

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] NEPA: Eighth Circuit Denies NEPA Challenge to Missouri Reservoir Reconstruction

The Eighth Circuit Court of Appeals has denied a NEPA challenge to the Federal Energy Regulatory Commission's (FERC) authorization for the reconstruction of the Taum Sauk reservoir in the Missouri Ozarks. *Mo. Coal. for the Env't v. FERC*, No. 08-1390 (8th Cir. 10/23/08).

Petitioners argued that, in authorizing the reconstruction of the reservoir, which was damaged in a 2005 breach that sent more than a billion gallons of water rushing down a hillside partially destroying a state park, FERC violated NEPA by not preparing a full environmental impact assessment associated with the \$300 million reservoir rebuild. FERC had concluded that the reconstruction did not constitute "a major federal action significantly affecting the quality of the human environment."

The court ruled that FERC's decision that an environmental impact assessment was not required was not "arbitrary and capricious." The court also held that FERC's decision was limited to the reservoir's reconstruction and not to whether AmerenUE, the reservoir's former operator, would be re-licensed to operate the reconstructed reservoir in the future.

[2] RCRA/CERCLA: Seventh Circuit Upholds Ruling that Inactive Asbestos-Containing Boiler System is Not Disposal under RCRA/CERCLA

The Seventh Circuit Court of Appeals has ruled that a company which sold an industrial facility containing an inactive, asbestos-containing boiler system, did not thereby dispose of a hazardous waste or substance under RCRA or CERCLA. *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, No. 08-1118 (7th Cir. 10/20/08).

The 2006 lawsuit charged that defendant violated RCRA and CERCLA by leaving the inactive system in the facility, which plaintiff purchased in 1985. The complaint alleged that defendant "disposed" of the asbestos when it sold the site and sought an order forcing defendant to clean up the asbestos. Plaintiff did not identify the asbestos until 2004.

According to both the district court and appeals court, defendant did not "dispose" of the asbestos because "it did not place the asbestos into or on any land or water so that it may enter the environment or be emitted into the air or discharged into any waters." The asbestos was encased in piping confined inside a building and there was no release or threatened release, as required under CERCLA. As to the RCRA claim, the courts said, defendants did not handle, store, treat, transport, or dispose of the asbestos, as required for RCRA liability.



[3] Air: Federal Court Rules CAA Authorizes Court to Order Mitigation for Harm from Power Plant

A federal judge in Indiana has ruled that section 113 of the Clean Air Act (CAA) allows courts to require companies to carry out actions aimed at offsetting or mitigating the damage to the public health and environment caused by a company's violations of the new source review (NSR) requirements of the CAA. *U.S. v. Cinergy Corp., No. 99-1693 (S.D. Ind. 10/14/08)*.

The court rejected a motion for summary judgment filed by several utility company defendants which argued that section 113 allows courts to grant only prospective relief for NSR violations. Ruling that section 113 allows courts to order NSR violators to carry out both prospective and retrospective actions, the court cited *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), which held that when a court's equitable jurisdiction is invoked by a statute, "all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction," unless the law by "clear and valid legislative command" or "necessary and inescapable inference" restricts the court's equitable powers. According to the court, section 113 allows courts to "...restrain [a] violation, to require compliance, to assess [a] civil penalty, to collect fees owed to the United States... and to award any other appropriate relief." A trial on remedies will be scheduled for February 2009.

[4] Air/Greenhouse Gases: Canadian Court Dismisses Suit over Non-Implementation of Kyoto Treaty

The Federal Court of Canada has ruled that the Canadian government cannot be ordered by the court to comply with the terms of the Kyoto

Protocol Implementation Act (the Act), which is legislation implementing Canada's commitments under the Kyoto Protocol. *Friends of the Earth v. Ministry of the Env't, No. 2013-07 (Fed. Ct. 10/20/08)*.

According to the court, while plaintiff environmental groups had standing to seek judicial review of alleged violations of the Act, the issues raised by the complaint were beyond the scope of judicial review. Canada committed itself under the Kyoto Protocol to a 6 percent reduction in greenhouse gas emissions by 2012, compared to 1990 levels, and enacted the Act on June 22, 2007.

The court ruled that it could not force the government to make specific policy proposals or to provide the funding necessary under the Act. The court also questioned the judicial system's role in enforcing legislative action. Plaintiffs vowed to appeal the ruling, according to news reports. *See BNA Daily Environment Report and Law 360*, October 22, 2008.

[5] Envtl. Crime: Wastewater Treatment Company Executives Found Guilty of Illegally Discharging Untreated Liquid Wastes

Three former executives of a Dearborn, Michigan, company that operates an industrial waste treatment and disposal facility have reportedly been convicted by a jury, following a three-week trial, of criminal violations of the Clean Water Act, making false statements to the government and conspiracy to violate the CWA. According to court documents, the company, Comprehensive Environmental Solutions, Inc., had a permit to treat liquid industrial waste through a variety of processes and then to discharge it into the Detroit sanitary sewer system. The facility



contained 12 large, above-ground storage tanks capable of holding more than 10 million gallons of liquid industrial wastes.

