

# Environmental & Chemical Update

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

Issue 331 • July 23, 2010

## Litigation and Regulatory Enforcement

- [1] **FIFRA: D.C. Circuit Reverses District Court Dismissal for Lack of Jurisdiction** . . . . . 1
- [2] **Toxic Tort: Ninth Circuit Rules Economic Loss Doctrine Bars Negligence Claim in Cleanup** . . . . . 1
- [3] **CERCLA: Federal Court Rules Washington State DOT Not Liable as Owner/Operator.** . . . . . 2
- [4] **TSCA: Home Builders Challenge EPA Lead Rule** . . . . . 2

## Legislation, Regulations and Guidance

- [5] **Greenhouse Gases: EPA Publishes Final Rule Requiring Four Sectors to Report GHG Emissions** . . . . . 2
- [6] **EPCRA: EPA Publishes Guidance on Reporting Options** . . . . . 3
- [7] **Water: EPA Publishes Proposed Revisions to Total Coliform Rule.** . . . . . 3
- [8] **Renewable Fuels: EPA Proposes Renewable Fuel Standard for 2011.** . . . . . 3
- [9] **Greenhouse Gases: EPA Seeks Information on Biomass Emissions.** . . . . . 4
- [10] **Greenhouse Gases: CEQ Releases Draft Guidance to Federal Agencies on GHG Emissions** . . . . . 4
- [11] **Waste: North Carolina Enacts Revisions to Electronics Recycling Law.** . . . . . 4
- [12] **Europe: EC Adopts Power Plant Emissions Cap for 2013** . . . . . 5

## Scientific/Technical Items

- [13] **Climate Change: Study Claims Puget Sound More Acidic from GHG Emissions.** . . . 5

## Conferences/Seminars

- [14] **Casto to Participate in Joint ABA/CBA Web Conference.** . . . . . 5

Shook,  
Hardy &  
Bacon<sub>L.L.P.</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] FIFRA: D.C. Circuit Reverses District Court Dismissal for Lack of Jurisdiction

The U.S. Court of Appeals for the District of Columbia Circuit has reversed a district court ruling that found no subject matter jurisdiction in a complaint related to an EPA risk mitigation decision (RMD). *Reckitt Benckiser, Inc. v. EPA*, No. 09-1314 (D.C. Cir. 7/16/10). In 2008, EPA issued an RMD for 10 rodenticide chemicals and notified plaintiff that its registered products would be considered misbranded on June 14, 2011, unless reformulated. After declining to make the changes requested, plaintiff stated its intention to challenge the RMD through the registration cancellation procedures under FIFRA sections 6 and 7.

When EPA failed to expeditiously start cancellation proceedings, plaintiff sought declaratory and injunctive relief on the ground that the agency lacks authority “to commence enforcement proceedings for misbranding against the company’s non-RMD-conforming products without first cancelling their registrations.” EPA, however, maintained that its decision to treat noncompliant products as misbranded “is neither final agency action nor ripe for review.”

In reversing the district court, the appeals court held that EPA’s argument “fails to address the finality of EPA’s interpretation of FIFRA as allowing it to bypass Section 6 cancellation proceedings in the implementation of the RMD.” According to the

court, a pesticide product remains registered until EPA or the registrant cancels it under section 6 or 7 or FIFRA. The court has remanded the matter to the district court for a decision on the merits.

### [2] Toxic Tort: Ninth Circuit Rules Economic Loss Doctrine Bars Negligence Claim in Cleanup

The U.S. Court of Appeals for the Ninth Circuit has reportedly ruled that the economic loss doctrine under Nevada law bars a landowner’s claim that an oil company negligently failed to comply with cleanup obligations in leases and other contracts. *GCM Air Group v. Chevron*, No. 09-15825 (9<sup>th</sup> Cir. 7/9/10). The complaint involved two Lake Tahoe properties where a service station once operated. According to the plaintiff, defendant was negligent in cleaning up and monitoring the properties over a 14-year period because it improperly installed monitoring wells, failed to design the most effective and comprehensive cleanup plan possible, and failed to obtain a “No Further Action” letter from the state environmental agency. Plaintiff also claimed an inability to sell the properties because of the contamination.

Affirming a decision by the district court, the appeals court in an unpublished opinion held that defendant’s cleanup obligations were being carried out under the terms of leasing and other contract agreements with plaintiff and, as a result, the economic loss doctrine barred recovery. Citing *Giles v. GMAC*, 494 F.3d 865 (9<sup>th</sup> Cir. 2007), the court noted that the economic loss doctrine may bar tort



claims amounting “to nothing more than a failure to perform a promise contained in a contract.” See *BNA Daily Environmental Report*, July 15, 2010.

