

# Environmental & Chemical Update

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SUSTAINABILITY • TOXIC TORT • WASTE • WATER

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## Litigation and Regulatory Enforcement

### [1] CERCLA: D.C. Circuit Rules EPA UAOs Satisfy Due Process

A unanimous D.C. Circuit Court of Appeals panel has ruled that EPA's authority under CERCLA to issue unilateral administrative orders (UAO's) neither denies due process nor violates constitutional property rights. *General Elec. Co. v. EPA, No. 09-5092 (D.C. Cir. 6/29/10)*. Filed in 2000, the lawsuit alleged that section 106 of CERCLA, which authorizes EPA to issue UAOs to potentially responsible parties (PRPs) ordering them to clean up hazardous substances, as administered by EPA, denies due process and is unconstitutional because it does not provide an opportunity for a hearing when an order is issued.

A UAO recipient has the option of complying with the order and cleaning up a property and then attempting to obtain reimbursement from EPA, or refusing to comply and risking an EPA enforcement action with fines of up to \$37,500 per day. EPA may also undertake the cleanup itself and then sue the recipient. Under such circumstances, the court may find that the PRP "fail[ed] without sufficient cause" to comply with the UAO and impose punitive damages of up to "three times the amount of any costs" the agency incurs. The district court ruled in EPA's favor, and the plaintiffs appealed.

Affirming the district court, the appellate court held that section 106 "satisfies due process because (UAO) recipients may obtain a pre-deprivation hearing by refusing to comply and forcing EPA to sue in federal court." In other words, according to the court, a UAO recipient does not bear any costs for cleanup or pay any fines or penalties to EPA until a lawsuit brought by EPA is settled. Consequential injuries, such as an imminent threat to the PRP's stock price, results not from EPA's issuance of the UAO, but from market reactions to it, said the court.

### [2] NEPA: Corps Failed to Fulfill Statutory Duties in Issuing Florida Development Permit

A federal judge in the District of Columbia has ruled that the U.S. Army Corps of Engineers (Corps) violated NEPA by failing to require an environmental impact statement (EIS) and violated the Clean Water Act (CWA) by failing to make developers of a 500-acre multi-use development near Tampa, Florida, demonstrate that practicable alternatives to destroying wetlands were not available. *Sierra Club v. Van Antwerp, No. 071756 (D.D.C. 6/30/10)*. The project plan included retail stores, financial institutions, hotels, restaurants, theaters, offices, and multi-family housing. The 500-acre site includes 155 acres of wetlands. The Corps issued a permit for the development in May 2007.

After turbid, silt-laden water was discharged from the site in violation of the permit, environmental organizations and individuals sued, alleging violations



of NEPA, the CWA and the Endangered Species Act (ESA). In a scathing opinion, the court accused the Corps of manipulating models and changing definitions where necessary to make the project seem compliant with NEPA and the CWA. According to the court, an EIS was necessary because the removal of wetland buffer areas could increase runoff into a nearby creek and because the project was located in an ecologically sensitive area. As to the CWA, the court said the developers failed to show that a reduction in the project's size was impracticable, failed to prove their cost calculations were accurate and failed to show that a reduction in the number of parking spaces was impracticable. The court ruled that the ESA was not violated and thus granted in part and denied in part plaintiffs' motion for summary judgment.

### [3] **CERCLA: Federal Court Finds Washington State DOT Liable for Stormwater Runoff**

A federal judge in Washington has ruled that the state transportation agency (WSDOT) may be liable for cleanup costs incurred at a CERCLA site in Tacoma, Washington, as an arranger for contamination caused by runoff from highway construction projects near the site. [\*U.S. v. Wash. State DOT, No. 085722 \(W.D. Wash. 6/7/10\)\*](#).

WSDOT argued that it could not be liable as an arranger under CERCLA because it did not have control over the release of hazardous substances and it did not intend to dispose of hazardous substances. It also contended that no evidence indicates the agency actually disposed of waste through the highway stormwater system. The U.S. government countered by arguing that WSDOT arranged for disposal by designing, constructing and operating drainage systems whose sole function

was to collect highway runoff and dispose of it in nearby water bodies. The government also argued that WSDOT had actual knowledge that the runoff contained hazardous substances and had the ability to redirect, contain and treat its contaminated runoff.

The court agreed with the federal government, holding that WSDOT designed the drainage system to discharge highway runoff into the environment. According to the court, the agency also knew that the runoff contained hazardous substances, and it had control of the collected runoff. The court found that WSDOT was therefore a potentially responsible party (PRP) under CERCLA.

