

# Environmental & Chemical Update

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

Issue 246 • August 22, 2008

## Litigation and Regulatory Enforcement

- [1] **Food Security/Wetlands:** Eighth Circuit Determines That Iowa Farmer Violated Swampbuster Provisions of Food Security Act . . . . . 1
- [2] **Air:** Fifth Circuit Upholds Houston Smog Plan . . . . . 2
- [3] **Water/RCRA:** Second Circuit Affirms Dismissal of CWA/RCRA Suit Against Dairy . . . 2
- [4] **NEPA:** Federal Court Enjoins FS Roadless Rule . . . . . 2
- [5] **Envtl. Crime:** Michigan Appellate Court Upholds 5-year Prison Sentence for State Water Criminal Violations . . . . . 3
- [6] **Air:** Power Plant Agrees to NSR Settlement, Will Pay Penalty and Millions to Reduce Emissions . . . . . 3
- [7] **Air:** Groups Sue to Block Construction of Coal-Fired Boiler at Power Plant. . . . . 3
- [8] **Toxic Torts:** Bus Drivers Sue Diesel Companies over Exposure to Particulates . . . 4

## Legislation, Regulations and Guidance

- [9] **Endangered Species Act:** U.S. Fish and Wildlife Service Proposes Changes to ESA . 4
- [10] **Air/Greenhouse Gases:** Environment Canada Seeks Comments on Draft Guide for GHG Offsets . . . . . 4
- [11] **Consumer Product Safety Improvement Act:** President Signs Consumer Product Safety Overhaul Legislation into Law . . . . . 5
- [12] **Agriculture:** Groups Begin Work on Development of ANSI Sustainable Agriculture Practice Standard . . . . . 5
- [13] **Chemical Exposure:** FDA to Hold Public Meeting to Discuss Draft BPA Risk Assessment . . . . . 6

Shook,  
Hardy &  
Bacon<sub>L.L.P.</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] Food Security/Wetlands: Eighth Circuit Determines That Iowa Farmer Violated Swampbuster Provisions of Food Security Act

The Eighth Circuit Court of Appeals has affirmed a district court holding that an Iowa farmer converted wetlands in violation of the “Swampbuster” provisions of the Food Security Act of 1985 (FSA). [\*Clark v. USDA, No. 07-3127 \(\(8th Cir. 8/12/08\)\*](#). The Swampbuster provisions authorize the U.S. Department of Agriculture (USDA) to make determinations as to whether certain lands qualify as wetlands and whether wetlands, which have been manipulated, qualify as “converted wetlands.” To deter the conversion of wetlands, the FSA provides that a person found to have converted wetlands may become ineligible to receive farm program payments. 16 U.S.C. § 3821(c). An exception to the ineligibility provision exists for manipulations determined to have only a minimal effect on wetland and biological functions. 16 U.S.C. § 3822(f).

The record indicates that the farmer decided to convert certain pasture ground, through which a creek meandered, for use in row cropping. In 2002, the farmer sought a wetlands determination from the Natural Resources Conservation Service, a USDA agency. The agency determined that eight sites in the pasture area contained five acres of wetlands and notified the farmer not to manipulate the wetlands

without notifying the agency and that certain permits might be required from the U.S. Army Corps of Engineers. Yet, the farmer proceeded to fill and level the wetlands without notifying the agency or obtaining any permits. USDA issued a determination that the farmer had illegally converted wetlands, and the farmer appealed, ultimately filing a lawsuit in federal court seeking to overturn USDA’s determination.

The farmer argued that USDA’s action was “arbitrary and capricious” because the agency (i) followed inadequate procedures when making the wetlands determination, (ii) misinterpreted the term “converted wetland” in the FSA, and (iii) failed to conduct a “minimal effect” determination required by the FSA.

Rejecting her arguments, the district court ruled that USDA followed the required statutory procedure and that, under the statute, manipulations “for the purpose or to have the effect of making the production of an agricultural commodity possible,” are prohibited. The evidence clearly indicated that the purpose of the manipulations was to make the wetlands more suitable for cropping, and there was no evidence of prior successful cropping on the manipulated wetlands. The court also held that the agency followed its own regulation which places the burden of proof on the landowner if the landowner converts a wetland without first asking USDA to make a minimal effect determination. The appellate court affirmed, ruling that the district court’s decision properly interpreted the FSA.



