

# Environmental & Chemical Update

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SUSTAINABILITY • TOXIC TORT • WASTE • WATER

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## Litigation and Regulatory Enforcement

### [1] CERCLA/Natural Resource Damage: Federal Court Rules NRD Claim Premature Until Final Remedy Is Selected

A federal judge in Oklahoma has **ruled** that a CERCLA claim for natural resource damages (NRD) is premature until EPA has selected a final remedy for the site at issue. *Quapaw Tribe v. Blue Tee Corp.*, No. 03-0846 (N.D. Okla. 7/7/08). Filed by the Quapaw Tribe, the claim alleged that the government and others caused the tribe to lose the use of various natural resources within the Tar Creek Superfund site. Under 42 U.S.C. Section 9613(g), a party may not pursue an NRD claim “before selection of the remedial action if ... [EPA] is diligently proceeding with a remedial investigation and feasibility [study] of the site.” The tribe cited a Tenth Circuit decision, arguing that the timing limitation in Section 9613(g) applied only to NRD claims for restoration or replacement costs and not to claims for interim lost use of natural resources. *New Mexico v. General Electric*, 467 F.3d 1223 (10<sup>th</sup> Cir. 2006).

In rejecting the claim and argument, the court held that Section 9613’s timing limitation applies to all NRD claims. The court then evaluated whether EPA was “diligently proceeding” with its investigation of the Tar Creek Site. Finding that EPA had undertaken numerous on-site investigation activities, the court dismissed the CERCLA and NRD claim.

### [2] CERCLA: Federal Court Rules CERCLA’s Petroleum Exclusion Does Not Apply to MTBE Alone

A federal judge in New York has ruled that CERCLA’s petroleum exclusion does not bar a claim stemming from a release of methyl tertiary butyl ether (MTBE) alone. *In re MTBE Products Liability Litigation*, No. 00-1898 (S.D. N.Y. 7/8/08).

Plaintiff, the Commonwealth of Puerto Rico, filed a CERCLA Section 107 cost-recovery claim against several oil companies alleging only “releases or threatened releases of ... MTBE.” Defendants argued that CERCLA’s petroleum exclusion, exempts gasoline containing MTBE from CERCLA under Section 9601(14), which specifically excludes petroleum and petroleum products.

In rejecting defendant’s arguments, the court held that an allegation that there were releases of MTBE, which is listed under CERCLA as a hazardous substance, would overcome a motion to dismiss. Plaintiffs represented to the court that the releases it cited were of MTBE only – not of gasoline containing MTBE.

### [3] Natural Resources: California Supreme Court Strikes Down Logging Plan

The California Supreme Court has **struck down** a California Department of Forestry and Fire Protection logging plan because it failed to approve an identifiable final sustainable yield plan demonstrating how long-term timber harvesting activities on 211,000 acres would comply with state laws.



*Environmental Protection and Information Center v. California Department of Forestry and Fire Protection*, No. 5140547 (Cal. S. Ct. 7/17/08).

Rather than approving a single, clear planning document, the agency relied on the contents of “a voluminous administrative record” that did not include an adequate analysis of the cumulative impacts the timber harvesting would have on forest watersheds, according to the court. The court concluded that the agency’s actions were not consistent with California Forest Practice Rules or the Forest Practice Act. The lawsuit challenged regulatory decisions state agencies made in finalizing a \$500 million agreement between the state and federal government and Pacific Lumber that preserved more than 7,000 acres of old-growth redwood forest. In return, Pacific Lumber received long-term federal and state permits to harvest timber on its remaining land. In addition to invalidating the plan, the court decision also invalidated a permit the Department of Fish and Game granted to the company allowing incidental takes of species protected under the states’ Endangered Species Act.

#### **[4] Air: Kansas State Court Dismisses Coal-Fired Power Plant Lawsuit**

A Kansas district court judge has reportedly dismissed two lawsuits brought by an electric utility seeking to reverse the state agency’s denial of a permit to construct two coal-fired generators at a power plant in Finney County. *Sullivan Electric Power Corp. v. KDHE*, No. 07-245 (Ks. Dist. Ct. 7/16/08). Sunflower Electric Power had applied to the state to construct two 700-megawatt generating units at its Holcomb Station power plant. The Kansas Department of Health and Environment (KDHE) denied the permit applications in October 2007,

citing projections that the units would produce 11 million tons of greenhouse gas emissions annually. The dismissals, on jurisdictional grounds, means the state Office of Administrative Hearings will consider the utility’s administrative appeal of the permit denial. See *BNA Daily Environment Report*, July 18, 2008.