### [4] **Envtl. Crime: Ship Management Company to Pay \$4 Million Penalty for Concealing Deliberate Pollution**

A ship management corporation registered in Panama reportedly pleaded guilty on July 8, 2010, in federal court to felony obstruction of justice and violation of the Act to Prevent Pollution from Ships for deliberately concealing vessel pollution from a cargo ship that made port calls in Baltimore, Maryland; Tacoma, Washington; and New Orleans, Louisiana. According to a plea agreement, the company will pay a \$3 million criminal fine and \$1 million in organizational service payments that will fund various marine environmental projects.

According to court documents, the vessel's chief engineer directed the dumping of waste oil overboard through a bypass hose that circumvented pollution-prevention equipment required by law. The bypasses occurred only at night between June and December 2009. Senior ship officers allegedly made false statements to the U.S. Coast Guard and destroyed evidence of illegal dumping. *See DOJ Press Release*, July 9, 2010.



### [5] **Alternative Energy: Groups Sue to Halt Nantucket Sound Wind Farm**

A coalition of environmental groups has sued several federal agencies seeking to halt construction of a 130-turbine wind farm proposed to be built near the coast of Massachusetts in Nantucket Sound. *Pub. Employees for Envtl. Responsibility v. Bromwich*, No. 101067 (D.D.C. 6/25/10). The complaint alleges that the agencies violated the Endangered Species Act and the Migratory Bird Treaty Act by approving a project that will kill migratory birds without obtaining authorization to do so. It also alleges that the U.S. Department of Interior's Bureau of Ocean Energy Management, Regulation and Enforcement (formerly the Minerals Management Service) violated NEPA by issuing an environmental impact statement that "ignores or fails to take a hard look at both alternatives to the lease applicant's proposed project and the numerous ways in which the project will be harmful to wildlife. . . ." The complaint seeks to enjoin and vacate authorization of Cape Wind Associates' proposal to construct and operate the wind power facility in federal waters.

## Legislation, Regulations and Guidance

### [6] **Air: New Air Transport Rule Proposed to Reduce Power Plant Emissions That Cross State Lines**

EPA has published proposed regulations that would revise the 2005 Clean Air Interstate Rule (CAIR) or Transport Rule, with the goal of reducing power plant emissions of sulfur dioxide (SO<sub>2</sub>) and nitrogen oxides (NO<sub>x</sub>) emissions that cross state lines. The proposed regulations would apply to power plant emissions that drift across the borders

of 31 eastern states and the District of Columbia. The original CAIR was remanded by a federal appeals court after it found "more than several fatal flaws" with the treatment of upwind and downwind states' ability to meet Clean Air Act attainment goals for reducing power plant emissions. *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008).

The 1,361-page proposed rule would mandate cuts in power plant emissions to meet state-by-state reduction targets, using a cap-and-trade system through which plants would be able to swap emission allowances. The proposal lays out several alternatives that differ as to whether power plants can swap emission allowances over state lines and whether targets will be set either as pollution limits or budgets on a state-by-state basis. EPA will accept comments on the proposed regulations for 60 days after publication in the *Federal Register* and will hold three public hearings before the end of the comment period.

### [7] **Greenhouse Gases: EPA Proposes Rule on Confidentiality of Data Obtained Under Mandatory GHG Reporting Rule**

EPA has issued a proposed rule that would determine the confidentiality status of data required to be reported under the Mandatory Greenhouse Gas (GHG) Reporting Rule that the agency issued in October 2009. *75 Fed. Reg.* 39,093 (7/7/10). Under that rule, EPA will collect data from facilities that directly emit GHGs from their processes or stationary fuel combustion sources as well as upstream suppliers of fuels and industrial GHGs. In the proposed rule, EPA grouped data elements for 40 C.F.R. Part 98 into 22 data categories each containing similar data elements. It also sets forth proposed determinations regarding confidential treatment of each data category and presents further



background and information on the agency's decision process, including detailed rationales for the proposed determinations for each data category. EPA will accept comments on the proposed rule until September 7, 2010.

#### **[8] Air: EPA Report Says Agency Is Behind Schedule in Regulating Urban Air Toxics**

According to a June 24, 2010, EPA Inspector General (IG) [report](#), the agency is as much as a decade behind schedule in meeting many of its obligations under the Clean Air Act (CAA) to reduce emissions of toxic pollutants in urban areas. The report also says that EPA is eight years overdue in reporting to Congress on its efforts to curb emissions of hazardous air pollutants in urban areas as required by section 112(k) of the CAA.

The report also noted that the agency has failed to (i) establish NESHAPs for all source categories, (ii) develop baseline emissions data to determine progress toward reducing the risk of air toxic exposure, and (iii) develop the risk-based program determined necessary by the agency in 2001 to meet the emission reduction goals of its Integrated Urban Air Toxics Strategy. The report recommends that EPA draft a report to Congress by the end of fiscal year 2010 detailing its progress toward reducing urban air toxics emissions and outlining how the agency intends to measure future progress toward meeting those requirements. The report to Congress was due in 2002.

