

# Environmental & Chemical Update

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

Issue 249 • September 19, 2008

## Litigation and Regulatory Enforcement

- [1] **Wetlands:** Ninth Circuit Rules Corps Wetlands Decision Not Reviewable . . . . . 1
- [2] **Air:** Federal Court Denies Motion to Enjoin California Clean Truck Program in Ports . . . . . 1
- [3] **Air:** Cement Companies Settle NSR Enforcement Actions . . . . . 2
- [4] **Envtl. Crime:** Texas Business Owner Sentenced for RCRA Criminal Violations . . . 2
- [5] **Envtl. Crime:** Waste Treatment Firm Pleads Guilty to CWA Criminal Violations . . 3
- [6] **RCRA:** Colorado Agency Sues Army to Compel Chemical Weapons Disposal . . . . 3
- [7] **Water/Sludge:** Group to Sue EPA over Sewage Sludge Program . . . . . 3

## Legislation, Regulations and Guidance

- [8] **Water:** EPA Announces Notice of Final Effluent Guidelines Program Plan . . . . . 4
- [9] **HAZMAT:** DOT Proposes Rule Revising HAZMAT Security Rules . . . . . 4
- [10] **IAQ:** New York Enacts Law Protecting Tenants from Vapor Intrusion and Other IAQ Problems . . . . . 4
- [11] **Water/AFOs:** Maryland DE Proposes General Discharge Permit for Poultry AFOs . 5
- [12] **Air/Greenhouse Gases:** Cal/EPA Air Board to Hold Public Meeting on GHG Reporting . . . . . 5

## Scientific/Technical Items

- [13] **Nanotechnology:** Report Urges Research on Nanoscale Silver in Consumer Products . . . . . 5
- [14] **Chemical Exposure:** Study Claims PBDE Levels Higher in Children . . . . . 6
- [15] **Alternative Energy:** Report Advocates Community Development of Wind Energy. 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] Wetlands: Ninth Circuit Rules Corps Wetlands Decision Not Reviewable

The Ninth Circuit Court of Appeals has ruled that a U.S. Army Corps of Engineers (Corps) determination that a site in Fairbanks, Alaska, contains wetlands subject to Clean Water Act (CWA) requirements is not reviewable because the Corps' regulatory determination alone is not a final agency action. *Fairbanks N. Star Borough v. Corps, No. 07-35545 (9th Cir. 9/12/08).*

The case stems from the city's plan to develop a tract of property for recreational use. At the city's request, the Corps issued a determination in 2005 that the site contained "waters of the United States" subject to Corps jurisdiction. Fairbanks sued the Corps in August 2006, seeking to set aside the determination. The city argued that the Corps acted unlawfully in determining the site was subject to the CWA, in part because the property "is underlain by shallow permafrost at a depth of 20 inches" and therefore could not possibly be a wetland. The district court granted the Corps' motion to dismiss, and the city appealed.

Affirming the district court decision, the appellate court said the Corps' determination "simply puts Fairbanks on notice that the Corps believes a permit is necessary if Fairbanks decides to proceed with its project." The judge noted that Fairbanks has not

applied for a CWA section 404 permit, nor has the Corps initiated any pre-enforcement or enforcement action.

### [2] Air: Federal Court Denies Motion to Enjoin California Clean Truck Program in Ports

A federal judge in California has denied the trucking industry's motion to preliminarily enjoin two ports from implementing "concession agreements" designed, among other matters, to reduce diesel emissions from trucks servicing container facilities at the ports of Los Angeles and Long Beach. *Am. Trucking Assns., Inc. v. The City of Los Angeles, No. 08-04920 (C.D. Cal. 9/9/08).*

In December 2007, the California Air Resources Board adopted rules to limit the emissions from diesel trucks providing drayage services in state ports. At approximately the same time, the two ports developed a Clean Air Action Plan that included a "Clean Trucks Program," a multi-faceted program designed to reduce the emissions of trucks providing drayage services to the ports.

Under the program, the ports adopted tariff amendments requiring that all drayage trucks that service the ports meet EPA 2007 truck emissions standards by 2012. The ports also adopted tariff amendments instituting a "Clean Truck Fee," to be paid by cargo owners of merchandise leaving the ports, and, in February and March 2008, Long Beach and Los Angeles port authorities, respectively, adopted orders stating that drayage trucks would not be allowed access to the ports without "concession agreements."



