

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] Legal Representation: California Supreme Court Authorizes Public Entities' Expanded Use of Contingent-Fee Private Attorneys.

The California Supreme Court has expanded the circumstances under which a public entity, such as a city or county, may hire a private attorney on a contingent-fee basis to litigate an action on behalf of that entity. *County of Santa Clara v. Super. Ct. (Atl. Richfield Co.)*, 2010 Cal. LEXIS 7241 (Cal. 2010).

Specifically, the court held that public entities may enter contingent-fee agreements with private attorneys where (i) the remedies sought and interests implicated do not involve fundamental interests, and (ii) a neutral government attorney retains supervisory control over the litigation and has final decision-making authority over all critical discretionary decisions.

In *County of Santa Clara*, various public entities hired private attorneys to prosecute public-nuisance actions against lead-paint manufacturers. The defendants moved to bar the private attorneys from being compensated by contingency fees, arguing that *People ex re. Clancy v. Superior Court*, 29 Cal.3d 740 (1985), prohibited such arrangements due to fear that private attorneys' financial motivations would cause them to use the government's power in a capricious manner.

Rejecting the defendants' argument, the court held that *Clancy* is properly read to forbid only those contingent-fee arrangements in which fundamental interests are affected or when public attorneys do not maintain authority over critical discretionary decisions, such as settlement. The court found that Santa Clara's prosecution of a public-nuisance action did not involve fundamental interests because it would not prevent businesses "from continuing their current business operations" or "exercising any First Amendment right or any other liberty interest," nor would it subject anyone to criminal liability.

The court held that public entities could hire private attorneys on a contingent-fee basis if principles of neutrality were protected through formal agreements that placed decision-making authority for critical discretionary decisions in the hands of supervisory attorneys at the public entity. Consequently, it remanded the case to the superior court to determine if such clauses existed in the formal agreements at issue.

A practical consequence of the court's decision will likely be a dramatic increase in the opportunities for public entities to initiate litigation in the public interest as governmental units find themselves in circumstances where they have little to lose and much to gain from allowing plaintiffs' attorneys to litigate on their behalf. Highly regulated industries in California may see an increased interest in environmental and regulatory compliance litigation, among other matters.



[2] Water: Fifth Circuit Upholds EPA's Phase III Cooling Water Intake Rule

The Fifth Circuit Court of Appeals has upheld EPA's Phase III cooling water intake rule which regulates existing small power plants and other existing facilities in industries such as pulp and paper, chemicals, petroleum and coal products, and primary metals. It also covers new offshore oil and gas facilities. *Conoco Phillips Co. v. EPA, No. 06-60662 (5th Cir. 07/23/10)*. The rule is the third in a series of rules EPA has promulgated to regulate intake structures.

The U.S. Supreme Court remanded the 2004 Phase II rule to allow EPA to determine whether to use cost-benefit analysis when issuing regulations that reflect the "best technology available for minimizing adverse environmental impact." *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1493 (2009). The Phase II rule regulated large, existing plants that are "point sources" and primarily generate electric power and either transmit or sell it to another entity for transmission and whose cooling water intake structures are designed to use 50 million gallons or more of water per day.

In this case, the Fifth Circuit granted EPA's request to remand that part of Phase III relating to existing facilities and affirmed the rule for new offshore oil and gas facilities. According to press reports, EPA intends to propose a new rule that would combine aspects of the Phase II and Phase III rules.

Industrial facilities use cooling water intake structures to draw water from natural water bodies for cooling. They may harm or kill aquatic life by entraining small organisms through the plant's heat exchanges and trapping larger fish and wildlife on intake screens. Section 316(b) of the Clean Water Act requires that the location, design, construction, and

capacity of cooling water intake structures "reflect the best technology available for minimizing adverse environmental impact." See *BNA Daily Environment Report*, July 27, 2010.

[3] FIFRA: D.C. Circuit Vacates Part of EPA Carbofuran Rule

The D.C. Circuit Court of Appeals has vacated a portion of an EPA final rule that revoked all food residue tolerances for carbofuran, a pesticide used to control insect infestations in a number of crops. *Nat'l Corn Growers Ass'n v. EPA, No. 09-1284 (D.C. Cir 7/23/10)*. The three-judge panel unanimously upheld the rule as it applied to tolerances for domestically grown food, but held that EPA acted arbitrarily and capriciously in revoking the tolerances for imported food.