### [3] CERCLA: Federal Court Rules Washington State DOT Not Liable as Owner/Operator

After ruling that the Washington Department of Transportation (WSDOT) may be liable as an arranger for storm water runoff that contained hazardous substances, *U.S. v. Washington State DOT, No. 08-5722 (W.D. Wa. 6/7/10)*, the same court has ruled that the agency is not liable as an owner/operator for cleanup costs to address off-site contamination. *U.S. v. Washington State DOT, No. 08-5722 (W.D. Wa. 7/7/10)*. A drainage system for a roadway on WSDOT property allegedly contributed to contamination of the Thea Foss and Wheeler Osgood Waterways, which were part of the Commencement Bay/ Nearshore Tidelands CERCLA site in Tacoma, Washington. The federal government alleged that WSDOT could be held liable under Sections 107(a)(1) or 107(a)(2) as a current or former owner or operator.

Rejecting the government’s argument, the court ruled that the “facility” owned and operated by WSDOT was not part of the CERCLA site and that the government did not claim to have expended cleanup money at the WSDOT property. The court noted that the federal government has reserved its right to hold the WSDOT liable as an arranger or transporter and its ruling did not affect those potential causes of action.

### [4] TSCA: Home Builders Challenge EPA Lead Rule

A homebuilders coalition has filed a petition for review challenging an EPA lead renovation, repair and painting rule issued May 6, 2010.

*National Association of Home Builders v. EPA, No. 10-1183 (D.C. Cir. Filed 7/8/10)*. The original rule required EPA certification for individuals involved in the construction and remodeling industry. It also included an opt-out provision available to contractors working in homes where no children younger than age 6 or pregnant women were present. The 2010 rule removed this opt-out provision as of July 7, 2010, but petitioners have alleged that EPA had no new scientific data to indicate that the opt-out provision should be removed. Petitioners include the National Association of Home Builders, Hearth, Patio & Barbecue Association, National Lumber and Building Material Dealers Association, and Window and Door Manufacturers Association.

## Legislation, Regulations and Guidance

### [5] Greenhouse Gases: EPA Publishes Final Rule Requiring Four Sectors to Report GHG Emissions

EPA has published a final rule that requires coal mines, industrial waste landfills, industrial waste water treatment systems, and magnesium production facilities to monitor and report greenhouse gas (GHG) emissions. *75 Fed. Reg. 39735 (7/12/10)*. Effective September 10, 2010, the rule expands the number of stationary sources required to report GHG emissions under EPA’s national mandatory GHG reporting program. Listed facilities that emit more than 25,000 metric tons of GHG emissions annually would begin monitoring GHG emissions on January 1, 2011, and file their initial reports on March 31, 2012.



## [6] EPCRA: EPA Publishes Guidance on Reporting Options

EPA has published guidance on reporting options under sections 311 and 312 of the Emergency Planning and Community Right-to-Know Act (EPCRA). [75 Fed. Reg. 39852 \(7/13/10\)](#). Addressed to state and local agencies that administer EPCRA sections 311 and 312, the guidance will affect organizations and facilities subject to EPCRA and its implementing regulations at 40 C.F.R. parts 355 and 370. EPCRA sections 311 and 312 require facilities to submit information about on-site hazardous chemicals that exceed threshold quantities to the State Emergency Response Commission (SERC), the Local Emergency Planning Committee (LEPC) and the local fire department.

The guidance discusses public comments on a June 1998 proposed rule that included options to streamline reporting requirements and reduce the burdens on SERC, LEPC and fire departments. Based on this feedback, EPA has provided the following interpretations: (i) states may implement a program allowing joint access to information in EPCRA reports by adopting a single-point submission to one agency and then distribution to the other two agencies; (ii) states may require electronic reporting with options to submit in hard copy for the facilities without electronic filing capability; (iii) states may allow the incorporation of previous submissions into section 312 reporting; (iv) states may implement a requirement that facilities comply with section 312 three months after acquiring a new chemical; (v) facilities may have up to 30 days to submit a written follow-up report after an emergency release notification unless states adopt more stringent requirements; and (vi) under section 311(e)(2), facilities would need only to count the

amount of fume or dust given off a piece of metal, brick or any other manufactured solid item that undergoes a modification process (i.e., cutting, welding, etc.), unless the state adopts more stringent requirements.

## [7] Water: EPA Publishes Proposed Revisions to Total Coliform Rule

EPA has proposed revisions to the total coliform rule, a regulation governing bacterial contamination in drinking water. [75 Fed. Reg. 40925 \(7/14/10\)](#). The proposed revisions require systems that have an indication of coliform contamination in the distribution system to assess the problem and take corrective action to reduce potential fecal contamination and water borne pathogen exposure. It would use *E. coli* bacteria as the indicator of coliform bacteria, which includes *E. coli* and many harmless bacteria. Under the Safe Drinking Water Act (SDWA), EPA must review and revise, as appropriate, each national primary drinking water regulation not less often than every six years. Comments on the proposed rule must be received by September 13, 2010.

## [8] Renewable Fuels: EPA Proposes Renewable Fuel Standard for 2011

EPA has issued a notice of proposed rulemaking (NPRM) that would set the levels of ethanol and other biofuels required in the nation's 2011 motor fuel supply at a range between 6.5 million and 25.5 million gallons. [75 Fed. Reg. 42238 \(7/20/10\)](#).

