

Environmental & Chemical Update

AIR • CLIMATE CHANGE • NANOTECHNOLOGY • RENEWABLE FUELS
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Litigation and Regulatory Enforcement

[1] Administrative Procedure Act/RCRA: Tenth Circuit Rules EPA May Revise Tentative Interpretation of Regulation Without Rulemaking

The Tenth Circuit Court of Appeals has determined that EPA can revise a tentative interpretation governing the handling of magnesium waste without conducting a formal rulemaking. [*U.S. v. Magnesium Corp. of Am.*, No. 08-4185 \(10th Cir. \(8/17/10\)](#). The case concerned the regulation of magnesium process wastes and waste byproducts at defendant's mine and plant in Rowley, Utah.

EPA had initiated an enforcement action against defendant in 2001, alleging noncompliance with waste management regulations under subtitle C of RCRA. Defendant argued that facility wastes were exempted from subtitle C under an agency interpretation contained in a report to Congress and that, to revise its interpretation, EPA was required to conduct a formal rulemaking under the Administrative Procedure Act. The federal district court in Utah agreed and granted defendant's motion for partial summary judgment; the government appealed.

Reversing the district court, the appeals court held that the prior EPA interpretation was repeatedly described as "tentative" in the report, submitted in response to congressional action that required the

agency to determine under the Beville Amendment whether it could regulate ore and mineral processing wastes under subtitle C or subtitle D. In the report, EPA noted that its tentative findings were subject to comments from interested parties. According to the court, an EPA decision to revise a tentative interpretation of a regulatory provision does not require formal notice-and-comment rulemaking. The court remanded the case to the district court for further proceedings.

[2] Stormwater: Federal Appeals Court Rules Stormwater Runoff from Logging Roads Is Point-Source Discharge

According to the Ninth Circuit Court of Appeals, discharges from systems of ditches, culverts, and channels that receive stormwater runoff from two logging roads in Oregon's Tillamook State Forest are point-source discharges and thus require CWA discharge permits. [*Nw. Envtl. Defense Ctr. v. Brown*, No. 07-35266 \(9th Cir. 8/17/10\)](#). The appeals court decision reverses a district court ruling and contradicts an EPA policy that stormwater which washes from logging roads into collection systems is nonpoint-source pollution and is not subject to NPDES permits. According to press reports, unless overturned on appeal, the Ninth Circuit decision may require EPA to establish an NPDES permitting process for such discharges. *See BNA Daily Environment Report*, August 18, 2010.



[3] National Forest Management Act/NEPA: Ban on Old Growth Logging Reversed, Forest Service Found in Compliance with Law

A split Ninth Circuit Court of Appeals panel has reversed a district court injunction that halted a U.S. Forest Service (FS) plan for logging in an old growth forest area in Oregon. *League of Wilderness Defenders-Blue Mountains Bio-Diversity Project v. Allen*, No. 09-35094 (9th Cir. 8/13/10). Plaintiffs alleged that the Fire Buttes Project violated the National Forest Management Act (NFMA) and NEPA. They argued that the project called for logging within an area that did not comply with NFMA and that the FS environmental impact statement (EIS) did not adequately consider cumulative effects and did not respond to opposing views on logging and the prevention of catastrophic fires.

The district court ruled that the FS record of decision (ROD) on the project “was not strong enough to meet the NWFP [Northwest Forest Plan] requirement that commercial thinning projects focused on older stands must clearly result in greater assurance of long-term maintenance of habitat.” As to the NEPA claim, the district court found that the cumulative impact discussion in the EIS was deficient for lack of detailed, quantitative information about past projects. The district court granted plaintiffs’ motion for summary judgment, enjoined the FS from any additional logging and remanded the matter to the FS for preparation of a new ROD that complies with NFMA and NEPA. FS appealed.

According to the appeals court, FS determined that logging in the old growth area was (i) permissible under the NFMA after several wildfires had burned several thousand acres in the project area, and (ii) necessary to protect the area from future fires.

The court found that the FS decision process reflected the balancing of risks required under NFMA. As to NEPA, the appeals court held that FS’s analysis was consistent with Council on Environmental Quality guidelines and “adequately considered cumulative effects of past, present and foreseeable future projects in compliance with NEPA.” The dissenting judge agreed with the district court that the project did not comport with NFMA and would have upheld the injunction.