As for the import tolerances, the court found that EPA had acknowledged that exposure to carbofuran from imported food was safe, yet determined that the petitioners had failed to make a timely request to the agency that the import tolerances be left in effect. The court ruled that EPA's factual description was "untenable" because petitioners had made such a request on two occasions, making EPA's decision to revoke those tolerances "arbitrary and capricious." According to news sources, the appellate court opinion reinstates import residue tolerances for carbofuran on rice, bananas, coffee, and sugar cane. See *BNA Daily Environment Report*, July 26, 2010.

[4] Air/Fuel Economy: Injunction Holds in NYC Attempt to Force Taxicabs to Switch to Hybrids

The Second Circuit Court of Appeals has upheld a district court ruling that New York City does not have authority under the Energy Policy and Conservation Act (EPCA) or the Clean Air Act (CAA)



to force taxicab fleet owners to switch to hybrid vehicles. *Metro. Taxicab Bd. of Trade v. City of New York*, No. 09-2901 (2d Cir. 7/27/10). The city appealed a district court order imposing a preliminary injunction on the enforcement of the city's amended lease-rate rules for taxicabs that essentially mandated fuel-economy and emissions levels achievable by hybrid vehicles only. The district court held that the lease rates related to fuel-economy standards and new-vehicle emissions and were thus preempted under EPCA and the CAA. *Metro Taxicab Bd. v. City of New York*, 633 F. Supp. 2d 83 (S.D.N.Y. 2009).

The appellate court agreed, ruling that the lease-rate rules were preempted by EPCA, which preempts state laws that are "related to fuel economy standards," 49 U.S.C. § 32919(a), and the CAA, 42 U.S.C. § 7543(a), which forbids states from setting emission standards for new motor vehicles. The court therefore concluded that the preliminary injunction was appropriate.

[5] NEPA: D.C. Circuit Allows Natural Gas Drilling Project in Wyoming to Proceed

The D.C. Circuit Court of Appeals has upheld the Bureau of Land Management's (BLM's) approval of natural gas drilling on a 270,000-acre tract in Wyoming. *Theodore Roosevelt Conservation P'ship v. DOI*, No. 09-5162 (D.C. Cir. 7/23/10). A conservation group sued the Department of Interior (DOI) and BLM in 2007, alleging that they violated NEPA, the Administrative Procedure Act and the Federal Land Policy and Management Act by granting oil and gas drilling permits for the Atlantic Rim area, described as "a previously undeveloped region prized by sportsmen for its abundant game populations and hunting opportunities."

Five additional plaintiffs filed a separate lawsuit in 2007, making similar allegations. Wyoming and three companies that received BLM permits intervened in the case in support of the federal government. In April 2009, the district court granted BLM's motion for summary judgment while denying plaintiff's motion for summary judgment, determining that BLM did not violate NEPA or the other statutes; plaintiffs appealed.

The appellate court agreed with the district court, finding that BLM's environmental impact statement for the project outlined "relatively detailed mitigation measures" and "... were accompanied by discussions of environmental studies supporting BLM's decisions about protection required" for endangered and other species. According to the court, "the record clearly reflects that BLM analyzed and considered various alternatives and put in place measures" that were far more stringent than those included in the original proposal.

[6] NEPA: Federal Court Denies Preliminary Injunction over Tax Credits for Use of Clean Coal Technology

A federal court in the District of Columbia has refused to suspend the allocation of a \$1 billion tax credit for projects using "clean coal" technology, thus denying the preliminary injunctive relief sought by a group of nonprofit organizations devoted to the environmental preservation of the Appalachian Mountains region. *Appalachian Voices v. Chu*, No. 08-0380 (D.D.C. 7/26/10).

Plaintiffs argued that the Departments of Treasury and Energy violated NEPA and the Endangered Species Act by failing to consider the environmental consequences of a program that provides tax credits to companies that use "clean coal" technology. They also alleged that the agencies violated the law by failing to consult with the U.S. Fish and Wildlife



Service and the U.S. National Marine Fisheries Service before allocating the tax credits to an energy company planning a “clean coal” project in North Carolina and eight other projects. The Internal Revenue Service allocated \$1 billion in tax credits for the nine projects in 2006.

Denying plaintiff’s motion, the court noted that the plant at issue will not begin operating until summer 2012. According to the court, “[b]ecause the plaintiff’s asserted injury is not imminent, and because the court will be able to render a decision on the merits of the plaintiff’s claims before the anticipated injury becomes imminent, the plaintiffs are not entitled to injunctive relief.” The court did not consider the other legal requirements for a preliminary injunction in light of its decision on the injury prong of the test.

