

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] NEPA: Ninth Circuit Affirms Restrictions on Navy's Use of High-Powered Sonar

The Ninth Circuit Court of Appeals has upheld restrictions imposed by a district court on the U.S. Navy's use of high-powered sonar during anti-submarine training exercises in waters off the California coast. [NRDC v. Winter, No. 08-550541 \(9th Cir. 2/29/08\)](#). In July 2007, NRDC and other groups sued the Navy, alleging that it failed to take steps required to protect marine life as required by NEPA, the Coastal Zone Management Act and the Endangered Species Act when training with high-intensity sonar. Plaintiffs initially won a preliminary injunction blocking the training exercises for two years, but the appeals court remanded the case to the trial court to impose narrower restrictions on the Navy's use of sonar.

The district court issued a second preliminary injunction in July 2007 outlining a series of measures the Navy must take to prevent harm to marine life, including (i) shutting down the sonar and reducing sonar levels when whales and other mammals are within certain distances; (ii) imposing a 12-nautical-mile, no-sonar zone along the California coastline; and (iii) requiring increased monitoring. On January 16, 2008, the Bush administration granted the Navy a waiver exempting the exercises from Coastal Zone Management Act requirements, and, separately, the White House

Council on Environmental Quality granted the Navy's request for "alternative arrangements for compliance with NEPA."

The Navy asked the Ninth Circuit to overturn the injunction in light of these documents, but the appeals court ordered the trial court to weigh the impact of the exemption on the injunction. The trial court on February 4, 2008, rejected the Navy's request, and, on February 29, the Ninth Circuit affirmed. According to a news source, the three-member appellate panel did, however, stay for 30 days the requirements that the Navy shut down the sonar whenever marine mammals are spotted within 2,200 yards or ratchet down sonar levels when certain conditions are detected that increase the sonar's sound. The court could extend the stay if the Navy petitions the U.S. Supreme Court for review of the decision. *See BNA Daily Environment Report*, March 4, 2008.

[2] Air/EPCRA: Chemical Distribution Facility to Settle Blast-Related Violations

The owner of a chemical-distribution facility in Kansas City, Missouri, has agreed to pay a \$225,000 civil penalty to EPA and reimburse the agency \$150,713 for response costs associated with an explosion in February 2007 that destroyed the facility. [In the Matter of Chemcentral Midwest Corp., No. 07-0045 \(EPA Admin. filed 2/19/08\)](#). The EPA complaint charged the company with violating the Clean Air Act and the Emergency Planning and Community Right-to-Know Act.



The explosion occurred when workers were transferring polybutene, a final additive used in sealants, coatings, lubricants, and adhesives.

The company was charged with failing to identify chemical hazards, maintain a safe facility and submit a chemical-inventory form for polybutene. In addition to the EPA settlement, the company agreed to pay OSHA \$95,000 to settle allegations of two willful and four serious violations related to the explosion. See *BNA Daily Environment Report*, March 3, 2008.

[3] NEPA: Groups Seek to Stop DOE Tax Credits for Clean Coal Power Plants

Environmental groups have reportedly sued the Department of Energy seeking to halt \$1 billion in tax credits for nine new power plants that employ "clean coal" technology. *Appalachian Voices v. Bodman*, No. 08-0380 (D.D.C. filed 3/03/08). The complaint alleges that DOE failed to conduct an environmental assessment of the plants as required by NEPA. It argues that coal-fired power plants are major sources of air pollution, including greenhouse gases, and they rely on coal that can be mined in mountaintop removal operations that may destroy forests and streams. Plaintiffs seek a preliminary injunction suspending the tax credits. DOE announced the tax credits in 2006 as an incentive to promote technologies proven in the laboratory but needing additional support to become commercially viable. NEPA requires federal agencies to conduct an environmental assessment of any federal action that may have significant environmental impacts. See *BNA Daily Environment Report*, March 6, 2008.

