

# Environmental & Chemical Update

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SUSTAINABILITY • TOXIC TORT • WASTE • WATER

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## Litigation and Regulatory Enforcement

### [1] NEPA: Ninth Circuit Overturns Alaskan Off-shore Drilling Plan

The Ninth Circuit Court of Appeals has determined that the U.S. Department of Interior's Minerals Management Service (MMS) improperly authorized a proposal to drill exploratory oil wells in Alaska's Beaufort Sea. [\*Alaska Wilderness League v. Kemphorne\*, No. 07-71457 \(9th Cir. 11/20/08\)](#). The ruling came in response to separate complaints filed by a coalition of environmental and native groups, the North Slope Borough and the Alaska Eskimo Whaling Commission.

According to the court, the MMS review under NEPA failed to consider the possibility of oil spills and the harm that ship noise could cause to migrating bowhead whales. The court also found that the review did not address the impacts that would be associated with specific well sites. The ruling criticized the MMS for relying on a voluntary conflict-avoidance agreement struck between Shell Oil Co. and the Inupiat whalers as the way to resolve unknown harm to migrating whales. The ruling vacated a permit Shell had obtained to drill about a dozen wells over three years near Sivulliq, about 16 miles offshore. Under the court's order, MMS will have to revise its environmental assessment or prepare a full environmental impact statement before any drilling can be conducted.

### [2] Water/Standing: Sixth Circuit Rejects Challenge to Michigan Ballast Water Statute

The Sixth Circuit Court of Appeals has upheld a Michigan statute requiring oceangoing vessels docking at state ports to certify that any ballast water they plan to discharge has been treated to prevent the spread of invasive species. [\*Fednav, Ltd. v. Chester\*, No. 07-2083 \(6th Cir. 11/21/08\)](#). Michigan's law, which went into effect in 2007, requires all such vessels to obtain permits from the state Department of Environmental Quality (DEQ) certifying that they either will not discharge ballast water or will use approved technologies to treat it. A coalition of shipping companies and port operators argued that the law was unconstitutional and is preempted by federal law.

Rejecting plaintiffs' claims, the appellate court affirmed the district court's 2007 decision, ruling that plaintiffs lacked standing to challenge the permitting requirement. The court also found that the Michigan law did not violate due process or the Commerce Clause and it is not preempted by federal law. As to the latter argument, the court held that the National Invasive Species Act allowed for concurrent state and federal action.



**[3] Air: Ninth Circuit Rules Challenge to Power Plant Construction Near School Must First Be Heard by EPA**

The Ninth Circuit Court of Appeals has affirmed the dismissal of a lawsuit challenging the issuance of a permit to construct a power plant 1,100 feet from an elementary school. *Romoland Sch. Dist. v. Inland Empire Energy Ctr., LLC, No. 06-56632 (9th Cir. 11/18/08)*.

Plaintiffs also sued the California South Coast Air Quality Management District (SCAQM), which issued the permit and authorized construction of the power plant.

Filed in April 2006 under the citizen suit provisions of the Clean Air Act, the lawsuit alleged that the plant would violate the CAA because defendant had purchased emissions offsets for which it was not eligible and because it would produce more particulate emissions than the CAA allowed. The district court ruled that Title V of the CAA did not allow citizen suits challenging permits granted under a permit system that, like SCAQM's system, consolidates all federal, state and local regulations. The court dismissed the complaint, and plaintiffs appealed.

The appeals court agreed with the district court, remanding the case with instructions that the lower court not entertain any further proceedings in the case. According to the court, the proper forum for challenging a SCAQM permit was a petition filed with the EPA, subject to appellate court review.

**[4] Toxic Torts: Federal Court Dismisses Benzene Toxic Tort Claim for Lack of Expert Testimony**

A federal judge in New York has dismissed a toxic tort claim against several paint manufacturers filed by a man who alleged that he contracted bone disease from long-term exposure to benzene in oil-based paint. *Smolowitz v. Sberwin-Williams Co., No. 02-5940 (E.D.N.Y. 11/10/08)*.

