

# Environmental & Chemical Update

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

Issue 329 • July 2, 2010

## Litigation and Regulatory Enforcement

- [1] **NEPA:** Ninth Circuit Rules BLM Failed to Take Hard Look at Cumulative Impacts of Mine-Exploration Expansion on Tribal Lands . . . . . 1
- [2] **Coastal Zone Mgmt. Act:** Fifth Circuit Affirms Dismissal of Challenge to Wind Farm . . . . . 1
- [3] **NEPA:** Tenth Circuit Rules BLM Did Not Violate NEPA in Rejecting Phased Drilling Plan . . . . . 2
- [4] **Greenhouse Gases:** Cases Challenging EPA’s Endangerment Finding Held in Abeyance . . . . . 2
- [5] **Oil Spill:** Federal Court Enjoins Moratorium on Deepwater Drilling in the Gulf. . . . . 2
- [6] **Clean Water Act:** Pennsylvania Wastewater Authority Agrees to Settle Sanitary Sewer Discharge Violations. . . . . 3
- [7] **FIFRA:** EPA Agrees to Settle Human-Testing Lawsuit . . . . . 3

## Legislation, Regulations and Guidance

- [8] **Air:** EPA Publishes Revisions to SO<sub>2</sub> Standard. . . . . 3
- [9] **RCRA:** Proposed Rule on Coal-Combustion Residuals from Power Plants Offers Options . . . . . 4
- [10] **CWA:** EPA Proposes Amendments to NPDES Test-Method Regulations . . . . . 4
- [11] **Compliance:** EPA Issues Interim Guidance Allowing Employees to Participate in Chemical Site Inspections . . . . . 4
- [12] **CERCLA:** GAO Report Says Remediation Funds Insufficient. . . . . 4
- [13] **OSHA:** Severe Violators Enforcement Program Directive Now in Effect . . . . . 5
- [14] **Chemical Exposure:** California Agency Seeks Comments on Draft Green Chemistry Regulations . . . . . 5

Shook,  
Hardy &  
Bacon<sub>LLP</sub>

[www.shb.com](http://www.shb.com)

---

# Environmental & Chemical Update

---

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

## Litigation and Regulatory Enforcement

### [1] NEPA: Ninth Circuit Rules BLM Failed to Take Hard Look at Cumulative Impacts of Mine-Exploration Expansion on Tribal Lands

The Ninth Circuit Court of Appeals has ordered a district court to reconsider whether the cumulative impact of a proposed expansion to a mine exploration project in Nevada requires a new environmental impact statement (EIS) under NEPA. [\*Te-Moak Tribe of W. Shoshone of Nev. v. DOI\*, No. 07-16336 \(9th Cir. 6/18/10\)](#). Plaintiffs alleged in the original lawsuit that the Bureau of Land Management (BLM) approved, without a comprehensive EIS, a proposed amendment to an existing exploration project plan that would allow 250 acres throughout the project area to be disturbed. According to plaintiffs, the project area is located on ancestral lands that include meditation sites, sources of pine nuts, burial grounds, and locations that figure in creation stories and world renewal.

Plaintiffs contended that BLM's approval of the amendment to the exploration project violated NEPA, the National Historic Preservation Act and Federal Land Policy and Management Act. The district court denied plaintiff's motion for summary judgment and granted defendant's motion for summary judgment.

The appeals court affirmed the district court's ruling as to the historic preservation and land policy act claims, but reversed and remanded for further

proceedings on plaintiff's NEPA claim. According to the appeals court, "NEPA requires the BLM to take a hard look at the cumulative impacts of the amendment and other projects within the cumulative effects area; this they failed to do." The court ordered the district court to grant plaintiff's motion for summary judgment on the NEPA claim and remand to BLM for further proceedings.

### [2] Coastal Zone Mgmt. Act: Fifth Circuit Affirms Dismissal of Challenge to Wind Farm

The Fifth Circuit Court of Appeals has upheld a district court decision allowing the construction of a coastal wind farm to proceed without an environmental consistency review or public comment. [\*Coastal Habitat Alliance v. Patterson\*, No. 09-50553 \(5th Cir. 6/17/10\)](#). Plaintiff sought declaratory and injunctive relief against the Texas General Land Office and Public Utility Commission under the Coastal Zone Management Act (CZM Act), arguing that the state agencies should be forced to perform an environmental consistency review and hold public hearings because the state coastal management program accepted federal funding. Plaintiff also argued that the CZM Act preempted state law on coastal management.

