

Environmental & Chemical Update

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

Issue 335 • August 20, 2010

Litigation and Regulatory Enforcement

- [1] **Air:** Citizen Suit Against South Dakota Power Plant Filed Too Late. 1
- [2] **Endangered Species Act:** Ninth Circuit Upholds FWS Critical Habitat Designation. 1
- [3] **CERCLA:** Federal Court Rules EPA Cost Recovery Lawsuit Barred Under Compulsory Counterclaim Rule 2
- [4] **Endangered Species Act:** Federal Court Reinstates Protection for Gray Wolf 3
- [5] **Toxic Tort/State CERCLA:** Vermont Court Rules Migration of Contaminants Alone Is Insufficient to Prove Public Nuisance 3
- [6] **Water:** Honolulu Settles Wastewater Collection System Violations. 4
- [7] **Prop. 65:** California Sues Bounce House Manufacturers over Lead Content 4

Legislation, Regulations and Guidance

- [8] **Greenhouse Gases:** EPA Proposes Finding PSD Programs in 13 States Inadequate to Enforce Emissions Requirements 4
- [9] **Air:** EPA Signs NESHAPs for Portland Cement Plants 5
- [10] **TSCA:** EPA Proposes Amendments to IUR Rule. 5
- [11] **GHG:** EPA Proposes Amendments to GHG Reporting Rule 5
- [12] **FOIA:** CEQ Revises Regulations 6
- [13] **Nanotechnology:** Massachusetts OTA to Issue Guidance on Safe Use of Engineered Nanoparticles 6

Scientific/Technical Items

- [14] **Carbon Capture:** Federal Task Force Report Supports Use of Technology to Reduce GHG Emissions 7

Shook,
Hardy &
Bacon_{LLP}

www.shb.com

Environmental & Chemical Update

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

Litigation and Regulatory Enforcement

[1] Air: Citizen Suit Against South Dakota Power Plant Filed Too Late

The Eighth Circuit Court of Appeals has dismissed a Clean Air Act (CAA) citizen suit filed in June 2008 seeking civil penalties against a South Dakota power plant for allegedly failing to obtain necessary permits and for violating emissions standards. [*Sierra Club v. Otter Tail Power Co.*, No. 09-2862 \(8th Cir. 8/12/10\)](#).

The lawsuit alleged that defendant failed to obtain permits for a series of modifications at the Big Stone Generating Station near the South Dakota/Minnesota border and failed to comply with best available control technology (BACT). According to district court records, the plant's first operating permit was issued in January 1975, and the plant began operations in May, burning lignite coal as its primary fuel. In August, the plant began burning subbituminous coal as its primary fuel.

Plaintiffs alleged that the conversion resulted in a significant net emissions increase in nitrogen oxide and particulate matter and that defendants did not obtain a permit under the CAA's prevention of significant deterioration (PSD) provisions. Plaintiffs also challenged changes made in 1998 to the plant's boiler and amendments the state made in August 2001 to the plant's permit. In April 2009, the district court dismissed the lawsuit, finding that it was not filed within the five-year statute of limitations, and plaintiffs appealed.

Affirming the district court, the appellate court held that plaintiffs' failure to object to the 2001 permit modification or seek judicial review of that modification divested the district court of jurisdiction over plaintiffs' claims under section 7607(b)(2) of the CAA. The court also ruled that because plaintiffs' civil penalty claims are barred by the statute of limitations, the equitable remedies it seeks are likewise barred.

[2] Endangered Species Act: Ninth Circuit Upholds FWS Critical Habitat Designation

The Ninth Circuit Court of Appeals has upheld the U.S. Fish and Wildlife Service's (FWS) designation of 850,000 acres of critical habitat for 15 federally protected vernal pool species under the Endangered Species Act (ESA), rejecting a challenge by building industry groups. [*Home Builders Ass'n of N. Cal. v. FWS*, No. 07-16732 \(9th Cir. 8/9/10\)](#). Vernal pools are a "unique kind of wetland ecosystem" that exists temporarily following fall and winter rains. The pools are home to a diverse group of species including freshwater crustaceans, amphibians, insects, and plants.