The concession agreements require that each truck accessing the ports must meet numerous standards including compliance with all diesel emissions standards. In July 2008, the plaintiff sued the ports, alleging that the concession agreements violate the Supremacy Clause of the U.S. Constitution and the Federal Aviation Administration Authorization Act of 1994 (FAAA). Plaintiffs argued that the FAAA, which was enacted to achieve deregulation of the motor carrier industry, preempted the Clean Trucks Program's concession agreements.

Denying plaintiff's motion, the court ruled that the FAAA, while it preempts state regulation "related to price, route, or service of a motor carrier that transports property," contains an express exception that says the preemption provision "shall not restrict the safety regulatory authority of a state with respect to motor vehicles..." 49 U.S.C § 14501 (c)(2)(A). According to the court, "defendants have shown that there is a significant probability that the concession agreements fall under the safety exception to the FAAA, and that they may therefore be saved from preemption."

### **[3] Air: Cement Companies Settle NSR Enforcement Actions**

A cement manufacturing facility in western Illinois has entered into a consent decree, agreeing to pay an \$800,000 civil penalty and install modern pollution-control equipment to settle alleged violations of new source review (NSR) requirements under the Clean Air Act (CAA). *U.S. v. St. Marys Cement Inc., No. 08-50199 (N.D. Ill. entered 9/8/08)*.

According to an EPA press release, the settlement is the first formal action related to a federal enforcement initiative aimed at the Portland cement industry under NSR requirements. The enforcement action alleged

that the plant owner made significant modifications to the plant in November 2003 without obtaining a Prevention of Significant Deterioration (PSD) permit required by the NSR regulations. It also alleged that the modifications failed to comply with the CAA's best available control technology requirements for controlling nitrogen oxide emissions. Under the consent decree, defendants agreed to install selective non-catalytic pollution-control systems on three of four kilns by April 30, 2009. The company also agreed to install and operate continuous emissions monitoring systems on the kilns.

### **[4] Env'tl. Crime: Texas Business Owner Sentenced for RCRA Criminal Violations**

The owner of a welding supply business in Beaumont, Texas, has reportedly been sentenced to eight months in prison and fined \$1.2 million for criminal RCRA violations. *U.S. v. Mazoch*, No. 07-86 (E.D. Tex. *sentenced* 8/28/08). The defendant pleaded guilty in March 2008 to charges of conspiring to store, transport and dispose of hazardous wastes without a permit. Two of defendant's former employees also pleaded guilty to participating in the conspiracy and were sentenced to six months' home confinement, probation and 200 hours of community service. Court documents show that defendant received a \$700,000 bid for disposal of more than 550 compressed gas cylinders containing cyanide and other industrial gases, but instead stored them at a self-storage facility in Sulfur, Texas. Defendant paid one of his former employees \$30,000 to transport the cylinders to the storage unit and falsified documents to make it appear that the cylinders had been sold. *See BNA Daily Environment Report*, September 8, 2008.



### **[5] Env'tl. Crime: Waste Treatment Firm Pleads Guilty to CWA Criminal Violations**

A Detroit, Michigan, industrial waste treatment firm has reportedly entered a plea agreement with the Department of Justice admitting that it violated the Clean Water Act and made false statements to the government concerning illegal discharges of untreated liquid wastes. The company has agreed to pay a fine of \$600,000 plus an additional \$150,000 that will fund a community service project.

According to court documents, the company had a permit to treat liquid waste and then discharge the treated waste into the Detroit sanitary sewer system. From April 2001 to June 2002, the company took in more liquid waste than it could handle, but continued to receive up to 13 million gallons of liquid industrial waste which it discharged, untreated, directly into the Detroit sanitary sewer system. The company also falsified records to indicate the liquid waste had been treated. *See Law360.com*, September 8, 2008.

### **[6] RCRA: Colorado Agency Sues Army to Compel Chemical Weapons Disposal**

According to a news source, the Colorado Department of Public Health has sued the Department of Defense to compel the Army to dispose of chemical weapons stored near Pueblo, four years sooner than the Army had planned. *Colorado DPA v. U.S.*, No. 08-1883 (D. Colo. filed 9/3/08). The weapons contain mustard agent, which is acutely toxic and has been found to cause cancer and birth defects, according to the complaint. The lawsuit follows the Army's decision to appeal the state's June 17, 2008, administrative order requiring the weapons' accelerated destruction.