According to news sources, EPA will complete the report to Congress by summer 2011 and issue additional toxics standards in December 2010. See *BNA Daily Environment Report*, June 25, 2010.

#### **[9] Nuclear Waste: NRC Board Denies DOE's Attempt to Withdraw Yucca Mountain Repository License Application**

According to a recent Nuclear Regulatory Commission (NRC) Atomic Safety and Licensing Board decision, the U.S. Department of Energy (DOE) cannot withdraw its application for a license to construct a nuclear waste repository at Yucca Mountain, Nevada. [In re: U.S. DOE, No. 63-001 \(NRC Atomic Safety & Licensing Board 6/29/10\)](#). The board of three administrative law judges ruled that Congress had directed DOE to file the application under the Nuclear Waste Policy Act of 1982, and the law does not provide a mechanism for the agency to withdraw its application. The board's decision now goes before the full commission, where it may be affirmed or reversed.

#### **[10] Nanomaterials: GOA Report Addresses Need to Regulate Nanomaterials**

A Government Accountability Office (GAO) [report](#) has recommended that EPA expand its efforts to research and regulate nanomaterials. According to the June 25, 2010, report, "[t]he use of nanomaterials in products is growing faster than our understanding of the risks these materials pose to human health and the environment."

Requested by Senator Barbara Boxer (D-Calif.), who chairs the Senate Committee on Environment and Public Works, the report recommends that EPA (i) proceed with previously announced plans to issue chemical regulations that would increase the information the agency has about nanomaterials and expand its oversight of them, (ii) update FIFRA regulations to require pesticide registrants to identify



nanomaterial ingredients in pesticides and clarify that “nanoscale ingredients in already registered pesticides” are reported to the agency, (iii) make greater use of other regulatory authorities to obtain information about nanomaterials, and (iv) require owners to provide other information needed to carry out the Clean Water Act. The report notes that federal agencies other than EPA have regulatory authority over nanomaterials and that regulators abroad are also developing plans to regulate nanomaterials.

### **[11] Air: California Agency Adopts Regulations to Control Emissions from Commercial Harbor Craft**

The California Air Resources Board has reportedly approved [regulations](#) requiring the owners of diesel-powered crew and supply vessels, barges and dredges that operate along the state’s coast to replace high-emitting engines with newer models beginning in 2011. The regulations, approved June 24, 2010, establish in-use emissions limits and compliance schedules for auxiliary and propulsion diesel-fueled engines on the vessels operating within 24 miles of the California coast. Under the regulations, vessel owners are required between 2011 and 2016 to replace the engines categorized by EPA as Tier 0 with newer certified engines. From 2017 through 2022, all EPA Tier 1 engines must be replaced. *See BNA Daily Environment Report*, June 28, 2010.

## **Scientific/Technical Items**

### **[12] Air: Report Claims Decline in U.S. Power Plant CO<sub>2</sub> Emissions**

A recent [report](#) by a coalition of electric utilities, investor organizations and environmental groups claims that carbon dioxide (CO<sub>2</sub>) emissions from the 100 largest power producers in the United States

declined in 2008. The report, which surveyed emissions from 2,200 power plants owned by the 100 largest power companies, annually tracks emissions from power plants of sulfur dioxide, nitrogen oxides, mercury, and CO<sub>2</sub>. While sulfur dioxide and nitrogen oxides emissions had both fallen dramatically since the Clean Air Act Amendments were enacted in 1990, CO<sub>2</sub> emissions had increased since that time through 2007, according to the report. Overall, the utilities posted a 2.1 percent decline in CO<sub>2</sub> emissions over 2007. The report claims that the 100 largest power plants account for 85.3 percent of total CO<sub>2</sub> emissions in the United States.

### **[13] Greenhouse Gases: WCI Report Claims Western Regional Climate Plan Will Save Energy Costs**

A recent Western Climate Initiative (WCI) [report](#) claims that its greenhouse gas (GHG) strategy would save states and Canadian provinces participating in their regional program about \$100 billion in reduced energy costs by 2020. According to the report, most of the savings would come through increased energy efficiency and reduced fuel consumption. Established in 2007, WCI is a coalition of seven U.S. states and four Canadian provinces; it aims “to reduce GHG pollution, spur growth in new green technologies, help build a strong clean-energy economy, and reduce dependence on oil.”

A specific coalition goal is to reduce GHG emissions 15 percent below 2005 levels by 2020 through a regional cap-and-trade program and complementary policies. The WCI includes Arizona, California, Montana, New Mexico, Oregon, Utah, and Washington, and the Canadian provinces of British Columbia, Manitoba, Ontario, and Quebec.



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

Jim Neet ([jneet@shb.com](mailto:jneet@shb.com); 816-474-6550).

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