

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] **Water/FIFRA: Sixth Circuit Vacates EPA Rule Exempting Pesticides from Permitting Requirements**

The Sixth Circuit Court of Appeals has vacated an EPA rule that exempted certain applications of pesticides from the Clean Water Act requirement for discharge permits under the NPDES program. [Nat'l Cotton Council of Am. v. EPA, No. 06-4630 \(6th Cir. 1/7/09\)](#). The 2006 rule stated that if pesticides were used in accordance with FIFRA, no permit would be required for applications directly over waters to control pests or if the applications were near waters, such as applications to nearby forest canopies. 40 C.F.R. Part 122.

An environmental coalition challenged the rule claiming that it violated the CWA. EPA responded that pesticide residues were not subject to the NPDES permitting program because they are not discharged from a point source. The court translated EPA's argument as "the pesticide is discharged from a point source, but the residue does not exist until after the discharge is completed and therefore should be treated as a nonpoint source pollutant," and rejected it, saying "if the EPA's interpretation were allowed to stand, discharges that are innocuous at the time they are made but extremely harmful at a later point would not be subject to the permitting program." Petitions for review of the

rule were filed in the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. circuits and then consolidated in the Sixth Circuit.

[2] **Forest Management: Ninth Circuit Rules USFS Must Reconsider Standard for Allowing Snowmobile in National Forest**

The Ninth Circuit Court of Appeals has ruled that the U.S. Forest Service (USFS) must reconsider the standard it uses to decide whether snowmobiling and other land uses harm grizzly bears in Flathead National Forest in Montana. [Swan View Coal., Inc. v. Barbouletos, No. 03-00112 \(9th Cir. 1/6/09\)](#). Plaintiffs sued in 2003 alleging that a permit granted by the USFS allowing more snowmobiles into park land with grizzly bears conflicted with the National Forest Management Act and the Flathead Forest Management Plan that requires the USFS to value the needs of grizzly bears over other "competing" land use requests in certain sensitive habitat areas. The district court ruled, "so long as the competing uses do not pose a demonstrable and significant biological threat to the grizzly bears or their habitat," the needs of the grizzly bears and the other uses "do not compete for purposes of the Forest Plan."

The appellate court noted that the USFS has not adopted any standard for evaluating when land uses "compete" within the meaning of the Forest Plan. Under the Forest Plan, the term "competitive uses" includes "all factors that lead eventually to increased negative impact of human activity on grizzly populations." Vacating the district court decision,



the appellate court held that the court “erred in applying a standard of its own making to resolve the question.” The appellate court ordered the district court to require the USFS to create a standard to use to decide what constitutes “competing” land uses under the plan for the Flathead Forest.

[3] **Air: Group Sues EPA to Block Air Permit for Gas Compressor Station**

A wildlife preservation group has filed a Clean Air Act citizen suit against EPA asking the court to block a permit authorizing the operation of a gas compressor station in Colorado. [Wildearth Guardians v. Johnson, No. 08-2253 \(D.D.C. filed 12/31/08\)](#).

The complaint seeks a court order compelling EPA to rule on plaintiff’s objection to a Title V permit that was issued to Anadarko Petroleum Corp. in January 2007 authorizing the operation of the Fredrick Natural Gas Compressor Station in Weld County, Colorado.

According to the complaint, the station collects and processes natural gas in a facility that includes three large natural gas-fired reciprocating internal combustion engines and a natural gas dehydrator that can process 80 million cubic feet of natural gas per day. Plaintiff alleges that the permit fails to take into account connected sources of air pollution, including interrelated natural gas wells and compressor stations, as a single air pollution source. Pollutants allegedly emitted from the station include volatile organic compounds, nitrogen oxides, carbon monoxide, formaldehyde, and benzene.

[4] **Natural Resources: Coalition Seeks Chesapeake Bay Clean Up**

A coalition of environmental and trade groups has reportedly sued EPA over the agency’s alleged failure to clean up Chesapeake Bay. Filed in the U.S. District Court for the District of Columbia on January 5, 2009, the complaint seeks to force the agency to require reductions in air pollution, nutrient pollution from wastewater treatment plants and urban, suburban and agricultural runoff. Under a 2000 agreement, EPA committed to reduce bay pollution enough to remove it from the federal impaired waters list by 2010. A major study by the Chesapeake Bay Foundation in 2007 concluded that EPA was falling short of its commitment to prevent 110 million pounds of nitrogen from entering the bay by 2010, and EPA recently admitted that it would not meet environmental health goals set for 2010. The complaint alleges that by not living up to the 2000 and two previous agreements to clean up the bay, EPA has acted in an “arbitrary and capricious” manner. See *Washington Post* and *LAW360*, January 6, 2009.