## [2] Air: Fifth Circuit Upholds Houston Smog Plan

The Fifth Circuit Court of Appeals has upheld the Mid-Course Review State Implementation Plan (SIP) that Texas submitted for the Houston/Galveston/Brazoria Severe Nonattainment Area and that EPA approved. *Galveston-Houston Ass'n for Smog Prevention v. EPA*, No. 06-61030 (5th Cir. 8/13/08).

Petitioners challenged EPA's approval of the SIP, alleging that (i) EPA acted arbitrarily and capriciously in approving the SIP because it does not demonstrate attainment of specified emissions reductions; (ii) EPA acted arbitrarily and capriciously in relying on a weight of evidence analysis to exclude modeled non-attainment; and (iii) by approving the SIP, EPA violated the non-interference or anti-backsliding provision of the Clean Air Act. Petitioners also argued that the SIP would not meet federal health limits for ozone and would allow industries to emit more ozone-forming pollution into the air.

Rejecting petitioner's arguments, the court noted that two of the three computer models EPA used in its analysis showed improvement under the SIP. The court ruled that EPA's approval was reasonable and deferred to the agency's expertise.

## [3] Water/RCRA: Second Circuit Affirms Dismissal of CWA/RCRA Suit Against Dairy

The Second Circuit Court of Appeals has reportedly affirmed a district court decision dismissing a Clean Water Act (CWA) and RCRA citizen suit against a large New York dairy farm. *Coon v. Willet Dairy*, No. 07-3454 (2d Cir. 7/30/08). The court said in a *per curiam* opinion that the operator of the 8,000-cow farm, which was alleged to have improperly discharged animal waste into the area's waters,

had a general permit to operate as a Concentrated Animal Feeding Operation (CAFO). Because the dairy did not, under the terms of the permit, have to be fully compliant with its permit until December 2006—after the lawsuit was filed—the court ruled that no viable CWA citizen suit could be brought against the dairy. The court also affirmed the dismissal of the RCRA portion of the lawsuit, ruling that the RCRA claims were essentially the same as the CWA claim and were thus barred by RCRA's “non-duplication provision.” 42 U.S.C. 6905(a). See *BNA Daily Environment Report*, August 14, 2008.

## [4] NEPA: Federal Court Enjoins FS Roadless Rule

A federal judge in Wyoming has enjoined the U.S. Forest Service's (FS) 2001 Roadless Rule that prohibited roads and other development on 58.5 million acres of national forests and wilderness lands. *Wyoming v. USDA*, No. 07-17 (D. Wyo. 8/12/08).

Wyoming originally filed a challenge to the rule in May 2001, alleging that it violated NEPA, the Wilderness Act, the Wyoming Wilderness Act of 1984, the Multiple-Use and Sustained-Yield Act, and the National Forest Management Act. In 2003, the same court held that the rule violated NEPA and the Wilderness Act and vacated the rule. *Wyoming v. USDA*, 277 F.Supp.2d 1197 (D. Wyo. 2003). In September 2006, the U.S. District Court for the Northern District of California re-instated the 2001 Roadless Rule. *Lockyer v. USDA*, 459 F.Supp.2d 874 (N.D. Cal. 2006), and Wyoming renewed its challenge in January 2007.

In again vacating the rule, the court said that the rule violated the process set forth in the Wilderness Act for designation of wilderness areas. The court also determined again that the rule violated NEPA.



The California ruling is currently on appeal to the Ninth Circuit, and news reports indicate that environmental groups will appeal the Wyoming court's decision to the Tenth Circuit. *See The Los Angeles Times*, August 13, 2008.

