

Environmental & Chemical Update

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

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Litigation and Regulatory Enforcement

[1] Air: D.C. Circuit Vacates CAA CAIR Rule

The U.S. Court of Appeals for the District of Columbia Circuit has **vacated** EPA's Clean Air Interstate Rule (CAIR) ruling that there were "more than several fatal flaws in the rule." *North Carolina v. EPA*, No. 05-1244 (D.C. Cir. 7/11/08).

The rule, which was codified at 40 C.F. R. Parts 51-52, would have required 28 states and the District of Columbia to revise their state implementation plans (SIPs) to reduce emissions of sulfur dioxide and nitrogen oxides through a trading scheme. 70 *Fed Reg.* 25, 162 (5/12/05). The rule was intended by EPA to reduce ozone and fine particle pollution from power plants that is transported across state boundaries and to help downwind states attain air quality standards for ozone and fine particles.

In a unanimous decision, the court ruled that the CAIR was "fundamentally flawed" and upheld claims by North Carolina, which argued the rule did not account for pollution that crosses state boundaries and provided insufficient protection for downwind regions in danger of missing air quality attainment levels. The state also argued that EPA ignored a CAIR requirement to verify that each state's implementation plan ensure that pollution emissions sources within that state do not "contribute significantly to nonattainment ... or interfere with maintenance" of national ambient air quality standards in another state. The court agreed, holding that EPA's interpretation of

the "interference with maintenance" language "unlawfully nullifies that aspect of the statute and provides no protection for downwind areas" that fail to meet ambient air quality standards. The court also ruled that EPA improperly tied sulfur dioxide and nitrogen oxides emission reductions required by CAIR to Title IV of the CAA, which was meant to regulate acid rain.

[2] CERCLA: Fifth Circuit Rules Cleanup Conditions Must Be Met for Preemptive Discovery Rule to Apply

The Fifth Circuit Court of Appeals has **ruled** that CERCLA's preemptive discovery rule in section 9658 applies only "where the conditions for CERCLA cleanup are satisfied." *Barnes v. Koppers Inc.*, No. 06-60708 (5th Cir. 6/30/08).

Where applicable, section 9658 prevents a state statute of limitations in a toxic tort case from commencing until a plaintiff knows or should know of both his injury and its cause. In this case, plaintiff sued a wood treatment facility in Grenada, Mississippi in 2003 alleging that her mother contracted and died from breast cancer caused by exposure to dioxin and other pollutants allegedly released from the facility. A jury found defendants liable for negligence and awarded plaintiffs \$785,000 in damages. At trial and on appeal, defendants argued that the suit was barred by Mississippi's three-year statute of limitations on tort claims. On appeal, plaintiffs argued that the state statute did not run until the cause of injury was discovered, and alternatively that the CERCLA discovery rule preempts state law limitations in all toxic tort suits.



In rejecting plaintiff's arguments, the court held that the plain language of the Mississippi statute references only the knowledge of injury, not knowledge of injury and its cause, and while CERCLA section 9658 could preempt a state limitations period in an appropriate toxic tort suit involving hazardous substance, plaintiff failed to show that the conditions of a CERCLA cleanup had been satisfied. To prevail, plaintiff must "prove that her claims arose from a release of hazardous substances into the environment."

[3] Toxic Torts: FRSA Amendment Bars Preemption of State Toxic Tort Claims, Eighth Circuit Rules

The Eighth Circuit Court of Appeals has ruled that an amendment to the Federal Railroad Safety Act (FRSA) bars preemption of state-law negligence claims over federally regulated matters. *Lundeen v. Canadian Pacific Railway Co.*, No. 07-1656 (8th Cir. 7/2/08). The case involved a January 2002 derailment of a freight train in Minot, North Dakota, releasing a cloud of anhydrous ammonia that allegedly caused some nearby residents permanent respiratory disease and eye damage. After jurisdictional issues were resolved, the suit was brought in federal district court in Minnesota. The district court dismissed the lawsuit holding that the claim was preempted by federal law. *Lundeen v. Canadian Pacific Railway Co.*, 507 F. Supp. 2d 1006 (D. Mn. 2007). While the appeal was pending, section 20106 of the FRSA was amended, retroactively to the date of the derailment, to make clear that the FRSA would not preempt state causes of action which allege railroad accident victims were injured by railroads that violated safety standards imposed by a railroad's own rules, certain state laws or federal regulations. The court denied defendant's arguments that the amendment violated the U.S. Constitution's separation of powers doctrine and due process and directed the district court to remand the matter to state court.