Plaintiff alleged that his contraction of myelodysplastic syndrome (MDS), a disease in which a person's bone marrow does not produce sufficient healthy blood cells, was caused by very small amounts of benzene in the solvents used in oil-based paints made by defendant and other companies. Despite court orders that plaintiff present expert testimony related to his specific exposure amount and whether that amount could cause MDS, plaintiff offered the testimony only of his treating physician to establish a causal link. According to the court, this testimony, which failed to quantify the precise amount of benzene to which plaintiff was exposed and offered no opinion as to whether limited levels of benzene exposure could cause MDS, was insufficient.

**[5] Water: Federal Court Blocks West Virginia Mountaintop Mine Operation**

A federal judge in West Virginia has issued a preliminary injunction halting operations at two mountaintop removal mines in the state after trial testimony raised questions about the U.S. Army Corps of Engineers (Corps) permitting strategy. *Ohio Valley Envtl. Coal. v. Corps, No. 08-00979 (S.D. W. Va. issued 10/31/08)*.



Several local and national environmental groups challenged the Corps' permits, which would allow more than five miles of streams to be buried in an area where the watershed has already been harmed by past mining activities. Plaintiffs argued that the Corps was not fulfilling its regulatory duty under the Clean Water Act to assess permanent environmental impacts caused by valley fills, created when rock and rubble covering coal seams are dumped in nearby ravines.

The court ruled that "the Corps was arbitrary and capricious in its assessment of stream functions and by relying on stream creation to mitigate the loss of these streams." Plaintiffs had argued that the Corps took the position that if the value of streams created as a result of mountaintop removal exceeds the value of buried streams, the environment has a net gain and the mine's environmental impacts are insignificant.

#### **[6] Toxic Torts: Canada Supreme Court Finds Corporation Liable for Toxic Tort Despite Compliance**

The Supreme Court of Canada has ruled that a corporation is liable for damages caused to nearby residents, despite the fact that the facility complied with environmental regulations. *St. Lawrence Cement, Inc. v. Huguette Barrette, No. 31782 (Can. 11/20/08)*. The court upheld a provincial court decision that allowed a class action lawsuit by individuals living near defendant's cement plant in Beauport, Quebec, claiming damages from the plant's air emissions and noise. The court concluded that the Quebec legislature's 1952 special statute authorizing operation of the cement plant did not grant the company immunity from actions seeking damages caused by its industrial activities and in no way exempted the company from the

application of ordinary law. The ruling upheld provisions of the Civil Code of Quebec that provide no-fault liability for neighborhood disturbances and confirmed that those provisions are consistent with approaches to no-fault liability in Canadian common law and French civil law.

#### **[7] NEPA/Alternative Energy: Washington Supreme Court Refuses to Block Wind Energy Project**

The Washington Supreme Court has unanimously upheld Governor Christine Gregoire's (D) approval of a wind energy project in Kittitas County, thus preempting the county's rejection of the project. *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council, No. 81332-9 (Wash. 11/20/08)*.

The wind project, proposed in January 2003, called for installation of up to 121 wind turbine generators along Highway 97 between Cle Elum and Ellensburg. The Energy Facility Site Evaluation Council (EFSEC) overruled the county's rejection of the application and approved the project. The EFSEC administers the state site certification process under state law, which "expressly preempts energy facility certification decisions by other governmental entities." The governor subsequently upheld the EFSEC decision. Several individuals and Kittitas County challenged the decisions, alleging violations of NEPA and state administrative law.

The court rejected plaintiff's arguments, ruling that the EFSEC had the authority under state law to overrule the county's decision, that the council had properly evaluated the project's EIS and that the EIS adequately addressed mitigation of the turbines' visual impacts. The court also held that the state Energy Facility Site Locations Act covers the siting of



wind energy facilities and that EFSEC's preemptive authority under the law does not violate the state's Growth Management Act.

