

# Environmental & Chemical Update

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

Issue 244 • August 8, 2008

## Litigation and Regulatory Enforcement

- [1] **CAFA:** Seventh Circuit Interprets Reform Act's Provisions to Allow Removal of Suits Involving More Than 100 Plaintiffs . . . . . 1
- [2] **Water:** Federal Court Rules Florida's Everglades Forever Act Violates CWA . . . . . 1
- [3] **OSHA:** Workplace Safety Agency Announces Proposed Penalty of \$8.7 Million Against Sugar Company for Hazardous Conditions . . . . . 2
- [4] **Air:** Groups Sue to Block Los Angeles Clean Trucks Program . . . . . 2
- [5] **FIFRA:** Lawsuit Seeks Ban on Pesticide Diazinon . . . . . 3
- [6] **NEPA:** Phosphate Mine Permit Challenged in Federal Court . . . . . 3
- [7] **Air/Greenhouse Gases:** Coalition to Sue EPA over Failure to Regulate GHG Emissions from Ships and Airplanes . . . . . 3
- [8] **ESA:** Groups Announce Intent to Sue FWS over Listing of Polar Bear as a Threatened Species . . . . . 4
- [9] **Envtl. Crime:** Hong Kong-Based Ship Management Company Indicted for Criminal Violations of CWA and Falsifying Records . . . . . 4
- [10] **CERCLA/Fraud:** Canadian Company to Pay \$1 Million Criminal Penalty for Defrauding EPA . . . . . 4

## Legislation, Regulations and Guidance

- [11] **EPA Audit Policy:** EPA Seeks Comments on Applying Audit Policy to New Facility Owners . . . . . 4
- [12] **HAZMAT:** DOT Proposes Revisions to Rules Addressing Safe Transport of Batteries . . . . . 5
- [13] **Biofuels:** New Massachusetts Law Requires Development of Low-Carbon Fuel Standard . . . . . 5
- [14] **Green Buildings:** California Adopts Statewide Green Building Code . . . . . 6

## Scientific/Technical Items

- [15] **Biofuels:** World Bank Report Claims Biofuels Caused 70 Percent of Food Price Increases . . . . . 6

Shook,  
Hardy &  
Bacon<sub>LLP</sub>

[www.shb.com](http://www.shb.com)

---

# Environmental & Chemical Update

---

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

## Litigation and Regulatory Enforcement

### [1] CAFA: Seventh Circuit Interprets Reform Act's Provisions to Allow Removal of Suits Involving More Than 100 Plaintiffs

The Seventh Circuit Court of Appeals has ruled that the Class Action Fairness Act of 2005 (CAFA) provides federal courts with jurisdiction over cases in which 100 or more plaintiffs bring related claims even though plaintiffs did not propose a joint trial. [\*Bullard v. Burlington N. Santa Fe Ry. Co., No. 08-8011 \(7th Cir. 8/1/08\)\*](#).

The complaint identified 144 plaintiffs who sought damages from four corporations that had designed, manufactured, transported or used chemicals that allegedly escaped from a wood-processing plant and injured people living nearby.

Defendants removed the lawsuit from state court to federal court under CAFA, which creates federal jurisdiction over class litigation--including "mass actions" in which plaintiffs propose a trial involving the claims of 100 or more litigants. Plaintiffs moved to remand, arguing that the lawsuit was not a "mass action" because the complaint never proposed a "trial," and it was possible that fewer than 100 claims, if any, would ultimately reach trial. The district court denied the motion to remand, and plaintiffs appealed.

Upholding the district court, the appellate court held that section 1132(d)(11)(B)(i) of CAFA, which defines mass actions as the "claims of 100 or more persons ... proposed to be tried jointly" would be rendered defunct if plaintiffs' argument were adopted because, under their argument, a suit could never be identified as a mass action until close to trial, and thus, "no mass action could ever be a class action." According to the court, "litigation counts as a class action if it is either filed as a representative suit or becomes a 'mass action' at any time."

### [2] Water: Federal Court Rules Florida's Everglades Forever Act Violates CWA

A federal judge in Miami has ruled that Florida's Everglades Forever Act and the state's phosphorus rule violate the Clean Water Act (CWA); the court ordered EPA to re-review the state's 2003 revisions to the law. [\*Miccosukee Tribe v. U.S. No. 04-21448 \(S.D. Fla. 7/29/08\)\*](#). According to the court, the state revisions postponed for 10 years a 2006 statutory deadline requiring use of a numeric water quality standard to regulate phosphorus and constituted an impermissible change in water quality standards. The court criticized EPA, which had reviewed and approved the revisions, for allowing the state action without sufficient investigation.

