

# Environmental & Chemical Update

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SUSTAINABILITY • TOXIC TORT • WASTE • WATER

Issue 248 • September 12, 2008

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## Litigation and Regulatory Enforcement

### [1] **Water: Sixth Circuit Vacates EPA's Approval of Kentucky's CWA Tier II Anti-Degradation Rules**

The Sixth Circuit Court of Appeals, as part of a complex ruling, has ordered EPA to re-examine its approval of Kentucky's Clean Water Act Tier II anti-degradation rule. *Ky. Waterways Alliance v. Johnson, No. 06-5614 (6th Cir. 9/3/08)*.

Several environmental groups alleged that EPA had failed to finalize Kentucky's federal water quality Tier II anti-degradation standards after disapproving the state's proposed water quality standards on two separate occasions. After the suit was filed, EPA approved the state's revised anti-degradation implementation procedures. On May 27, 2005, plaintiffs amended their complaint to add a third count--that EPA's approval was "arbitrary, capricious and otherwise contrary to law." Plaintiffs later voluntarily dismissed counts one and two of the lawsuit. In September 2005, the district court granted EPA's motion for summary judgment, and plaintiffs appealed.

Plaintiffs argued first that EPA's approval of Kentucky's classification of certain waters as eligible for Tier I protection rather than Tier II protection was arbitrary, capricious and contrary to law. Tier I protection establishes the minimum water quality standard for all of a state's waters and requires that "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses

shall be maintained and protected." 40 C.F.R. § 131.12(a)(1). Tier II protection applies when "the quality of the waters exceed[s] levels necessary to support propagation of fish, shellfish, and wild-life and recreation in and on the water." 40 C.F.R. § 131.12(a)(2). Plaintiffs' second argument was that EPA's specific approval of six exemptions to the Tier II review procedure, which applies to new discharges into Tier II waters, made it useless.

The appellate court upheld EPA's approval of Kentucky's classification of certain waters as eligible for Tier I protection but remanded to EPA the agency's approval of the state's exemptions of six types of pollution discharges from review. As to these exemptions, the court said that EPA, in approving the exemptions, (i) failed to explain why their effect would be insignificant and (ii) violated the Administrative Procedures Act by relying on unenforceable state commitments about how it intended to interpret its regulations, instead of requiring the state to revise them. A concurring judge said he would have gone further than his colleagues and required EPA to rework all of Kentucky's regulations because they too often rely on assurances from the state without any legal support.

### [2] **CERCLA/RCRA: Tenth Circuit Applies CERCLA Pre-Enforcement Review Bar Before Removal Action Selected**

The Tenth Circuit Court of Appeals has held that CERCLA's bar on challenging ongoing removal actions applies even though the federal government has not yet selected a removal action. *Cannon v. Gates, No. 07-4107 (10th Cir. 8/26/08)*.



The lawsuit, filed in 2007 against the U.S. Department of Defense, alleged that the government contaminated the plaintiffs' property in Tooele County, Utah, in 1945 when it used the property to test a variety of chemical and other weapons. Plaintiffs alleged that the presence of munitions and other hazardous substances on their property constituted "an imminent and substantial endangerment" under RCRA. They also alleged APA violations, among other claims.

Defendants moved to dismiss, arguing that the federal government had recently begun investigating the site's contamination under section 104 of CERCLA and under the Defense Environmental Restoration Program. The environmental investigation had already produced several reports that, defendants argued, constituted part of an ongoing removal action at the site, thus triggering section 9613(h) of CERCLA, which bars "any challenges to removal or remedial actions selected." The district court granted defendant's motion to dismiss, concluding that the government had already "selected" a removal action through its preliminary efforts to investigate whether remediation or removal was necessary. Plaintiffs appealed.

Agreeing with the district court, the appellate court ruled that section 9613(h) "is a blunt withdrawal of the jurisdiction of federal courts, which applies once the Government has begun its removal action." The court acknowledged a split of authority between the Seventh and Tenth Circuits on the issue of when a remedial or removal action is "selected." See *Frey v. EPA*, 403 F.3d 828 (7th Cir. 2005). In support of its ruling, the court cited *Razore v. Tulalip Tribes*, 66 F.3d 236 (9th Cir. 1995), and *Boarhead Corp. v. Erickson*, 923 F.2d 1011 (3d Cir. 1991).

