

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] **ESA: Ninth Circuit Dismisses ESA Challenge to FCC Towers**

The Ninth Circuit Court of Appeals has dismissed a citizen suit challenging a Federal Communications Commission (FCC) licensing order under the Endangered Species Act (ESA) in an effort to reduce collisions of migratory birds with seven FCC-approved towers in Hawaii. [*Am. Bird Conservancy v. FCC*, No. 06-15429 \(9th Cir. 10/6/08\)](#). The appellate court affirmed the decision of the district court which held that challenges to FCC orders must follow procedures set forth in the Communications Act of 1934.

Plaintiffs alleged that the towers were killing two endangered seabird species and that the FCC failed to comply with its statutory obligation to consult with the secretary of the Department of Interior before registering the towers. While the court said it sympathized with plaintiff's argument that the FCC administrative process moves at a "glacial pace," it was not willing to circumvent the FCC regulatory procedures enacted by Congress.

Plaintiffs cited a D.C. Circuit Court of Appeals decision which held that the FCC violated NEPA and the ESA when it denied a petition from the American Bird Conservancy, Inc. seeking to reduce migratory bird collisions with communications towers over a 1,000-mile stretch of coastline between Port Isabel, Texas, and Tampa Bay, Florida.

Am. Bird Conservancy, Inc. v. FCC, 516 F.3d 1027 (D.C. Cir. 2008). The Ninth Circuit distinguished the two decisions, holding that plaintiffs in the instant case did not challenge the tower registrations themselves but only the FCC's procedures, which the court said were valid.

[2] **Air: Utah Supreme Court Strikes Down Law Limiting Voter Initiatives on Power Plant Permitting Decisions**

The Utah Supreme Court has declared unconstitutional a state election-code law that limited voter initiatives on power plant permitting decisions. [*Sevier Power Co., LLC v. Bd. of Comm'rs*, No. 08-0780 \(Utah 10/17/08\)](#). So ruling, the court upheld the right of Sevier County voters to decide the fate of a coal-fired power plant planned near Sigurd, Utah, that would burn coal from Sufco Mine, one of the state's largest coal mines. The law said that voters could not vote on land-use ordinances, but the state constitution reserves the right of the people to vote on "any desired legislation." According to the court, the state legislature does not have the authority "to suspend or forbid the use of the initiative power." Several environmental groups challenged the statute that would have prevented a vote by county residents on the siting of the \$600-million proposed power plant.



[3] **Envtl. Crime: Gas Company Convicted of RCRA Criminal Violation for Illegal Mercury Storage**

The former owner of a New England gas company has reportedly been convicted of one felony count of storing hazardous waste without a permit in violation of RCRA. *U.S. v. S. Union Co.*, No. 07-134 (D.R.I. 10/15/08). The company was convicted by a jury after a 12-day trial. According to court documents, the company began a program in 2001 to remove mercury-containing gas regulators from customers' homes. The company hired an environmental services company to remove the mercury from the regulators and ship it to a facility in Pennsylvania for further processing. Despite the expiration of the removal contract, company technicians continued to remove the regulators from customers' homes and store the loose liquid mercury in various containers in a building. By July 2004, approximately 165 mercury-containing regulators were stored at the site. Sentencing is scheduled for February 20, 2009. The company faces a potential \$38 million fine. See *DOJ Press Release*, October 15, 2008.

[4] **Radioactive Waste: Nevada AG Challenges EPA's Yucca Mountain Radiation Standards**

Nevada Attorney General Catherine Cortez Masto (D) has challenged EPA's radiation standards for the proposed nuclear waste repository at Yucca Mountain, Nevada. *Nevada v. EPA*, No. N/A (D.C. Cir. 10/10/08). The petition for review alleges that U.S. Department of Energy data show that, under EPA's recently issued radiation standards, state groundwater will be contaminated and Nevada citizens will be exposed to unacceptable radiation levels. The petition also alleges that, by failing to protect the public and the environment, EPA has

violated the Energy Policy Act, the Atomic Energy Act and the Nuclear Waste Policy Act. EPA issued its radiation standards for the Yucca Mountain Repository on September 30, 2008. See *Nevada AG Press Release*, October 10, 2008, and *Law360*, October 13, 2008.