Plaintiffs alleged that EPA acted arbitrarily and capriciously because it failed to determine on its own whether the state revision and the phosphorus rule violated the CWA and whether discharges of



phosphorus and other pollutants would be allowed to continue to 2016 and beyond. The court held that EPA's conclusion that the revisions would not change water quality standards was "patently wrong and [the agency] acted arbitrarily and capriciously in reaching its conclusion." The court also said that EPA erred by failing to adequately review whether the state phosphorus rule complied with section 303 of the CWA.

### **[3] OSHA: Workplace Safety Agency Announces Proposed Penalty of \$8.7 Million Against Sugar Company for Hazardous Conditions**

The Occupational Safety and Health Administration (OSHA) has reportedly issued citations proposing civil penalties totaling \$8,777,500 against the Imperial Sugar Co. and two affiliates, alleging hazardous conditions at plants in Port Wentworth, Georgia, and Gramercy, Louisiana. OSHA initiated inspections of the facilities following a February 7, 2008, explosion and fire at the Port Wentworth facility that killed 13 employees and hospitalized 40 others. The proposed penalty against Imperial is the third largest fine in OSHA history.

The inspections revealed large accumulations of combustible sugar dust in workrooms and on electrical motors and other equipment. Citations included 108 instances of willful violations related to the combustible dust hazard, 10 citations for other willful violations, 100 citations for serious violations, and four citations for other than serious safety and health violations. *See OSHA Press Release*, July 25, 2008.

### **[4] Air: Groups Sue to Block Los Angeles Clean Trucks Program**

The American Trucking Association has reportedly filed a lawsuit to block the ports of Los Angeles and Long Beach, California, from implementing what is known as the "clean trucks program," which plaintiffs argue conflicts with federal motor carrier laws. *Am. Trucking Ass'n, Inc. v. City of Los Angeles*, No. N/A (C.D. Cal. filed 7/28/08). The program is part of the San Pedro Bay Ports Clean Air Action Plan, approved in 2006, which includes a commitment to cut diesel emissions from 16,000 short-haul trucks that service the ports by 80 percent over 5 years. The program bars all pre-1989 trucks from entering the ports' terminals beginning October 1, 2008, and bans, as of January 1, 2010, all 1989-1993 trucks and any 1994-2003 trucks without certified pollution-control equipment. Beginning January 1, 2012, the program limits access to the ports to trucks meeting the federal 2007 standard for heavy-duty diesel trucks.

The complaint argues that "concession" programs included in the plan unlawfully re-regulate the port trucking industry to the detriment of motor carriers, shippers and the businesses and consumers that depend on products handled by the ports. The concession programs allow only licensed motor carriers that sign concession agreements demonstrating financial viability and the ability to comply with the new clean-truck standards to service the ports. They also require concessionaries to pay assorted fees, register their drivers and trucks, provide a maintenance schedule for the trucks, and tag trucks with radio-frequency identification devices so the ports can monitor compliance. The complaint argues that the Federal Aviation Administration Authorization Act of 1994 preempts the concession program.



### [5] FIFRA: Lawsuit Seeks Ban on Pesticide Diazinon

Several environmental and farm worker groups have sued EPA seeking a ban on all remaining uses of diazinon, arguing that the pesticide poses a danger to farm workers and nearby communities when it is applied to crops. *United Farm Workers v. EPA, No. 08-3595 (N.D. Cal. filed 7/28/08)*.

EPA banned the use of diazinon in and around residences in 2004 but reregistered the chemical in 2006 for continued use on crops including blueberries, broccoli, cherries, pears, spinach, and apples. The complaint alleges that, in weighing the risks and benefits of diazinon, EPA “failed to put the burden” on the manufacturer, which should have been required to ensure the product could continue to be used safely, and also failed to determine whether the pesticide has an impact on several listed species under the Endangered Species Act.

### [6] NEPA: Phosphate Mine Permit Challenged in Federal Court

Several environmental groups have sued the U.S. Army Corps of Engineers (Corps) over a permit for a phosphate mine that, according to the complaint, would destroy nearly 500 acres of Florida wetlands. *Sierra Club, Inc. v. Corps, No. 08-750 (M.D. Fla. filed 7/29/08)*. The lawsuit seeks an injunction halting the permit until the Corps prepares a full environmental impact statement (EIS) that considers the cumulative impact of large-scale mining in the Peace River Basin. The complaint alleges that the Corps violated the Clean Water Act (CWA), the Administrative Procedure Act and NEPA by failing to hold a public hearing or critically reviewing

the permit application. The permit, issued under section 404 of the CWA, would allow mining in the 2,367-acre Altman Tract in the watershed of Horse Creek, a major tributary of the Peace River.