### [3] NEPA: Ninth Circuit Upholds Injunction on Genetically Modified Alfalfa Until USDA Complies with NEPA

The Ninth Circuit Court of Appeals has upheld a district court injunction that bars the planting of herbicide-tolerant alfalfa seeds genetically engineered by Monsanto Co. until the U.S. Department of Agriculture (USDA) completes a study of their environmental impact. *Geertson Seed Farms v. Johanns*, No. 07-16458 (9th Cir. 9/2/08). The Center for Food Safety challenged USDA's decision to deregulate Roundup Ready® alfalfa seeds, which were developed to tolerate glyphosate, the active ingredient in the herbicide Roundup®. In February 2007, the district court concluded that USDA's Animal and Plant Health Inspection Service failed to take a "hard look" at the potential environmental impacts of deregulating the seeds under NEPA. Specifically, the court held that the agency failed to determine if the alfalfa would contaminate organic and conventional alfalfa or promote the growth of Roundup-resistant weeds. In a 2-1 decision, the appeals court agreed, finding that the district court did not abuse its discretion.

### [4] Air: Eleventh Circuit Rules EPA Need Not Object to State-Issued CAA Operating Permits Despite Enforcement Action

The Eleventh Circuit Court of Appeals has ruled that EPA has wide discretion in overseeing the issuance of state air pollution permits and need not object to the issuance of a permit even though EPA has issued a notice of violation (NOV) to the facility. *Sierra Club v. EPA*, No. 07-11537 (11th Cir. 9/2/08). The court held that EPA, which had issued such NOVs, was not required to object to operating permits issued by a Georgia state agency because an NOV is merely a step in an enforcement action,



not proof of a Clean Air Act (CAA) violation. The CAA requires EPA to object to an operating permit if it can be demonstrated that a facility fails to meet pollution standards. But agency allegations, the court said, do not necessarily trigger such an objection.

**[5] CERCLA: Federal Court Rules EPA May Recover CERCLA Cleanup Costs for Nonhazardous Substances**

A federal judge in New Jersey has ruled that EPA may recover CERCLA cleanup costs in a section 107(a) cost recovery action for the cleanup of nonhazardous substances at a site in Camden. *U.S. v. Sensient Colors, Inc., No. 07-1275 (D.N.J. 8/12/08)*. Rejecting defendant's argument, the court noted that nothing in the National Contingency Plan (NCP), which sets criteria for CERCLA cleanups, limits EPA from recovering the costs of nonhazardous substances. The court cited a 1997 Ohio decision that analyzed the NCP language, concluding that the NCP "did not mention, much less prohibit, the removal of nonhazardous substances from the site." *U.S. v. 150 Acres of Land*, 3 F. Supp. 2d 823 (N.D. Ohio 1997). In that case, the defendant argued that money EPA spent removing empty drums and an underground storage tank could not be recovered because those items did not contain hazardous substances and were therefore inconsistent with the NCP. In the New Jersey case, EPA spent more than \$16 million cleaning up a former pigment and dye-making facility that was contaminated with lead, benzene and other hazardous substances. The cleanup also included removing thousands of abandoned drums, the demolition of structures and on-site treatment of soil. Defendants argued that EPA could not include costs associated with the removal of any nonhazardous substances.

**[6] Air/Greenhouse Gases: States, Cities Challenge EPA's Failure to Regulate GHG Emissions from Refineries**

Several states, New York City and the District of Columbia have reportedly challenged EPA over the agency's failure to regulate greenhouse gas (GHG) emissions from petroleum refineries. *New York v. EPA*, No. N/A (D.C. Cir. filed 8/25/08). The petition for review alleges that EPA violated the Clean Air Act (CAA) by declining to regulate GHG from refineries when the agency issued final new source performance standards in June 2008. Other states joining the challenge are California, Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, and Washington. EPA published an advance notice of proposed rulemaking (ANPR) on June 30, 2008, seeking comments on the advantages and disadvantages of regulating GHG emissions under various sections of the CAA. In April 2007, the U.S. Supreme Court ruled that carbon dioxide and other GHGs are air pollutants as defined in the CAA and said the agency must regulate GHGs or explain why it is not doing so. *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007). See *NY Attorney General Press Release*, August 25, 2008, and *BNA Daily Environment Report*, August 26, 2008.

**[7] Env'tl. Crime: Missouri City Pleads Guilty to Discharging Untreated Sewage**

The City of Lake Ozark, Missouri, reportedly pleaded guilty August 25, 2008, to violating the Clean Water Act by discharging untreated sewage into the Lake of the Ozarks. *U.S. v. Lake Ozark, Mo.*, No. N/A (Mo. Cir. Ct. plea entered 8/25/08). As part of the plea, the city agreed to pay a \$50,000 fine to upgrade and maintain its wastewater treatment system and to report all bypasses from its treat-



ment system and lift stations as required by permits and state regulations. According to court documents, the city has a long history of allowing sewage to overflow from its treatment plant into the lake, including hundreds of “bypass events.” In September 2007, Missouri Department of Natural Resources staff members observed a lift station overflow that resulted in a 10,000 to 15,000 gallon discharge. *See BNA Daily Environment Report*, August 28, 2008.