[4] Natural Resources: Courts Must Defer to U.S. Forest Service, Says Ninth Circuit

The Ninth Circuit Court of Appeals has ruled en banc that courts must defer to the U.S. Forest Service (FS) when the agency makes decisions about forest management unless those decisions are clearly "arbitrary and capricious." *The Lands Council v. Ranotta McNair*, No. 07-35000 (9th Cir. 7/2/08). At issue was a forest service plan to log 3,829 acres in the Idaho Panhandle National Forest. The district court had denied plaintiff's request for an injunction to halt logging until the case was resolved, but a three-member Ninth Circuit panel reversed that decision, granting the injunction. The *en banc* court reversed holding that the three-judge panel erred in requiring the Forest Service to prove the logging project would pose no harm to the environment and by specifying that the agency must prove its case with "on-the-ground analysis." The complaint had argued that the Forest Service violated the National Forest Management Act (NFMA) and NEPA in approving the project.

In reversing, the *en banc* court held that the court's role "is not to make fine-grained judgments of the agency's analysis" but "is simply to ensure that the [Forest Service] made no clear error of judgment that would render its action arbitrary and capricious." According to the court, the Forest Service acts arbitrarily and capriciously "only when the record plainly demonstrates that [the agency] made a clear error in judgment in concluding that a project meets the requirements of NFMA and the relevant Forest Plan." The court went on to uphold the Forest Service environmental impact statement saying that "NEPA does not require the agency to explore every possible problem."



[5] Prop. 65: California Sues Cement Plant over Failure to Warn of Hexavalent Chromium Emissions

California Attorney General Jerry Brown (D) has reportedly filed a lawsuit against the TXI Riverside Cement plant alleging a failure to warn neighbors about hexavalent chromium emissions. *California v. TXI Riverside Inc.*, No. 502893 (Cal. Super Ct. 7/3/08). The complaint seeks penalties and court orders requiring the plant to provide “clear and reasonable warnings” to neighboring residents and businesses that they are being exposed to a cancer-causing substance, as required under Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as Proposition 65.

In June 2008, the company negotiated a \$1 million settlement with the South Coast Air Quality Management District (SCAQMD) to resolve alleged air violations. SCAQMD detected elevated levels of hexavalent chromium near the Riverside plant during a regional study of air toxics in 2007. See *BNA Daily Environment Report and San Francisco Chronicle*, July 8, 2008.

[6] Air: Groups Sue Montana DEQ for Failure to Require BACT Analysis in Permitting Power Plant

Environmental groups have reportedly sued the Montana Department of Environmental Quality (DEQ) alleging the agency violated the Clean Air Act by issuing a permit for a proposed power plant near Great Falls without requiring an analysis of best available control technology (BACT) for carbon dioxide. *Environmental Information Center v. Montana DEQ*, No. 08-820 (Mon. 8th Jud. Dist Ct. filed 6/30/08). The complaint asks the court to invalidate the power plant’s permit and halt construction until developers obtain a valid permit. The complaint cites a recent Georgia decision that ruled that a BACT analysis must be completed

before a permit can be issued for the construction of a power plant. *Friends of the Chattahoochee v. Couch*, No. 146398 (Fulton County Sup Ct. 7/1/08). See *BNA Daily Environment Report*, July 8, 2008.

[7] Env’t Crime: Italian Shipping Company Ordered to Pay \$1.5 Million for Criminal Discharge of Oily Waste

An Italian shipping company has reportedly been sentenced by a federal judge in Texas to pay a \$1.5 million criminal fine for illegally dumping oily sludge, bilge wastes and oil-contaminated ballast water from a bulk carrier vessel in violation of the Act to Prevent Pollution from Ships. *U.S. v. B. Navi Ship Management Services*, No. 08-00033 (S.D. Tx. 7/9/08). The defendant also admitted to violating the False Statement Act by making false statements to the Coast Guard. The court ordered the defendant to allocate \$300,000 of its fine as a community payment to the National Fish and Wildlife Foundation. See *DOJ Press Release*, July 9, 2008.

