomic Energy Agency (IAEA) in its Code of Conduct on the Safety and Security of Radioactive Sources. The objective of the proposed rule, according to NRC, is to provide reasonable assurance of theft or diversion prevention of category 1 and 2 quantities of radioactive material.

The proposed rule would also include security requirements for the transportation of irradiated reactor fuel that weighs 100 grams or less. The proposed rule would affect any licensee that is authorized to (i) possess category 1 or 2 quantities of radioactive material, (ii) transport these materials using ground transportation, and (iii) transport small quantities of irradiated reactor fuel. NRC will accept comments on the proposed rule until October 13, 2010.

### [11] HazMat: Coast Guard Proposes Harmonizing Bulk Hazmat Regulations with International Rules

The U.S. Coast Guard has issued a [proposed rule](#) that would harmonize its bulk solid hazardous materials regulations with those of the International Maritime Organization. *75 Fed. Reg.* 34,573 (06/17/10). The proposed rule would allow certain solid hazardous materials in bulk to be shipped without a special permit so long as they comply with the international rules that the agency will recognize as equivalent to U.S. regulations. It would also detail special handling requirements for the materials based on the Solid Bulk Cargoes Code and existing special permits. The proposed rule would amend 46 C.F.R. Parts 97 and 148. The Coast Guard will accept comments until July 15, 2010.



### [12] Oil Pollution Act: President Signs Revisions to Oil Pollution Act

President Barack Obama (D) has signed revisions to the Oil Pollution Act ([S. 3473](#)) that authorize advances from the Oil Spill Liability Trust Fund for the Deepwater Horizon oil spill in the Gulf of Mexico. The revisions, signed June 15, 2010, authorize the U.S. Coast Guard to obtain multiple advances up to \$100 million each, up to a total of \$1 billion.

### [13] CWA: Corps Suspends Nationwide Mining Permit in Six States

The U.S. Army Corps of Engineers (Corps) has [suspended](#) a nationwide coal mining permit in six Appalachian states as “an interim measure to protect aquatic environment” while the agency evaluates whether the permit should be modified. *75 Fed. Reg.* 34,711 (06/18/10). The permit authorizes discharges of dredged or fill materials into U.S. waters for surface coal mining activities in Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia. The suspension prohibits Corps district engineers from processing pending, new or revised Nationwide Permit 21 requests. It does not apply to other states.

Nationwide permits eliminate the need for separate applications and environmental impact statements for a project that complies with the Surface Mining and Reclamation Act. While the suspension is in effect, proposed surface coal mining projects that involve discharge of dredged or fill material into U.S. waters will need Corps authorization under the Clean Water Act through individual permit processes.

### [14] Europe: EU Parliament Adopts Proposal to Update Food Labels

The European Parliament has adopted a [proposal](#) that would require food label updates throughout the European Union (EU), including a requirement that foods containing nanomaterials must specify that information with the word “nano” in the list of ingredients. According to an explanatory statement, “[c]onsumers have a right to know what their food contains.” The proposal details food additives that would be covered by or excluded from the proposed regulation. The proposal will be forwarded to the European Commission and the national parliaments for possible implementation.



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