

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] Water: Ninth Circuit Finds Decision to Revise CWA Effluent Guidelines Discretionary

The Ninth Circuit Court of Appeals has ruled that EPA review of Clean Water Act (CWA) effluent guidelines using technology-based criteria falls within the agency's discretion. *Our Children's Earth Found. v. EPA, No. 05-16214 (9th Cir. 5/23/08)*. Plaintiff environmental groups sued EPA, alleging that the agency violated its mandatory CWA duties by abandoning technology-based review in favor of hazard-based review. The former focuses on a level of pollutant reduction that can be achieved with current technology while the latter focuses on identifying known contaminants in the water and trying to reduce their prevalence. The district court ruled in EPA's favor, holding that the challenged actions were discretionary. Plaintiffs appealed.

Affirming the district court, the appeals court reviewed the language of several CWA provisions, finding that although specific CWA provisions appear to require EPA to use technology-based factors, the statute itself "does not expressly and unequivocally state as much." According to the court, in a citizen suit under section 505 (a)(2) of the CWA, plaintiffs seeking to compel agency action must identify a nondiscretionary duty that is "readily-ascertainable" rather than simply the end result of "inferences based on the overall statutory scheme."

[2] Natural Gas Act: Court Rules Federal Law Preempts County Gas-Plant Siting Decision

The Fourth Circuit Court of Appeals has ruled that a Baltimore County, Maryland, law that prohibits the siting of a liquefied natural gas facility in a heavily industrialized area on the Chesapeake Bay is preempted by the federal Natural Gas Act. *AES Sparrows Point LNG LCC v. Smith, No. 07-1615 (4th Cir. 5/19/08)*. Area residents objected to the siting, prompting the Baltimore County Council to approve a bill that amended the county zoning law to require an LNG terminal to obtain a special exception and to be located at least 5 miles from residential zones and 500 feet from any business. The bill would have blocked the siting of the LNG terminal.

Plaintiff companies sued the county, claiming that the bill was preempted by the Natural Gas Act, which names the Federal Energy Regulatory Commission (FERC) as the exclusive authority for siting LNG terminals. The district court found in the companies' favor but the county then amended its coastal regulations to add LNG terminals to the list of prohibited uses in the Chesapeake Bay Critical Area, which included the site where the terminal was to be built.

The companies again filed a lawsuit based on preemption. While the suit was pending, Maryland's Critical Area Commission amended the critical area protection program to include the new bill in the program. Ruling in the county's favor, the district court found that by adopting the bill into the state



program, the state had incorporated the bill into the state's coastal zone management plan, something it is authorized to do under the federal Coastal Zone Management Act. The companies appealed.

Reversing the district court, the appellate court focused on the Natural Gas Act's preemptive provision, which gives FERC "exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of a LNG terminal." 15 U.S.C. 717b(e)(1). For the county to trump the preemption provision, federal approval was required to incorporate the bill into the state's coastal zone management plan. Because the county failed to obtain federal approval, the court found that its effort to bar the facility was preempted.

[3] Water: Fifth Circuit Dismisses CWA Citizen Suit Challenging Storm Water Management

The Fifth Circuit Court of Appeals has affirmed the dismissal of a Clean Water Act (CWA) citizen suit filed against Dallas, Texas, challenging the city's storm water management system, because the issues raised had already been resolved by state and federal enforcement actions. *Envtl. Conservation Org. v. Dallas, No. 07-10583 (5th Cir. 5/27/08)*. A Dallas-based nonprofit environmental group filed the suit in 2003 after the group notified the city and EPA that it planned to sue because of problems with the city's operation of its storm water management system and the polluted appearance of some Dallas water bodies. At the same time, state and federal authorities began enforcement actions against the city, resulting in a consent judgment in which the city agreed to make improvements to the sewer system and to spend more than \$3.5 million to resolve allegations of improperly operating a municipal storm water management system in

violation of the CWA. *U.S. v. Dallas*, No. 06-845 (N.D. Tex. 8/28/06). The district court held in 2007 that, in light of the consent judgment, all claims against the city had already been decided.