The district court ruled that plaintiff lacked standing to bring its preemption claim because it failed to allege that the agencies caused particularized harm and because the federal program contained no private cause of action. The court also held that plaintiff



lacked standing for its other claims because the claims lacked redressability. Plaintiff appealed. Affirming the district court, the appellate court said that the CMZ Act expressly states that it does not preempt state law. The court also held that the environmental consistency review and public comment obligations in the CMZ Act fall on the U.S. Department of Interior and not state agencies. According to the court, the remedy for a state's failure to comply with the CMZ Act is a cut off of funding by the federal government.

### [3] **NEPA: Tenth Circuit Rules BLM Did Not Violate NEPA in Rejecting Phased Drilling Plan**

The Tenth Circuit Court of Appeals has affirmed a district court determination that the Bureau of Land Management (BLM) did not abuse its discretion when it declined to study a phased-development drilling plan proposed by environmentalists. *Biodiversity Conservation Alliance v. BLM*, No. 09-8011 (10th Cir. 6/18/10). Plaintiffs had originally challenged a BLM resource management plan amendment allowing natural gas development in Wyoming's Powder River Basin. They alleged that BLM violated NEPA when it refused to study in detail their proposal to phase in development in the basin over decades. The district court held that BLM had adequately considered their proposed alternative. *WORC v. BLM*, 591 F. Supp. 2d 1206 (D. Wyo. 2008). Plaintiffs appealed.

Rejecting plaintiffs' arguments, the appeals court stated, "delaying production for decades does not effectively meet current energy demands" and "phased development will cause a significant loss of gas from drainage and changed reservoir pressure." According to the court, BLM "reasonably concluded

that phased development was impractical and would not meet the project's purpose." The court also found no violation of NEPA or the Federal Land Policy and Management Act.

### [4] **Greenhouse Gases: Cases Challenging EPA's Endangerment Finding Held in Abeyance**

In light of petitions for reconsideration pending before EPA, the D.C. Circuit Court of Appeals has denied Virginia's motion to remand to EPA to adduce further evidence on its endangerment finding—i.e., that greenhouse gas (GHG) emissions from cars and light trucks endanger public health and welfare. *Coal. for Responsible Regulation, Inc. v. EPA*, No. 09-1322 (D.C. Cir. 6/16/10).

The motion cited stolen e-mails leaked to the media that involved scientists at East Anglia University's Climate Research Unit in the United Kingdom discussing the suppression of information from climate change skeptics. In February 2010, Virginia Attorney General Kenneth Cuccinelli (R) petitioned EPA to reconsider the endangerment finding and reopen its scientific basis to public comment. The court also granted a motion to hold consolidated cases against EPA in abeyance until August 16, 2010, or 14 days after EPA issues a decision on the petitions for reconsideration.

### [5] **Oil Spill: Federal Court Enjoins Moratorium on Deepwater Drilling in the Gulf**

A federal judge in Louisiana has issued a preliminary injunction ordering the U.S. Department of Interior and the Minerals Management Service to immediately lift the government's ban on drilling on the Outer Continental Shelf in water depths greater than 500 feet and



prohibiting the agencies from enforcing the ban until after a full trial on the merits. [\*Hornbeck Offshore Servs., LLC v. Salazar\*, No. 10-1663 \(E.D. La. 6/22/10\)](#).

The six-month moratorium, which went into effect May 28, 2010, had idled 33 deepwater drilling rigs operating off the coasts of Louisiana and Texas until all of the drilling rigs were fully inspected and more stringent regulations were in place. The action followed the April 20, 2010, explosion of the Deepwater Horizon rig that killed 11 workers and resulted in the release of large volumes of oil into the Gulf of Mexico. The court appeared to base its ruling on the moratorium's economic impact on the region. The government reportedly appealed the ruling and may issue a narrower moratorium. On June 24, the same court refused to stay its previous order while the government appeals. See *BNA Daily Environment Report*, June 23 and 25, 2010.