The range would place the percentage of renewable fuel that must be included in gasoline at 7.95 percent. The NPRM would also allow biofuel producers that use canola oil, grain sorghum, pulpwood or palm oil to generate delayed renewable



identification numbers after they have produced and sold renewable fuel so that EPA can determine the lifecycle greenhouse gas (GHG) emissions produced from those feedstocks.

Under the Energy Independence and Security Act (EISA), the nation's motor fuel supply must include 36 billion gallons of ethanol or other renewable fuel by 2022. EISA defines a renewable fuel as one that produces at least 20 percent less GHG emissions than gasoline. EPA will accept comments on or before August 19, 2010.

#### **[9] Greenhouse Gases: EPA Seeks Information on Biomass Emissions**

EPA has called for information on approaches to accounting for greenhouse gas (GHG) emissions from bioenergy and other biogenic sources. [\*75 Fed. Reg. 41173 \(7/15/10\)\*](#). To develop an approach for such emissions under Prevention of Significant Deterioration (PSD) and Title V programs under the Clean Air Act, the agency has solicited data submissions about these sources and their emissions, technical comments on accounting for these emissions, and comments on the underlying science that should inform possible accounting approaches. EPA will accept information and comments until September 13, 2010.

#### **[10] Greenhouse Gases: CEQ Releases Draft Guidance to Federal Agencies on GHG Emissions**

The White House Counsel on Environmental Quality (CEQ) has released draft guidance to federal agencies on greenhouse gas (GHG) emissions. [\*75 Fed. Reg. 41452 \(7/16/10\)\*](#). In accordance with an October 5, 2009, executive order signed by President Barack Obama (D), the draft guidance establishes government-wide requirements for

calculating and reporting GHG emissions resulting from federal agency operations. Such emissions include (i) direct emissions from agency activities; (ii) indirect emissions, such as those from electricity purchases; and (iii) emissions from outside sources, such as those produced by agency vendors, visitors to a national park, or oil leases on federal land. CEQ will accept public comments on the draft until August 16, 2010.

#### **[11] Waste: North Carolina Enacts Revisions to Electronics Recycling Law**

North Carolina Governor Bev Perdue (D) has signed legislation ([\*S.B. 887\*](#)) aimed at increasing recycling rates for computer equipment and televisions.

Designed to apportion the responsibility for recycling and reuse of electronic equipment among manufacturers, retailers, consumers, and state and local governments, the law revises previously existing legislation that required computer and television makers to develop collection and recycling plans and meet certain labeling and annual reporting requirements.

The new version allows manufactures to implement one of three recycling plans. Initial registration and annual fee renewals are based on the plan type, with the lowest fees reserved for the most comprehensive recycling program, which requires companies to establish physical collection sites in 50 counties, including the 10 most populous. The fees are waived for computer manufacturers that sell fewer than 1,000 items annually. The requirements are effective August 1, 2010, and a statewide ban on disposing of computer equipment and televisions in landfills or by incineration takes effect July 1, 2011.



## [12] Europe: EC Adopts Power Plant Emissions Cap for 2013

The European Commission (EC) has [adopted](#) an emissions cap for 2013 for power plants and industrial installations covered by the EU Emission Trading System (ETS), which will allow facilities to emit 1.927 billion metric tons of carbon dioxide. According to a July 9, 2010, EC memorandum, the emission limit applies a formula contained in the ETS law to the average annual allocation of allowances during the period 2008-2012. The 1.927 billion allowance cap represents a 6.3 percent reduction in the volume of carbon dioxide that ETS participants are allowed to emit compared to the verified emissions in 2007. The commission has stated that the 2013 cap is consistent with legislation requiring the European Union to reduce its greenhouse gas (GHG) emissions by 20 percent by 2020 compared with 1990 levels. The cap will be reduced by 1.74 percent each year through 2020 to achieve the required reductions.

## Scientific/Technical Items

### [13] Climate Change: Study Claims Puget Sound More Acidic from GHG Emissions

A forthcoming study in the August 2010 issue of *Estuarine, Coastal and Shelf Science* reportedly claims that the waters of Puget Sound are becoming more acidic due to greenhouse gas (GHG) emissions from human sources. Titled "The Combined Effects of Ocean Acidification, Mixing, and Respiration on pH and Carbonate Saturation in an Urbanized Estuary," the study is reportedly the first to measure the combined impact of ocean acidification and other natural human-induced processes in a large estuary like Puget Sound. The study was co-sponsored by EPA, National Oceanic and Atmospheric

Administration, University of Washington, and Washington Department of Ecology. See *BNA Daily Environment Report*, July 16, 2010; *Seattle Post-Intelligencer*, July 12, 2010.

## Conferences/Seminars

### [14] Casto to Participate in Joint ABA/CBA Web Conference

SHB Partner [Keith Casto](#) will participate in a September 14, 2010, Web conference hosted by the American and Canadian bar associations. Titled "From Kyoto to Copenhagen, and Beyond: Developments on the West Coast," the program will focus on regional solutions for reducing and regulating greenhouse gas emissions. Casto will provide insight on U.S. federal regulations and other issues. To register for the event, please click [here](#).



---

# 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** L.L.P.®