[7] Env'tl. Crime: Louisiana Vessel Owner Pleads Guilty to Ocean Dumping

A Louisiana vessel owner has reportedly pleaded guilty to knowingly discharging waste oil from one of its vessels in violation of the Act to Prevent Pollution from Ships (Act) and has agreed to pay a \$1.75 million criminal fine and remit a payment of \$350,000 to the National Marine Sanctuary Foundation. Offshore Vessels LLC also agreed to serve a three-year period of probation.

Court documents show that the vessel, R/V Lawrence M. Gould, was under contract with the National Science Foundation to serve as an ice-breaking research vessel to and from Antarctica. The company admitted that on September 8, 2008, the ship’s crew members knowingly discharged oily wastewater from the bilge tank of the ship overboard, in violation of the Act. Federal regulations require that oily wastewater be discharged only after it has been processed through an oily water

separator to ensure that the concentration of oil in the wastewater is below the legal limit. *See DOJ Press Release*, July 30, 2010

[8] FIFRA: Environmental Groups Sue EPA over Failure to Respond to Petition to Ban Pesticide Chlorpyrifos

The Natural Resources Defense Council and a pesticides action network have sued EPA seeking to force the agency to respond to a 2007 petition to ban the crop pesticide chlorpyrifos. *NRDC v. EPA, No. N/A (S.D.N.Y. 7/22/10)*. The complaint alleges that the agency violated the Administrative Procedure Act, FIFRA and the Federal Food, Drug, and Cosmetic Act (FFDCA) by failing to respond to the petition as required by FIFRA and FFDCA. It alleges that chlorpyrifos is dangerous, can cause harmful health effects in humans and should be banned from all uses. The complaint seeks declaratory relief and an order requiring EPA to make a final decision on the petition within 60 days.

[9] Radiation Exposure: Lawsuit Challenges San Francisco Cell Phone Radiation Ordinance

A wireless communication industry group has filed a challenge to a San Francisco ordinance requiring disclosure of cellular phone radiation emission levels. *CTIA v. San Francisco, No. 10-3224 (N.D. Cal. filed 7/23/10)*. The complaint alleges that the ordinance, adopted by San Francisco’s Board of Supervisors in June 2010, unlawfully interferes with the exclusive authority of the Federal Communications Commission to regulate radio frequency (RF) emissions from mobile devices like cell phones. The complaint argues that the ordinance is preempted under the U.S. Constitution’s Supremacy Clause because it (i) interferes with the federal government’s authority to set standards for RF emissions; (ii) disrupts Congress’s ability to set uniform



nationwide standards for “safe” cell phones; and (iii) is expressly preempted by section 332(c)(3)(A) of the Communications Act, which prohibits state-imposed limits on “entry” into the wireless market through methods such as labeling requirements. The complaint seeks declaratory and injunctive relief as well as costs.

Legislation, Regulations and Guidance

[10] Greenhouse Gases: EPA Denies Petitions Challenging Endangerment Finding

EPA has **denied** 10 petitions asking that the agency reconsider its December 7, 2009, finding that greenhouse gas (GHG) emissions from vehicles endanger public health and the environment. The petitions were filed by Texas, Virginia, the U.S. Chamber of Commerce, Competitive Enterprise Institute, Coalition for Responsible Regulation, Ohio Coal Association, Peabody Energy Co., Pacific Legal Foundation, Southeastern Legal Foundation, and one individual.

Petitioners argued that (i) the underlying science and the process of developing the finding were flawed; (ii) scientists manipulated data to make climate change appear more dramatic than it actually was; and (iii) there were numerous errors in the *Intergovernmental Panel's Fourth Synthesis Assessment Report*, which EPA used to reach its finding. According to EPA, “the petitioners have provided inadequate and generally unscientific arguments and evidence that the underlying science supporting the Findings is flawed, misinterpreted, or inappropriately applied by EPA,” and “petitioners’ arguments fail to meet the criteria for reconsideration under the Clean Air Act.” The agency’s July 29, 2010, denial has been sent to the *Federal Register* for publication.

[11] Envtl. Justice: EPA Releases Interim Guidance on Environmental Justice

EPA has released **interim guidance** to assist agency staff in incorporating environmental justice into the agency’s rulemaking process. According to EPA, the guidance “seeks to advance environmental justice for low-income, minority and indigenous communities and tribal governments who have been historically underrepresented in the regulatory decision-making process.” It also “outlines steps that every EPA program office can take to incorporate the needs of overburdened neighborhoods into the agency’s decision-making, scientific analysis, and rule development.”

