

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] Air: D.C. Circuit Vacates EPA Title V Monitoring Rule

The D.C. Circuit Court of Appeals has vacated, as inconsistent with the Clean Air Act, a 2006 EPA rule that prohibited supplemental monitoring in Title V operating permits issued by state and local authorities. [*Sierra Club v. EPA, No. 04-1243 \(D.C. Cir. 8/19/08\)*](#).

The 2006 rule reversed a previous EPA policy that had allowed state regulators to require supplemental monitoring in cases where they believed federal requirements were inadequate.

The 1990 Clean Air Act Amendments added Title V to establish a national permit program for stationary sources of air pollution to be administered by state and local authorities under EPA's supervision. Title V permits must include applicable emissions limits and monitoring requirements. According to the court, Title V's requirement that "each" permit must include sufficient air pollution monitoring requirements means that a monitoring requirement that is insufficient to assure compliance with emissions limits "has no place in a permit unless and until it is supplemented by more rigorous standards." The court ruled that Title V "unambiguously precludes EPA's interpretation in the 2006 rule."

[2] Air: Ninth Circuit Finds Air Emissions Jurisdiction Restricted Under CAA

The Ninth Circuit Court of Appeals has determined that a district court exceeded its jurisdiction by ordering the California Department of Pesticide Regulation to adopt strict air emissions caps on pesticides in three areas of the state. [*El Comité para el Bienestar de Earliment v. Dep't of Pesticide Regulation, No. 06-16000 \(9th Cir. 8/20/08\)*](#). The district court ruled that the state agency violated the Clean Air Act (CAA) by renegeing on a commitment in the 1994 state implementation plan (SIP) to adopt regulations cutting pesticide emissions by 20 percent within three years. The district court ordered the state agency to adopt regulations by January 1, 2008, that would achieve the emissions reductions.

Plaintiffs' lawsuit focused on California's 1994 ozone SIP. Before EPA approved it, the agency discussed the "pesticide elements" of the plan with state officials. The state agency backed away from an earlier plan to adopt regulations to cut pesticide-related emissions, indicating that they were not necessary. EPA ultimately approved the SIP. In their complaint, plaintiffs argued that an initial memorandum from the state agency outlining a schedule for adopting regulations and correspondence on interim standards were part of the approved SIP. The complaint also challenged a change in the state's methodology for setting an emissions



baseline. The district court had agreed with plaintiffs that the initial memorandum was part of the approved SIP.

According to the appellate court, “the district court ultimately exceeded its jurisdiction ... the CAA provides jurisdiction only to enforce an ‘emission standard or limitation,’ and because the challenged conduct did not implicate such a standard or limitation, the court was without jurisdiction to order a remedy.”

[3] State Cleanup Law: Seventh Circuit Rules Ongoing Environmental Cleanup Under State Law Bars Nuisance Action

The Seventh Circuit Court of Appeals has upheld a district court ruling that an ongoing environmental cleanup conducted under the Illinois Environmental Protection Act bars an action based on purported violations of a local ordinance that was adopted to expedite the cleanup. *Village of DePue v. ExxonMobil Corp., No. 07-2311 (7th Cir. 8/11/08)*.

The site is being cleaned up under a consent order between ExxonMobil and Illinois; it involves 1,500 acres contaminated by more than 80 years’ worth of zinc processing operations. Because the lawsuit conflicts with the consent order’s “phased and considered plan” for cleaning up the site, the court ruled that the suit is preempted by the state law. According to the court, the nuisance lawsuit’s threatened daily \$750 penalty for noncompliance could prevent compliance with the measured cleanup process adopted by the state through a consent order under the authority of Illinois law. Such a result, the court said, “would frustrate the purpose of the Illinois Act, which permits the

Illinois Attorney General to enter consent orders precisely like this one for the purpose of removing and remediating environmental hazards.”

[4] Toxic Tort: Federal Court Allows Landowners to Establish Property Devaluation Through Own Testimony

A federal judge in Mississippi has ruled that under state law, property owners who had filed a lawsuit alleging diminution in value caused by a gasoline spill from a nearby bulk storage facility may establish damages and devaluation through their own testimony. *Lewis v. Kinder Morgan Se. Terminals, LLC, No. 07-47 (S.D. Miss. 8/6/08)*.

According to the court, the opinions of the landowners themselves on the issue of valuation were sufficient to survive summary judgment, despite defendant’s showing that the spill had been cleaned up to the satisfaction of the state environmental agency. Under Mississippi law, a plaintiff may recover for reduced market value based on stigma damage upon a showing of “permanent and physical injury” to the property. Although defendant’s experts testified that the contamination was remediated and there was no diminution in the value of plaintiffs’ properties, the court cited the Federal Rules of Evidence, which permit a landowner to testify as an expert as to the value of her land. Fed. R. Evid. 702. The court found that the background of the two landowners who offered their opinion as to valuation was sufficient to survive dismissal. One was the county clerk who recorded county land transactions, the other was an attorney who practiced real estate law.