Legislation, Regulations and Guidance

[5] **Water: EPA Issues Cruise Ship Discharge Report**

EPA has issued the [Cruise Ship Discharge Assessment Report](#) assessing five primary cruise ship waste streams: sewage, graywater, oily bilge water, solid waste, and hazardous waste.



For each waste stream, the report discusses (i) the nature and volume of the waste stream generated; (ii) existing federal regulations applicable to the waste stream; (iii) environmental management, including treatment, of the waste stream; (iv) potential adverse environmental impacts of the waste stream; (v) actions by the federal government to address the waste stream; and (vi) a wide range of options and alternatives that address the waste stream from cruise ships.

The report is the result of a petition filed by Bluewater Network in 2000 on behalf of 53 organizations, asking EPA to assess, and, where necessary, control cruise ship discharges. Bluewater later submitted an addendum to the petition requesting that EPA also examine and make recommendations about how to address pollution from ships, both from engine emissions and from shipboard incinerators. On December 20, 2007, EPA invited comment on a draft report and specifically requested public input on options, alternatives and recommendations for addressing waste streams identified in the draft report. The report, announced in the *Federal Register* on December 29, 2008, was issued after the agency reviewed and considered the public comments. 74 *Fed. Reg.* 442.

[6] Pest Management: USDA/EPA Release National Plan to Improve Pest Management in Schools

The U.S. Department of Agriculture (USDA) and EPA announced January 7, 2009, a **national plan** to help reduce pest infestations in schools.

The plan calls for (i) better understanding among educators, school administrators and others of pests and pest biology; (ii) careful inspection and monitoring for pests and conditions that favor them

in schools; (iii) pest prevention through education; and (iv) sanitation and facility maintenance to achieve these goals.

The plan sets several objectives to achieve through 2015 including (i) creating integrated pest management committees in school-related organizations, (ii) setting up integrated pest management demonstrations in local schools, (iii) helping states craft new regulations, and (iv) organizing national training programs. According to the plan, it is aimed at establishing programs in the 95,726 elementary and secondary public schools and 28,273 private schools in the United States.

[7] Chemical Exposure: EPA Consults with NAS on Perchlorate Risk

EPA announced January 8, 2009, that it is consulting with the National Academy of Sciences (NAS) before making a final determination on whether to issue a national regulation for perchlorate in drinking water. EPA said it specifically wants advice on (i) its new estimate of a safe exposure level of 15 parts per billion, (ii) its method of estimating impacts on infants and young children, (iii) the implication of recent biomonitoring studies, and (iv) the role of perchlorate relative to other compounds that similarly inhibit the thyroid gland's iodine uptake. EPA expects to issue a final health advisory—its new estimate of a safe exposure level—concurrent with the final determination on regulation under the Safe Drinking Water Act. Perchlorate is a naturally occurring chemical that has been associated with explosives, rocket fuel and fireworks. It has been detected in groundwater in several locations in the United States. *See EPA Press Release*, January 8, 2009.



[8] **Air: New York Environmental Board Adopts Stringent Power Plant NSR Regulations**

The New York State Environmental Board reportedly approved final new source review (NSR) [regulations](#) January 6, 2009, that are more stringent than federal requirements for major stationary air pollution sources. The new regulations take effect 30 days after publication in the *New York State Register*. They require major stationary sources, such as power plants and industrial facilities, to install state-of-the-art pollution controls if they expand or modify operations in ways that significantly increase emissions.

The regulations are more stringent than the federal rules in terms of recordkeeping and monitoring, emission measurement baseline and the so-called baseline emission look-back period. Under the regulations, the state will use a five-year look-back period for determining baseline emissions and require that facilities select a single baseline period for all pollutants. Baseline emissions, according to the regulations, will be determined by using any 24-consecutive-month period within the previous five years. Under federal standards, there is a 10-year look-back period, and facilities are allowed to choose different baseline periods for each pollutant.