The destruction plan called for on-site neutralization of the mustard agent followed by biological treatment of the resulting waste by 2017. In 2004, however, the Army terminated its plans and ordered the facility to be redesigned to reduce costs. A new plan now extends the destruction period until 2021. According to the state agency, the mustard agent weapons are properly stored and are deteriorating. *See BNA Daily Environment Report*, September 9, 2008.

### **[7] Water/Sludge: Group to Sue EPA over Sewage Sludge Program**

The Center for Food Safety (Center) has reportedly announced plans to sue EPA in an attempt to force the agency to set a moratorium on the land application of sewage sludge until more scientific study is conducted on the possible harm to people and animals from contaminants and heavy metals that might be contained in the sludge. Federal regulations allow sludge, a byproduct of sewage treatment, to be disposed of on public lands, including parks and farms. It is often used as an alternative to commercial fertilizers.

A Center spokesperson said the suit is expected to be filed within 60 days. The lawsuit will reportedly seek an order requiring Clean Water Act NPDES permits to mandate a method of sludge disposal other than land application. It will also ask the court to order EPA to issue a rule eliminating land application as an acceptable practice for sludge disposal. EPA denied a Center petition in December 2003 that sought a moratorium on land disposal of sludge. The agency said that current scientific evidence did not support a ban. *See BNA Daily Environment Report*, September 15, 2008.



## Legislation, Regulations and Guidance

### [8] Water: EPA Announces Notice of Final Effluent Guidelines Program Plan

EPA has issued a [notice](#) of its final 2008 effluent guidelines program plan. Section 304(m) of the Clean Water Act (CWA) requires the plan, and the agency publishes a new one every other year. The plan establishes a schedule for the annual review and revision of promulgated effluent guidelines and for identifying industrial categories without effluent guidelines that might need to be regulated to prevent or control pollution.

EPA's notice also describes the agency's preliminary thoughts concerning its 2009 annual reviews under CWA sections 304(b) and 307(b) and solicits comments, data and information to assist EPA in performing its reviews. The notice explains that EPA is actively working with other federal agencies to understand the implications of pharmaceutical compounds that have been identified in the nation's rivers, lakes and streams and that the agency has initiated a study of pharmaceutical disposal practices at health care facilities. Once the notice is published in the *Federal Register*, EPA will accept comments for a prescribed period.

### [9] HAZMAT: DOT Proposes Rule Revising HAZMAT Security Rules

The U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration has proposed a [rule](#) revising existing hazardous materials transportation (HAZMAT) regulations by eliminating the requirement for security plans for the transport of certain materials and expanding the requirement for others. *73 Fed. Reg. 52,557*

(9/9/08). The proposed rule would (i) increase the threshold amounts at which the transport of certain flammable gases require a security plan from 119 gallons to 792.5 gallons, (ii) eliminate the security plan requirement for certain spontaneously combustible materials, (iii) expand the security plan requirement for certain infectious substances that can easily be turned into weapons, (iv) expand the security threshold for the shipment of radioactive materials to meet thresholds recommended by the International Atomic Energy Agency, and (v) weaken the security plan requirement for the transport of small amounts of corrosive materials. The agency is accepting comments on the proposed rule until November 10, 2008.

### [10] IAQ: New York Enacts Law Protecting Tenants from Vapor Intrusion and Other IAQ Problems

New York Governor David Patterson (D) recently signed [legislation](#) (A. 10952) designed to protect tenants from vapor intrusion and other problems associated with indoor air quality (IAQ) by requiring landlords to provide prospective tenants with certain information on indoor air contamination. The new law, which takes effect 90 days from September 4, 2008, requires landlords to provide health and safety information to prospective tenants in cases where indoor air testing has been done on a property and the results exceed state or federal guidelines. Specifically, landlords must disclose the results of tests involving indoor air, sub-slab air, ambient air, sub-slab groundwater samples, and sub-slab soil samples if the results exceed guidelines developed by the state Department of Health or the U.S. Occupational Safety and Health Administration. The law establishes additional notification requirements for landlords when their properties have



engineering controls to mitigate indoor air pollution or are subject to ongoing monitoring. *See BNA Daily Environment Report*, September 10, 2008.