[8] Air/Greenhouse Gases: EPA Issues ANPR for GHG Emissions

Stating that regulatory action on greenhouse gases (GHGs) is “premature,” EPA released an [advance notice of proposed rulemaking](#) (ANPR) on July 11, 2008, requesting public comments on ways to regulate GHG emissions and setting a 120-day comment period from the date the ANPR is published in the *Federal Register*. EPA has been under pressure from Congress and environmental groups to begin regulating GHG emissions since the Supreme Court ruled that the agency had authority under the Clean Air Act to regulate tailpipe GHG emissions if the agency determines they cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007). According to a press release issued



by EPA along with the ANPR, EPA initially anticipated making a finding of “endangerment” and proposing regulations to control GHGs. After the president issued an Executive Order in May 2007 and EPA began working with the Departments of Energy, Agriculture and Transportation to develop new regulations, however, the agency determined not to go forward with proposed regulations until certain issues were investigated through an ANPR. A primary factor in deciding not to go forward with proposed regulations, according to EPA, was a concern that regulations controlling GHG emissions might indirectly affect other provisions of the Clean Air Act.

In the ANPR, EPA seeks comments about (i) the advantages and disadvantages of regulating emissions under various sections of the CAA; (ii) how a decision to regulate emissions under one section of the Act could trigger regulations of those emissions under other sections; (iii) what issues should Congress consider as part of any future climate change legislation and possible conflicts between regulation under the CAA and any future legislation; (iv) any scientific information relevant to EPA’s consideration of whether GHG emissions endanger public health and welfare; and, (v) alternative regulatory approaches and technologies for reducing GHG emissions. See *EPA Press Release*, July 11, 2008.

Legislation, Regulations and Guidance

[9] Air: EPA Issues Draft Guidelines to Curb VOC Emissions from Commercial and Consumer Products

EPA has issued [draft control techniques guidelines](#) designed to curb volatile organic compound (VOC) emissions from five categories of commercial and consumer products. According to EPA, section 183 (e)(3)(c) of the Clean Air Act

allows the agency to issue the guidelines in lieu of new regulations provided they are “substantially as effective as regulations” in reducing VOC emissions. Industries covered by the draft guidelines include (i) miscellaneous metal (i.e., paints used in manufacturing utility trailers, automotive parts, extruded aluminum parts, business machines, etc.); (ii) plastic parts coatings; (iii) auto and light-duty truck assembly coatings; (iv) fiberglass boat manufacturing materials; and (v) miscellaneous industrial adhesives. The control technologies would generally be required at facilities that emit 15 tons of VOCs daily or 300 tons annually. EPA will accept public comment on the draft guidelines for 30 days after they are published in the *Federal Register*.

[10] Water: EPA Issues Draft Technical Guidance for Proposed ADWR

EPA has issued [draft guidance](#) and current agency policy recommendations for compliance with the proposed Aircraft Drinking Water Rule (ADWR). The ADWR was published in April 2008 (73 *Fed. Reg.* 19319, 4/9/08) and is currently under consideration by EPA after the public comment period ended on July 8, 2008.

According to the agency, the primary purpose of the ADWR is “to ensure that safe and reliable drinking water is provided to aircraft passengers and crew.” Once finalized, the ADWR will apply to aircraft that convey passengers in interstate commerce and are public water systems that board only finished water. The guidance is intended by EPA “to help facilitate compliance with and implementation of the requirements of the ADWR when final.” The document (i) explains the applicability of the ADWR to aircraft water systems; (ii) describes the rule requirements; (iii) recommends sampling procedures that ensure accurate sampling results; (iv) recommends maintenance procedures that help



preserve good water quality onboard the aircraft; and, (v) provides templates for the various public notices required by the proposed rule.

[11] Alternative Energy: DOI Proposes Regulations on Alternative Energy for U.S. Outer Continental Shelf

The U.S. Department of Interior (DOI) has proposed a [rule](#) that would establish a program under the Minerals Management Service for granting leases, easements and rights of way for projects and for sharing federal royalties with coastal states from alternative energy production on the U.S. Outer Continental Shelf. According to the agency, the proposed rule is aimed at encouraging energy production from solar, wind, wave, and other alternative energy sources. The proposed rule is accompanied by a draft environmental impact statement (EIS). The rule would allow both new alternative energy facilities and conversion of existing oil and gas facilities – such as offshore platforms – to alternative energy uses. The proposed rule would provide for two types of leases: (i) commercial – up to 25 years for full-scale production; and, (ii) limited – up to five years for site assessment, technology testing and similar activities. Comments on the proposed rule and draft EIS will be accepted until September 8, 2008.

