

# Environmental & Chemical Update

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

Issue 257 • November 21, 2008

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## Litigation and Regulatory Enforcement

### [1] **Water: Eleventh Circuit Rules CWA Citizen Suit Not Preempted by Later Resolved State Agency Enforcement Action**

The Eleventh Circuit Court of Appeals has ruled that a Clean Water Act (CWA) citizen suit is not preempted by a subsequently filed state agency enforcement action that was resolved by consent judgment. [\*Black Warrior Riverkeeper, Inc. v. Cherokee Mining, LLC\*, No. 08-10810 \(11th Cir. 11/13/08\)](#).

On May 16, 2007, an environmental group served notice that it would file a CWA citizen suit against Cherokee Mining LLC, which owns and operates two surface mines in northern Alabama, alleging violations of state environmental permits resulting from the discharge of excessive pollutants into the Black Warrior River and other creeks.

The Alabama Department of Environmental Management (ADEM) initiated an enforcement action against the company on July 20 and offered to resolve the action by consent order. The citizen suit was filed on July 27, or 72 days after the notice was filed, and the consent order in ADEM's action was finalized September 24. The company argued that the federal citizen suit should be dismissed because ADEM had commenced an enforcement action against it. The CWA contains a bar on citizen suits when there is a pending government enforcement action. 33 U.S.C. § 1319(g)(6)(A)(ii). The district

court ruled that the environmental group could proceed with its lawsuit because it met the statutory requirements of notice of intent to sue and that the CWA bar had been lifted when the enforcement action was settled.

The appeals court agreed with the district court, ruling that “the provisions of the Clean Water Act were written to operate in such a manner as to maximize the limited resources of the federal EPA, states and private citizen as enforcers and guardians of the Nation’s waterways.” The court also held that plaintiffs had established subject matter jurisdiction by giving the defendant mining company timely notice at least 60 days before filing its federal CWA lawsuits.

### [2] **NEPA/Standings: Federal Court Dismisses Challenge to Coal-Fired Power Plant Tax Credits**

A federal judge in Washington D.C. has dismissed a lawsuit challenging federal tax credits that the U.S. Department of Energy (DOE) agreed to give to the owner of a coal-fired power plant under the Energy Policy Act of 2005. [\*Appalachian Voices v. Bodman\*, No. 08-0380 \(D.D.C. 11/10/08\)](#).

The complaint, filed by environmental groups, alleged that in allowing the tax credits, DOE had failed to consider the environmental impacts under NEPA. Defendant argued that the plaintiff groups lacked standing to sue because they failed to show how cleaner coal plants which were outside the state of North Carolina, where plaintiffs resided, would harm them.



The court agreed with defendant that plaintiffs failed to satisfy the injury-in-fact requirement as to the projects that were outside the state. The court also held that plaintiffs had failed to meet the requirement that their alleged injury be fairly traceable to the government action at issue (providing tax credits). The court found that defendant would have constructed the plants with or without the tax credits.

### **[3] Endangered Species Act: Federal Court Upholds Tuna Fishing Rules**

A federal judge in Washington D.C. has upheld rules on tuna fishing in the Gulf of Mexico adopted by the National Marine Fisheries Service (NMFS), which rejected a proposed ban on fishing in the western bluefin tuna's spawning ground. [\*Blue Ocean Inst. v. Gutierrez, No. 06-01869 \(D.D.C. 11/12/08\)\*](#).

The complaint alleged that the NMFS 2006 fisheries management plan for the Gulf of Mexico did not prevent bycatch of spawning tuna, that is, accidentally catching them while fishing fleets are catching other, non-threatened fish species. The court disagreed with plaintiffs, finding that the agency did not fail to conduct a full and fair evaluation of the plight of the western bluefin tuna or to articulate a rational basis for its conclusion.

### **[4] Air: EAB Rules EPA Has Authority to Regulate CO<sub>2</sub> Emissions from Power Plants**

EPA's Environmental Appeals Board (EAB) has ruled that the agency has the discretion to regulate carbon dioxide (CO<sub>2</sub>) emissions from coal-fired power plants and ordered EPA's Region 8 to reconsider a decision against requiring CO<sub>2</sub> pollution controls on a planned power plant expansion in Utah. [\*In re Deseret Power Elec. Coop., No. 07-3 \(EAB 11/13/08\)\*](#). In issuing a prevention of

significant deterioration (PSD) permit to the plant in August 2007, the EPA regional office had determined that it did not have authority to impose a CO<sub>2</sub> best available control technology (BACT) limit because the Clean Air Act and regulations, under a historical agency interpretation, only require monitoring and reporting of CO<sub>2</sub> emissions, not controlling them. The EAB found the record did not support this proffered rationale and remanded the matter to the regional office for a determination of whether to impose a CO<sub>2</sub> BACT limit in light of its decision and to develop an adequate supporting record.