Plaintiffs challenged the designation on the following technical grounds: (i) FWS erred in designating as critical habitat those areas in which the physical or biological features essential to the conservation of a species do not occur simultaneously; (ii) FWS failed to determine when the protected species will be conserved; (iii) FWS erred in discussing occupied and unoccupied habitat



designations together; (iv) FWS erred in designating as critical habitat areas that contained no “primary constituent elements” (PCEs) by including buildings, paved areas and boat ramps; and (v) FWS failed to properly account for the economic impact of its critical habitat designation. The district court rejected plaintiffs’ arguments, and plaintiffs appealed, again raising the five technical challenges.

Rejecting plaintiffs’ arguments, the appellate court ruled that (i) the ESA does not require that two elements essential for the conservation of a species need be present in the same area at the same time; (ii) the ESA does not require that FWS determine exactly when conservation will be complete; (iii) under the ESA, an area constitutes “critical habitat” if it meets the requirements for occupied habitat *or* for unoccupied habitat, 16 U.S.C. § 1532(5)(A); (iv) the statute does not require that FWS separate buildings, paved areas and boat ramps from the critical habitat designation; and (v) the FWS did not fail to properly account for the economic impact of its designation.

[3] CERCLA: Federal Court Rules EPA Cost Recovery Lawsuit Barred Under Compulsory Counterclaim Rule

A federal judge in California has ruled that CERCLA cost recovery claims involving perchlorate and trichloroethylene contamination of the Rialto-Colton Groundwater Basin are subject to Federal Rule of Civil Procedure 13(a), which “bars a party who failed to assert a compulsory counterclaim in one action from instituting a second action in which that counterclaim is the basis of the complaint. *City of Colton v. Am. Promotional Events, Inc.*, No. 09-1864 (C.D. Cal. 8/10/10). The current lawsuit is a consolidated action that comprises six individual cases.

Litigation over this contamination began in 2004 when the City of Rialto sued the U.S. Department of Defense (DOD) and several other parties over contamination at the former 2,800-acre Rialto Ammunition Storage Point. DOD asserted counterclaims for contribution under CERCLA section 113(f) and declaratory relief for contribution under section 113(g) to the 2004 *Rialto* lawsuit. In 2005, the City of Colton sued many of the same parties, but not DOD. Like the *Rialto* litigation, the 2005 *Colton* lawsuit sought response costs and declaratory relief under CERCLA and injunctive relief under RCRA. DOD was added as a cross-defendant, but it did not counter- or cross-claim.

The court later issued an order in *Colton* that deemed all defendants, except cross-defendants, to have asserted cross-claims for section 107(a) response costs, contribution and declaratory relief against each other defendant, including DOD. DOD was deemed to deny those claims and to assert contribution cross-claims against the cross-claimants. In 2006, the court entered summary judgment against the City of Colton because it had incurred no response costs when the suit was filed and dismissed the counterclaims and cross-claims without prejudice.

In 2006, the City of Colton filed a follow-up lawsuit that was consolidated with the 2004 *Rialto* case, again seeking response costs. A defendant filed a third-party complaint against the United States for recovery of response costs under sections 107 and 113 of CERCLA. In 2007, another party filed a similar third-party complaint against DOD. The United States did not include in its answers any counterclaims for recovery of response costs. In an order consolidating the cases in 2007, the court deemed that all defendants’ answers, except DOD’s, included cross-claims for section 107(a) recovery of response costs.



After the parties failed to reach a settlement and began filing the more recent individual actions consolidated before the court, the United States filed a complaint seeking to recover response costs under section 107 “for the first time in approximately six years of litigation.” Defendants filed a motion to dismiss under Federal Rule of Civil Procedure 13(a), arguing that the U.S. claim was barred by inaction on the government’s part in the earlier cases. The United States argued that CERCLA provided an exemption from Rule 13(a)’s compulsory counterclaim requirement by giving the United States “significant flexibility in determining when to bring § 107 claims.”