#### **[6] Clean Water Act: Pennsylvania Wastewater Authority Agrees to Settle Sanitary Sewer Discharge Violations**

The Williamsport Sanitary Authority (WSA) has agreed to make improvements to its combined sewer system at an estimated cost of \$10 million to resolve allegations of discharge-permit violations. [\*U.S. v. WSA\*, No. 10-1304 \(M.D. Pa. proposed consent decree filed 6/22/10\)](#). In addition to upgrading its sewer system, WSA will pay a civil penalty of \$320,000 for past Clean Water Act violations. Under the settlement's terms, WSA will expand the treatment capacity of its central wastewater treatment plant and increase its storage capacity to cope with high flow during wet weather. The settlement also requires WSA to implement long-term control plans designed to minimize the potential for combined sewer overflows to the West Branch of the Susquehanna River and, ultimately, to the Chesapeake Bay. Lodged in the U.S. District

Court for the Middle District of Pennsylvania, the proposed consent decree is subject to a 30-day public comment period and approval by the court.

#### **[7] FIFRA: EPA Agrees to Settle Human-Testing Lawsuit**

EPA has agreed to withdraw a 2006 rule that allowed the use of human subjects for testing of pesticides and to issue a proposed rule with stricter protections by January 2011, thereby settling a challenge to the rule filed by several environmental and other groups. [\*NRDC v. EPA\*, No. 06-0820 \(2d Cir. settlement announced 6/17/10\)](#). The agency also agreed to pay petitioners \$135,000 for attorney's fees and costs. The 2006 rule allowed intentional dosing of human subjects, except for pregnant women and children. 71 *Fed. Reg.* 6,138 (2/6/06). Under the settlement, EPA's proposed rule would allow the continued intentional dosing of adult males and females who are not pregnant if certain ethical requirements were met, such as ensuring the subjects were made fully aware of any risks associated with the exposures. The settlement is subject to public comment and approval by the court.

## **Legislation, Regulations and Guidance**

#### **[8] Air: EPA Publishes Revisions to SO<sub>2</sub> Standard**

EPA has published a [final rule](#), establishing the first hourly primary air quality standard for sulfur dioxide (SO<sub>2</sub>) at 75 parts per billion. 75 *Fed. Reg.* 35,519 (6/22/10). The rule revokes previous limits on daily and annual emissions. The new limit, effective August 23, 2010, is the first revision to the primary standard since it was established in 1971. According to EPA, SO<sub>2</sub> exposure has been linked



to asthma and other respiratory and cardiovascular health problems such as emphysema, bronchitis and heart disease.

#### **[9] RCRA: Proposed Rule on Coal-Combustion Residuals from Power Plants Offers Options**

EPA has published a [proposed rule](#) on coal-combustion residuals from power plants in which the agency offers two options for public comment. The first would regulate the residuals as hazardous waste under RCRA; it would phase out the disposal of the residuals in wet storage ponds and set new requirements for storing and monitoring the residuals in dry landfills. The other option would classify the residuals as nonhazardous, setting federal guidelines for state disposal that mandate the installation of liners on new wet storage ponds to keep the slurry from leaching into groundwater. *75 Fed. Reg.* 35,127 (6/21/10). Under the second option, existing ponds would have to be retrofitted with liners or stop receiving ash within five years. EPA will accept comments on the proposal until September 20, 2010, and expects to hold public meetings to discuss the options.

#### **[10] CWA: EPA Proposes Amendments to NPDES Test-Method Regulations**

EPA has issued a [proposed rule](#) that would amend Clean Water Act (CWA) regulations to codify that under the National Pollutant Discharge Elimination System (NPDES) program only “sufficiently sensitive” analytical test methods may be used when completing permit applications and when performing sampling and analysis pursuant to the monitoring requirements in a permit. *75 Fed. Reg.* 35,712 (6/23/10). The proposal would add or modify language to define “sufficiently sensitive” at 40 C.F.R. 122.21(e)(3) and 122.44(i)

(1)(iv). The proposed rule would affect chemical-specific methods only, not Whole Effluent Toxicity (WET) methods or their use. EPA will accept comments on the proposal until August 9, 2010.