### **[11] Water/AFOs: Maryland DE Proposes General Discharge Permit for Poultry AFOs**

The Maryland Department of the Environment (MDE) has proposed a general discharge permit and regulations for poultry animal feeding operations (AFOs).

The permit and regulations would apply to poultry farms with 100,000 square feet or more poultry house capacity. Medium-sized poultry farms of 75,000 to 99,000 square feet would have to certify to the state that they are meeting the same standards required for the larger feeding operations, but with a reduced paperwork burden. Under the proposal, MDE could designate a medium-sized poultry operation as a “Maryland animal feeding operation,” which would require the permit. The permit and certification requirements would include (i) adoption of management plans, (ii) authorization for unannounced MDE inspections, (iii) limits on outdoor storage of manure, and (iv) rules for vegetative buffers if manure is applied to fields as fertilizer. MDE will hold public hearings on November 10, 12 and 13, 2008, and will accept comments on the proposal until November 20, 2008. *See MDE Press Release*, September 12, 2008.

### **[12] Air/Greenhouse Gases: Cal/EPA Air Board to Hold Public Meeting on GHG Reporting**

Cal/EPA’s Air Resources Board (ARB) has announced that it will hold a public meeting on September 25, 2008, in Diamond Bar, California, to consider the adoption of greenhouse gas (GHG)

reporting and project protocols for quantifying and reducing GHG emissions from local government operations, urban forestry and manure digesters.

During the meeting, ARB staff will propose that the board adopt three protocols designed to assist local governments in quantifying their GHG emissions and assist businesses in quantifying GHG emission-reduction projects. ARB will accept comments until September 24.

## **Scientific/Technical Items**

### **[13] Nanotechnology: Report Urges Research on Nanoscale Silver in Consumer Products**

A recent report from the Woodrow Wilson International Center for Scholars Project on Emerging Nanotechnologies urges increased research on risks posed by the growing use of nanoscale silver in consumer products. The report discusses ways that nanoscale silver is being used to treat air and water and in myriad consumer products including socks, air sprays, toothpaste, body lotions, hair brushes, and toys. According to the report, the inventory of such products has grown from 212 products in March 2006 to 803 products in August 2008. The report recommends (i) the integration of nanoscale risk research into a unified, multi-agency, stakeholder-vetted nanotech dialogue; (ii) the assignment of responsibilities, resources and timelines for implementing nanoscale research; (iii) the integration of research among international research programs to leverage resources and ensure timely and relevant progress; (iv) the development and sharing of appropriate terminologies to underpin research and oversight; (v) the definition of clear rules for defining a product’s ingredients that take into account its unique physical and chemical attributes; (vi) the assessment of what information is needed to



oversee safe uses of nanosilver; and (vii) the assessment of the relevance and shortcomings of current silver-relevant regulations to nanosilver.

#### **[14] Chemical Exposure: Study Claims PBDE Levels Higher in Children**

A study by Environmental Working Group scientists claims to have found that children had levels of the fire retardant polybrominated diphenyl ether (PBDE) in their blood three times as high as their mothers. The study examined concentrations of PBDEs in 20 American families, finding that in 19 of the 20 families, children had greater total PBDE concentrations than their mothers. The study, which was conducted in 2007, claims to have detected PBDEs in the blood of children and in the blood and breast milk of mothers. The study reports PBDE concentrations in children that averaged 62 parts per billion and ranged from 25 to 114 ppb. Concentrations in mothers averaged 25 ppb and ranged from 10 to 74 ppb. PBDEs, phased out in 2004, were widely used as flame retardants in furniture and foam items that are still in American homes. Several states ban the sale of items containing PBDE, and the European Union prohibited their use in 2003. See *Environmental Working Group Research Report*, September 10, 2008.

#### **[15] Alternative Energy: Report Advocates Community Development of Wind Energy**

A recent [report](#) by an energy industry group advocates community development of wind energy projects to boost local economies and increase the nation's wind power capacity. According to the report, wind energy projects are currently dominated by large institutional investors. The report proposes the creation of state and federal policies to make wind power ownership more accessible to groups like farmers, consumer-owned utilities, school districts, colleges, and Native American tribes. Currently, community-based projects make up only 4 percent of installed U.S. wind projects—the report suggests that 20 percent is possible by 2030 if challenges like insufficient transmission systems and energy markets are overcome. The report also recommends restructuring the production tax credit for renewable energy to accommodate more small-scale projects.



---

# 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.®