### **[5] Env'tl. Crime: Pennsylvania Business Owner Sentenced to Prison for RCRA Criminal Violations**

The owner of a Pennsylvania textile dyeing business has reportedly been sentenced to 16 months in prison for illegally storing hazardous waste at his facility in Allentown. According to court documents, when the business ceased operations in 2001, numerous containers of hazardous waste were stored at the site without the required environmental permits. After local authorities responded to two fires at the site, EPA and the city initiated a major cleanup of the property in October 2005, including the disposal of numerous containers of hazardous waste and hazardous substances. In addition to the prison term, defendant and his son were ordered to pay restitution of \$450,000. Defendant's son pleaded guilty to one count of making a materially false statement to EPA. *See EPA Press Release*, November 12, 2008.



### [6] **Envtl. Crime: Japanese Cargo Ship Operator Pleads Guilty to Conspiracy and Falsifying Records**

The Japanese operator of a commercial cargo ship reportedly agreed to plead guilty in federal court in Tampa, Florida, to conspiracy and to falsifying and failing to properly maintain records meant to ensure environmental compliance. Specifically, the company agreed to plead guilty to falsifying the oil record book kept on board the Balsa 62. According to the plea agreement, from June 2007 through February 2008, the ship's chief engineer directed other crew members and personally participated in the operation of a bypass pipe used to circumvent the pollution prevention equipment on board the ship, thereby transferring oily water and sludge directly overboard approximately twice a month.

In February 2008, the chief engineer was replaced but the practice continued. On October 31, 2007, and May 31, 2008, the Balsa 62 arrived in the Port of Tampa with its falsified oil record book. The company faces possible fines of \$500,000 per felony count. According to the plea agreement, the company has agreed to pay a \$1.75 million fine and implement a detailed environmental compliance plan. The two chief engineers pleaded guilty on October 15, 2008, to felony counts of falsification of the vessel's oil record book and face up to six years in prison and a \$250,000 fine. *See DOJ Press Release*, November 10, 2008.

### [7] **NEPA: Groups Challenge FWS over Herbicide Use in Wildlife Refuge**

Two Alaskan environmental groups have sued the U.S. Fish and Wildlife Service seeking to ban the use of herbicides in the Kodiak National Wildlife Refuge. [\*Alaska Survival v. Haskett\*, No. N/A \(D. Alaska 11/13/08\)](#). The complaint alleges that the agency

failed to follow procedures in NEPA requiring an environmental impact analysis and public input. The suit claims the agency is targeting certain weeds without conducting a proper evaluation to determine the harm the plants pose to the Alaskan environment. According to plaintiffs, the chemicals being used—Transline, Milestone VM, Agri-Dex and ACMJ Violet Dye—have the potential to harm plant, animal and aquatic life, and no studies have been conducted to evaluate their leaching capabilities in the northern coastal environment.

### [8] **Air/NEPA: Environmental Organizations Seek to Enjoin FMC Suit to Block California Clean Truck Program**

NRDC and two other environmental groups have sued the Federal Maritime Commission (FMC) over the agency's move to block allegedly anti-competitive elements of a diesel-truck phaseout program at ports in two California cities. [\*NRDC v. FMC\*, No. 08-07436 \(D.C. Cal. 11/10/08\)](#). The complaint alleges that the FMC violated NEPA and the Energy Policy and Conservation Act by failing to assess the environmental impact of blocking the state's Clean Trucks Program before the agency filed lawsuits to stop implementation of the program in Los Angeles and Long Beach. The Clean Trucks Program was initiated on October 1, 2008, to reduce air pollution from trucks entering the ports by 80 percent by 2012. The FMC filed a lawsuit on October 31, seeking an injunction on portions of the program, arguing that they violate federal trade laws by reducing competition necessary for the free trade of foreign goods into the United States.