**[5] Envtl. Crime: Michigan Appellate Court Upholds 5-year Prison Sentence for State Water Criminal Violations**

The Michigan Court of Appeals has reportedly affirmed a five-year prison sentence and a \$1 million fine for an Ypsilanti apartment complex owner convicted of violating state water protection laws. *Michigan v. Kircher*, No. 275215 (Mich. Ct. App. 8/14/08). According to court documents, the defendant was found guilty on two counts of discharging raw sewage into a storm drain for sending an estimated 100,000 gallons of sewage into the Huron River over a three-day period in 2004. Evidence demonstrated that even after being told by his employees that the practice was illegal, defendant continued to pump sewage into the storm drain. *See BNA Daily Environment Report*, August 18, 2008.

**[6] Air: Power Plant Agrees to NSR Settlement, Will Pay Penalty and Millions to Reduce Emissions**

An Arizona coal-fired power plant has agreed to pay a \$950,000 civil penalty and spend \$400 million on new pollution-control equipment to settle alleged violations of the Clean Air Act's new source review (NSR) requirements. *U.S. v. Salt River Project Agric. Improvement & Power Dist., No. 08-1479 (D. Ariz. proposed consent decree filed 8/12/08)*. In the complaint, EPA and DOJ alleged that the owner of the plant modified two electricity generating units at the Coronado Generating Station, a coal-fired power plant in St. Johns,

Arizona, between 1998 and 2000, without obtaining the necessary permits that would have required the company to install best available control technology to curb emissions of nitrogen oxides, sulfur dioxide and particulate matter.

As part of the settlement, the company agreed to install scrubbers and selective catalytic reduction controls on both units to reduce emissions of sulfur dioxide and nitrogen oxides. The company also agreed to spend \$400 million on environmental projects such as retrofitting diesel school buses in Phoenix with pollution controls, installing solar panels on school buildings and providing incentives to homeowners to replace wood-burning stoves with more efficient models. The consent decree is subject to a 30-day comment period. *See EPA Press Release*, August 12, 2008.

**[7] Air: Groups Sue to Block Construction of Coal-Fired Boiler at Power Plant**

According to a news source, environmental groups have filed a lawsuit against Duke Energy seeking to enjoin construction of a coal-fired boiler at a North Carolina power plant. *S. Alliance for Clean Energy v. Duke Energy Carolinas, Inc.*, No. 08-318 (W.D.N.C. filed 8/8/08). In May 2008, plaintiffs filed a notice of citizen suit in which they argued that the new project would violate the Clean Air Act (CAA) until air emissions analyses were conducted and threatened to sue the company under section 304 of the CAA. The North Carolina state agency had issued a permit for the construction of the new unit in January 2008. According to the complaint, the permit failed to contain a maximum achievable control technology (MACT) determination as required by the CAA for the construction or modification of major



pollution sources. The complaint also alleges that the defendant has not otherwise obtained such a determination from EPA or the state agency. See *BNA Daily Environment Report*, August 12, 2008.

### [8] Toxic Torts: Bus Drivers Sue Diesel Companies over Exposure to Particulates

Thirteen former New York bus drivers, shifters and mechanics, or their next of kin, have reportedly sued more than 15 companies that manufacture diesel engines used by New York City transit, alleging adverse health effects due to exposure to particulates. Three complaints, filed in state court on August 18, 2008, seek damages for negligence, wrongful death and pain and suffering, and allege that the manufacturers should have known the dangers of their products and taken precautions in designing them. The defendants include General Motors, Detroit Diesel Corp. and Northrop Grumman Corp., among others. See *amNY.com*, August 19, 2008.

## Legislation, Regulations and Guidance

### [9] Endangered Species Act: U.S. Fish and Wildlife Service Proposes Changes to ESA

The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) have **published** proposed revisions to the Endangered Species Act (ESA) that would eliminate the need for federal agencies to consult with FWS or NMFS on projects deemed to have no impact on threatened species. 73 *Fed Reg.* 47,868 (8/15/08).

The revisions would also prevent federal agencies from tying global warming emissions directly to the deterioration of any species.

FWS anticipates that the changes would free up agency scientists who currently spend hours evaluating projects that have minimal or even beneficial impacts on protected species. Under section 7 of ESA, scientists are now required to consult on every project reviewed, paid for or approved by the federal government that could have an impact on an endangered or threatened species or its habitat. Environmental groups reportedly plan to “vigorously” oppose the amendments. See *BNA Daily Environment Report*, August 15, 2008.