[4] Air/Enforcement: US Enforcement Action Amended, Alleged Violation of General Duty Clause Added

The United States has reportedly amended its complaint in an enforcement action against the owners and operators of a Danvers, Massachusetts, inks and paint products plant that exploded in 2006, adding a charge of violation of the Clean Air Act’s (CAA’s) general duty clause. *U.S. v. C.A.I., Inc.*, No. 10-10390 (D. Mass. filed 7/19/10). The original complaint filed in March 2010 sought \$2.7 million in costs that EPA incurred under CERCLA cleaning up the site after the explosion, as well as future costs that EPA might incur.

The CAA’s general duty clause requires companies to take measures to prevent and minimize the effects of accidental releases of extremely hazardous substances. The amended complaint alleges that a number of facility conditions contributed to the general duty clause violation, including (i) failure to identify the hazards of operating an ink-mixing process without proper ventilation, (ii) lack of appropriate vapor detectors and alarms to detect buildups of dangerous vapors while workers were not present, (iii) storage of considerable quantities of flammable substances, and (iv) flammable substances in a tank that was left mixing overnight.



The explosion destroyed a 12,000-square-foot building and damaged much of the surrounding commercial and residential property. *See BNA Daily Environmental Report*, August 18, 2010.

[5] NEPA: Environmental Group Sues to Block Nuclear Facility

An environmental group has sued the U.S. Department of Energy (DOE) seeking to block construction of a planned \$4 billion nuclear research facility in Los Alamos, New Mexico. [*The Los Alamos Study Group v. DOE*, No. N/A \(D.N.M. filed 8/16/10\)](#). The complaint alleges that DOE's National Nuclear Security Administration violated NEPA by expanding the size of the proposed Chemistry and Metallurgy Research Replacement Nuclear Facility without updating the project's environmental impact statement (EIS).

The plaintiff argues that since the original EIS was submitted in 2003, the facility's projected cost has risen roughly by a factor of 10 from its original estimate of between \$350-500 million and the construction time has increased from three years to more than a decade. The complaint seeks a declaratory judgment and an injunction requiring DOE to prepare a new EIS that addresses the project in its current form and an order prohibiting any investment in the project until the EIS is submitted.

Legislation, Regulations and Guidance

[6] Air: EPA Issues Final NESHAP for Reciprocating Internal Combustion Engines

EPA has published a final national emissions [standard](#) for hazardous air pollutants (NESHAP) for gas-fired stationary spark ignition reciprocating

internal combustion engines built before June 12, 2006. *75 Fed. Reg.* 51,569 (8/20/10). The rule will require operators of these engines to control emissions of hazardous air pollutants (HAPs), such as formaldehyde, acetaldehyde, acrolein, methanol, and benzene. It sets emissions standards for spark ignition engines that are both major sources and area sources of HAPs.

Major sources are those that emit 10 tons per year or more of one HAP or 25 tons or more per year of any combination of HAPs, and they are subject to maximum available control technology (MACT) standards. Area sources are those that emit less than the major-source threshold and are subject to the less stringent generally available control technology (GACT) standard. EPA agreed to issue the standards as part of a settlement. *Sierra Club v. Johnson*, No. 01-1537 (D.D.C. 3/31/06). The final rule will amend subpart 2222 of 40 C.F.R. part 63 and will take effect October 19, 2010.

[7] Air: EPA Proposes Revisions to Transportation Conformity Rules

EPA has published a [proposed rule](#) that would establish procedures so the agency will not be required to change transportation conformity rules every time national ambient air quality standards (NAAQS) are revised. *75 Fed. Reg.*, 49,435 (8/13/10). The proposal would revise the rules governing the required emissions analysis used to demonstrate conformity at 40 C.F.R. § 93.109. It would restructure existing requirements for regional conformity tests and project-level conformity tests. It also would change the time frame used to analyze the projected air quality impact of a proposed project so that transportation planners could use data from a year within five years of the conformity determination.