#### **[8] Air: Sunflower Electric Sues Kansas Over Power Plant Permit Denial**

Sunflower Electric Power Corp. has sued Kansas over the Kansas Department of Health and Environment's (KDHE) October 2007 denial of air quality permit applications that would have allowed the utility to build two coal-fired power plants in the southwestern part of the state. *Sunflower Elec. Power Corp. v. Sebelius, No. 08-2575 (D. Kan. filed 11/17/08)*. The complaint alleges that, in denying the permit applications, KDHE "discriminated against 400,000 Kansans and over 1.5 million in other states who will be forced to pay the price of this decision for decades to come through higher electric rates." It also argues that "the Sunflower permit application is the only one, out of thousands of applications since 2003, that the KDHE has denied" and that the denial "is unfair and a violation of rights guaranteed to Sunflower by the U.S. Constitution." The complaint alleges, among other matters, that the denial violates the company's right to conduct interstate commerce.

The lawsuit culminates a battle between environmentalists and the company over the permit denial, which cited potential carbon dioxide emissions and global warming. The state legislature passed legislation three times to overturn the KDHE denial, but Governor Sebelius vetoed each measure, and the legislature could never muster enough votes to override the vetoes.

#### **[9] Air: Groups Sue EPA over Power Plant Permit Approval**

Environmental groups have sued EPA over the agency's issuance of a Clean Air Act operating permit to a coal-fired power plant in Wisconsin. *Sierra Club v. Johnson, No. 08-664 (W.D. Wis. filed 11/14/08)*. The complaint alleges that EPA violated the CAA when it failed to respond to plaintiffs' petition requesting that EPA deny a Title V operating permit to Wisconsin Electric Power Co.'s Oak Creek plant. In July 2007, the Wisconsin Department of Natural Resources submitted a proposed Title V operating permit to EPA for review. The Sierra Club petitioned EPA in August 2007 to deny the request, but EPA never responded. The complaint seeks a court order requiring EPA to grant or deny the petition, as well as an award of legal fees and costs.

#### **[10] RCRA: Washington State Sues DOE over Hanford Cleanup**

Washington has sued the U.S. Department of Energy over the agency's cleanup of the Hanford Nuclear Reservation in the eastern part of the state. *State v. Bodman, No. N/A (E.D. Wash. 11/26/08)*.

The suit arose after DOE acknowledged that it could not meet a cleanup schedule established after an 18-month negotiation among state and federal agencies. The complaint seeks a court order to enforce a timeline for the agency to remove hazardous waste stored in 177 underground tanks. The former nuclear manufacturing site at Hanford contains more than 50 million gallons of high-level liquid waste, over 2,000 tons of spent nuclear fuel,



12 tons of plutonium, about 25 million cubic feet of buried or stored solid waste, and about 270 billion gallons of contaminated groundwater. According to the complaint, DOE has pushed back the start date for tank-waste treatment three times and has missed several other agreed-to deadlines. *See Law 360*, December 1, 2008.

## Legislation, Regulations and Guidance

### [11] Water: EPA Issues Effluent Guidelines for Construction Stormwater

EPA is **proposing** effluent limitations guidelines (ELGs) and new source performance standards (NSPS) to control the discharge of pollutants from construction sites. The proposed rules would require construction sites to implement erosion and sediment control best management practices to reduce pollutants in stormwater discharge. Under the proposal, construction sites disturbing 10 or more acres at a time must install sediment basins to treat their stormwater discharges. Developers would have to meet numeric standards limiting sediment in stormwater runoff at sites that are larger than 30 acres and “located in areas of high rainfall energy and with soils with significant clay content.”

