

## ENVIRONMENTAL & CHEMICAL UPDATE

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### LITIGATION AND REGULATORY ENFORCEMENT

#### Ninth Circuit Rules EPA Violated APA in Approving California's San Joaquin Valley SIP

The Ninth Circuit Court of Appeals has overturned the U.S. Environmental Protection Agency's (EPA's) approval of a 2004 state implementation plan (SIP) for California's San Joaquin Valley, ruling that the agency's approval relied on outdated emissions data and violated the Administrative Procedure Act (APA). [\*Sierra Club v. EPA, No. 10-71457 \(9th Cir. 1/20/12\)\*](#). EPA approved the plan on March 8, 2010, but failed to consider the state's 2007 motor vehicle emissions inventory even though it contained the most current and accurate available information. According to the court, EPA "did not bother to address substantively the apparent disparities between the 2007 emissions data and the 2004 inventory data," and its failure to do so was arbitrary and capricious under the APA. The court remanded the matter to EPA to re-evaluate the SIP in light of the more current data.

#### Ninth Circuit Upholds EPA Rule Disapproving Montana SIP Governing SO<sub>2</sub> Emissions

The Ninth Circuit Court of Appeals has upheld a U.S. Environmental Protection Agency (EPA) rule disapproving a Montana state implementation plan (SIP) governing sulfur dioxide (SO<sub>2</sub>) emissions and a subsequent federal implementation plan (FIP) to control SO<sub>2</sub> emissions in the state. [\*Montana Sulphur & Chem. Co. v. EPA, Nos. 02-71657, 08-72642 \(9th Cir. 1/19/12\)\*](#). The court denied two consolidated petitions for review filed by a Montana company that recovers sulfur gas piped in from an adjacent petroleum refinery near Billings.

Petitioner argued that EPA improperly disapproved the state SIP by ignoring actual air monitoring data. According to the company, "EPA's reliance on dispersion modeling 'provides an unrealistic picture of reality because it assumes that every single facility is always emitting as much pollution as it can possibly emit during every hour of the modeling run' and under 'worst case' weather conditions." Petitioner made the same argument with respect to the FIP and added that EPA exceeded a two-year time limit to promulgate the FIP.

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SHB offers expert, efficient and innovative representation to clients targeted by environmental and toxic tort lawyers and regulators. We know that the successful resolution of these matters requires a comprehensive strategy developed in partnership with our clients.

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The court disagreed, ruling that the Clean Air Act “expressly recognizes modeling as an appropriate regulatory tool” and that EPA “reasonably interpreted the Clean Air Act to require continuous limits on emissions.” Finally, the court held that EPA did not act arbitrarily or capriciously with respect to the SIP or the FIP.

### Federal Court Dismisses Malpractice Lawsuit Alleging Law Firm’s Failure to Complete Environmental Due Diligence

A Louisiana federal court has dismissed a lawsuit against a law firm alleging malpractice, negligence and securities fraud for failing to ensure the completion of an environmental assessment on a proposed 324-acre residential development located on a World War II-era bombing range. [\*SCB Diversified Mun. Portfolio v. Crews & Assocs., No. 09-7251 \(E.D. La. 1/4/12\)\*](#).

Coves of the Highland Community Development District retained the law firm, McGlinchey Stafford PLLC, in 2006 to assist in securing nearly \$7.7 million in bonds to support the eastern Louisiana development.

Filed in November 2009 after Coves defaulted on the bonds, the lawsuit alleged that the law firm failed to conduct environmental due diligence, failed “to obtain informed consent for the limited scope of representation it outlined in its engagement letter” and charged “fees in excess of what was estimated in the engagement letter and allowed under the Attorney General’s Bond Counsel Fee Schedule.” The project came to a standstill in April 2009 after the U.S. Army Corps of Engineers found the potential for unexploded ordinance on the land designated for development from its prior use.

