

Environmental & Chemical Update

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

Issue 239 • June 27, 2008

Litigation and Regulatory Enforcement

- [1] **Water:** Eleventh Circuit Upholds EPA Rule Allowing Underground Injection of Treated Sewage 1
- [2] **Air:** D.C. Circuit Denies Petition for Review of HON Rule 1
- [3] **Insurance:** Fifth Circuit Rules Damages Caused by Explosion of Combustible Vapors from Oil Production Waste Excluded Under CGL Policy Pollution Exclusion 2
- [4] **CERCLA:** Federal Court Finds U.S. Government Not Liable Under CERCLA for Contamination at Contractor Operated Site 2
- [5] **Fees & Costs:** Federal Court Awards Prevailing Party Fees in EAJA Lawsuit After Dismissing Two of Three Claims 2
- [6] **Water:** Four Large U.S. Homebuilders Settle Storm Water Violations for \$4.3 Million 3
- [7] **Water:** Refiner Agrees to Settle Oil Spill Enforcement Action for \$1.65 Million. . . 3
- [8] **Envtl. Crime:** Recycling Company Sentenced to Prison for Hazardous Waste Criminal Violations 4
- [9] **Prop. 65:** California Sues Four Companies for Lack of Warnings on Consumer Products 4

Legislation, Regulations and Guidance

- [10] **Water:** EPA Issues Final Rule Clarifying that Water Transfers are Excluded from Regulation Under CWA 4
- [11] **Air:** EPA Proposes Rule to Revise NSPS for Fossil Fuel-Fired Steam Generating Units. 4
- [12] **Air:** NACAA Issues Model Permit Guidance on Reducing HAPs from Industrial Boilers. 5
- [13] **Recycling:** Canada Creates National Vehicle Scrap Program 5
- [14] **OSHA:** OSHA Announces 2008 Site-Specific Inspection Targeting Plan. 6

Shook,
Hardy &
Bacon L.L.P.®

www.shb.com

Environmental & Chemical Update

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

Litigation and Regulatory Enforcement

[1] **Water: Eleventh Circuit Upholds EPA Rule Allowing Underground Injection of Treated Sewage**

The Eleventh Circuit Court of Appeals has upheld an EPA final rule that allows Florida municipal wastewater treatment facilities to dispose of treated sewage via underground injection. *Miami-Dade County v. EPA, No. 06-10551 (11th Cir. 6/6/08)*. EPA's rule, published in November 2005, 70 *Fed. Reg.* 70,513 (11/22/05), allowed municipal wastewater facilities in 24 Florida counties to continue using wastewater injection wells if they met certain environmental requirements, including pre-treatment, secondary treatment and high-level disinfection of wastewater before disposal. The rule that preceded the 2005 version prohibited fluid movement from Class I wells--the only wells at issue before the appeals court--that could migrate into underground sources of drinking water. According to EPA, the former rule was amended to include the 24 counties because their underlying carbonate rock geology provided pathways for the movement of underground fluids.

The Sierra Club, Miami-Dade County and several cities challenged the rule, arguing that it violated the Safe Drinking Water Act and the Administrative Procedure Act (APA). Rejecting their challenge, the court determined that EPA demonstrated a "reasonable basis" for the rules' approach to non-biological contaminants,

which petitioners had argued were not addressed by the final rule. Among EPA arguments that the court adopted were that a risk assessment had found that only pathogenic microorganisms posed a potential threat and that Class I wells were already prohibited from injecting listed or characteristic hazardous waste. The court also held that EPA did not violate the APA by failing to provide sufficient notice.

[2] **Air: D.C. Circuit Denies Petition for Review of HON Rule**

The D.C. Circuit Court of Appeals has denied the NRDC's petition for review challenging EPA's interpretation of the Hazardous Organic NESHAP Rule (HON Rule), which sets standards for synthetic organic compounds and applies to chemical manufacturing facilities nationwide. *NRDC v. EPA, No. 07-1053 (D.C. Cir. 6/6/08)*. NRDC alleged that EPA failed to set maximum achievable control technology standards for several hazardous air pollutants under section 112(f)(2)(A) of the Clean Air Act (CAA), which requires EPA to reduce lifetime cancer risk for people living near chemical plants to one in a million--without considering costs to industry. The petition argued that EPA violated the CAA by failing to adequately protect the public from cancer.

