

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] **Water: Ninth Circuit Rules CWA Protects Federal Waters Only from Point Source Discharges**

The Ninth Circuit Court of Appeals has upheld a district court ruling that cattle-grazing on U.S. Forest Service lands does not constitute a discharge under the Clean Water Act (CWA). *Or. Natural Desert Ass'n v. U.S. Forest Service, No. 08-35205 (9th Cir. 12/11/08)*. The lawsuit, filed in April 2007 by a coalition of environmental groups against the U.S. Forest Service (USFS), alleged that cattle-grazing permits issued by the USFS in Malheur National Forest violated the CWA. The alleged violations, according to the complaint, were due to cattle feces causing short-and long-term damage to the stream basin in the Middle Fork John Day River Basin.

Citing *Oregon Natural Desert Association v. Dombeck*, 172 F.3d 1092 (9th Cir. 1998), the appeals court held that section 401(a) of the CWA does not apply to nonpoint pollution sources, which indirectly pollute the water. Section 401 requires a state certification that actions on federal land that may result in water pollution discharges will not violate water quality standards. The USFS did not require Colvin Cattle Co. to obtain a state certificate before issuing the company a grazing permit.

[2] **Prop. 65: Toy Manufacturers Settle Lawsuit over Lead in Toys**

Nine toy manufacturers have reportedly settled a lawsuit brought by California Attorney General Jerry Brown (D) under the state's Safe Drinking Water and Toxic Enforcement Act of 1987 (Prop. 65) over lead levels in the companies' toy products. *Cal. v. Mattel, Inc.*, No. RG – 07356892 (Cal. Super. Ct. 12/4/08). Under a proposed settlement agreement, the toy manufacturers agreed to pay \$1.8 million to the state and accelerate implementation of strict new federal lead standards included in the Consumer Product Safety Improvement Act. The companies also agreed to stop selling and distributing toys with lead paint found to exceed 90 parts per million (ppm) and 330 ppm for lead in plastics, metals and fabrics. *See BNA Daily Environment Report*, December 9, 2008.

Legislation, Regulations and Guidance

[3] **Air: EPA Issues Final Rule Revising NSR Improvement Rules**

EPA has finalized a rule that excludes some industries from having to count "fugitive" emissions when determining whether they must install new pollution controls under new source review (NSR) provisions of the Clean Air Act (CAA). In 2002, EPA issued NSR improvement rules that specifically included fugitive emissions from sources that were listed and non-listed when determining whether



a physical or operational change in a plant was a major modification triggering CAA requirements. This rule was issued in response to a 2003 petition from Newmont Mining Corp. asking the agency to reconsider the 2002 rule because EPA failed to comply with the CAA when it required fugitive emissions to be counted in determining whether a major modification occurs in sources not listed according to section 302(j) of the CAA. The final rule requires that fugitive emissions be included in determining whether a physical or operational change results in a major modification *only* for sources in industries that have been designated through rulemaking under section 302(j).

[4] CERCLA/EPCRA: EPA Finalizes a Rule Allowing Exemption for Air Releases of Hazardous Substances from Animal Waste

EPA has issued a final [rule](#) exempting poultry farms and other concentrated animal feeding operations (CAFOs) from reporting ammonia and other air emissions related to animal waste under CERCLA and EPCRA. According to the rule, the exemption applies to releases of hazardous substances to the air that meet or exceed their reportable quantity “where the source of those hazardous substances is animal waste at farms.”

CERCLA requires a facility to notify the Coast Guard’s National Response Center and local and state emergency planning committees if specific emissions exceed certain limits or there are hazardous material spills. The current rules apply to large CAFOs with high levels of ammonia, hydrogen sulfide or other pollution from animal waste. Under the new final rule, those facilities would be exempt from the reporting obligations. The rule will be effective 30 days after it is published in the *Federal Register*.