The court agreed with the defendants, ruling that the government’s section 107 claim was compulsory in the prior actions and that nothing in CERCLA trumps the Federal Rules of Civil Procedure. According to press reports, the government is currently reviewing the decision and weighing its options. *See LAW360*, August 11, 2010.

[4] Endangered Species Act: Federal Court Reinstates Protection for Gray Wolf

A federal judge in Montana has reinstated Endangered Species Act (ESA) protection for gray wolves in the northern Rocky Mountains. [*Defenders of Wildlife v. Salazar*, No. 09-77 \(D. Mont. 8/5/10\)](#). Filed by several conservation groups, the lawsuit challenged a U.S. Fish & Wildlife Services (FWS) decision to “designate and partially remove protections for the northern Rocky Mountain gray wolf distinct population segment (‘DPS’) under the ESA,” effectively keeping the protections in effect in Wyoming only.

Plaintiffs argued that the delisting decision violated the ESA because (i) it partially protects a listed species; (ii) it is based on outdated and

unscientific recovery targets; (iii) there is a lack of genetic connectivity to support the decision; (iv) inadequate regulatory mechanisms protect wolves without the ESA’s protection; (v) FWS failed to consider loss of historic range when determining whether the wolves are “recovered”; (vi) FWS disregarded the status of gray wolves throughout the lower-48 states in conducting its analysis; (vii) the decision delists a previously unlisted population of wolves; (viii) the FWS defined the DPS contrary to the ESA and FWS’s own policy; and (ix) the decision impermissibly designates wolves in Wyoming as a “non-essential experimental” population.

The court accepted many of plaintiffs’ arguments but based its decision to reinstate ESA protections on the statute’s plain language, which “does not allow the agency to divide a DPS into a smaller taxonomy.” According to the court, “[t]he northern Rocky Mountain DPS must be listed, or delisted, as a distinct population, and protected accordingly.”

[5] Toxic Tort/State CERCLA: Vermont Court Rules Migration of Contaminants Alone Is Insufficient to Prove Public Nuisance

The Vermont Supreme Court has ruled that the offsite migration of contaminants is insufficient, in itself, to establish a public nuisance. [*Vermont v. Howe Cleaners, Inc.*, No. 09-110 \(Vt. 8/6/10\)](#). Affirming a lower court’s decision, the high court agreed that the state failed to demonstrate that perchloroethylene released on the subject property for some two decades and detected in a large groundwater plume had reached the level of a public nuisance.

The state sued several parties, including the current owner of the property, which had formerly operated as a dry-cleaning establishment, seeking to recover costs it incurred cleaning up the perchloroethylene



contamination. Under a state statute that provides a defense to a “diligent owner,” i.e., one who can establish that after making diligent and appropriate investigation he had no knowledge or reason to know of a release on the property, the lower court also ruled that the landowner was not liable because he had relied on a recent environmental assessment of the property.

While the state supreme court affirmed this aspect of the ruling as well, it held that reliance on a valid environmental assessment may not always satisfy the diligent-owner defense—it depends on the facts of the case. Here, the supreme court found that the assessment was professionally and adequately performed.

[6] **Water: Honolulu Settles Wastewater Collection System Violations**

The City and County of Honolulu (CCH) has agreed to settle wastewater collection and treatment system violations with the United States, Hawaii and three environmental groups. *U.S. v. City & County of Honolulu*, No. 94-765 (D. Haw. lodged 8/10/10). The proposed settlement includes a comprehensive compliance schedule for CCH to upgrade its wastewater collection system by 2020 and a requirement that its wastewater treatment plant be upgraded to secondary treatment by 2024. A second plant at Sand Island will be upgraded by 2035.

Press reports indicate that CCH expects to spend at least \$3.4 billion in capital costs through fiscal year 2020, largely on the collection system and treatment plant upgrades. The settlement also requires CCH to pay \$1.6 million in civil fines. The proposed consent decree was lodged in federal court August 10, 2010, and is subject to a 30-day public comment period and court approval. *See BNA Daily Environment Report*, August 12, 2010.

[7] **Prop. 65: California Sues Bounce House Manufacturers over Lead Content**

California Attorney General Jerry Brown (D) has sued nine manufacturers of vinyl bounce houses under the state’s Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65), alleging failure to provide a lead and lead compounds exposure warning. *California v. Bay Area Jump*, No. N/A (Cal. Super. Ct., Alameda County 8/11/10).