From January 2001 to June 2002, the company routinely bypassed the facility's treatment system and discharged waste directly into the sanitary sewer systems. During most of this period, the company had no operable equipment to treat the waste and discharged nearly 13 million gallons of untreated liquid waste into the sanitary sewer system. The company also took steps to conceal the lack of treatment from customers and regulatory officials. On September 4, 2008, the company agreed to pay a fine of \$600,000 plus an additional \$150,000 to fund a community project. The company also agreed to spend \$1.5 million to clean up the facility. The executives will be sentenced individually for their crimes at a future hearing. *See DOJ Press Release*, October 22, 2008.

[6] Air: Groups Sue EPA over Failure to Establish Air Emission Standards for PVC Industry

Several environmental groups have sued EPA alleging that the agency has failed to enforce Clean Air Act (CAA) requirements for hazardous pollutants from polyvinyl chloride (PVC) manufacturers. *Mossville Env'tl. Action Now v. EPA, No. N/A (D.D.C. 10/22/08)*. The complaint alleges that EPA has not met a 2000 deadline requiring the agency to set emissions standards based on best-performing emission sources for the PVC industry. Under the CAA, EPA must set a standard for industries emitting any of 189 listed hazardous air pollutants based on the best-demonstrated control technology or practices in similar sources. In 2002, EPA issued a national standard for vinyl chloride, but the D.C. Court of Appeals vacated that standard. *Mossville Env'tl.*

Action Now v. EPA, 370 F.3d 1232 (D.C. Cir. 2004). Plaintiffs went to court to set deadlines that force EPA to set emissions standards.

PVC is a form of plastic used for decades in everything from vinyl siding to plumbing, carpet backing and raincoats. Its production results in the release of vinyl chloride, dioxins, chromium, chlorine, and hydrogen chloride, among other chemicals.

[7] Air: Groups Sue EPA over Enforcement of National Park Haze Rule

Earthjustice has sued EPA on behalf of the Environmental Defense Fund and the National Parks Conservation Association alleging that the agency has failed to enforce Clean Air Act (CAA) provisions that require states to submit plans for reducing air pollution in national parks and wilderness areas. *Env'tl. Defense Fund v. Johnson, No. N/A (D.D.C. 10/21/08)*.

According to the complaint, the CAA and regulations required EPA to determine by June 17, 2008, whether each state had submitted haze plans meeting minimum completeness criteria set forth in section 110(k)(1)(A) of the CAA, but EPA failed to do so.

The complaint also alleges that only 14 states and other jurisdictions have submitted plans and EPA has failed to determine whether any of them is adequate. Plaintiffs ask the court to order EPA to take the required actions within 60 days. The required plans must set out steps for making reasonable progress toward achieving natural visibility conditions in parks. They also must include emission limitations representing "best available retrofit technology" and schedules for compliance, unless the state demonstrates that other alternatives will achieve greater progress.



[8] Air: Groups to Sue EPA over Alleged Failure to Update CAA Emission Standards for Landfills

The Environmental Defense Fund (EDF) has sent EPA a [notice](#) of intent to sue under the Clean Air Act (CAA) for the agency's alleged failure to conduct a mandatory eight-year review and revision of the New Source Performance Standards (NSPS) for Municipal Solid Waste Landfills required by section 111(b)(1)(B) of the CAA. The notice claims that EPA last published NSPS for new or modified municipal solid waste landfills in 1996 and has failed to conduct a review since. The notice alleges that the EPA review is mandatory under section 111 and that the agency is in continuous violation of the CAA. EDF must wait 60 days from the notice's postmark to file a lawsuit. The notice indicates that the suit will be filed in the U.S. District Court for the District of Columbia under section 304(a) of the CAA.

[9] Climate Change: New York AG Announces Agreement Requiring National Power Company to Disclose Climate Change Risks

New York Attorney General (AG) Andrew Cuomo (D) has announced an agreement with national power company Dynegy, Inc., under which the company must provide information to investors about the financial risks it faces because of climate change. The agreement requires the company's 10-K filings with the Securities and Exchange Commission to address risks from "present and probable" future climate rules and legislation, as well as lawsuits and physical effects of climate change. The company must also disclose current emissions, projected increases from planned coal plants and strategies for curbing or offsetting emissions. *See New York AG Press Release*, October 23, 2008.