The proposal would also clarify that certain nonattainment areas that have monitoring data showing they are now in attainment with a particular air quality standard can choose to complete a regional conformity analysis using the most recent year of data demonstrating compliance, rather than an interim test listed in 40 C.F.R. § 93.119. EPA will accept comments on the proposed rule through September 13, 2010.

[8] TSCA: EPA Issues Action Plan for Chemicals Used in Consumer and Industrial Applications

EPA has issued an [action plan](#) to address potential health risks of nonylphenol (NP) and nonylphenol ethoxylates (NPEs). NP is primarily used in the manufacture of NPE, which is used in industrial applications and consumer products such as detergents, cleaners, agricultural and indoor pesticides, and food packaging. According to EPA, NP is persistent in the aquatic environment, moderately bioaccumulative and extremely toxic to aquatic organisms. NPEs, though less toxic than NP, are also highly toxic to aquatic organisms and, in the environment, degrade into NP.

EPA's plan announced the following actions with respect to NP and NPE: (i) support and encourage the voluntary phase-out of NPEs in industrial laundry detergent; (ii) encourage the manufacturers of all NPE-containing direct-release products (e.g., firefighting gels and foams, dust-control agents and deicers) to move to NPE-free formulations; (iii) develop an alternatives analysis and encourage the elimination of NPE in other industries that discharge NPEs to water; (iv) initiate rulemaking to simultaneously propose a significant new use rule (SNUR) under TSCA section 5(a) and a test rule for NP and NPE under TSCA section 4 which would

designate use of NPEs in detergents as a significant new use and require submissions to EPA of a significant new use notice (SNUN) at least 90 days before beginning that use; (v) consider initiating a rulemaking under TSCA section 5(b)(4) to add NP and NPEs to the list of chemicals that may present an unreasonable risk of injury to health or the environment; and (vi) initiate rulemaking to add NP and NPEs to the Toxic Release Inventory (TRI), which would require facilities to report releases of these chemicals to the environment. EPA also intends to evaluate the disproportionate impact on children of these chemicals.

[9] Waste: GAO Report Recommends EPA Regulation of E-Waste

A recent Government Accountability Office (GAO) [report](#) recommends that EPA push for ratification of the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal and work with other federal agencies to finalize a legislative proposal to halt export of electronic waste to developing countries. According to the report, EPA currently has regulations prohibiting the export of cathode-ray tubes (CRT) but not of other electronics, such as computers and cell phones. In the absence of federal laws regarding reclamation and recycling, several states have passed their own laws aiming to keep electronic waste out of landfills by requiring manufacturers to take back their products, but states do not have authority to regulate exports. The report examines laws in California, Maine, Minnesota, Texas, and Washington, comparing their financing mechanisms and the devices covered.



[10] Canada/Greenhouse Gases: DOE Notice Requires Industrial Facilities to Report Specified GHGs

The Canadian Department of the Environment (DOE or Environment Canada) has published a [notice](#) that requires industrial facilities to report their 2010 specified greenhouse gas (GHG) emissions. The data, directed for submission under section 46(i) of the Canadian Environmental Protection Act, are intended to help DOE conduct research, establish an emissions inventory, formulate objectives and codes of practice, issue guidelines, and report on the state of the environment.

The notice, which specifies exactly what must be reported, applies to emissions of carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, HFC-23, HFC-32, HFC-41, HFC-43-10mee, HFC-125, HFC-134, HFC-134a, HFC-143, HFC-143a, HFC-152a, HFC-227ea, HFC-236fa, HFC-245ca, perfluoromethane, perfluoroethane, perfluoropropane, perfluorobutane, perfluorocyclobutane, perfluoropentane, and perfluorohexane. The reporting deadline is June 1, 2011, and the notice applies to all persons who operate a facility that emits at least 50,000 tons of carbon dioxide equivalents of these GHGs. The Canadian government has pledged under the Copenhagen Accord that by 2020 it will reduce its overall GHG emissions 17 percent from 2005 levels. See *Canada Gazette*, August 14, 2010.

