

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] **Water Resources: Tenth Circuit Denies Motion to Dismiss Lawsuit over State Laws Banning Out-of-State Water Transfers**

The Tenth Circuit Court of Appeals has ruled that a lawsuit challenging the constitutionality of state laws prohibiting out-of-state water transfers may proceed. [Tarrant Reg'l Water Dist. v. Sevenoaks, No. 07-6273 \(10th Cir. 10/27/08\)](#). The lawsuit, filed by the county water district in Fort Worth, Texas, alleged that an Oklahoma law unconstitutionally prevented the district from appropriating or purchasing water located in Oklahoma. Defendants are nine members of the Oklahoma Water Resources Board, the Oklahoma agency responsible for issuing permits for the appropriation, sale and use of the state's water.

In 1978, Texas, Oklahoma, Arkansas, and Louisiana entered into the Red River Compact, which apportions water from the river and its tributaries to the four states. The Oklahoma Legislature also enacted a series of statutes that regulate the use and transfer of surface water in Oklahoma. One of those statutes established a moratorium on the sale or exportation of water outside the state until November 2009. Okla. Stat. tit. 74, § 1221A.

The lawsuit alleges that the Red River Compact preempts Oklahoma's "anti-export laws" under the Supremacy Clause and that the laws violate the dormant Commerce Clause. Defendants filed

a motion to dismiss, arguing that (i) the issue is not ripe for adjudication; (ii) they are entitled to immunity under the Eleventh Amendment; (iii) the district court should abstain; and, (iv) Louisiana and Arkansas, as parties to the Red River Compact, are indispensable parties. The district court denied the motion, and defendants appealed. Affirming the district court, the appeals court rejected each of defendants' arguments and added that Oklahoma does not have an ownership interest in the state's water resources.

[2] **Air: Seventh Circuit Finds Engineering Studies and Excavation Insufficient Indicia of Construction Activity Under PSD Permit**

The Seventh Circuit Court of Appeals has blocked the construction of a coal-fired power plant in southern Illinois because the company's Clean Air Act (CAA) prevention of significant deterioration (PSD) permit had expired. [Sierra Club v. Franklin County Power of Ill., LLC, No. 06-4045 \(7th Cir. 10/27/08\)](#).

The Sierra Club brought the suit under the CAA's citizen suit provisions, alleging that control technology in defendant's 2001 permit was outdated and, if the company wished to proceed with the project, it should be required to use more modern pollution controls. Defendant argued before the district court that the Sierra Club lacked standing to sue and that the 2001 permit could not have expired because the company had engaged in a continuous program of construction activities, including engineering studies and excavation.



The district court held that the Sierra Club had demonstrated that at least one of its members would suffer an injury traceable to the company and therefore had standing. The court also held that the company had not engaged in “actual construction” activity and enjoined the company from any further activity unless it obtained a valid permit.

Affirming, the appellate court agreed that the Sierra Club had standing to sue and ruled that, because the company had neglected to begin permanent construction of the plant within an 18-month window created under the PSD program, the permit had expired.

[3] Env'tl. Crime: Cargo Ship Owner Fined for Ocean Dumping and Falsifying Records

The owner of a Malta-based, Greek-owned cargo ship has reportedly been fined \$750,000 after admitting to illegally dumping waste oil at sea and falsifying the vessel's waste oil disposal records. *U.S. v. Casilda Shipping Ltd.*, No. 08-00448 (N.D. Cal. sentenced 10/22/08). The vessel's chief engineer was sentenced to three years of probation and fined \$5,000. In a plea agreement, defendants admitted using a “magic pipe” to bypass the ship's pollution-control equipment and to making false entries in the onboard records to cover up the crime. *See BNA Daily Environment Report*, October 28, 2008.