The appeals court affirmed the dismissal for a different procedural reason, finding the lawsuit moot because a May 2006 enforcement action by the EPA and the state "ended each and every water pollution claim" that the group wished to pursue. Under section 1365 of the CWA, no citizen suit may be brought if the EPA or state "has commenced and is diligently prosecuting a civil or criminal action" against the alleged violator.

[4] Hazardous Waste: Court Finds No Immunity for State Environmental Agency in Lawsuits Challenging Inspections

According to a Louisiana state appeals court, the Louisiana Department of Environmental Quality (DEQ) does not have sovereign immunity from tort lawsuits for failing to carry out "meaningful inspections" of a permitted hazardous waste facility. *Wilson v. Davis*, No. 07-1929 (La. Ct. App. 5/28/08). DEQ argued that it is immune because state officials cannot be sued over discretionary acts involving policy making. The court disagreed, ruling that the state's hazardous waste law required the state to carry out inspections of permitted hazardous waste facilities, making the inspections "non-discretionary." Even though the agency had no sovereign immunity, the court dismissed plaintiff's lawsuit on the ground that plaintiffs "failed to come forward with factual support to show that DEQ violated its non-discretionary duties." *See BNA Daily Environment Report*, June 5, 2008.



[5] Env'tl. Crime: Colorado Chemical Distiller Sentenced to Two Years in Prison for CWA Criminal Violation

The former operator of Chemical Specialties in Grand Junction, Colorado, was sentenced May 30, 2008, to two years in prison for dumping wastewater containing propylene glycol, an airplane de-icing chemical, into the Colorado River. *U.S. v. Ortiz*, No. 03-113 (D. Colo. 5/30/08). A federal grand jury indicted the defendant in 2003 on charges of knowingly and negligently discharging pollutants into the Colorado River in violation of the Clean Water Act (CWA). He was convicted on October 15, 2003, and was originally sentenced to serve 12 months in federal prison and fined \$2,000. Defendant appealed the felony conviction to the Tenth Circuit Court of Appeals, which ultimately dismissed the case after the defendant left the state. The U.S. Attorney's Office obtained an order from the appellate court for the district court to re-sentence defendant when he was apprehended. The court doubled the original sentence after considering that defendant "had absconded from supervision while on bond."

Court documents show that defendant, on May 29 and June 18, 2002, dumped industrial wastewater containing propylene glycol into a storm sewer that drained into the river. The discharged chemicals killed a large number of fish and resulted in an emergency environmental cleanup response. See *BNA Daily Environment Report*, June 6, 2008.

[6] Chemical Exposure: FDA Settles Lawsuit and Warns About Risks from Mercury Dental Fillings

The Food and Drug Administration (FDA) has reportedly agreed to alert consumers that silver-colored metal dental fillings containing mercury may cause health problems in pregnant women,

fetuses and children. To settle a lawsuit brought by several consumer advocacy groups, including Mothers Against Mercury, the FDA agreed to issue warnings that (i) "[d]ental amalgams contain mercury, which may have neurotoxic effects on the nervous systems of developing children and fetuses," and, (ii) "[p]regnant women and persons who may have a health condition that makes them more sensitive to mercury exposure, including individuals with existing high levels of mercury bioburden, should not avoid seeking dental care, but should discuss options with their health practitioner." The FDA also agreed to issue new rules by July 2009 that will give the agency "special controls [that] can provide reasonable assurance of the safety and effectiveness of the product." Mercury has been linked to brain and kidney damage at certain levels. Amalgams contain half mercury and half a combination of other metals. According to the American Dental Association, 30 percent of fillings contained mercury as of 2003. See *Greenwire*, June 5, 2008.

Legislation, Regulations and Guidance

[7] Air: EPA Releases Proposed New Source Performance Standards for Cement Kilns

EPA recently released a proposed [rule](#) revising its new source performance standards for Portland cement kilns and clinker coolers. Under the proposed rule, particulate matter emissions from new kilns and clinker coolers would be capped at 0.086 pound per ton of clinker. New kilns would also be subject to a nitrogen oxide limit of 1.5 lb/ton on a 30-day rolling average. Sulfur dioxide emissions would be limited to 1.33 lb/ton of clinker, or plants would also have the option of reducing sulfur dioxide emissions by 90 percent. Both nitrogen



oxides and sulfur dioxide would require continuous monitoring. EPA will accept comments on the proposed rule for 60 days after it is published in the *Federal Register*.