[12] Climate Change: EPA Seeks Comments on Interim Report on Global Climate Change Impacts

EPA is seeking public comments on an [interim report](#) on the impacts of global climate change on regional U.S. air quality. *73 Fed. Reg. 39695* (7/10/08). The interim report was prepared by the Global Change Research Program in EPA's Office of Research and Development. The report provides an update on the progress that EPA has made in applying climate and atmospheric chemistry models

to investigate potential future meteorological effects on air quality and preliminary interpretation of what this understanding means for air quality management. The agency plans future reports that will cover the combined impacts of changing climate and air pollutant emissions on air quality. EPA will accept comments on the interim report until August 25, 2008.

[13] Air: EPA Releases Draft Report on Destruction of Ozone-Depleting Substances

EPA has released a [draft report](#) prepared by ICF International for the agency's Stratospheric Protection Division, that examines the state of ozone-depleting substances in the United States. By ratifying the "Montreal Protocol on Substances That Deplete the Ozone Layer" (Montreal Protocol) in 1988, the United States committed to regulate and phase out ozone-depleting substances, including chlorofluorocarbons (CFCs), hydrochlorofluorocarbons (HCFCs), halons, carbon tetrachloride, methyl chloroform, methyl bromide and hydrobromofluorocarbons (HBFCs). Among regulations promulgated by EPA are requirements for the safe handling of ozone-depleting substances and prohibitions on the known venting or release of ozone-depleting substances into the atmosphere.

The report examines (i) technologies for the destruction of ozone-depleting substances; (ii) recommendations on the destruction of ozone-depleting substances; (iii) U.S. regulations on the destruction of ozone-depleting substances; (iv) the ability of U.S. facilities to meet the recommendations of the Technology & Economic Assessment Panel of the Montreal Protocol for ozone-depleting substance destruction; (v) future amounts of ozone-depleting substances available for destruction; and (vi) the costs associated with the destruction of ozone-depleting substances.



[14] FIFRA: EPA Seeks Comments on New Safety Measures for Soil Fumigant Pesticides

EPA is seeking public comment on [new safety measures](#) for soil fumigant pesticides that the agency claims will increase protections for agricultural workers and bystanders – people who live, work or otherwise spend time near fields that are fumigated. The new restrictions would apply to methyl bromide, chloropicrin, dazomet, metam sodium, and metam potassium.

Mitigation measures required of the certified applicator supervising the fumigation or the owner/operator of the fumigated field would include (i) written, site-specific fumigant management plans; (ii) monitoring and maintenance of buffer zones around treated fields; (iii) public notice of the location and timing of fumigations; (iv) fumigant-specific safety information and training for first responders; (v) outreach programs to educate community members about fumigants; (vi) stringent worker protection measures and training. EPA will accept comments on the measures for 60 days after they are published in the *Federal Register*.

[15] Recycling: ISO Issues Global Criteria for Recycling and Reusing Plastics

The International Organization for Standardization (ISO) has issued new global criteria for selecting methods and processes for recycling and reusing plastics. The criteria, ISO 15270:2008, was developed to promote sustainable global infrastructure and markets for plastics recovery and recycling. Recycling options outlined in the criteria document include (i) mechanical collection: sorting, separating and palletizing; (ii) feedstock or chemical: converting plastics into chemical constituents or hydrocarbon components; and (iii) biological or organic: anaerobic or aerobic decomposition of biodegradable plastics. The criteria is available for purchase on the ISO [Web site](#).

Scientific/Technical Issues

[16] Nanotechnology: Council of Canadian Academies Issues Report on Nanomaterial Risks

The Council of Canadian Academies, an independent academic advisory group funded by the Canadian government, has issued a [report](#) to Health Canada summarizing “the state of knowledge with respect to existing nanomaterial properties and their health and environmental risks.”

Among other things, the report concludes that (i) nanomaterials can pose particular challenges to risk assessment, and hence to regulation, because they exhibit properties based on their physical structure and their chemistry; (ii) the diversity of possible nanomaterials is vast and the tolerances of a biological system to changes in their physico-chemical properties that determine their behavior are poorly understood; (iii) no unique biological effects are currently associated with exposure to nanomaterials, but there is poor understanding of how specific nanomaterials lead to specific endpoints; (iv) prevailing human and ecological risk assessment frameworks when applied to nanomaterials require new ways of measuring exposure, dose and response; (v) changes in the potential for nanomaterials to cause harm at different stages in their life-cycle imply a need for a life-cycle approach to risk assessment; (vi) there are inadequate data to inform quantitative risk assessments on current and emerging nanomaterials; and, (vii) systematically targeted research is needed to fill gaps and reduce uncertainty. The 133-page report also contains additional findings and recommendations on regulatory approaches to nanomaterials as well as specific recommendations for research on the health effects of nanoparticles.



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