[5] RCRA: Property Owner Who Plugged Contaminated Well May Bring RCRA Claim

A federal judge in Illinois has ruled that a property owner who plugged a drinking water well because of its alleged contamination may still pursue an “imminent and substantial endangerment” RCRA suit against the alleged contamination source. [*Cannata v. Forest Pres. Dist.*, No. 06-2196 \(N.D. Ill. 7/24/08\)](#).

In 2006, plaintiffs sued under both RCRA and CERCLA, alleging that hazardous substances, including chlorinated hydrocarbons, had been released from a nearby landfill and had contaminated plaintiffs’ drinking water well. In October 2006, the court certified a class of more than 150 property owners who alleged their water was contaminated. Later, the named plaintiffs shut down their drinking water well and began using water from the public water supply. Defendants moved to dismiss the RCRA claim, on the ground that RCRA requires either a present or future injury which no longer existed after the well was plugged.

Rejecting defendants’ motion, the court ruled that “the fact that [plaintiffs] stopped using the allegedly polluted area (the ground water aquifer below their home) does not erase their standing to sue for the contamination of their property.” The court cited *Friends of Earth v. Laidlaw*, 528 U.S. 167 (2000), for the proposition that “even a plaintiff denied recreational use of public land has suffered an injury.”

[6] FOIA: Federal Court Finds EPA Erred in Not Waiving Fees for Production of Documents

A federal judge in New York has ruled that EPA was legally incorrect to deny a public interest waiver of fees for production of documents under the Freedom of Information Act. [*NRDC v. EPA*, No. 08-2443 \(S.D.N.Y. 8/19/08\)](#). In an earlier decision, the same court granted summary judgment to NRDC in a lawsuit concerning EPA regulation of a family of fungicides known as ethylene bisdithiocarbamates (EBDCs). On December 28, 2007, EPA rejected a request for waiver of fees for production of documents associated with the earlier litigation, saying that it was “not in the public interest” to waive the fees. NRDC pursued administrative remedies and then sued.

The court held that NRDC’s pesticide litigation was in the public interest, that the request was made with sufficient specificity and that the requestor need not show “bad faith” on the part of the agency. The court did find that the fee waiver request was overbroad and ordered EPA to waive fees with respect only to certain records.

[7] Air: Groups Allege California Air District Issued Invalid Emissions Reduction Credits

NRDC and other environmental groups have reportedly sued California’s South Coast Air Quality Management District (SCAQMD) alleging that the air district distributed invalid emissions reduction credits which are used to offset new sources of air pollution. *NRDC v. SCAQMD*, No. 08-05403 (C.D. Cal. filed 8/18/08). Under SCAQMD rules, power plants and other pollution sources cannot be constructed unless they receive emissions credits from the district. The complaint alleges that SCAQMD lacks documentation that the credits are “real,



surplus, enforceable, quantifiable, and permanent,” as required by the Clean Air Act. The complaint targets more than 200 tons per day of pre-1990 credits in two SCAQMD offset accounts. *See BNA Daily Environment Reports*, August 25, 2008.

[8] **FIFRA: Groups Sue EPA to Compel Release of Records on Bee Colony Collapse**

NRDC has sued EPA seeking to force the agency to provide records on the potential toxic effects of the insecticide clothianidin on bees. *NRDC v. EPA*, No. 08-1429 (D.D.C. filed 8/18/08). The complaint requests that the court order EPA to provide records related to the conditional registration of clothianidin within 20 days in light of the agency’s repeated refusals to provide the records. The suit claims that beekeepers have reported unexplained losses of 30 to 90 percent of their hives over the past two years and that a new class of insecticides including clothianidin “is suspected to play a role.” *See BNA Daily Environmental Report*, August 20, 2008.

[9] **Alternative Energy/Nuisance: Wind Farm Is Not a Nuisance, Says Texas Appeals Court**

A Texas appeals court has reportedly upheld a lower court ruling that FPL Energy’s Horse Hollow Wind Energy Center near Abilene is not a nuisance. The lawsuit was brought in 2005 by several property owners near the wind farm alleging that the turbines were too loud, lowered their property values and ruined their scenic views. According to the appeals court, the trial judge did not err because “Texas law does not provide a nuisance action for aesthetic impact.” Horse Hollow covers about 60,000 acres in Taylor and Nolan counties in West Texas and contains more than 400 turbines. *See Houston Chronicle*, August 21, 2008.