The complaint alleges that inflatable children’s bounce houses exceed federal lead limits of 90 parts per million (ppm) for painted surfaces and 300 ppm for all other parts. The lawsuit was reportedly prompted by tests showing lead levels in defendants’ products between 5,000 and 29,000 ppm. The tests were conducted by the Center for Environmental Health, which purportedly sampled dozens of bounce houses in the state. Seeking declaratory and injunctive relief and civil penalties, the complaint also alleges violations of federal Consumer Product Safety Improvement Act of 2008 and the state’s Unfair Competition Act. *See The New York Times*, August 11, 2010.

Legislation, Regulations and Guidance

[8] **Greenhouse Gases: EPA Proposes Finding PSD Programs in 13 States Inadequate to Enforce Emissions Requirements**

EPA issued a proposed rule August 12, 2010, that would require 13 states to amend their regulations to authorize them to enforce greenhouse gas (GHG) emissions requirements. The proposed rule would require each state, through a state implementation plan (SIP) call, to revise its SIP as necessary to correct inadequacies in New Source Review Prevention of Significant Deterioration (PSD)



programs. The “SIP call” would establish an expedited review schedule for SIP revisions so that new regulations could be in effect by January 2, 2011, when GHG emissions from new and modified sources will become subject to emission control and permitting requirements.

The states subject to the proposed rule are Alaska, Arizona, Arkansas, California, Connecticut, Florida, Idaho, Kansas, Kentucky, Nebraska, Nevada, Oregon, and Texas. According to EPA, the states will have 30 days to respond to EPA following publication of the proposed SIP call in the *Federal Register*. EPA will then determine whether the states have SIPs that are deficient to enforce PSD emissions control and permitting requirements for GHGs and whether SIP revisions are required.

EPA has said in its GHG Tailoring Rule *75 Fed. Reg.* 31,514 (6/3/00), that it plans to issue a federal implementation plan (FIP) to ensure GHG emissions sources will be permitted consistent with the rule. EPA will accept comments on the proposed rule for 30 days after it is published in the *Federal Register*.

[9] Air: EPA Signs NESHAPs for Portland Cement Plants

EPA has signed a **final rule** setting revised national emissions standards for hazardous air pollutants (NESHAPs) and new source performance standards (NSPS) for the Portland cement manufacturing industry. EPA revised the emissions standards as the result of a settlement with the Sierra Club. *Portland Cement Ass’n v. EPA*, No. 07-1046 (D.C. Cir. 1/16/09). The rule sets emissions limits for mercury, total hydrocarbons and particulate matter for both major source cement kilns and smaller area source kilns. It also establishes emissions limits for hydrochloric acid for kilns that are major sources of the pollutant. The final rule will go into effect 60 days after it is published in the *Federal Register*.

[10] TSCA: EPA Proposes Amendments to IUR Rule

EPA has announced that it plans to submit a **proposed rule** amending the reporting requirements of the TSCA Inventory Update Reporting (IUR) rule. The IUR rule requires manufacturers and importers of certain chemical substances listed on the TSCA Chemical Substances Inventory to report information about manufacturing (including import), processing and use of those chemical substances. According to EPA, the proposed amendments will provide the agency with improved information to allow it to better identify and, where appropriate, take steps to manage the risks associated with chemical substances.

The proposed amendments would require electronic reporting of IUR information and modify IUR reporting requirements, including certain circumstances that trigger reporting, the specific data to be reported, the reporting standard for processing and use information, and Confidential Business Information (CBI) reporting procedures. EPA will accept comments on the proposed amendments for 60 days after publication in the *Federal Register*. See *EPA Press Release*, August 11, 2010.