[5] RCRA: EPA Expands Comparable Fuels Exclusion Rule

EPA has issued a final [rule](#) expanding RCRA’s comparable fuel exclusion. The rule allows certain secondary material, called emission-comparable fuel (ECF), to be burned for energy recovery in industrial boilers if the emissions are comparable to those from burning fuel oil. The rule also sets conditions under which ECF wastes may be burned to ensure comparable emission levels. According to the rule, ECF should be managed as a commodity valued for its energy content. The agency estimates that 13,000 tons per year of hazardous secondary material were captured under an existing RCRA fuels exclusion and projects that as much as 118,500 additional tons per year may be excluded under the new final rule. The final rule is effective 30 days from the date it is published in the *Federal Register*.

[6] Endangered Species Act: FWS/NMFS Issue Final Rule on Interagency Cooperation Under ESA

The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) have issued a final [rule](#) amending regulations governing interagency cooperation under the Endangered Species Act of 1973 (ESA). Under section 7 of the ESA, FWS and NMFS scientists are required to consult on every project that is reviewed, funded or approved by the federal government and that could have an impact on an endangered or threatened species or its habitat. The final rule would allow federal agencies to determine for themselves whether a project would pose any significant harm to a protected species. Under the rule, even if agencies make that determination, they could still consult with FWS and NMFS scientists informally, but that process would be limited to 60 days; the



rule would also limit consideration of the effects of greenhouse gases on protected species. The rule will be effective 30 days after it is published in the *Federal Register*.

Environmental groups have already reportedly challenged the rule in federal court. *Ctr. for Biological Diversity v. Kempthorne*, No. N/A (N.D. Cal. filed 12/11/08). The complaint alleges that the rule violates the ESA and fails to provide an adequate review process. See *BNA Daily Environment Report*, December 12, 2008.

[7] Env'tl. Crime: EPA Launches Online Environmental Crime Most Wanted List Web Site

EPA has created a [Web site](#) that lists the agency's most-wanted alleged environmental violators. EPA is reportedly the first federal agency to create such a Web site, which provides mug shots of each fugitive and a list of his or her alleged crimes. EPA also provides details about the alleged violator's last-known whereabouts. Anyone who sees a fugitive listed on the Web site is asked to notify the agency by filling out a "Report a Fugitive" form on the Web site or calling the police or nearest U.S. Embassy.

[8] Endangered Species Act: FWS Reinstates Gray Wolf Protections under ESA

The U.S. Fish and Wildlife Service (FWS) has issued a final [rule](#) reinstating regulatory protections under the Endangered Species Act (ESA) for some gray wolf populations. *73 Fed. Reg.* 75,356 (12/11/08). FWS issued the rule in an attempt to comply with court orders that required the reinstatement of gray wolf protections in specific areas. See *Humane Soc'y of the U.S. v. Kempthorne*, No. 07-00677 (D.D.C. 9/29/08); *Defenders of Wildlife v. Norton*, No. 03-1348 (D. Or. 1/31/05); and *Nat'l Wildlife Fed'n v.*

Norton, No. 03-340 (D. Vt. 8/19/05). The rule lists all gray wolves in the western Great Lakes and northern Rocky Mountain regions as endangered species under ESA.

[9] Civil Penalties: EPA Adjusts Civil Penalties to Reflect Inflation

EPA has issued a final civil monetary penalty inflation adjustment [rule](#), as required by the Debt Collection Improvement Act of 1996 (DCIA), to make inflation adjustments to the statutory civil monetary penalties that may be assessed for EPA-administered statutes and regulations. *73 Fed. Reg.* 75,340 (12/11/08). Under DCIA, EPA must review the civil monetary penalties for its statutes at least once every four years and adjust the penalties according to a DCIA formula.

[10] Air/Greenhouse Gases: California Air Board Approves GHG Emissions Plan

Cal/EPA's Air Resources Board (ARB) has approved the state's plan to reduce greenhouse gas (GHG) emissions to 1990 levels by 2020 as required by the Global Warming Solutions Act of 2006 (AB 32). A central part of the plan is a cap-and-trade program covering 85 percent of the state's emissions that will be developed in conjunction with the Western Climate Initiative, a collaboration comprising seven states and four Canadian provinces committed to capping their emissions and creating a regional carbon market.