[9] **Recycling: Michigan Law Requires Manufacturers to Accept Electronic Devices for Recycling**

A new Michigan law signed by Governor Jennifer Granholm (D) on December 30, 2008, requires manufacturers to accept computers and video display devices for recycling. Each manufacturer must register with the state Department of Environmental Quality each year and pay a \$2,000 fee—\$3,000 if the manufacturer does not

use Michigan-based recyclers—to participate in the program. The law also sets out reporting, insurance and other requirements for recyclers, who must also pay \$2,000 registration fees. The law, which takes effect April 1, 2010, is similar to programs in Illinois, New Jersey, Oregon, and Washington.

[10] **Envtl. Crime: EU Directive Requires Criminal Sanctions for Environmental Law Violations**

A European Union (EU) [directive](#), effective December 26, 2008, requires EU member states to ensure that certain violations of EU environmental law are punishable by criminal sanctions.

Covered violations include illegal disposal of radioactive substances, serious instances of waste dumping, negligent or deliberate pollution releases, and serious damage to conservation sites. The directive also requires member states to ensure that legal persons such as companies can be held liable “where such offenses have been committed for their benefit.” Although the directive requires EU member states to criminalize certain environmental violations, it does not set out a scale of penalties. The European Commission originally proposed harmonized criminal penalties, but the European Court of Justice ruled in October 2007 that defining criminal sanctions was a matter for member states.

Scientific/Technical Items

[11] **Nanotechnology: Study Claims Toxic Materials Enter Cells When Bound to Nanoparticles**

A recent study by German and Swiss researchers claims that toxic materials which cannot enter cells on their own can hitchhike into cells when they are bound in nanoparticles. S. Bastian, *et al.*, “Toxicity of Tungsten Carbide and Cobalt-doped Tungsten



Carbide Nanoparticles in Mammalian Cells In Vitro,” *Environmental Health Perspectives*, 12/1/08. The researchers examined acute toxicity of tungsten carbide and cobalt-doped tungsten carbide nanoparticles in different human cell lines (lung, skin and colon) as well as rat neuronal and glial cells. Alone, the tungsten carbide nanoparticles were not toxic to human lung, skin or intestinal cells or rat brain cells. When ionic cobalt was added to the solution of tungsten carbide nanoparticles, the solution was not toxic to the cells either. When cobalt was incorporated into the tungsten carbide nanoparticles by a process called doping, however, the combined materials affected the cells. The resulting cell death with the tungsten-cobalt nanoparticles was higher than would be expected based on the levels of cobalt used.

The researchers concluded that cobalt becomes more readily available to cells by hitchhiking on the nanoparticles, which are known to cross into cells. The nanoparticle thus acts as a carrier for toxic ions into the cells.

[12] Nanotechnology: ISO Issues Technical Report on Use of Nanomaterials in the Workplace

The International Organization for Standardization (ISO) has reportedly published a Technical Report that provides information on occupational safety for those involved in the manufacture and use of nanomaterials in the workplace. *ISO/TR 12885:2008*. The report is designed to help companies, researchers, workers, and others prevent adverse health and safety consequences during the production, handling, use, and disposal of manufactured nanomaterials. The report was

developed by a U.S.-led workgroup on Health, Safety and the Environment. The report is available for purchase on the ANSI or ISO Web sites. See *ANSI Press Release*, January 7, 2009.

[13] Chemical Exposure: Study Claims BPA Blood Levels Eleven Times Higher in Infants

A recent study by Canadian researchers claims that bisphenol A, or BPA, a high-protein chemical that has been used for decades to make polycarbonate plastics and epoxy linings for food cans, has been detected in the blood of infants at a level roughly 11 times higher than in adults. Andrea Edginton, *et al.*, “Predicting Plasma Concentrations of Bisphenol A in Young Children (< Two Years) Following Typical Feeding Schedules Using a Physiologically-based Toxicokinetic Model,” *Environmental Health Perspectives*, November 14, 2008.

The researchers examined data from animal studies and limited human tests to try to determine how long BPA stays in an infant’s system. They first looked at data from adults to determine how long the chemical stays in the body before it is broken down by liver enzymes and eliminated. Then, by looking at several key enzymes, they estimated how infants’ bodies might process BPA. They projected that those enzymes are significantly less active in babies, particularly those younger than 3 months of age (a baby’s liver enzyme is 5 percent as active as an adult’s). The researchers then developed a computer model to determine elimination rates in babies. The conclusion: assuming that exposure is identical for adults and babies, the amount of BPA in a baby’s blood is roughly 11 times higher.



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

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