Ruling for defendant, the court reviewed the firm’s engagement letter and found that the scope of the representation contemplated between plaintiff and the firm clearly did not include environmental due diligence. According to the court, under the engagement letter, the firm’s role was assisting plaintiff in its formation under Louisiana law and in issuing bonds. Because environmental due diligence was not within that scope, the firm did not commit legal malpractice.

### Federal Court Allows Minneapolis-St. Paul Light-Rail Project but Orders Detailed EIS

A federal court in Minnesota has ruled that a \$957-million light-rail project linking downtown areas of Minneapolis and St. Paul may proceed but also ordered governmental agencies to conduct a more detailed environmental impact statement (EIS). *St. Paul Branch, NAACP v. Dep’t of Transp.*, No. 10-147 (D. Minn. 1/23/12). Plaintiffs sued three government agencies that sponsored the 11-mile line, known as the Central Corridor Light Rail Transit Project, arguing that the final EIS for the project was deficient and violated the National Environmental Policy Act and Administrative Procedure Act.

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In January 2011, the court ruled that the final EIS was inadequate insofar as it failed to analyze lost business revenues as an adverse impact of the project's construction and ordered defendants to supplement the EIS consistent with its order. Instead, defendants prepared a supplemental environmental analysis (EA) that resulted in a finding of no significant impact. In October 2011, plaintiffs filed a motion to enforce the January 2011 order, alleging that defendants failed to comply with it.

The court agreed, ordering defendants to follow its January 2011 order and prepare an EIS. According to the court, an EA is not the equivalent of an EIS—the former requires sponsors to develop only a “brief discussion” of the proposed project, while the latter requires a more detailed discussion of the project's impacts as well as an all-important mitigation component. The court denied plaintiffs' motion for an injunction blocking the project holding that, “despite plaintiffs' concerns with the sufficiency of the [final EIS], there are significant public benefits to the project.”

### Federal Court Rules Environmental Group Lacks Standing to Challenge Tahoe Development Plan

A federal court in California has ruled that an environmental group lacks standing to challenge a new development plan for South Lake Tahoe. [\*League to Save Lake Tahoe v. City of S. Lake Tahoe, No. 11-1648 \(E.D. Cal. 1/16/12\)\*](#). Plaintiff, a local environmental group, alleged that an update to the city's general plan allowed taller buildings and more high-density development, violated environmental standards for the area and would harm the group's members due to increased pollution and traffic. The city argued that, although the revised plan contained provisions that would violate the existing environmental standards, which date to 1987, the new plan contains a paragraph barring implementation of any of those provisions until a new regional plan is in place and both the city and the Tahoe Regional Planning Authority determine that the city's plan complies with a new regional plan. The city argued that it had not implemented, nor could it implement, any of the plan's provisions that plaintiff claimed violated the environmental standards.

The court agreed with the city, ruling that plaintiff could not show any actual or imminent injury and failed to prove that vacating the plan update would actually prevent further development in South Lake Tahoe. The court also held that the plaintiff's claims were not yet ripe because no development projects had ever been proposed. According to the court, plaintiffs will have an opportunity to challenge specific development projects when they undergo environmental review. The court dismissed the claims without prejudice.

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### Florida Shipping Company Sentenced for Oil Pollution and Ballast Water Environmental Crimes

A federal court has reportedly sentenced a Miami, Florida-based shipping company to five years of probation and a \$1-million fine after the company pleaded guilty to oil pollution and ballast water environmental crimes. *United States v. Americas Marine Mgmt. Servs., Inc.*, No. 11-20348 (S.D. Fla. sentencing 1/20/12). The court also ordered defendant to complete an environmental compliance plan in connection with eight ships in the company's fleet.