Disagreeing with the petitioner, the court ruled that EPA's interpretation of the synthetic organic compound standard was reasonable and that the agency's decision to use industry-supplied data, which the agency compared to the National



Emissions Inventory, to interpret the HON Rule was not arbitrary and capricious. According to the court, “the sole question before us is whether EPA has acted reasonably, not whether it has acted flawlessly.”

[3] Insurance: Fifth Circuit Rules Damages Caused by Explosion of Combustible Vapors from Oil Production Waste Excluded Under CGL Policy Pollution Exclusion

The Fifth Circuit Court of Appeals has ruled that a pollution exclusion clause in a commercial general liability insurance (CGL) policy unambiguously barred any claims by workers injured or killed when combustible vapors from oil production-related waste ignited and exploded. *Noble Energy, Inc. v. Bituminus Cas. Co., No. 07-20354 (5th Cir. 6/2/08)*. The insured oil company argued that the pollution exclusion clause should not apply to a 2003 truck explosion because the vapors that caused the explosion which killed and injured several workers were an “accelerant” rather than a “pollutant.” Rejecting that argument, the court held that the pollution exclusion was unambiguous under Texas law and was written broadly enough to bar all of the worker’s personal injury-related damage claims. The exclusion defined “pollutants” as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste.”

[4] CERCLA: Federal Court Finds U.S. Government Not Liable Under CERCLA for Contamination at Contractor Operated Site

A federal judge in Kansas has ruled that the U.S. Air Force is not a potentially liable party (PRP) under CERCLA at the Tri-County Airport Site in Herrington, Kansas, which was contractor operated, where the contaminant, trichloroethylene (TCE),

was used primarily for “indirect military” applications. *Raytheon Aircraft Co. v. U.S., No. 05-2328 (D. Kan. 5/30/08)*. The contractor filed a CERCLA contribution action against the government, arguing that TCE, a solvent degreaser used to clean metal parts, was widely available to the military during World War II, and the site once processed the B-29 long-range bomber, a “high priority” and significant part of the military’s war time arsenal, making it likely that TCE was used at the site. The court relied on the testimony of a defense expert who stated that valuable chemicals such as TCE were tightly controlled during the war years under an allocation system established by the War Production Board and that TCE was allocated for indirect military and civilian use. The court also found that a Raytheon predecessor had released TCE at the site in the 1950s, while it was carrying out various aircraft-related activities.

[5] Fees & Costs: Federal Court Awards Prevailing Party Fees in EAJA Lawsuit After Dismissing Two of Three Claims

A federal court in Louisiana has awarded attorney’s fees and costs to plaintiffs as the “prevailing party” under the Equal Access to Justice Act (EAJA), despite their decision to voluntarily dismiss two of their three claims. *Holy Cross v. Corps, No. 03-370 (E.D. La. 5/30/08)*. Under the EAJA, a prevailing party may be awarded fees and costs in an action against the government “unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.” According to the court, because all three claims were interrelated and the primary purpose of the lawsuit was achieved, plaintiffs can also recover costs associated with the claims on which they did not prevail.



The plaintiffs filed their lawsuit in 2003 and alleged that a multimillion-dollar dredging and lock modernization project proposed by the U.S. Army Corps of Engineers (Corps) should be stopped because (i) it would result in the discharge or release of solid and hazardous waste-contaminated sediments, creating a violation of RCRA; (ii) the Corps had failed to take a “hard look” at the environmental consequences of the project under NEPA; and (iii) the Corps failed to properly supplement its environmental impact statement on the project after it had been alerted to the project’s potentially negative effects. Plaintiffs succeeded on the NEPA claim in 2006, and the court ordered the Corps to stop work on the project until it complied with NEPA. The court dismissed without prejudice the remaining two claims when plaintiffs decided to voluntarily dismiss them. The court awarded plaintiffs a total of \$91,426 in fees and costs out of more than \$110,000 sought.