EPA was under a court order to issue a proposed rule by December 1, 2008, and a final rule by December 1, 2009. *NRDC v. EPA*, No. 07-55183 (9th Cir. 9/18/08). EPA will accept comments on the proposed rule for 90 days after it is published in the *Federal Register*.

### [12] FIFRA/Nanotechnology: EPA Seeks Comments on Petition for Rulemaking Regarding Nanoscale Silver Products as Pesticides

EPA is seeking **comments** on a petition filed in May 2008 by the International Center for Technology Assessment and other organizations, asking the agency to classify nanoscale silver as a pesticide, assess the potential human health and environmental risks of the material, and require labeling of all new products. *73 Fed. Reg.* 69,644 (11/19/08). According to the petition, “while the risks of nanosilver to the environment and human health are not well understood, existing studies have indicated cause for concern, such as harmful impacts on fish and aquatic ecosystems, potential interference with beneficial bacteria in our bodies and the environment, and the potential development of more virulent harmful bacteria.” Claiming that nanoscale silver products now on the market violate FIFRA, the 100-page petition seeks enforcement actions against companies that currently sell such products. The petitioners allege that nanoscale silver is the most common commercialized nanomaterial and appears in more than 260 products, including household appliances and cleaners, odor-resistant clothing, cutlery, children’s toys, and electronics. Comments on the petition must be received by EPA on or before January 20, 2009.



### [13] Water/SPCC: EPA Issues Final Rule Amending SPCC Regulations

EPA has issued a **final rule** that amends the agency's spill-prevention regulations exempting hot-asphalt mix; equipment and containers used to apply pesticides; containers for residential heating oil; and other items from its Spill-Prevention, Control, and Countermeasures (SPCC) rule. *73 Fed. Reg.* 72,016 (11/26/08).

The SPCC regulations and 40 C.F.R. Part 112 require owners and operators of facilities that use, store, transfer or consume oil or oil-based products to develop and implement professionally certified spill-prevention plans to avoid discharge of oil into U.S. waters. In addition to promulgating exemptions, the new rule clarifies a number of other provisions and amends security requirements to allow an owner or operator to tailor any security measures to specific site characteristics.

### [14] RCRA: EPA Proposes to Add Hazardous Pharmaceutical Wastes to the Universal Waste Rule

EPA has **proposed** a rule that would integrate hazardous pharmaceutical wastes into RCRA's Universal Waste Rule, which is codified at 40 C.F.R. Part 273.

EPA's current universal waste rule covers batteries, pesticides, mercury-containing equipment, and lamp bulbs. The proposed rule applies to pharmacies, hospitals, physicians' offices, dentists' offices, outpatient care centers, ambulatory health care services, residential care facilities, and veterinary clinics, as well as other facilities that generate hazardous pharmaceutical wastes. According to EPA, pharmaceutical wastes present a relatively low risk during accumulation and transport and therefore

would be a good fit for the Universal Waste Rule, which is designed to reduce the complexity of RCRA regulations by allowing wastes to be disposed of at non-RCRA permitted facilities. Comments on the proposed rule will be accepted for 60 days following its publication in the *Federal Register*.

### [15] Alternative Energy: DOI Issues Final Oil Shale Rule

The U.S. Department of Interior (DOI) has **issued** final regulations to establish a commercial oil shale program in the United States. *73 Fed. Reg.* 69,413 (11/18/08).

Issued by the department's Bureau of Land Management (BLM), the regulations establish policies and procedures for the implementation of a commercial leasing program for the management of federally-owned oil shale and any associated minerals located on federal lands. The regulations incorporate specific provisions of the Mineral Leasing Act of 1920 and the Energy Policy Act of 2005 relating to oil shale lease size, acreage limitations, rental, and lease diligence. Before any oil shale leases are issued, site-specific analyses under NEPA would be completed, according to BLM. Once a lease is issued, the lessee would have to obtain all required permits from state and local authorities before operations could begin. The new regulations are effective January 17, 2009.



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