### [7] Air/Greenhouse Gases: Coalition to Sue EPA over Failure to Regulate GHG Emissions from Ships and Airplanes

A coalition of environmental groups, states, government agencies, and New York City have sent a **notice** of intent to sue EPA under the Clean Air Act (CAA) citizen suit provision over the agency’s failure to regulate greenhouse gas (GHG) emissions from ships and airplanes. The coalition filed petitions with EPA in October and December 2007 requesting that the agency determine whether GHG emissions from ships and airplanes endanger public health and welfare, and regulate them if they are found to be harmful.

The notice letter argues that the recent advanced notice of proposed rulemaking (ANPR) that EPA published July 30, 2008, and in which the agency seeks comments on whether GHGs should be regulated under the CAA, is a “stalling tactic” that neither makes a finding as to whether the agency will regulate GHGs under the CAA nor draws conclusions about how to protect public health and welfare from global warming. The letter cites *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), in which the U.S. Supreme Court ordered EPA to determine if GHGs posed a health threat and, if so, to regulate them. Under section 304(a)(3) of the CAA, a person who intends to file a legal action against EPA for unreasonable delay must provide notice of intent to sue 180 days before commencing the action.



**[8] ESA: Groups Announce Intent to Sue FWS over Listing of Polar Bear as a Threatened Species**

The Pacific Legal Foundation (PLF) has sent an **intent** to sue letter to the U.S. Fish and Wildlife Service (FWS), detailing a challenge to the agency's listing of the polar bear as a threatened species under the Endangered Species Act (ESA). In a 60-day notice letter mailed July 23, 2008, PLF argues that the FWS, in its listing decision (i) relied on anecdotal evidence, (ii) used flawed sea-ice models, and (iii) ignored an increase in polar bear populations. The notice of intent to sue was submitted under section 11 of the ESA on behalf of the California Cattlemen's Association, the California Forestry Association and the Congress of Racial Equality. The letter warns that unless the FWS withdraws the listing, legal action to invalidate the listing will follow.

**[9] Envtl. Crime: Hong Kong-Based Ship Management Company Indicted for Criminal Violations of CWA and Falsifying Records**

A federal grand jury in California has returned a criminal indictment against the company operating the Cosco Busan, the container ship that hit the Oakland-San Francisco Bay Bridge in 2007 and spilled 58,000 gallons of bunker fuel into the bay. *U.S. v. Fleet Mgmt. Ltd.*, No. 08-160 (N.D. Cal filed 7/23/08). The indictment charges the company with negligently causing the discharge of a pollutant and violations of the Clean Water Act and Migratory Bird Treaty Act. The indictment also alleges that the company falsified documents after the incident to cover up its negligence and that it obstructed justice. The indictment added the company to a preexisting indictment that charged the ship's pilot

with the same violations. The company has also been sued by federal prosecutors in federal court seeking civil damages for the spill. *See DOJ Press Release*, July 23, 2008.

**[10] CERCLA/Fraud: Canadian Company to Pay \$1 Million Criminal Penalty for Defrauding EPA**

A Canadian-based company that treats and disposes of contaminated soils, reportedly pleaded guilty July 31, 2008, to a charge of participating in a conspiracy to defraud EPA and has agreed to pay a \$1 million criminal fine. DOJ will also recommend that defendant and its co-conspirators pay a total of \$1.66 million in restitution. Defendant allegedly defrauded the agency by inflating the prices it charged to a prime EPA contractor and to paying kickbacks to that contractor's employees from May 2002 to 2004 at the federal Creosote Superfund Site in New Jersey. Other co-conspirators included a Laurel Springs, New Jersey, wastewater-treatment supply company and its owner, and a former contracts administrator. They pleaded guilty to bid rigging, fraud and tax charges in connection with sub-contracts for wastewater treatment supplies and services. Sentencing is scheduled for November 3, 2008, in the U.S. District Court for the District of New Jersey. *See DOJ Press Release*, July 31, 2008.

## Legislation, Regulations and Guidance

**[11] EPA Audit Policy: EPA Seeks Comments on Applying Audit Policy to New Facility Owners**

EPA is **seeking** comments on its Interim Approach to Applying the Audit Policy to New Owners, which describes how the agency will



apply its audit policy to new owners of regulated facilities. 73 *Fed. Reg.* 44,991 (8/1/08). EPA issued the audit policy, titled “Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations,” in 2000. 65 *Fed. Reg.* 19,618 (4/11/00). The stated purpose of the policy was to “enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, promptly disclose, expeditiously correct and prevent the recurrence of violations of federal environmental law.” Under the policy, entities that disclose violations may obtain reductions in and, in some cases, the elimination of civil penalties and an EPA determination not to recommend criminal prosecution.