[10] **Prop. 65: Settlement Leads to Phase-Out of Lead Wheel Weights in California**

The settlement of a lawsuit filed by the Center for Environmental Health under California’s Proposition 65 (Prop. 65), the Safe Drinking Water and Toxic Enforcement Act, has reportedly resulted in a phase-out of the lead wheel weights that are widely used to balance vehicle tires. The lawsuit was filed in May 2008 against Chrysler Corp. and the three largest manufacturers of lead wheel weights in the United States. Under the settlement, which was approved by the Alameda County Superior Court, Chrysler will end the use of factory-installed lead wheel weights in vehicles sold in California by July 31, 2009. In addition, wheel-weight manufacturer Plombco, Inc. of Canada will end shipments of lead wheel weights to California by the end of 2008; Perfect Equipment, Inc. and Hennessey Industries will stop shipments to California by the end of 2009.

The European Union banned lead wheel weights in 2005, and they are being phased out in Japan and South Korea. EPA has an initiative encouraging voluntary reductions in the use of lead wheel weights. *See The Los Angeles Times*, August 21, 2008.

Legislation, Regulations and Guidance

[11] **FIFRA: EPA Seeks Comments on Petitions to Revoke Tolerances for Pesticide-Endosulfan**

EPA is seeking public comments on a petition filed by the Natural Resources Defense Council and Pesticide Action Network North America asking the agency to revoke all tolerances for the organophosphate pesticide endosulfan. *73 Fed. Reg.* 49,194 (8/20/08).

The petition argues that endosulfan, which is used on tomatoes, cotton and other crops, “harms the hormone system, and low levels of exposure



in the womb have been linked to male reproduction harm, other birth defects and possibly autism.” The petition also claims that “[a]cute poisoning can cause headaches, nausea, vomiting, convulsions, and in extreme cases, unconsciousness and even death.” EPA will accept comments on the petition until October 20, 2008.

[12] Agriculture: North Carolina DENR Solicits Input on Draft Performance Standards for Swine Farms

The North Carolina Department of Environment and Natural Resources (DENR) is seeking comments on draft performance standards for new and expanding swine farms in the state. The draft standards are designed to (i) eliminate animal waste discharge to surface water and groundwater through direct discharge, seepage or runoff; (ii) substantially eliminate the atmospheric emissions of ammonia; (iii) substantially eliminate odor emissions detectable beyond the tract of land on which a farm is located; (iv) substantially eliminate the release of disease-transmitting vectors and airborne pathogens; and (v) substantially eliminate nutrient and heavy metal contamination of soil and groundwater. DENR will accept comments on the draft standards until September 30, 2008.

[13] CERCLA: GAO Report Examines Sources of Superfund Funding

The Government Accountability Office (GAO) recently issued a report titled *Superfund: Funding and Reported Costs of Enforcement and Administration*, which examines funding sources for the Superfund Trust Fund and the allocation of those funds to program activities, notably enforcement and administration. The report finds that for fiscal years 1981 through 1995, when Superfund-

related taxing authority expired, taxes accounted for approximately 68 percent of trust fund revenues. Between 1995 and 2007, trust fund revenues drew only 6 percent from taxes and 59 percent from general fund appropriations; 16 percent from interest; and 19 percent from fines, penalties and recoveries. The trust fund also declined to \$173 million in fiscal year 2007 from \$4.7 billion at the start of fiscal year 1997.

Scientific/Technical Items

[14] Nanotechnology: Report Critical of CPSC’s Ability to Protect Consumers from Nanotechnology Risks

A recent report titled *The Consumer Product Safety Commission and Nanotechnology* from the Woodrow Wilson International Center for Scholars claims that the agency does not have sufficient expertise or authority to identify and address potential public health risks associated with nanomaterials in consumer products. The report criticizes the newly enacted Consumer Product Safety Improvement Act of 2008, which provides the agency with only \$1 million to study the safety of nanoengineered products.

The report contends that CPSC, instead of being able to recall a dangerous product, must negotiate a voluntary agreement with the manufacturer while retailers may continue to sell products deemed “dangerous.” The act also prevents CPSC from issuing mandatory safety standards, according to the report, which advises the agency to (i) hire expert scientists who can evaluate nanotechnology research and products, (ii) convene a Chronic Hazard Advisory Panel to address risks associated with engineered products, and (iii) call on industry to create



voluntary safety standards for the most common nanoproducts on the market and those intended for use by children.

[15] Natural Resources: Study Finds Dead Zones in Oceans Growing

A joint study by U.S. and Swedish researchers claims that dead zones in oceans around the world have increased exponentially since the 1960s. Robert J. Diaz, et al., "Spreading Dead Zones and Consequences for Marine Ecosystems," *Science*, August 2008. The study tallied 405 dead zones worldwide affecting an area of 95,000 square miles. In addition to finding that the number of dead zones has approximately doubled since the 1960s, researchers identified relatively new dead zones in the Baltic, Kattegat, Black Sea, Gulf of Mexico, and the East China Sea, all of which are major fishery areas. Dead zones are areas of the sea floor with too little oxygen to support life. The study attributes much of the problem to excess nutrients such as nitrogen and phosphorus that enter coastal waters and fertilize algae blooms.



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