### [9] **Air: Groups Sue BLM over Oil and Gas Industry Air Emissions**

Environmental groups have reportedly sued the Department of Interior's Bureau of Land Management (BLM) alleging that the agency has failed to curb ozone levels and safeguard air quality in New Mexico from oil and gas industry emissions. The complaint alleges that BLM leased more than 22,000 acres during quarterly mineral leases in April and July 2008, "without regard to air quality." The groups want the lease sales halted until the agency complies with NEPA. The groups contend that New Mexico state air monitors recently indicated that ozone levels in the region were at an average of 77 parts per billion, exceeding the federally allowed limit of 75 ppb. See *Greenwire*, November 13, 2008.

## Legislation, Regulations and Guidance

### [10] **HAZMAT/Security: TSA Announces Final Railway Security Rule**

The Department of Homeland Security's Transportation Security Administration (TSA) announced November 13, 2008, a **final rule** designed to strengthen the security of freight and passenger rail systems and reduce the risks associated with the transportation of security-sensitive materials like toxic and hazardous materials.

The rule requires freight rail carriers to hire or designate a rail security coordinator and make available to federal inspectors information on radioactive, explosive and toxic chemicals that they ship. It also requires that carriers or shippers immediately report incidents, potential threats or specific security concerns to the TSA. The rule gives TSA new regulatory authority in the following areas: (i) secure chain of custody, (ii) communication, (iii)

reporting security concerns, (iv) location tracking, and (v) inspection authority. The rule is effective 30 days after its publication the *Federal Register*.

### [11] **Renewable Fuel: EPA Raises Renewable Fuel Standard to 10.2 Percent**

EPA **announced** November 17, 2008, that the agency is raising its renewable fuel standard to 10.2 percent for 2009. Under the Energy Policy Act, EPA sets a national standard for the amount of renewable fuel that must be used during the following year. The 2008 standard was 4.66 percent. According to the new level, 11.1 billion gallons of renewable fuels, mostly ethanol, will be blended into gasoline next year. The new standard will apply to all U.S. fuel refiners, importers and non oxygenated blenders. See *Law 360* and *BNA Daily Environment Report*, November 18, 2008.

## Scientific/Technical Items

### [12] **Nanotechnology: Royal Commission Report Urges Major and Urgent Effort to Assess Safety of Nanomaterials**

A recent report by the United Kingdom's Royal Commission on Environmental Pollution, an independent body that advises the British government and the public on environmental issues, has concluded that the pace of nanomaterial development and marketing has far exceeded the oversight abilities of regulators. The report urges major and urgent efforts to assess the safety of nanomaterials and argues that the European Union chemical regulation (REACH) must be extended to specifically cover nanomaterials.

The report recommends a renewed focus on understanding the properties and behavior of nanomaterials and the establishment of a substantial research program to study the matter. The report



also recommends that governments develop a framework to manage the necessary testing and oversight of nanomaterials to retain proper oversight control over the technology. See *Law 360*, *Timesonline* and *The Guardian*, November 12, 2008.

### **[13] Nanotechnology: Study Claims Nanoparticles Damage Brain Cells in Mice**

A recently published article by Chinese researchers in the *Journal of Toxicology* claims that nanoparticles of titanium dioxide can travel from the nose to the brain and cause damage to brain cells in laboratory mice. J. Wang, *et al.*, "Time-Dependent Translocation and Potential Impairment of Central Nervous System by Intranasally Instilled TiO<sub>2</sub> Nanoparticles," *Toxicology* 2008.09.014. The researchers exposed laboratory mice to titanium dioxide (TiO<sub>2</sub>), a white pigment widely used in paints, coatings, plastics, cosmetics, sunscreens, and other personal care products. The mice inhaled a preparation of 500 micrograms of TiO<sub>2</sub> particles suspended in water every other day for 30 days.

Mice brains were examined on days 2, 10, 20, and 30 to determine how quickly the particles traveled to the brain. After two days and only one inhalation exposure, significant amounts of TiO<sub>2</sub> were found in the brain, especially in the olfactory lobe. After 10 days of exposure, TiO<sub>2</sub> was also detected in other areas of the brain, including the cerebral cortex, cerebellum and hippocampus. Researchers observed significant changes in the cells of the olfactory bulb and hippocampus regions of the brain. The researchers concluded that (i) inhaled TiO<sub>2</sub> can travel from the nose to the brain, (ii) inhaling TiO<sub>2</sub> particles can damage brain cells, and (iii) effects were observed at a relatively low exposure rate and within a short period of time.



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