**[8] Env'tl. Crime: Grease Hauling and Disposal Company Fined for Criminal CWA Violations**

A North Carolina-based grease hauling and disposal company was reportedly fined \$160,000 for criminal violations of the Clean Water Act. *U.S. v. Ecosolve*, No. 07-98 (W.D.N.C. 8/25/08). The company was also sentenced to three years' probation during which government investigators can inspect its records, facilities and equipment without notice. The company was retained by restaurants and food outlets to remove, haul, pretreat, and dispose of waste from grease traps. The indictment alleged 10 felony counts of engaging in a conspiracy to defraud customers by charging them for hauling and disposal services that the company never intended to provide. The company pleaded guilty to four of those counts. According to press reports, six current and former officials and employees were also sentenced for roles in the scheme. *See DOJ Press Release*, August 25, 2008.

**[9] Prop. 65: California AG Sues Artificial Turf Manufacturers for Failure to Provide Lead Warnings**

California Attorney General Jerry Brown (D) has reportedly sued six artificial-turf companies alleging that they failed to warn of exposure to lead at

unsafe levels in their turf, as required by the Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65). The city attorney of Los Angeles and the district attorney of Solano County joined the attorney general in the lawsuits. According to press reports, more than 150 samples from two dozen companies tested by an independent lab showed that 30 percent contained high levels of lead. One company had a sample showing lead at 150 times higher than EPA standards. *See San Francisco Chronicle*, September 3, 2008.

**[10] Toxic Torts: Cameron, Missouri, Residents Sue Fiber Insulation Manufacturer over Exposure to Contaminants**

According to press reports, residents of Cameron, Missouri, have filed a putative class action against the successors of a fiber insulation manufacturer alleging the company released or dumped lead, arsenic and other toxic substances in the area. *Gardner v. Rockwool Indus., Inc.*, No. 08-00692 (Mo. Cir. Ct. filed 8/21/08). Plaintiffs allege that toxic substances from the site have led to a disproportionately high incidence of brain tumors and other neurological illnesses among area residents. The plaintiffs allege negligence, strict liability, nuisance, and trespass. *See BNA Daily Environment Report*, September 4, 2008.

## Legislation, Regulations and Guidance

**[11] Wetlands: EPA Vetoes Corps Project over Wetlands Loss**

EPA issued a [final determination](#) August 31, 2008, vetoing an Army Corps of Engineers (Corps) project that would have drained thousands of acres of Mississippi wetlands to control flooding in residential and agricultural areas. The Yazoo



Backwater Area Pumps Project, a \$220 million initiative, was designed to reduce flood damage in the Yazoo Backwater Area in west-central Mississippi. The project would have entailed the construction of a pumping station to remove water from the area and would have required the discharge of dredged or fill material into 44 acres of forested wetlands and into water bodies in Issaquena County. It also called for the reforestation of up to 40,571 acres of agricultural land. Under section 404 of the Clean Water Act, EPA has authority to prohibit, restrict or deny using waters of the United States as a disposal site for fill material when it determines it will have an unacceptable effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas.

## Scientific/Technical Items

### [12] Climate Change: Draft Government Report Warns of Damage to Ecosystems from Global Warming

A recent draft [report](#) by the National Oceanic and Atmospheric Administration's U.S. Climate Change Science Program warns that the threat of climate change may push ecosystems across thresholds that would render restoration extremely difficult or impossible. The program will accept comments on the report until October 17, 2008. One example provided by the report is arctic tundra-snow melting, due to climate change, that exposes dark vegetation, which absorbs heat from the sun and leads to more global warming. This, in turn, fosters the invasion of shrubs into the tundra, which would further add to warming.

The draft report recommends that (i) federal agencies monitor indicators of ecosystem stress to better understand when ecosystems may be approaching thresholds; (ii) resource managers

reduce other environmental stressors that may reduce the threat of crossing thresholds; (iii) managers reconsider the species-carrying capacity of given parcels of land, minimum habitat sizes and the water needs of a given ecosystem; (iv) federal agencies work to project the impacts to water supply, biodiversity and resource extraction from climate change; and (v) institutions increase their capacity to adapt to climate change.

### [13] Nanotechnology: Report Argues for Immediate Moratorium on Use of Carbon Nanotubes

A recent Friends of the Earth Australia [report](#) argues for an immediate moratorium on the commercial use of carbon nanotubes and on the sale of products that incorporate nanotubes, until research can demonstrate safe levels of exposure. The report summarizes published scientific studies alleging that exposure to carbon nanotubes can cause asbestos-like disease and other lung problems, accelerated development of artery plaque associated with heart disease, cell death and DNA damage. The report recommends a new nanotechnology-specific regulation to protect workers, the public and the environment and the mandatory labeling of all nanomaterials in the workplace and in consumer products.



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