#### **[5] Air: Groups Challenge EPA Soot Rule for Coal-Fired Power Plants**

Earth Justice has filed a [petition](#) for review in the U.S. Court of Appeals for the District of Columbia on behalf of the Sierra Club and NRDC seeking review of an EPA rule that exempts coal-fired power plants from fine particulate standards for a three-year “transition” period while the agency develops a better test method. *NRDC v. EPA*, No. N/A (D.C. filed 7/15/08). The rule, titled Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM2.5), was promulgated in May 2008. *73 Fed. Reg. 28321 (05/16/08)*. The petitioners allege that the NSR rule is not sufficiently protective of public health.

#### **[6] Water: Groups Sue EPA over Failure to Set Standards for Farm and Urban Runoff**

Five environmental groups have sued EPA in federal court in Florida alleging that the agency is violating the Clean Water Act by failing to set numeric nutrient criteria for farm and urban runoff. [\*Florida Wildlife Federation v. EPA\*, No. N/A \(N.D. Fl. filed 7/17/08\)](#). Filed by Earth Justice on behalf of the Florida Wildlife Federation, the Sierra Club, the Conservancy of Southwest Florida, and St. Johns Riverkeeper, the complaint alleges that EPA has failed to perform a non-discretionary duty under the CWA and seeks an order to compel EPA to set numeric nutrient criteria for the state of Florida. According to the complaint, Florida’s estuaries and



coastal oceans have been plagued with harmful algae blooms associated with nutrient over-enrichment caused by uncontrolled runoff.

## Legislation, Regulations and Guidance

### [7] Water: EPA Proposes SDWA Rules for Underground Injection of CO<sub>2</sub>

EPA has proposed new **requirements** under the Safe Drinking Water Act (SDWA) for the underground injection of carbon dioxide (CO<sub>2</sub>) for the purpose of long-term storage or geologic sequestration. The requirements are designed to protect underground sources of drinking water from contamination by injected CO<sub>2</sub>, as well as any impurities the CO<sub>2</sub> may contain. The proposal would create a new class of injection wells – Class IV – for CO<sub>2</sub>. It includes technical criteria for geologic site characterization for the wells, as well as requirements to construct wells with materials compatible with injected CO<sub>2</sub>, which is corrosive in combination with water. The wells must be constructed in a manner that prevents fluid movement into unintended zones. EPA will accept comments on the proposal for 120 days after it is published in the *Federal Register*.

### [8] Air: EPA Proposes Revisions to NAAQS for Ozone

EPA has issued a **proposed rule** that would revise the Phase 2 implementation rules for the eight-hour ozone national ambient air quality standard (NAAQS). *73 Fed. Reg. 42294 (7/21/08)*. The proposed revisions are EPA's attempt to address issues raised by the U.S. Court of Appeals for the District of Columbia Circuit when it vacated the prior Phase 2 ozone rule in 2007. *NRDC v. EPA*, No. 06-1045 (D.C. Cir. 11/02/07). The original rule, published in 2005, described how reasonably available control technology,

reasonable further progress and new source review applied to areas deemed not in attainment with the eight-hour ozone standard. EPA had interpreted the rule to allow certain emissions-reduction measures outside designated nonattainment areas to be credited toward the reasonable further progress requirement. Under its interpretation, reductions in volatile organic compounds (VOCs) within 100 kilometers and nitrogen oxides within 200 kilometers of a nonattainment area could be claimed if states could prove those emissions contributed to nonattainment elsewhere.

Under the proposed rule, states would be able to claim VOC or nitrogen oxide emissions reductions outside nonattainment areas toward their annual emissions – reduction goals, provided the states' further assessments reflect emissions changes from all sources in that area. If states do justify considering emissions from outside the nonattainment area, they must provide EPA with separate information about “on-road mobile source emissions within the nonattainment area for transportation conformity purposes.”

### [9] Climate Change: EPA Issues Final Report on Effects of Global Climate Change

EPA has issued a **final report** on the potential impacts of global climate change on human health, human welfare and U.S. communities. Titled “Analyses of the Effects of Global Change on Human Health and Welfare and Human Systems,” the report also identifies adaptation strategies to assist in responding to the challenge brought by changing climate and identifies near- and long-term research goals for addressing data and knowledge gaps.