[6] Water: Four Large U.S. Homebuilders Settle Storm Water Violations for \$4.3 Million

In consent decrees reportedly filed in a federal court in Virginia, four large U.S. homebuilders agreed to collectively pay \$4.3 million in penalties and implement sediment-control procedures nationwide to settle alleged violations of Clean Water Act construction storm water rules. The government alleged that the companies, MDC Holdings, Inc., KB Home, and Centex Homes, failed to obtain permits until after construction had begun or failed to obtain the required permits at all. At sites that had permits, the allegations included failure to prevent or minimize the discharge of pollutants, such as silt and debris,

in storm water runoff. The government complaints alleged a common pattern of violations that was discovered by reviewing documentation the companies submitted and through federal and state inspections. Colorado, Maryland, Missouri, Nevada, Tennessee, Utah, and Virginia, joined the federal government in the settlement and will receive a portion of the penalties based on the number of sites located within each state. The consent decrees are subject to a 30-day public comment period and approval by the federal court. *See EPA Press Release*, June 11, 2008; and *The Los Angeles Times*, June 12, 2008.

[7] Water: Refiner Agrees to Settle Oil Spill Enforcement Action for \$1.65 Million

Valero Refining-Texas LP has entered a settlement agreement and will pay a \$1.65 million civil penalty to resolve a federal enforcement action under the Clean Water Act for the discharge of 3,400 barrels of oil from a containment basin and associated above-ground storage tanks at a Corpus Christi, Texas, refinery in June 2006. *U.S. v. Valero Refining-Texas LP, No. 08-190 (S.D. Tex. lodged 6/10/08)*. The discharge caused an oil sheen on the water and stained the adjoining shoreline and marshes along the shoreline. The civil fine will be deposited in the federal Oil Spill Liability Trust Fund, which is used to pay for federal oil spill cleanups. In addition to the fine, Valero has agreed to perform a supplemental environmental project, at a cost of \$300,000, involving the design and construction of a boat ramp on the Corpus Christi Ship Channel to aid emergency response efforts. The consent decree is subject to a 30-day public comment period and court approval.



[8] Env'tl. Crime: Recycling Company Sentenced to Prison for Hazardous Waste Criminal Violations

A federal judge has reportedly sentenced the president of a Portland, Oregon, recycling facility to six months in prison and one year of supervised release after he admitted to three felony violations of RCRA. *U.S. v. Spencer*, No. 07-00381 (D. Or. 6/5/08). The court also ordered the defendant to pay a \$75,000 fine, which will be used for various environmental projects in the state. According to court records, the company, Spencer Environmental, Inc., contracted with industrial companies to collect, recycle and dispose of wastewater, used oil and anti-freeze. Between 2000 and 2004, company employees repeatedly violated RCRA by spilling used oil, by over-filling a waste pit used for oily waste and by failing to properly clean up spills when they occurred. See *BNA Daily Environment Report*, June 9, 2008.

[9] Prop. 65: California Sues Four Companies for Lack of Warnings on Consumer Products

California Attorney General Edmund Brown Jr. (D) has reportedly filed a lawsuit under Proposition 65 (Prop. 65) against four companies, alleging that their products contain 1,4-dioxane, a possible cancer-causing chemical, without warning that the products contain a chemical that may cause cancer. Defendants in the case are Avalon Natural Products, Whole Foods Market California, Beaumont Products, and Nutribiotic. The companies manufacture body care or household cleaning products that contain 1,4-dioxane, a byproduct of a process used to soften harsh detergents. The lawsuit follows an investigation in March 2008 by the Organic Consumers Association (OCA) which found that nearly one-half of 100 soaps, shampoos and other consumer products labeled as "natural" or "organic" contained 1,4-dioxane.

The chemical was found in the four defendants' products at levels of up to 20 parts per million. OCA filed its own lawsuit in April 2008 against several companies using organic labeling but containing the chemical. See *Greenwire*, June 11, 2008.

Legislation, Regulations and Guidance

[10] Water: EPA Issues Final Rule Clarifying that Water Transfers are Excluded from Regulation Under CWA

EPA has issued a final [rule](#) that amends Clean Water Act (CWA) regulations to expressly exclude water transfers under the National Pollutant Discharge Elimination System (NPDES) permitting program. According to the agency, water transfers occur routinely and may include routing water through tunnels, channels or natural stream courses for public water supplies; irrigation; power generation; flood control; and environmental restoration. The final rule is based on EPA's CWA interpretation, i.e., that Congress did not intend to subject water transfers to regulation under the NPDES program partly because there is no "addition" of a pollutant in a water transfer that would trigger the requirement to obtain a NPDES permit. The final rule will be effective 60 days after its June 12, 2008, publication in the *Federal Register*.