[5] **NEPA: Group Sues BLM to Halt Grazing in Wildlife Area**

The Western Watersheds Project has sued the U.S. Bureau of Land Management (BLM) alleging the agency violated NEPA and other federal statutes when it allowed grazing, fencing and other management decisions in the Bruneau Resource Area in Idaho. *W. Watersheds Project v. BLM, No. 08-435 (D. Idaho filed 10/14/08)*. According to the complaint, BLM was aware that overgrazing in the wildlife area threatened the habitat of dozens of wildlife and plant species and yet, issued grazing permits anyway. The complaint also alleges that BLM failed to adhere to a management plan adopted in 1983 to establish standards for protecting and encouraging the growth of wildlife species in the area. Plaintiffs specifically challenge BLM's 2008 Environmental Assessment and a Finding of No Significant Impact that resulted in the issuance of 10-year grazing permits.

Legislation, Regulations and Guidance

[6] **Air: EPA Issues Final Air Quality Standard for Lead**

EPA has issued final revised national ambient air quality **standards** (NAAQS) for lead. The revision sets both the primary and secondary lead standards at 0.15 microgram per cubic meter ($\mu\text{g}/\text{m}^3$). The previous standards were 1.5 $\mu\text{g}/\text{m}^3$. The revised standards will be averaged quarterly, and EPA will expand its lead monitoring network to all sources



emitting more than one ton of lead annually and to all urban centers with more than 500,000 people. EPA, which has not revised the lead standard since 1978, was ordered by a federal court to make a decision by October 15, 2008, whether to revise the lead standard. *Mo. Coal. for the Env't v. EPA*, No. 04-660 (E.D. Mo. 9/14/05). The revised standard has been submitted to the *Federal Register* for publication and will be effective 60 days after it is published.

[7] EPCRA: EPA Amends EPCRA Reporting Requirements

EPA finalized several amendments to the Emergency Planning and Community Right-to-Know Act (EPCRA) on October 17, 2008. The amendments include clarification on how to report hazardous chemicals in mixtures and changes to Tier I and Tier II forms. As to the former, when determining whether the threshold quantity of an extremely hazardous substance (EHS) has been met, “the quantity present in a mixture must be included even if the total quantity of that particular mixture is also being counted toward the threshold level for that mixture.” For hazardous chemicals that are mixtures and do not contain any EHS, facilities have an option when determining whether the threshold quantity is present: (i) add together the quantity present in its pure form and as a component in all mixtures; or (ii) consider the total quantity of each mixture separately.

The changes to the Tier I and II forms include the following: (i) the forms and their instructions have been removed from the *Code of Federal Regulations* (CFR) and included on EPA’s Web site; (ii) the amended regulation includes a description of the Tier I and II requirements; and (iii) the chemical or its common name as listed on the Material Safety

Data Sheet must be included on the Tier II form. The amendments will be effective 30 days after they are published in the *Federal Register*.

[8] Air/Climate Change: California Air Board Releases Proposed Climate Change Scoping Plan

Cal/EPA’s Air Resources Board (ARB) has released an updated proposal to implement the state’s Global Warming Solutions Act (the Act).

According to the agency, the proposal is a “coordinated approach to address climate change and reduce dependence on fossil fuel that can serve as a model for the rest of the nation.” The proposal calls for a mix of measures and policies, including market mechanisms designed to cut greenhouse gas emissions from a variety of sources to 30 percent below 1990 levels, as required by the Act. It relies on energy conservation and energy efficiency improvements for early emissions reductions, development of a multi-sector regional emissions cap-and-trade program and aggressive vehicle standards.

Specific elements of the proposal include (i) strengthening the state’s existing energy efficiency programs; (ii) requiring utilities to increase their mix of renewable energy to 33 percent; (iii) establishing regional targets for transportation-related greenhouse gases; (iv) strengthening existing vehicle and fuel standards; and (v) establishing some carbon fees to fund the long-term costs of implementing the program. The ARB has until January 1, 2009, to adopt the scoping plan and then must develop and implement the proposed measures and policies by 2012.



[9] Chemical Exposure: FDA Seeks Information on Regulated Products That Contain Bisphenol A

The Food and Drug Administration (FDA) is **seeking** information on the types of FDA-regulated products that contain Bisphenol A (BPA). *73 Fed. Reg.* 61,135 (10/15/08). The agency requests information on such products, whether as a component of the product or its packaging, and any information relating to the leaking of BPA from the packaging to the product and/or from the product following human administration.

BPA is found in a number of products, including baby bottles, compact discs, canned food, and sunglasses. Studies have claimed that the chemical can leak from these products, especially when heated, and it has allegedly been associated with cardiovascular disease and diabetes. It has also purportedly been linked to developmental problems of the endocrine system in infants and young children. The agency will accept information until the end of 2008.