[11] GHG: EPA Proposes Amendments to GHG Reporting Rule

EPA has issued a **proposed rule** amending the greenhouse gas (GHG) reporting rule that took effect December 29, 2009. *75 Fed. Reg.* 48,743 (8/11/10). The proposed amendments would (i) provide additional information and clarity on existing requirements, (ii) allow greater flexibility or simplified calculation methods for certain sources at a facility, (iii) amend data reporting requirements to provide additional clarity on when different types



of GHG emissions need to be calculated and reported, (iv) clarify terms and definitions in certain equations, and (v) make technical corrections. A challenge to the current rule by the American Petroleum Institute and other industry trade groups is pending before the D.C. Circuit Court of Appeals. EPA will accept comments on the proposed amendments until September 27, 2010.

[12] FOIA: CEQ Revises Regulations

The White House Council on Environmental Quality (CEQ) has issued a [final rule](#) revising its Freedom of Information Act (FOIA) regulations. *75 Fed. Reg.* 48,585 (8/11/10). CEQ was established within the Executive Office of the President by Congress as part NEPA. CEQ's current FOIA regulations are published at 40 C.F.R. Part 1515. They were originally published in 1977, *42 Fed. Reg.* 65,158 (12/30/77), and have not been revised since.

Amendments to FOIA, including the Open Government Act of 2007 and 1996 Electronic FOIA Amendments, require changes in CEQ FOIA practices to promote openness and transparency, provide for public access to information in an electronic format and ensure a prompt and effective response to requests for information. The revised regulations include a requirement for an online FOIA Requester Service Center and Reading Room, electronic FOIA requests, a new fee structure, and expedited processing for requests with compelling need. Many of the revisions allow the CEQ regulations to conform to those of other federal agencies.

[13] Nanotechnology: Massachusetts OTA to Issue Guidance on Safe Use of Engineered Nanoparticles

The Massachusetts Office of Technical Assistance & Technology (OTA) has prepared [guidance](#) that will be posted on its Website to encourage the safe use of engineered nanoparticles.

OTA is a department of the state's Executive Office of Energy and Environmental Affairs, which helps businesses and other organizations improve their environmental performance as well as conserve energy, water and other resources. According to OTA, the guidance was prepared for "the express purpose of assisting in the development of this technology, as failure to prevent exposures or releases will not just risk harm to health or the environment—it will also impede the common interest in realizing the benefits that nanotechnology can provide."

The guidance recommends that facilities handling engineered nanoparticles develop a risk-reduction program with the goal of preventing exposure and releases that may cause harm. Topics include (i) "good management practices"; (ii) "preventive materials selection and process design"; (iii) "containment"; (iv) "proper personal protective equipment"; (v) "preventing facility releases"; (vi) "cleanup, storage, transfer"; (vii) "impacts of use and post-use dispositions"; (viii) "labeling"; (ix) "proactive compliance"; and (x) "transparency." It also contains references to numerous studies on the potential risks associated with engineered nanoparticles.



Scientific/Technical Items

[14] Carbon Capture: Federal Task Force Report Supports Use of Technology to Reduce GHG Emissions

The Interagency Task Force on Carbon Capture and Storage (CCS) created by President Barack Obama (D) has issued a [report](#) that includes recommendations on how to overcome barriers to the widespread cost-effective deployment of CCS within 10 years. CCS represents technologies for capturing, compressing, transporting, and permanently storing power plant and industrial source emissions of carbon dioxide. The report concludes that CCS can play a crucial role in domestic greenhouse gas (GHG) emissions reductions while preserving the option of using coal and other abundant domestic fossil energy resources. The report includes input from 14 federal agencies and departments, stakeholders and CCS experts.

The report's main findings and recommendations include the following: (i) "there are no insurmountable technical, legal, institutional, or other barriers to the deployment of CCS"; (ii) cost-effective deployment of CCS cannot occur unless a carbon price is in place; (iii) a standing federal agency roundtable and expert committee should be created to coordinate federal actions with respect to CCS; and (iv) four viable approaches to limiting long-term liability include relying on existing frameworks, limiting claims, setting up a trust fund, and transferring liability to the federal government (with contingencies). The report also recommends a federal coordinated effort to track regulatory implementation for early commercial CCS demonstration projects and the development of a comprehensive outreach strategy that would include the general public and decision makers.



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; 816-474-6550) or

Jim Neet (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®