[4] ESA/Climate Change: Groups Sue DOI over Failure to Decide Whether to List Polar Bears as Threatened Species

Several environmental groups have reportedly sued the U.S. Department of Interior (DOI) alleging that the agency missed its legal deadline for issuing a final decision on whether to list the polar bear as threatened under the Endangered Species Act. *Ctr. for Biological Diversity v. Kempthorne*, No. 08-1339 (N.D. Cal. filed 3/10/08). The complaint seeks a court order compelling DOI to issue its final decision immediately. In January 2008, the U.S. Fish and Wildlife Service announced that DOI would miss a one-year statutory deadline because the agency was awaiting additional analysis of studies published by the U.S. Geological Survey during the listing process. According to the complaint, the Endangered Species Act does not allow such a delay. Plaintiffs argue that the main threat to polar bears is the decrease in sea ice attributable to global warming. See *BNA Daily Environment Report*, March 11, 2008.

[5] Water: Groups Challenge Los Angeles County over Stormwater and Urban Runoff

Environmental groups have reportedly sued Los Angeles County and the city of Malibu alleging that defendants ignored federal Clean Water Act standards designed to prevent tainted stormwater and urban runoff from flowing into coastal waters. *NRDC v. County of Los Angeles*, No. 08-01467 (C.D. Cal. filed 3/03/08). Specifically, the complaint alleges violations of a National Pollution Discharge Elimination System (NPDES) permit that Cal/EPA issued to the county and city. The day after the complaint was filed, the Los Angeles Regional Water Quality Control Board reportedly issued notices of violation to the county and 20 cities, including



Malibu, alleging violations of NPDES permits. According to plaintiffs, polluted runoff is the largest source of ocean pollution, with discharges containing bacteria, viruses, trash, and heavy metals. See *BNA Daily Environment Report*, March 5, 2008.

[6] FIFRA/Nanotechnology: California Company to Settle FIFRA Enforcement Action over Nano-Coatings

An Irvine, California, technology company will reportedly pay \$208,000 to settle an EPA FIFRA enforcement action for selling computer keyboards and mouse accessories, which, the company claimed, came with nano-coatings to control germs and pathogens. In its enforcement action, EPA alleged that the antimicrobial coatings on the computer peripherals were unregistered pesticides and were in violation of FIFRA. At issue were the company's wireless laser mouse with nanoshield coating, laser travel mouse with nano-coating technology, and wireless RF keyboard and mouse combination. See *EPA Press Release*, March 5, 2008.

Legislation, Regulations and Guidance

[7] Agriculture: EPA Proposes Revisions to CAFO Discharge Rule

EPA has issued a supplemental [notice](#) of proposed rulemaking (SNPRM) that would revise a 2006 proposed rule by allowing concentrated animal feeding operations (CAFOs) to certify that they do not discharge pollutants and therefore do not need Clean Water Act permits. *73 Fed. Reg.* 12,391 (3/07/08). The SNPRM would also provide three different approaches for nutrient management plans (NMPs) that could be used by permitting authorities and CAFOs to determine appropriate application rates of manure, litter and wastewater.

EPA is seeking comments on issues presented in the SNPRM and is not reopening for comment any other provisions of the June 2006 proposal. Comments must be submitted by April 7, 2008.

Under the 2006 proposed rule, CAFOs would not need permits if they do not discharge or propose to discharge pollutants to U.S. waters. *71 Fed. Reg.* 37,744 (6/30/06). The SNPRM would establish two eligibility criteria for CAFOs to certify that they do not discharge or propose to discharge pollutants. The two certification criteria are (i) an objective evaluation of the production area's design, construction, operation, and maintenance, showing that the production area would not discharge; and (ii) development, implementation and maintenance of an NMP that addresses operation and maintenance practices for the production area and land application areas under the CAFO's control.

Under the SNPRM, certification would be valid for five years and would terminate earlier if the CAFO ceased to abide by its terms. The purpose of the certification would be to allow a CAFO to document that it does not discharge or propose to discharge.

[8] Air/Green House Gases: Washington State Legislature Passes GHG Emissions Reporting Act

The Washington Legislature passed legislation requested by Governor Christine Gregoire (D) that sets requirements for greenhouse gas (GHG) reporting and addresses other aspects of climate change. ([Engrossed Second Substitute H.B. 2815](#)). Beginning in 2010, the statute would require reporting of GHG emissions by vehicle fleets emitting at least 2,500 metric tons per year or a source or combination of sources producing 10,000 metric tons per year. The state's Department of Ecology will develop GHG emission reporting rules.



In addition, the legislature has reportedly asked the governor to sign Substitute Senate Bill 6309, which would require GHG emission disclosure for new passenger cars, light duty trucks and medium duty passenger vehicles starting with the 2010 model year. See *Seattle Times*, March 7, 2008.