[11] Water: New York Law Bans Phosphorous in Detergent and Fertilizer

New York Governor David Paterson (D) has signed a bill ([A08914B](#)) that makes it illegal for stores operating in the state to stock fresh supplies of household dishwasher detergents that contain phosphorous. According to the legislation, retail establishments have 60 days to sell their inventories,

and sales for commercial use are to end July 1, 2013. A similar ban will apply to lawn fertilizers starting in 2012. The law limits permissible levels of phosphorous to 0.5 percent in household dishwasher detergent and to 0.67 percent in lawn fertilizer.

The new statute was modeled on Minnesota law. Maine, Florida and Wisconsin also have fertilizer controls, and 16 states have laws limiting phosphorous levels in dishwasher detergent. According to the New York state environmental agency, dishwasher detergent accounts for 9 to 34 percent of phosphorus in municipal wastewater, and fertilizer accounts for 50 percent of phosphorous in stormwater runoff. See *Recordline.com*, August 15, 2010.

[12] Waste: EPA Announces Public Hearings on Proposed Coal Ash Regulations

EPA has [announced](#) that it will convene seven public hearings on the agency's proposal to regulate the disposal and management of coal ash from coal-fired power plants. Each hearing will begin at 10 a.m. and last until at least 9 p.m. The hearings will be held August 30 in Arlington, Virginia; September 2 in Denver, Colorado; September 8 in Dallas, Texas; September 14 in Charlotte, North Carolina; September 16 in Chicago, Illinois; September 21 in Pittsburgh, Pennsylvania; and September 28 in Louisville, Kentucky. See *EPA Press Release*, August 19, 2010.

Scientific/Technical Items

[13] Nanotechnology: EPA Seeks Comments on Nanoscale Silver Case Study

EPA has announced that it seeks public comments on a nanoscale silver [case study](#) and an approach to analyzing its risks. Titled "Nanomaterial Case Study: Nanoscale Silver in Disinfectant Spray," the study poses questions about such issues as



(i) the physicochemical properties of nanoscale silver; (ii) analytic techniques to study it; (iii) ways to calculate worldwide and domestic nanoscale silver production; (iv) whether disinfectant sprays containing nanoscale silver could enter the environment; (v) whether sewage sludge and wastewater treatment technologies would remove nanoscale silver; (vi) whether particular species or human populations have greater exposure to nanoscale silver; and (vii) the extent to which particle properties, such as size, shape, chemical composition, and surface treatments, determine biological responses of nanoscale silver. EPA will accept comments through September 27, 2010.

[14] Chemical Exposure: Report Claims BPA and Mercury Exposure in Majority of Population

A recent Health Canada [report](#) has claimed that more than 90 percent of Canadians have measurable levels of bisphenol A (BPA) in their urine and 88 percent have measurable levels of mercury in their blood. The report contains results of a national biomonitoring survey, which is the first phase of a more detailed survey by the Canadian Health Ministry, and includes analysis of blood and urine samples collected from 5,600 Canadians between March 2007 and February 2009. The survey found BPA concentrations higher in children ages 6 to 11 than for adults ages 40 to 79, with the highest concentrations measured in teens ages 12 to 19. Canadians ages 6 to 79 had a geometric mean concentration of urinary BPA of 1.16 micrograms per liter.

The geometric mean concentration for mercury in blood samples across all age groups was 0.69 micrograms per liter, with lower levels reported for children than adults. The survey also measured national blood lead levels. It found that less than 1 percent of those tested had concentrations at or above the intervention level of 10 micrograms per deciliter. The highest concentrations were reported in those ages 60 to 79 and the lowest in children ages 6 to 19. The report said lead concentrations had fallen dramatically over the past 30 years.

[15] Nanotechnology: ISO Technical Report Addresses Classification of Nanomaterials

The International Organization for Standardization (ISO) has published a technical [report](#) that sets forth a methodology to classify and categorize nanomaterials.

The report, ISO/TR 11360, describes a method of classifying nanomaterials according to their size, chemical nature, properties, and characteristics. According to the August 17, 2010, report, the approach will be used in forthcoming documents that will provide internationally agreed-to definitions of nanomaterials. The classification system, called the “nanotree,” places nanotechnology concepts into a logical context by depicting their relationships as a branched-out tree with the most basic elements defined as the main trunk.



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