In May 2007, EPA sought public comments about whether and to what extent the agency should consider offering tailored incentives to encourage new owners of regulated entities to discover, disclose, correct, and prevent the recurrence of environmental violations under the policy. 72 *Fed. Reg.* 27,116 (5/14/07). EPA apparently incorporated numerous comments into its interim approach, which states that companies are eligible for treatment as “new owners” within nine months of purchasing a facility. Once these owners have voluntarily reported environmental violations, they would have the option of entering an audit agreement with EPA that details remedies and penalties, or disclosing violations individually without entering an agreement. New facility owners can report environmental violations within 21 days of discovery or within 45 days of closing on the facility, whichever is longer. EPA will accept comments on the interim approach until October 30, 2008.

### **[12] HAZMAT: DOT Proposes Revisions to Rules Addressing Safe Transport of Batteries**

The U.S. Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (PHMSA) has **proposed** revisions to its hazardous materials regulations to make battery-handling requirements consistent with the International Civil Aviation Organization’s Technical Instructions. 73 *Fed. Reg.* 44,803 (7/31/08). The revision would change proper shipping names, hazard classes, packing groups, special provisions, packaging authorizations, air transport limitations, and vessel stowage requirements. The revisions would also (i) require reporting of incidents involving batteries and battery-powered devices on vehicles; (ii) clarify the requirement that batteries and battery-powered devices and vehicles be offered for transportation and transported in a manner that prevents short-circuiting, dangerous evolution of heat, damage to terminals, and, in the case of transport by aircraft, unintentional activation; and (iii) eliminate a requirement to disconnect the terminals when a battery-powered wheelchair or mobility aid is transported as checked baggage. PHMSA will accept comments on the proposed revisions until September 29, 2008.

### **[13] Biofuels: New Massachusetts Law Requires Development of Low-Carbon Fuel Standard**

Massachusetts Governor Deval Patrick (D) signed the Clean Energy Biofuels Act (**H. 4951**) into law on July 28, 2008, requiring the state to develop a low-carbon fuel standard that would reduce greenhouse gas (GHG) emissions from the transportation sector by 10 percent. The new law also requires the state to seek an agreement with the member states of the



Regional Greenhouse Gas Initiative (RGGI) to implement the standard on a regional basis. The legislation exempts non-food-crop biofuels from the state gasoline tax and mandates their inclusion in all diesel and home-heating fuel sold in the state. Biofuels are liquid petroleum substitutes derived from renewable organic matter such as corn, soy, switchgrass, agricultural waste, wood, and waste vegetable oil. All diesel fuel and home heating fuel sold in the commonwealth would be required to have a minimum percentage of biofuel as a component, starting at 2 percent in 2010 and rising to 5 percent in 2013. All biofuels must also meet specific standards for reduction of GHG emissions. California is the only other state to adopt a low-carbon fuel standard.

#### **[14] Green Buildings: California Adopts Statewide Green Building Code**

The California Building Standards Commission approved new statewide green building standards on July 17, 2008, that require new buildings and homes to improve energy efficiency; curb water use; use adhesives, paints and other coatings with low levels of volatile organic compounds; and install high efficiency air conditioners. The new code includes standards for sediment and runoff at construction sites and requires a 50 percent cut in their waste streams, either by reducing wastes or recycling. Pending state legislation (A.B. 2939) would allow local governments to enact stricter standards. *See BNA Daily Environment Report*, July 30, 2008.

## **Scientific/Technical Items**

### **[15] Biofuels: World Bank Report Claims Biofuels Caused 70 Percent of Food Price Increases**

A recent World Bank report claims that the production of biofuels is responsible for 70 to 75 percent of the worldwide increase in food prices since 2002. According to the report, food prices rose 130 percent from 2002 to 2008 for several reasons, “but the most important was the large increase in biofuels production from grains and oilseeds in the U.S. and EU.” The report, which is part of the World Bank’s series of working papers on policy issues, blames the increase on U.S. and EU policies that provide incentives for biofuel production. Recommending that such policies be reconsidered in light of the rise in food prices, the report argues that “[r]emoving tariffs on ethanol imports in the U.S. and EU would allow more efficient producers such as Brazil and other developing countries, including many African countries, to produce ethanol profitably for export to meet the mandates in the U.S. and EU.”



---

# 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](mailto:derickson@shb.com); 816-474-6550) or  
Jim Neet ([jneet@shb.com](mailto: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<sup>LLP</sup>®