[11] Air: EPA Proposes Rule to Revise NSPS for Fossil Fuel-Fired Steam Generating Units

EPA has proposed [revisions](#) to Clean Air Act new source performance standards (NSPS) that will specify opacity monitoring requirements for fossil fuel-fired generating units. *73 Fed. Reg.* 33,641 (6/12/08). The revisions arise from the settlement of a lawsuit brought by the Coke Oven Task Force



seeking to require EPA to clarify provisions of the fossil fuel-fire steam generating unit NSPS. *Coke Oven Task Force v. EPA*, No. 06-1131 (D.C. Cir. *settlement announced* 4/11/08). As part of the settlement, EPA agreed to issue a direct final rule or a proposed rule clarifying the emissions monitoring standards and relieving coke oven gas-powered boilers and plants from the burden of monitoring particulate matter and nitrogen oxide emissions. Under the settlement, plants would continue to monitor for sulfur dioxide. EPA will accept comments on the proposed revisions until July 28, 2008. If a public hearing is requested, EPA will hold a hearing on the proposed revisions on June 27.

[12] Air: NACAA Issues Model Permit Guidance on Reducing HAPs from Industrial Boilers

The National Association of Clean Air Agencies (NACAA), which is the association of air pollution control agencies in 53 states and territories and more than 165 major metropolitan areas in the United States, has issued model permit [guidance](#) on reducing hazardous air pollutants (HAPs) from industrial, commercial and institutional boilers.

NACAA issued the model guidance to help member agencies comply with the Clean Air Act (CAA) in light of *NRDC v. EPA*, No. 04-1385 (D.C. Cir. 6/8/07), which vacated EPA's boiler rule. Section 112(g) and 112(j) of the CAA require sources to obtain determinations from states on the level of pollution control that represents maximum achievable control technology (MACT). EPA's vacated rule had capped carbon monoxide

emissions from all new large and limited-use boilers at 400 parts per million. The NACAA model guidance suggests a range of 3 ppm to 10 ppm for gas-fired and oil-fired boilers and 35 ppm to 60 ppm for coal-fired and 100 ppm to 150 ppm for wood-fired units. The model guidance also recommends that particulate matter emissions be limited to between 0.008 and 0.025 pound per million Btu for various existing boiler types, well below EPA's vacated limit of 0.21 lb/MM Btu. The guidance also recommends limits on hydrogen chloride and mercury emissions that are well below the limits in EPA's vacated rule.

[13] Recycling: Canada Creates National Vehicle Scrap Program

Environment Canada has [announced](#) that the Toronto-based Clean Air Foundation will oversee a new national vehicle scrap program that will be funded by \$92 million over four years. Beginning in 2009, the foundation will work with other not-for-profit, private and public organizations to develop incentives to take older, high-emitting vehicles off the road and place them into vehicle-recycling programs. Provincial environmental guidelines require environmental-friendly recycling, including draining and disposing of the vehicle's fluids, and recycling the tires, mercury switches and batteries. The program's goal is to reduce Canada's greenhouse gas emissions and other environmental problems caused by older vehicles which were not designed according to modern emissions rules.



[14] OSHA: OSHA Announces 2008 Site-Specific Inspection Targeting Plan

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) recently released its "[Site-Specific Targeting Plan](#)" for 2008. The plan updates OSHA's 2007 plan and focuses on approximately 3,800 high-hazard worksites on its primary list for unannounced comprehensive safety inspections over the coming year. The plan targets worksites that reported 11 or more injuries or illnesses for every 100 full-time employees resulting in days away from work, restricted work activity or job transfer. The plan also targets sites based on a "Days Away from Work Injury and Illness" rate of 9 or higher. OSHA will, as well, randomly select and inspect about 175 workplaces (with 100 or more employees) across the nation that reported low injury and illness rates.



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 group.
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.®