EPA defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” EPA is seeking public feedback on how to best implement and improve the guidance. See *EPA Press Release*, July 26, 2010.

[12] Energy: California Air Board to Require Energy Audits of Large Industrial Facilities

The California Air Resources Board (ARB), a department of Cal/EPA, has adopted a **regulation** that will require about 60 large industrial facilities in the state to analyze energy consumption and identify potential energy efficiency measures. The regulation, adopted July 22, 2010, applies to refineries, oil and gas production and transmission facilities, power plants, cement and mineral operations, hydrogen plants, and any other facility that emits 500,000 metric tons or more of carbon dioxide equivalent in a year.



Each facility has until the end of 2011 to submit a one-time audit of its 2009 fuel and energy consumption and a detailed assessment of steps to curb energy use. The audit report must also include each facility's 2009 calendar year greenhouse gas (GHG) emissions, criteria pollutants and toxic air contaminants.

Scientific/Technical Issues

[13] Climate Change: NOAA Report Analyzes Global Data

The National Oceanic and Atmospheric Administration (NOAA) has issued a [report](#) that gathered data from weather stations in 48 countries and analyzed more than 30 "climate indicators." Titled "State of the Climate in 2009," the report, issued July 28, 2010, studied climate indicators such as air temperature, temperature over land and over water, humidity, snow cover, glacier mass, and sea ice area.

Among the report's findings are the following:

- (i) "[g]lobal average surface and lower-troposphere temperatures during the last three decades have been progressively warmer than all earlier decades";
- (ii) the 2000-2009 decade was the warmest decade on record;
- (iii) "[a]tmospheric greenhouse gas concentrations continue to rise";
- (iv) "the 2009 Antarctic ozone hole was comparable in size to recent previous ozone holes, while still much larger than those observed before 1990";
- (v) "[g]lobal integrals of upper-ocean heat content for the last several years have reached values consistently higher than for all prior times in the record";
- (vi) the 2009

"summer minimum ice extent in the Arctic was the third lowest recorded since 1979"; and (vii) "the Antarctic Peninsula continues to warm at a rate five times larger than the global mean warming."

The 222-page report contains seven major chapters, thousands of data points and analyses by 300 authors from 160 different research groups. The stated purpose of the report was to document climate and weather events in 2009 from around the world and put them in historical perspective. It does not theorize on potential causes or sources of climate change.

[14] Air: EPA Releases Report on Health Benefits of Stratospheric Ozone Protection

EPA has released a peer-reviewed ICF Consulting [report](#) which predicts that Americans born between 1985 and 2100 will avoid more than 22 million additional cataract cases due to the "Montreal Protocol on Substances That Deplete the Ozone Layer" (Montreal Protocol). The environmental treaty, signed by 196 countries in 1987 and amended in 1990, 1992 and 1997, stipulates phase-out schedules for the production and consumption of compounds that deplete ozone in the atmosphere.

According to EPA, the ozone layer is predicted to recover to pre-1980 levels after 2065. In addition to lowering the incidence of cataract cases, the phase-out of ozone-depleting substances is projected by the report to significantly cut the number of skin cancer cases or deaths. *See EPA Press Release, July 30, 2010.*



[15] Chemical Exposure: CDC Report Claims 212 Chemicals Found in Americans

The U.S. Centers for Disease Control and Prevention (CDC) has recently released a [report](#) titled “Fourth National Report on Human Exposure to Environmental Chemicals.” The researchers measured 212 chemicals or their metabolites in the blood, serum and urine of 2,500 people in 2003-2004. CDC selected the 212 chemicals because prior studies had shown they were prevalent in Americans, and some data had suggested that they could cause potentially serious health effects. The study subjects participated in the National Health and Nutrition Examination Survey conducted by CDC’s National Center for Health Statistics.

Chemicals found in trace amounts included acrylamide, methyl mercury, arsenic perchlorate, and disinfection by-products. Chemicals found in more than 90 percent of those tested included poly brominated diphenyl ethers (PBDE), bisphenol A (BPA) and perfluoro-octanic acid (PFOA). The report was careful to point out that the presence of a chemical in the human body does not indicate a potential threat and that the capacity of a chemical to cause harm depends on a variety of factors such as dosage, concentration and a person’s sensitivity.



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please contact Dave Erickson (derickson@shb.com; 816-474-6550) or

Jim Neet (jneet@shb.com; 816-474-6550).

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