Other plan components include (i) strategies to enhance and expand proven cost-saving energy efficiency programs; (ii) implementation of California "clean cars" standards; (iii) increases in the amount of clean and renewable energy used to power the state; and (iv) implementation of a low-carbon fuel standard that will make fuels used in the



state cleaner. The plan also proposes deployment of the California Solar Initiative, high-speed rail, water-related energy efficiency measures, and a range of measures to reduce emissions from trucks and ships in state ports. See *ARB Press Release*, December 11, 2008.

Scientific/Technical Items

[11] Chemical Exposure: Study Claims Trucking Industry Workers Have Elevated Risk of Lung Cancer

A recent Harvard Medical School study claims that trucking company workers who have been regularly exposed to diesel exhaust from vehicles on highways, city streets and loading docks have a higher risk of developing lung cancer than other workers. Eric Garshick, et al., "Lung Cancer and Vehicle Exhaust in Trucking Industry Workers," *Environmental Health Perspectives*, October 2008. Based on work records of 31,135 male workers employed in the unionized U.S. trucking industry, the study analyzed the workers' exposure histories up to the year 2000 and health outcomes between 1985 and 2000.

The study found that drivers who do short-haul pickups and deliveries, including loading and unloading containers at ports and working at freight-delivery companies, had the highest rate of deaths and disease. Dock workers were also at high risk, according to the study, which in total reported 4,306 deaths and 779 cases of lung cancer, including 734 deaths where lung cancer was the underlying cause.

[12] Nanotechnology: NRC Report Critical of U.S. Plan for Assessment of Nanotechnology Risks

A recent [report](#) by the National Academies' National Research Council (NRC) claims that the federal National Nanotechnology Initiative (NNI) does not have a strategic national plan to address environmental, health and safety issues. Established in 2001, NNI coordinates the work of 25 federal agencies, 13 of which have research and development budgets for nanotechnology. In February 2008, NNI released its strategy plan for priority research on the environmental, health and safety aspects of nanomaterials.

NRC convened a panel to review this strategy plan and make recommendations based on its findings. According to the report, "[w]hile the strategy identifies broad research categories for assessing health and environmental risks, the plan fails to identify some important areas that should be researched." The report also faults NNI for overstating the number of environmental and health studies that are already funded and underestimating how much federal funding is targeted toward nanotech-related research.

The report is most critical of the plan, however, for relying on data about research projects funded in 2006 to evaluate how much federally funded research supported certain priorities and to conduct a gap analysis. Most of the 2006 research focused on understanding fundamentals of nanoscience, rather than on risk or development of nanotechnology applications.



[13] Chemical Exposure: Report Addresses Air Pollution Impact on Women and Children

A recent report by researchers at the University of California, Los Angeles, argues that federal air pollution regulations fail to reflect growing scientific evidence linking air pollution with premature birth, low birth weight, birth defects, and other serious health problems. Beate Ritz, "Air Pollution Impacts on Infants and Children," *UCLA Institute of the Environment*, Fall 2008. The report claims that despite this evidence, EPA does not properly consider infants, children and pregnant women when it sets pollution standards. The researchers urge state and federal governments to make drastic changes to motor vehicle emission standards, transportation systems and industrial processes to prevent health problems.

[14] Chemical Exposure: Study Finds Levels of PBDEs in Fetuses Increased from 1998 to 2006

A recent study by researchers from Health Canada and the McGill University Health Center claims that levels of polybrominated diphenyl ethers (PBDEs) measured in the livers of fetuses increased significantly from 1998 to 2006. Josée Doucet, et al., "Persistent Organic Pollutant Residues in Human Fetal Liver and Placenta from Greater Montreal, Quebec: A Longitudinal Study from 1998-2006," *Environmental Health Perspectives*, December 10, 2008. The study measured PBDE, polychlorinated biphenols (PCBs) and organochlorine pesticides in 52 fetal liver and 60 placental tissue samples. The study found that levels of PBDEs increased significantly in the fetal livers but not in the placental tissues, leading the researchers to conclude that PBDEs tend to accumulate in specific tissues.

PBDEs have been used over the past 20-30 years as a flame retardant in plastics, foams and other long-lived products that have widespread commercial and home use. According to the study, as well as a 2008 draft EPA exposure assessment, the major source of PBDE exposure appears to be dust.



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

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