[10] Chemical Exposure: Canada Announces Ban on Bisphenol A in Baby Bottles

According to news sources, Health Canada has announced that bisphenol A (BPA) has been placed on the agency's list of toxic substances and that it is banned for use in baby bottles. The ban, announced by Health Minister Tony Clement on October 16, 2008, took effect October 18; it makes Canada the first country to prohibit the use of the chemical in baby bottles.

Recent studies have allegedly linked exposure to BPA to heart disease, diabetes and liver problems. The U.S. Food and Drug Administration (FDA) issued a request for information on FDA-regulated products that contain BPA. *See Canada.com*, October 16, 2008.

[11] Air: IMO Committee Adopts Emissions Standards for Ships

The International Maritime Organization's (IMO) environmental committee recently adopted new emissions standards that would limit emissions of sulfur oxides and nitrogen oxides from container ships and tankers. The emissions limits will become effective July 1, 2010, under the tacit amendment acceptance procedure for amending the International Convention for the Prevention of Pollution from Ships (MARPOL). Starting January 1, 2012, the allowable sulfur content for vessels will fall from 4.5 to 3.5 percent, with a further drop to 0.5 percent by January 1, 2020.

New standards for nitrogen oxide emissions from marine engines will be phased in over three stages: (i) for diesel engines installed on ships constructed between January 1, 2000, and January 1, 2011, existing rules would be retained, that is, nitrogen oxide emissions would be set at 17 grams per kilowatt-hour (g/kWh); (ii) for diesel engines installed on ships constructed after January 1, 2011, but before 2016, nitrogen oxide limits would be reduced to 14.4 g/kWh; and, (iii) for diesel engines installed on ships constructed after January 1, 2016, limits would be reduced to 3.4 g/kWh while ships are operating in designated emission control areas. Outside those areas, stage II limits would apply. *See IMO Press Release*, October 14, 2008.

[12] Chemical Exposure: ATSDR Updates Policy Guidelines for Dioxin in Residential Soil

The Agency for Toxic Substances and Disease Registry (ATSDR), an agency within the Centers for Disease Control and Prevention, recently released new **guidance** for assessing the health risks of dioxins in residential soil. The guidance establishes a single reference point for health assessments,



providing instructions that dioxin levels should be evaluated if they exceed the screening level of 0.05 parts per billion. An earlier guideline was confusing because it used three levels of dioxin concentration: (i) a screening level of less than 0.05 ppb; (ii) an evaluation level of greater than 0.05 ppb; and (iii) an action level of greater than 1 ppb.

Scientific/Technical Items

[13] Ballast Water: Oregon DEQ Task Force Issues Report on Managing Aquatic Invasive Species Risks

The Oregon Task Force on the Shipping Transport of Aquatic Invasive Species, under the auspices of the Oregon Department of Environmental Quality (DEQ), has issued a [report](#) recommending the promulgation of new regulations that would halt the arrival and spread of aquatic invasive species that degrade existing ecosystems and displace native species. The proposed regulations track regulations adopted in California and Washington. The report recommends that (i) DEQ have authority to board and inspect regulated vessels and audit ballast water bookkeeping records, as well as collect samples from ballast tanks; (ii) reporting forms be streamlined; and (iii) the maximum penalty for illegal ballast discharges be raised from \$5,000 to \$27,500. DEQ may seek legislation based on the report's recommendations in next year's legislative session, which begins January 2009.

[14] Nanotechnology: Study Claims Nanoparticles of Aluminum Oxide May Kill Blood Cells in Human Brain

A recent study by University of Kentucky Medical Center researchers claims that nanoparticles of aluminum oxide can be toxic to cells that line blood vessels of the human brain. L. Chen, *et al.*, "Manufactured Aluminum Oxide Nanoparticles Decrease Expression of Tight Junction Proteins in Brain Vasculature," *Journal of Neuroimmune Pharmacology*, October 1, 2008. The researchers exposed human brain microvascular endothelial cells to alumina and control nanoparticles. After exposure, the researchers assessed cell structure and death and the effects on mitochondria and tight junction proteins. In addition, rats received an intravenous dose of nano-alumina. The nano-alumina increased cell death, disrupted mitochondrial function and disfigured cells. The animal experiments also confirmed the alteration in proteins with a loss of critical proteins in the rats' cerebral vessels.



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We welcome any leads on new developments in environmental law or toxic tort litigation.

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