Scientific/Technical Items

[9] Nanotechnology: EC Committee Issues Report on Safety of Nanomaterials in Cosmetics

The European Commission's (EC's) Scientific Committee on Consumer Products has issued a [report](#) on the safety of nanomaterials in cosmetic products. The report describes the types of nanoparticles typically used in cosmetics, dividing them into two general categories: (i) soluble and/or biodegradable nanoparticles, such as fat-based molecules that disintegrate upon application to the skin; and (ii) insoluble and/or biopersistent ingredients such as titanium dioxide. The report also lists nine characteristics that should be tracked during safety tests and considered in risk assessments, including the particles' size and size distribution, shape, surface charge, and porosity; and the amount of surface area, the molecules on the surface, how the material changes over time and the different uses to which it is put, and how regularly or irregularly the particle is shaped. The report concludes that the primary health concerns with cosmetic products involve the insoluble particles that may be taken into the body and may then be transported to various organs. See *BNA Daily Environment Report*, March 4, 2008.

[10] Children's Health: EPA Releases Report on Children's Environmental Health Research

EPA recently released a [report](#) titled *A Decade of Children's Environmental Health Research: Highlights From EPA's Science to Achieve Results Program*. The report is the result of a program EPA initiated after a 1997 executive order required federal agencies to place a high priority on identifying and assessing risks affecting children and to ensure that government policies, standards and programs address disproportionate risks to children. The EPA report summarizes research conducted over a 10-year period, highlighting studies that concluded: (i) "[p]eople metabolize pesticides differently based on their genotype"; (ii) "[c]hildren living close to major freeways in Southern California have a higher risk of asthma"; (iii) "EPA's ban on two household pesticides (diazinon and chlorpyrifos) resulted in a rapid decrease in exposures in New York City"; (iv) "Integrated Pest Management (IPM) can be effectively implemented in urban areas to reduce both pesticide and allergen triggers"; and (v) "[c]ommunity partners play a critical role in informing, implementing and translating children's environmental health research."

[11] Water: AP Study Finds Pharmaceuticals in U.S. Water Supply

A recent Associated Press (AP) study claims to have found a vast array of pharmaceuticals, including antibiotics, anticonvulsants, mood stabilizers, and sex hormones, in drinking water supplies across the United States. Conducted over a five-month period, the AP study reviewed hundreds of scientific reports, analyzed federal drinking water environmental research sites and treatment plants, and interviewed more than 230 officials, academics and scientists. In particular, the AP study allegedly



found that: (i) water testing in Philadelphia revealed 56 pharmaceuticals or byproducts in treated drinking water; (ii) drinking water in Washington D.C. tested positive for six pharmaceuticals; (iii) anti-epileptic and anti-anxiety medications were detected in a portion of the treated drinking water of 18.5 million people in South California; (iv) a sex hormone was detected in San Francisco's drinking water; and (v) only three of 28 major metropolitan drinking water supplies tested negative for pharmaceuticals. The study concluded that although drug concentrations were far below the levels of a prescribed medical dose, the presence of so many prescription and over-the-counter drugs is a cause for concern. The researchers point out that the long-term consequences of low-doses of prescription drugs may be significant. *See The MetroWest Daily News*, March 9, 2008; and *The Louisville Courier-Journal*, March 10, 2008.

[12] Nanotechnology: NIOSH Issues Draft Nanotechnology Research Strategic Plan

The National Institute for Occupational Safety and Health (NIOSH) has released for public comment a **draft** of its strategic plan for nanotechnology research and guidance. The draft updates a 2005 strategic plan with information gained from ongoing research. The purpose of the plan is to provide a tool for coordinating nanotechnology research and a guide for enhancing the development of new research. The plan also aims to (i) “[d]etermine if nanoparticles and nanomaterials pose risks for work-related injuries and illnesses”; (ii) “[c]onduct research to prevent work-related injuries and illnesses by applying nanotechnology products”; (iii) “[p]romote healthy workplaces through interventions, recommendations and capacity building”; and (iv) “[e]nhance global workplace safety and health through national and international collaborations on nanotechnology research and guidance.”



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We welcome any leads on new developments in environmental law or toxic tort litigation.

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