According to the report, older adults, infants and people with compromised immune systems are most vulnerable to temperature extremes. The



report projects an increase in cardio-pulmonary illness from ozone pollution and food-borne diseases from increased temperatures. The report also notes that “climate change is very likely to accentuate the disparities already evident in the American health care system. Many of the expected health effects are likely to fall disproportionately on the poor, the elderly, the disabled, and the uninsured.”

See *EPA Press Release*, July 17, 2008.

### **[10] Water Quality: EPA Inspector General Report Criticizes Agency Efforts to Cleanup Chesapeake Bay**

The EPA Office of Inspector General (IG) has issued a report, criticizing the agency’s ongoing efforts to clean up “continuing threats to aquatic life and human health, and citizens being deprived of ... [Chesapeake] Bay’s full economic and recreational benefits.”

According to the report, nutrient and sediment runoff have harmed bay grasses and bottom habitat creating disproportionate algae growth pushing the bay food web out of balance. Issues the report claims need to be addressed include (i) uncontrolled land development near and around the bay; (ii) limited implementation of agricultural conservation practices; (iii) limited control over air emissions affecting bay water quality; (iv) lack of consistent and sustained funding sources to meet the bay’s needs; and (v) EPA’s failure to effectively use its reporting powers to inform Congress and area citizens of program challenges.

### **[11] Tax Issues: IRS Rules That SEPs Analogous to Nondeductible Fine or Penalty**

The Internal Revenue Service (IRS) Large and Mid-Size Business Division has ruled that costs incurred for performance of a supplemental environmental project (SEP) under federal or

state law are analogous to a nondeductible fine or penalty under the IRS Code and therefore may not be included in the basis of the assets it produces. The IRS reasoned that SEPs are generally the result of an enforcement settlement and frequently lead to smaller penalties than those imposed on taxpayers who do not agree to perform SEPs. Therefore, to the extent that a taxpayer settles a civil penalty in whole, or in part, by incurring costs to perform an SEP or by contributing to an environmental fund, those amounts should be treated as nondeductible fines under Section 162(f) of the IRS Code. The ruling went on to say that a taxpayer may not capitalize the costs that are analogous to a penalty under Section 263A of the Code.

### **[12] Chemical Exposure: Canada Issues Final Regulations Banning Various Forms of PBDEs**

Environment Canada has issued final rules banning various forms of polybrominated diphenyl ethers (PBDEs). The new rules prohibit the manufacture of the tetra-, penta-, hexa-, hepta-, octa-, nona- and deca- PBDE forms and prohibit the use, sale, offer for sale and import of the tetra-, penta- and hexa- forms. The rules will not apply to manufactured articles or final products containing the substances that are imported or already in use in Canada.

PBDEs are used in flame retardants in a range of products, primarily in plastics such as building and automobile parts, carpet pad, furniture foam, and electronic equipment.



**[13] Nanotechnology: Study Targets Environmental Uses of Carbon-Based Engineered Nanomaterials**

A recent study by researchers at the Department of Chemical Engineering at Yale University describes ways that carbon-based, engineered nanomaterials could be used to detect and address environmental problems, such as groundwater and drinking water contamination. Meagan S. Mauter, et al., "Environmental Applications of Carbon-Based Nanomaterials," *Environ. Science and Technology*, July 12, 2008. According to the study, carbon-based nanomaterials can be used to develop new technologies for a broad range of environmental membranes, depth filters, antimicrobial agents, environmental sensors, and renewable energy technologies.

**[14] Water/Biosolids: Study Supports EPA Decision Not to Regulate Dioxins in Sewage Sludge**

A recent Metropolitan Water Reclamation District of Greater Chicago study investigated the effects of continuous long-term applications of dioxin-containing sludge to corn fields. *Lakhwinder S. Hundal, et al.*, "Level of Dioxins in Soil and Corn Tissues After 30 Years of Biosolids Application," *J. Environ. Qual.* 37: 1497-1500 (2008). According to the study, dioxins were not detected in the corn and only trace levels were found in corn leaves and stalks. The study concluded that although long-term application of biosolids may increase the level of dioxins in soil, it does not affect dioxin uptake in corn. EPA declined to regulate dioxins in land applied biosolids in 2003. 68 *Fed. Reg.* 61083 (10/24/03).



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