[8] Pipeline Safety: Amended Rules Cover Lines Carrying Hazardous Liquids

The Department of Transportation's (DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA) has issued a final [rule](#) amending its pipeline safety rules to cover previously unregulated lines carrying hazardous liquids, such as oil, in environmentally sensitive areas. *73 Fed. Reg.* 31634 (6/3/08). The rules require operators of rural onshore hazardous-liquid gathering lines to comply with safety requirements addressing corrosion and third-party damage. Operators must identify conditions that could require cleaning, such as the buildup of corrosive agents, or use other measures to prevent conditions that can lead to internal corrosion, like the use of inhibitors. The rule also applies the same requirements to low-stress pipelines operating in unusually sensitive areas. According to the agency, the rule is a step toward meeting the requirements of the Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006, which requires PHMSA to subject low-stress hazardous liquid pipelines to the same standards and regulations that apply to other hazardous-liquid pipelines. The rule is effective July 3, 2008.

[9] Water: EPA Issues Draft White Paper on Water Quality Emerging CECs

In a June 3, 2008, draft white [paper](#), EPA addresses water quality criteria to protect aquatic life from recently discovered water pollutants or contaminants of emerging concern (CECs). According to EPA, some CECs, such as pharmaceuticals and personal care

products exhibiting endocrine-disrupting activity or other toxic mechanisms, do not fit within water quality guidance developed in the 1980s. For example, EPA says these chemicals may demonstrate low acute toxicity but cause significant reproductive effects at very low levels of exposure and have very specific modes of action that may affect only certain types of aquatic animals. According to EPA, effects on aquatic organisms from exposures occurring during the early stages of life may not be observed until adulthood.

The white paper includes the following types of chemicals as CECs: (i) persistent organic pollutants such as polybrominated diphenyl ethers (PBDEs) and other global organic contaminants, such as perfluorinated organic acids; (ii) pharmaceuticals and personal care products, including drugs prescribed for human, over-the-counter medications, bactericides, sunscreens, and synthetic musks; (iii) endocrine-disrupting chemicals, including synthetic estrogens and androgens, as well as others that are capable of modulating normal hormonal functions and steroidal synthesis in aquatic organisms; and (iv) nanomaterials, such as carbon nanotubes or nano-scale particulate titanium dioxide. As to these CECs, EPA suggested that alternative approaches are necessary and promised to develop interim regulatory guidance once sufficient data are gathered.

[10] Indoor Radon: EPA's IG Critical of Agency's Voluntary Indoor Radon Program

EPA's Inspector General (IG) has issued a [report](#) criticizing an EPA program, adopted under the 1988 Indoor Radon Abatement Act (IRAA), that is supposed to reduce indoor radon health risks. The IRAA authorizes EPA to (i) issue regulations to carry out the IRAA; (ii) administer grants to states



to establish and carry out radon programs; (iii) report on studies of radon from federally owned buildings; (iv) conduct a study of radon contamination in schools and report on the study; (v) create a Citizen's Guide to radon; (vi) develop model construction standards and techniques; (vii) establish regional radon training centers; (viii) provide technical assistance to states; and (ix) establish proficiency programs for firms offering radon-related services. According to the report, instead of implementing the IRAA's goals, EPA has developed a voluntary Indoor Radon Program. Promoting radon awareness, testing, use of radon-resistant construction techniques, and installation of radon mitigation systems, the program is limited by inconsistencies in radon-related requirements among state and local governments, a lack of incentives and misuse of EPA guidance and radon maps.

The report recommends that EPA (i) develop a strategy to achieve the long-term goals of the IRAA; (ii) identify limitations in the authorities granted by Congress and other limitations that currently preclude achieving the long-term IRAA goals; (iii) revise the agency's performance measuring data to include metrics that will better measure the magnitude of the potential radon problem; and, (iv) revise how the agency reports results of the Indoor Radon Program.