[4] FIFRA: EPA Seeks Penalty from Retailer for Selling Unregistered Pesticides

According to news reports, EPA is seeking a civil penalty of \$1 million from the California-based 99 Cents Only discount retail chain for allegedly selling two brands of unregistered pesticides. One of the products, a Mexican import called Bref Limpieza y Desinfección Total, claimed in Spanish to disinfect and sanitize surfaces. The other, Farmer's Secret

Berry & Produce Cleaner, was allegedly sold with a label saying the product could “inhibit mold, fungus and bacteria, including E. Coli.” Under FIFRA, products making such claims must be registered as pesticides with EPA. The California Department of Pesticide Regulation and the Nevada Department of Agriculture discovered the violations while conducting in-state inspections from 2004 to 2008. *See Findlaw*, October 29, 2008.

[5] Water: Groups Threaten to Sue EPA over Chesapeake Bay Cleanup

The Chesapeake Bay Foundation and several other groups reportedly announced October 29, 2008, that they will sue EPA to force the agency to restore Chesapeake Bay and its ecosystem by 2015. The lawsuit would seek an order requiring EPA to reach water pollution reduction targets to which the agency agreed under the Chesapeake 2000 Agreement, which came about after a 1999 consent decree required EPA to place the bay on its impaired waters list. The groups mailed a Clean Water Act Notice Letter to EPA and impacted state agencies announcing their intent to file the lawsuit in 60 days. Other parties joining the Chesapeake Bay Foundation include the Virginia State Waterman's Association, Maryland Waterman's Association, Maryland Saltwater Sportfisherman's Association, and several individuals. *See The Washington Post*, October 29, 2008.



Legislation, Regulations and Guidance

[6] Agriculture/CAFOs: EPA Issues Final CAFO Rule

EPA announced the issuance of a **final rule** October 31, 2008, that attempts to improve water quality by requiring concentrated animal feeding operations (CAFOs) to safely manage manure. The rule revises a 2003 rule that was partially vacated by a federal appeals court in 2005. *Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2nd Cir. 2005). The 2003 rule expanded the number of CAFOs required to seek Clean Water Act NPDES permit coverage and added requirements applicable to the land application of manure for CAFOs. The appellate court ordered EPA to remove the requirement for all CAFOs to apply for NPDES permits and to add requirements for Nutrient Management Plans to be submitted by CAFOs with their permit applications.

The final rule revises the requirement that all CAFOs apply for NPDES permits and instead requires only those CAFOs that discharge or propose to discharge to apply for permits. The rule also provides a voluntary no-discharge certification option for CAFOs that do not discharge or propose to discharge. Under the new rule, permitting authorities are also required to review nutrient management plans and provide the public with an opportunity for meaningful review and comment. The rule will be effective 30 days after it is published in the *Federal Register*.

[7] RCRA: EPA Revises Definition of Solid Waste

EPA has published **revisions** to its definition of solid waste in the *Federal Register*. 73 *Fed. Reg.* 64,667 (10/30/08). The final rule establishes a new regulatory exclusion under RCRA for material that is not discarded if it is legitimately reclaimed by either the generator or, under specific conditions, another company. The new rule was discussed in more detail in issue 252 of this Update.

[8] Air: EPA Issues Supplemental Notice of Proposed Rulemaking for Petroleum Refiner NESHAP

EPA announced October 31, 2008, a supplemental **proposed rule** for national emissions standards for hazardous air pollutants (NESHAPs) for petroleum refineries.

It is intended to modify a proposal issued in September 2007. Among specific changes proposed are more stringent requirements for fitting emissions-reducing controls on the guide poles of some existing storage tanks with external floating roofs, and full controls on all storage tank fittings on tanks that can hold 40,000 gallons of liquid. The proposed rule would also require refinery owners and operators to sample and analyze their cooling systems monthly to detect leaks. EPA will accept comments for 30 days following publication of the supplemental proposed rule in the *Federal Register*.



[9] RCRA: EPA Issues Hazardous Waste Combustor NESHAP Reconsideration

EPA has **published** its final reconsideration of the agency's National Emission Standards for Hazardous Air Pollutants (NESHAP) for hazardous waste combustors. *73 Fed. Reg.* 64,067 (10/28/08). The agency initially published the NESHAP for new and existing sources at hazardous waste combustion facilities in 2005. *70 Fed. Reg.* 59,478 (10/12/05). EPA granted reconsideration of the rule in 2006 after it received petitions from four petitioners raising issues about it. The agency also reopened the rule to consider comments relating to a D.C. Circuit Court of Appeals post-promulgation decision. *Sierra Club v. EPA*, 479 F.3d 875 (D.C. Cir. 2007). According to EPA, the rule is projected to reduce emissions of hazardous air pollutants such as dioxins and heavy metals by up to 3,380 tons a year, from a baseline of 12,650 tons.