#### **[11] Compliance: EPA Issues Interim Guidance Allowing Employees to Participate in Chemical Site Inspections**

EPA has issued [interim guidance](#) that allows chemical manufacturing and storage facility employees to accompany EPA inspectors during periodic safety inspections. The interim guidance requires EPA inspectors to follow Occupational Safety and Health Administration guidelines at 29 C.F.R. Part 1903.8 when conducting on-site compliance evaluations of hazardous chemical facilities. Those guidelines require that representatives of both employers and employees be given the opportunity to accompany the federal inspector during the facility’s physical inspection to assist in the process.

EPA’s interim guidance also requires agency inspectors to document, as part of the compliance evaluation report for the facility, offers to participate in compliance inspections and the nature, extent and substance of employee participation. According to news sources, EPA intends to develop formal guidance for including facility employees or their representatives in the on-site inspection process later in 2010. *See BNA Daily Environmental Report*, June 23, 2010.

#### **[12] CERCLA: GAO Report Says Remediation Funds Insufficient**

According to a recent Government Accountability Office (GAO) [report](#), EPA’s cost estimate for remediation of 1,269 existing CERCLA sites exceeds current funding levels, and funding will likely be inadequate over the next five years. The report states that EPA’s estimated costs for remediation at nonfederal sites



on the National Priorities List (NPL) are between \$335 million and \$681 million each year for fiscal years 2010 to 2014. For fiscal years 2000 to 2009, EPA allocated \$220 million to \$267 million annually for remedial actions.

The GAO report also indicates that EPA expects to add 20 to 25 sites each year to the NPL. Separately, EPA has reportedly requested that Congress reinstate a series of “polluter pays” taxes that had financed the Superfund Trust Fund used to clean up sites at which no responsible party was identified or could not pay if identified. Those taxes expired in 1995. *See EPA Press Release*, June 21, 2010.

### **[13] OSHA: Severe Violators Enforcement Program Directive Now in Effect**

The U.S. Occupational Safety and Health Administration (OSHA) has announced that its Severe Violators Enforcement Program (**SVEP**) directive became effective June 18, 2010. The program, which OSHA originally announced in April 2010, focuses on employers who continually disregard legal obligations to protect their workers, according to the agency. The directive establishes procedures and enforcement actions for the SVEP, including increased inspections that call for mandatory follow-up in workplaces found in violation and inspections of other worksites of the same company where similar hazards or deficiencies may be present.

The directive explains that the SVEP is intended to focus enforcement efforts on employers who have demonstrated recalcitrance or indifference to their Occupational Safety and Health Act obligations by committing willful, repeated or failure-to-abate violations in one or more of the following circumstances: (i) a fatality or catastrophic situation, (ii) industry operations or processes that expose workers to severe occupational hazards or hazards

related to the potential release of highly dangerous chemicals, and (iii) all egregious enforcement actions. *See OSHA Press Release*, June 18, 2010.

### **[14] Chemical Exposure: California Agency Seeks Comments on Draft Green Chemistry Regulations**

California’s Department of Toxic Substances Control (DTSC) has released draft green chemistry **regulations** for public comment. The draft regulations would force manufacturers and importers to reduce the use of toxic chemicals in everyday consumer products. The draft regulations would also target manufacturing processes, such as heavy water use, long transport routes and wasteful packaging, that may harm the environment. Among the terms defined in the draft are “nanomaterial,” “nanoscale” and “nanostructure.”

The Great Chemistry Initiative of 2008, a state law, requires DTSC to adopt regulations that would take effect January 1, 2011. Under the draft regulations, the state would establish a list of “chemicals of concern” such as carcinogens, mutagens, neurotoxins, and compounds that disrupt hormones, persist in the environment or accumulate in humans. DTSC would pick “priority products,” popular items that are used a great deal by children, pregnant women, the elderly, and other sensitive populations. DTSC would prioritize the products based on such factors as volume in commerce, the extent of public exposure and how the product is eventually disposed of.

Manufacturers of those products would perform an “alternatives assessment” to determine if a viable safer alternative is available. Manufacturers, suppliers and importers would have to certify to DTSC—and to retailers—that their products are free of chemicals on the list before they can be sold in the state. DTSC is accepting comments on the draft regulations until July 15, 2010. *See DTSC Press Release*, June 23, 2010.



---

# 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](mailto:derickson@shb.com); 816-474-6550) or

Jim Neet ([jneet@shb.com](mailto: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** LLP.®