### [10] Air/Greenhouse Gases: Environment Canada Seeks Comments on Draft Guide for GHG Offsets

Environment Canada is **seeking** public comment on a draft guide for greenhouse gas (GHG) offset proposals. The draft provides detailed information on requirements and the process for completing an offset system quantification protocol, describing the approach that must be used to quantify GHG emissions reductions for specific project types. The protocol is part of Canada’s Offset System for Greenhouse Gases, which was established by the Environmental Protection Act.

Under the Act, GHG emissions reduction projects must satisfy the following criteria to generate offset credits: (i) “scope” (the project must take place in Canada; must achieve reductions in emissions of carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and/or sulfur hexafluoride; and must be included in Canada’s inventory of GHG emissions); (ii) “real” (the project must be a specific and identifiable action that results in a net reduction of GHG emissions); (iii) “incremental” (for projects starting or after January 1, 2000, credits are issued for reductions after January 1, 2008, that are beyond the baseline defined for



the product type, above all legal requirements, and beyond what is expected from other climate change incentives); (iv) “quantifiable” (project must be as specified in an offset system quantification protocol for the specific project type); (v) “verifiable” (the reductions claimed must be monitored, estimated, quantified, and reported in the registered project document); and (vi) “unique” (a GHG emissions reduction may only be used once to create an offset credit). The agency will accept comments on the draft until October 8, 2008.

#### **[11] Consumer Product Safety Improvement Act: President Signs Consumer Product Safety Overhaul Legislation into Law**

President George W. Bush (R) recently signed the [Consumer Product Safety Improvement Act of 2008](#) into law. The Act addresses lead in children’s toys and restricts the use of certain phthalates in children’s products. Consumer groups have reportedly claimed that the Act will create the first comprehensive publicly accessible consumer complaint database, increase civil penalties that the Consumer Product Safety Commission can assess against violators, and protect whistle-blowers who report product safety defects. The legislation was supported by most consumer advocacy and scientific groups, as well as many industry groups. *See BNA Daily Environment Report*, August 15, 2008.

#### **[12] Agriculture: Groups Begin Work on Development of ANSI Sustainable Agriculture Practice Standard**

A 58-member committee representing farmers, food processors, environmental advocates, consumers, and other stakeholders will meet September 25-26, 2008, in Madison, Wisconsin, to begin development of a voluntary standard for food, fiber and biofuel crop producers and agricultural product handlers and processors that may eventually be adopted by the American National Standards Institute (ANSI).

A [draft standard](#) developed by Scientific Certification Systems (SCS) and approved by the Leonardo Academy, an ANSI-accredited standards development organization, is to be used as a working tool for committee discussion and debate as it moves toward development of a standard that will be submitted to ANSI for approval. The SCS draft provides certification, auditing, testing and standards services focusing on food safety and quality, environmental protection and social responsibility. It covers areas such as (i) sustainable crop production, (ii) resource conservation, (iii) energy efficiency, (iv) ecosystem protection, (v) integrated waste management, (vi) social and economic sustainability, (vii) fair labor practices, (viii) quality, (ix) safety, and, (x) purity. The draft also addresses the impacts of product packaging, supply chain issues and agricultural practices that can minimize greenhouse gases. *See BNA Daily Environment Report*, August 18, 2008.



**[13] Chemical Exposure: FDA to Hold Public Meeting to Discuss Draft BPA Risk Assessment**

The U.S. Food and Drug Administration (FDA) has **announced** that it will hold a public meeting September 16, 2008, in Rockville, Maryland, to discuss the agency's draft risk assessment of bisphenol A (BPA) for use in food contact applications. *73 Fed. Reg. 47,957 (8/15/08)*. The draft FDA assessment reportedly concludes that BPA does not pose a health hazard when used in food containers. BPA, which has been in commercial use since the 1950s, is found in many everyday items including compact discs, automobiles, baby bottles, and other food containers. Some scientific studies have linked the chemical to prostate and breast cancers; diabetes; behavioral disorders, such as hyperactivity; and reproductive problems in laboratory animals. *See The Washington Post*, August 16, 2008.



---

# 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 LLP.®