[11] CERCLA: IG Report Slams EPA and New Jersey DEP Management of CERCLA Backlogs

EPA's Office of Inspector General (IG) has issued a [report](#) upbraiding EPA and the New Jersey Department of Environmental Protection (NJDEP) for their management of the backlog of CERCLA sites in the state.

Specifically, the report criticizes NJDEP because, when it was the lead agency on site cleanups, it failed to move forward without EPA concurrence and failed to review work products in a timely fashion, failed to hold potentially responsible parties (PRPs) accountable for unnecessary delays in performing cleanups, and failed to respond to PRPs after receiving EPA comments on documents in a timely manner. The report criticizes EPA for (i) failing to follow document review regulations when it was the support agency; (ii) failing to effectively use annual meetings with NJDEP to ensure state-led sites were prioritized; (iii) failing to enter into a memorandum of understanding concerning internal controls with NJDEP; and, (iv) failing to use available authorities to ensure progress at state-led sites. The report recommends that EPA direct its Region 2 Emergency and Remedial Response Division to coordinate with NJDEP officials on the cleanup of 14 identified older sites and establish criteria for monitoring progress in meeting milestones, and that EPA and NJDEP develop criteria for addressing situations where milestones are not met.

[12] Chemical Exposure: Ohio Bars Sale or Distribution of Dishwasher Detergent with High Phosphorus Content

Governor Ted Strickland (D) of Ohio has signed legislation ([S.B. 214](#)) prohibiting the sale or distribution of dishwasher detergent with a phosphorus content of more than 0.5 percent, beginning July 1, 2010. The new provision amends a state law by limiting the phosphorus content of household laundry detergent in 35 Ohio counties and establishing civil penalties for violators of \$50 for the first violation to \$500 for each subsequent violation



within a 12-month period. Penalties are collected by the Ohio EPA, which is charged with notifying violators and referring cases to the state attorney general. The fines will be spent on education and water pollution control efforts. The new law applies to rinsing and sanitizing agents primarily used in automatic dishwashers, although cleansers used in commercial or institutional dishwashers are exempt.

Scientific/Technical Items

[13] Chemical Exposure: NIH Study Investigates Potential Link Between Pesticides and Increased Risk of Diabetes

A recent study by National Institutes of Health (NIH) researchers claims that licensed pesticide applicators may have a higher-than-average risk of developing diabetes, based on the amount and type of chemicals they use over their lifetime. M.P. Montgomery, et al., "Incident Diabetes and Pesticide Exposure Among Licensed Pesticide Applicators: Agricultural Health Study 1993-2003," *Amer. J. Epidemiol.* 2008; 167: 1235-46. The study findings are based on interviews with more than 33,000 applicators, primarily farmers, who were recruited between 1993 and 1997. After establishing a baseline of data on the status of their health, researchers re-interviewed the participants in 2003. The study compares pesticide use and other potential risk factors reported by 1,171 applicators who developed diabetes since enrolling to those who did not develop diabetes. Among the pesticides claimed to pose the greatest risk are aldrin, chlordane, heptachlor, dichlorvos, trichlorfon, alachlor, and cynazine, which are chlorinated compounds. Most of the pesticides addressed by the study are no longer manufactured or used. See *BNA Daily Environment Report*, June 10, 2008.

[14] Chemical Exposure: Study Claims Exposure to Chlorine Byproducts While Pregnant May Cause Birth Defects

A recent study by researchers at the University of Birmingham in the United Kingdom claims that pregnant women who drink water disinfected with chlorine may increase the risk of having children with heart problems, cleft palate or major brain defects. Bing-Fang Hwang, et al., "Water Disinfection By-Products and the Risk of Specific Birth Defects: A Population-Based Cross-Sectional Study in Taiwan," *Environmental Health* 2008, 7:23. Based on an analysis of nearly 400,000 infants in Taiwan, the study is reportedly the first to link water chlorination byproducts to three specific birth defects. The researchers sought to discover if drinking tap water containing high, medium or low levels of chlorination byproducts increased the risk of 11 common birth defects. Although the study found "no consistent association between exposure and the risk of birth defects in general," it did find that high levels of chlorination byproducts "substantially increased" the risk of three specific defects: (i) ventricular septal defects, (ii) cleft palate, and (iii) anencephalus.



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