[10] FIFRA: EPA Revises Pesticide Container Regulations

EPA has **revised** its pesticide container regulations. *73 Fed. Reg.* 64,215 (10/29/08). The revisions include (i) extending the labeling compliance deadline by a year, (ii) changing some labeling definitions, and (iii) providing exceptions to some label language requirements. The rule amends 2006 regulations that required all pesticide products "distributed or sold" by a registrant to comply with EPA's labeling requirements as of August 17, 2009. The revisions substitute the language "released for shipment" for "distributed and sold" and extend the compliance deadline to August 17, 2010. The revisions amend current regulations codified at 40 C.F.R. parts 152, 156 and 165.

[11] Recycling: EPA and Stakeholders Issue Guidance on Responsible Recycling of Electronics

An EPA workgroup, composed of members from federal and state governments, electronics manufacturers and recyclers, and trade associations, has developed new **guidelines** designed to promote better environmental, worker safety and public health practices for electronic recyclers. Titled "Responsible Recycling ('R2') Practices for Use in Accredited Certification Programs for Electronics Recyclers," the voluntary guidelines include general principles and specific practices for recyclers disassembling or reclaiming used electronic equipment, including those electronics that are exported for refurbishment and recycling.

The guidance lists 13 principles to help electronics recyclers ensure their material is handled safely and legally in the United States and overseas. It calls on recyclers to (i) establish a management system for environmental and worker safety; (ii) develop a policy that promotes reuse and material recovery over landfill or incineration; and (iii) use practices that reduce exposure to emissions during recycling operations. The principles also call for recyclers to exercise due diligence to ensure appropriate management of materials throughout the recycling chain, including materials exported to foreign countries.

[12] Alternative Energy: New York AG Establishes Ethics Code for Wind-Power Companies

New York Attorney General Andrew Cuomo (D) has established a Wind Industry Ethics Code that calls for new oversight of wind-power companies through a multi-agency Task Force and establishes transparency designed to deter any improper relationships between wind-development



companies and local government officials. The code is a result of Cuomo's investigation into whether companies developing wind farms improperly sought land-use agreements with citizens and public officials and whether improper benefits were given to public officials to influence their official actions relating to wind-farm development.

Among other things, the code (i) prohibits wind companies from hiring municipal employees or their relatives, giving gifts of more than \$10 during a one-year period, or providing any other form of compensation that is contingent on any action before a municipal agency; (ii) prevents wind companies from soliciting, using or knowingly receiving confidential information acquired by a municipal officer in the course of his or her official duties; (iii) requires wind companies to establish and maintain a public Web site to disclose the names of all municipal officers or their relatives who have a financial stake in wind-farm development; (iv) mandates all wind easements and leases be in writing and filed with the county clerk; and (v) requires that within 30 days of signing the code, companies conduct a seminar for employees about identifying and preventing conflicts of interest when working with municipal employees. Several wind-development companies have already apparently signed the code. *See NY Attorney General Press Release*, October 30, 2008.

[13] Nanotechnology/TSCA: EPA Publishes Notice on Inventory Status of Carbon Nanotubes Under TSCA

EPA has published an inventory status of carbon nanotubes under TSCA. *73 Fed. Reg.* 64,949 (10/31/08). The notice clarifies that EPA considers carbon nanotubes to be chemical substances distinct from graphite or other allotropes of carbon listed on the TSCA inventory. Many carbon nanotubes may therefore be new chemicals under TSCA section 5, and manufacturers and importers of carbon nanotubes not on the TSCA inventory must submit a pre-manufacture notice under 40 C.F.R. part 720 or 723. To determine the TSCA inventory status of a carbon nanotube, a manufacturer may submit a bona fide intent to manufacture or import under 40 C.F.R 720.25 to EPA.



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

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