According to court records, the company operated the 260-foot cargo ship Titan Express from a terminal on the Miami River. In August 2010, the U.S. Coast Guard inspected the vessel and found excessive oil and diesel fuel leaking from the ship's main engine and also found the ship's water separator content meter filled with oil and giving inconsistent readings. The ship's oil record book contained fictitious entries and "did not provide any accounting for how the company or crew handled the ship's oily waste." In addition, the ship left a foreign country and arrived in Miami in July 2010 without making a required report to the National Ballast Information Clearinghouse. See *DOJ Press Release*, January 20, 2012.

### Advocacy Groups Sue NMFS over Navy's Use of Sonar in Pacific Ocean

Earthjustice, the Natural Resources Defense Council, other environmental groups, and Native American tribes have reportedly sued the U.S. National Marine Fisheries Service (NMFS) claiming the agency was wrong to approve the U.S. Navy's plan for expanded training in the Pacific Ocean, including the expanded use of sonar. *Intertribal Sinkyone Wilderness Council v. Nat'l Marine Fisheries Serv.*, No. n/a (N.D. Cal. filed Jan. 25, 2012). The lawsuit alleges that the expanded use of sonar can harass and kill whales and other marine life.

Plaintiffs challenge NMFS's 2010 approval of the Navy's five-year plan for operations in the Northwest Training Range Complex, about 126,000 nautical square miles that stretch from waters off Mendocino County, California, to the Canadian border. They argue that sonar use may kill whales outright, but, if not, could disrupt certain critical habitats, such as breeding or feeding grounds. The complaint asks that the Navy's permit be invalidated and that the court order NMFS to study the long-term effects of sonar on marine mammals as required by the National Environmental Policy Act, Endangered Species Act and other laws. See *The Seattle Times*, January 26, 2012.

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### Groups Sue to Halt Puerto Rican Waste-to-Energy Project

Local environmental groups, supported by a chapter of the Sierra Club, have sued Puerto Rican authorities seeking to block a \$50-million proposed waste-to-energy facility in Barceloneta, arguing that an environmental impact statement (EIS) is inadequate. *In Re: Administracion de Asuntos Energeticos*, No. 11-02 (P.R. Ct. App. filed 1/18/12). Plaintiffs allege that the government met only the minimum standard for public input on the project and that the EIS did not consider the health effects of incineration byproducts. They also argue that the facility as designed would not produce enough energy to justify the cost of operating it. According to a news report, the Barceloneta project is being permitted using a streamlined process instituted by the government after declaring an “energy emergency” in 2010. Plaintiffs seek to invalidate the EIS before the Energy Affairs Administration of Puerto Rico can issue a final project permit. See *BNA World Climate Change Report*, January 20, 2012.

## LEGISLATION, REGULATIONS AND GUIDANCE

### USGS Report to Congress Claims Progress in Acid Rain Program

A U.S. Geological Survey (USGS) [Report to Congress](#) released January 19, 2012, claims that since the establishment of the Acid Rain Program, under Title IV of the Clean Air Act Amendments, substantial reductions have occurred in sulfur dioxide (SO<sub>2</sub>) and nitrogen oxide (NO<sub>x</sub>) emissions from power plants that use fossil fuels such as coal, gas and oil. Douglas A. Burns, et al., “National Acid Precipitation Assessment Program Report to Congress 2011: An Integrated Assessment.” As of 2009, emissions of SO<sub>2</sub> and NO<sub>x</sub> have declined by about two-thirds relative to levels in the 1990s, with EPA data showing further declines in 2010, according to the report.

Despite documented reductions in SO<sub>2</sub> and NO<sub>x</sub> emissions, the report claims that full recovery from the effects of acid rain is unlikely for many sensitive forests and aquatic ecosystems. The report recommends continued implementation of the Acid Rain Program to promote additional and more widespread recovery to areas exposed to excessive levels of acid rain.

### GRI Issues Sustainability Reporting Guidance for Events Organizers

The Global Reporting Initiative (GRI) has released [sustainability reporting guidance](#) for the events sector covering traditional sustainability topics such as energy use and greenhouse gas (GHG) emissions, as well as site selection, materials sourcing, and the economic and environmental impacts such events have on a community. The events sector includes meetings, conferences, exhibitions, sports events, and cultural activities.