Legislation, Regulations and Guidance

[10] CERCLA: EPA Enters Into Proposed CERCLA Prospective Purchaser Agreement With Chicago Over Celotex Superfund Site

EPA and the city of Chicago have entered into a proposed prospective purchaser [agreement](#) and covenant not to sue regarding the Celotex Superfund Site. *73 Fed. Reg.* 62,498 (10/21/08). Under the proposed agreement, the city and the Chicago Park District would take ownership of the land and build a park at the Celotex site. In exchange for EPA's covenant not to sue, the city parties would develop a park using sustainable development practices. The city would acquire the 24-acre site, located at 2800 South Sacramento Avenue, through a condemnation or a sale in lieu of condemnation. The site was used by several companies from 1911 to 1982 to conduct various operations including (i) distillation of coal tar to produce sealants and coatings; (ii) manufacture of asphalt roofing product; (iii) mixing of asphalt concrete; and (iv) production of driveway sealer. In 2004, Honeywell International, Inc. agreed to conduct a response action at the site.

The city parties have agreed to (i) add topsoil and seeding; (ii) follow current guidelines and standards for landscaping developed by the Sustainable Sites Initiative; (iii) increase native biodiversity; (iv) control for invasive species; (v) control wildlife; (vi) add low-mow grassy areas; (vii) refrain from using chemical fertilizers, pesticides or herbicides; (viii) manage stormwater to minimize discharge to the combined sanitary/storm sewer; (ix) use energy efficient lighting; (x) promote recycling; (xi) restrict commercial uses on the property; (xii) construct park trails, soccer fields, parking lots,



and playgrounds using only recycled material; and (xiii) consider creation of a natural passive area that includes native grasses, wildflowers, shrubs, and trees. The agreement also provides the city parties with contribution protection as provided by CERCLA section 113(f)(2).

[11] Air: EPA Issues Determination on States Failing to Submit Complete PM 2.5 SIP

EPA has issued completeness **findings** for Clean Air Act section 110(a) state implementation plans (SIPs) pertaining to fine particulate matter (PM 2.5) National Ambient Air Quality Standards (NAAQS). *73 Fed. Reg.* 62902 (10/22/08). In the findings, EPA identifies those states that have failed to make a complete submission for all requirements or for specific requirements, and states that have made a complete submission.

EPA promulgated revised NAAQS for PM 2.5 in July 1997. Section 110(a) of the CAA requires states to submit SIPs that provide for the implementation, maintenance and enforcement of new or revised NAAQS within three years of promulgation or within a shorter period as prescribed by EPA. In March 2004, Earthjustice submitted a notice of intent to sue over the agency's failure to identify states that had not submitted a complete SIP as of 2004. EPA entered into a consent decree with Earthjustice, requiring EPA, in part, to make a determination as to whether each state has made a complete submission to the agency.

EPA consequently determined that (i) the following states and territories failed to submit SIPs: Alaska, American Samoa, Commonwealth of the Northern Mariana Islands, Hawaii, Guam, North Dakota, Oklahoma, Vermont, and Washington; (ii) the following states and territories failed to submit specific required elements: Arizona, California, Illinois, Massachusetts, Michigan, Minnesota,

New Jersey, New York, Puerto Rico, Virgin Islands, Washington D.C., and Wisconsin; and (iii) the following states have made complete submissions: Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Utah, West Virginia, and Wyoming.

[12] Air/Greenhouse Gases: Oregon Adopts GHG Reporting Rules

The Oregon Environmental Quality Commission (OEQC) has reportedly adopted rules requiring major air pollution sources to report greenhouse gas (GHG) emissions beginning in 2009. Under the rules, greenhouse gases include carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, hydrofluorocarbons, and perfluorocarbons. The rules would apply to permitted sources, including those with Title V operating permits or air contaminant discharge permits, that emit more than 2,500 metric tons of GHGs. Other major sources, such as solid waste disposal facilities, wastewater treatment facilities, electric generating units, and electricity and natural gas transmission and distribution systems, would begin reporting such emissions in 2010. *See BNA Daily Environment Report*, October 27, 2008.



Scientific/Technical Items

[13] Enforcement: GAO Report Claims EPA Overstates Enforcement Efforts

A recent Government Accountability Office (GAO) [report](#) claims that EPA has overstated and misrepresented its criminal and civil enforcement efforts. Requested by U.S. Representatives John Dingell (D-Mich.), chair of the House Committee on Energy and Commerce, and Bart Stupak (D-Mich.), chair of the Energy and Commerce Subcommittee on Oversight and Investigations, the report analyzes how EPA calculates and discloses civil and criminal penalties, as well as how the agency values injunctive relief and pollution reduction when it reports enforcement outcomes.

According to the report, the total value of penalties assessed by EPA, when adjusted for inflation, fell from \$240.6 million in 1998 to \$137.7 million in 2007. The report claims that EPA overstated the impact of its enforcement program by reporting the penalties levied rather than the funds actually collected. It also claims that EPA understated past accomplishments by reporting only the nominal values of past penalties rather than adjusting them for inflation and excluding the amounts paid to states.

The report recommends that (i) EPA take steps to improve the transparency and accuracy of its reports; (ii) EPA disclose penalties collected as well as assessed; and (iii) the agency clearly disclose that the monetary value of injunctive relief is based on estimates of future amounts that defendants expect to spend to achieve outcomes.



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