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Released January 24, 2012, the guidance covers the entire life cycle of an event, from the bidding and planning stages to the event and post-event period. The guidance was developed by GRI and a team of industry experts, including representatives from the London Organizing Committee of the 2012 Olympic Games.

Netherlands-based GRI is a non-profit organization that promotes sustainability through a global network of contributors and is a Collaborating Centre of the United Nations Environment Programme. According to its [Website](#), GRI oversees a network of 30,000 professionals representing corporations, governments, non-governmental organizations, universities, and research institutes. It has issued sustainability guidance on numerous subjects and intends to release reporting guidelines for the oil, gas and media sectors in upcoming months.

### Report Predicts Damage to Water Supplies from a Possible U.S. Nuclear Accident

A recent [report](#) by the Environment America Research & Policy Center and the U.S. Public Interest Research Group Education Fund predicts that drinking water for 49 million U.S. residents could be at risk of radioactive contamination from a potential leak or accident at a local nuclear power plant. The report comes in the aftermath of the March 11, 2011, nuclear meltdown and radiation release at the six-reactor Fukushima Daiichi nuclear facility in Japan caused by a 9.0-magnitude earthquake and tsunami.

Noting that drinking water for 49 million people is within 50 miles of an active nuclear power plant—the distance the U.S. Nuclear Regulatory Commission uses to measure risk to food and water supplies—the report recommends a thorough safety review of U.S. nuclear power plants. The review would require plant operators to put in place recommended changes immediately and would call for, among other actions, that nuclear plant operators conduct regular groundwater sampling to catch tritium leaks.

## SCIENTIFIC/TECHNICAL ITEMS

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### NRC Report Urges Review of Nanomaterial Risks

A National Research Council (NRC) [report](#) concludes that the federal government has not sufficiently linked its investment in environmental, health and safety research on engineered nanomaterials with strategies to prevent and manage their potential risks. Titled “A Research Strategy for Environmental, Health, and Safety Aspects of Engineered Nanomaterials,” the January 25, 2012, report recommends that agencies and others studying nanomaterials focus on specific research topics for the next five years.

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Noting that the federal government's budget for nanomaterial research is severely lacking, the report recommends that researchers (i) "identify and quantify the nanomaterials being released and the populations and environments being exposed," (ii) "understand processes that affect both potential hazards and exposure," (iii) "examine nanomaterial interactions in complex systems ranging from subcellular to ecosystems," and (iv) "support an adaptive research and knowledge infrastructure for accelerating progress and providing rapid feedback to advance research."

The report also recommends that the federal government's National Nanotechnology Initiative be changed from a coordinating body to one that has sufficient management and budgetary authority to direct development and implementation of an environmental, health and safety strategy across government agencies and others conducting nanomaterial research. The report can be purchased on the NRC Website. *See NRC Press Release, January 25, 2012.*

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Shook, Hardy & Bacon has successfully handled environmental and toxic tort cases in state and federal courts throughout the country, as well as before administrative tribunals in more than a dozen states. SHB's Environmental Law Practice offers cutting-edge litigation and compliance expertise relevant to all aspects of federal environmental, transportation, and health and safety statutes.

SHB's Environmental Law Practice also emphasizes the importance of taking preventative measures to avoid expensive litigation. Our attorneys focus on compliance counseling under statutes such as CERCLA, RCRA, the Clean Water Act, the Clean Air Act, the Oil Pollution Act, the Hazardous Materials Transportation Act, and the Act to Prevent Pollution from Ships.

Conversant in the many scientific issues affecting this area of law, SHB environmental attorneys have represented clients in multiple industries, including chemical, petroleum, utility, agricultural, food, airline, automotive, mining, cement, shipping, pharmaceutical, ethanol, and paper.

