

Environmental & Chemical Update

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

Issue 264 • January 30, 2009

Litigation and Regulatory Enforcement

- [1] **Envtl. Crime:** Second Circuit Affirms \$4.9 Million Jury Verdict in Ocean Dumping Case. 1
- [2] **Envtl. Crime:** Seventh Circuit Affirms Prison Sentence for President of Liquid Industrial Waste Treatment Company 1
- [3] **NEPA:** Federal Court Blocks BLM Issuance of Oil and Gas Leases. 2
- [4] **Air/Preemption:** Federal Court Dismisses Claims Against Railroad for Alleged Idling Violations 2
- [5] **RCRA:** Federal Court Refuses to Overrule State EPA on Waste Determination . . . 3
- [6] **Preemption:** Colorado Supreme Court Rules State Mining Statute Preempts County Ordinance Banning Use of Toxic Chemicals 3
- [7] **Envtl. Crime:** Plating Company Owner Sentenced to Prison for RCRA and CWA Criminal Violations 4
- [8] **NEPA:** Environmental Coalition Challenges USFS over Idaho Roadless Rule 4
- [9] **Air:** Groups Sue Maryland DOE over Alleged Failure to Require Air Permits 4
- [10] **Global Climate Change:** Center for Biological Diversity Sues Federal Agencies over Endangered Species Concerns 5

Legislation, Regulations and Guidance

- [11] **MARPOL:** U.S. Coast Guard Issues IFR on Oil Pollution Prevention Equipment . . . 5
- [12] **Air:** EPA Proposes Rule Revising 8 Hour Ozone NAAQS 5
- [13] **Air:** EPA Proposes Rule Setting National Emissions Standards for Aluminum Foundries. 6
- [14] **Nanotechnology:** Canada to Require Reporting on Toxicity of Nanomaterial. . . . 6

Shook,
Hardy &
Bacon_{L.L.P.}

www.shb.com

Environmental & Chemical Update

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

Litigation and Regulatory Enforcement

[1] **Envtl. Crime: Second Circuit Affirms \$4.9 Million Jury Verdict in Ocean Dumping Case**

The Second Circuit Court of Appeals has affirmed a jury verdict and a \$4.9 million criminal penalty against a Greek oil tanker management company convicted of violating the Act to Prevent Pollution from Ships. [U.S. v. Ionia Mgmt. S.A., No. 07-5801 \(2nd Cir. 1/20/09\)](#). According to the indictment, the oil tanker M/T Kriton, managed by defendant, routinely discharged oily wastewater into the ocean through a hose designed to bypass the vessel's oily water separator, and the crew made false record book entries to conceal the discharges. The crew also obstructed a federal investigation by hiding the hose and lying to the Coast Guard on March 20, 2007.

Four separate indictments were brought against defendant in June 2007—in Connecticut, Florida, New York, and the Virgin Islands—then consolidated for trial in Connecticut. The jury found the company guilty on 18 counts, including conspiracy, falsifying records, obstructing justice, and 13 counts under the Act to Prevent Pollution from Ships. Defendant's main argument on appeal was that the vessel's crew did not "maintain" the oil record book, but only possessed the false book, and did not make any false entries in it while the tanker was in U.S. waters.

The appellate court cited *U.S. v. Jho*, 534 F.3d 398 (5th Cir. 2008), in which the court noted that if record books did not have to be "maintained" while in the ports or navigable waters of the United States, then a foreign-flagged vessel could avoid application of the law by falsifying all of its records before entering U.S. waters. The court also cited 33 CFR § 151.25, which imposes record-keeping requirements, saying that "[n]o reasonable reader of this regulation could conclude, given the context, that the regulation merely imposes an obligation to preserve the [oil record book] in its existing state."

[2] **Envtl. Crime: Seventh Circuit Affirms Prison Sentence for President of Liquid Industrial Waste Treatment Company**

The Seventh Circuit Court of Appeals has affirmed a 60-month prison sentence for the former president of a now-defunct liquid industrial waste treatment company. [U.S. v. Hagerman, No. 07-3874 \(No. 06-0139 7th Cir. 1/15/09\)](#).

Defendant was convicted in 2007 of concealing elevated levels of chemical discharges into Indiana's Wabash River. Defendant argued that the trial court had improperly admitted certain evidence, that one of the jury instructions misstated the law and that the government could not quantify the damage caused by his violations.

In 2001, the company obtained an NPDES permit that limited the types of wastes it could receive and discharge. Evidence obtained from a search



warrant executed in December 2004 showed lab results documenting that the company discharged pollutants above effluent limitations for ammonia, biological oxygen demand, total suspended solids, copper, zinc, and phenol. Following trial, a jury found defendant guilty on 10 counts under the Clean Water Act of faking chemical discharge level reports that showed concentrations of zinc, copper, ammonia, and other substances lower than had actually been discharged into the river. In addition to affirming the five-year prison sentence, the court also upheld a \$238,000 fine.

[3] NEPA: Federal Court Blocks BLM Issuance of Oil and Gas Leases

A federal judge in Washington D.C. has granted plaintiff's motion for a temporary restraining order thereby blocking the U.S. Bureau of Land Management (BLM) from issuing oil and gas leases on 77 parcels of land in Utah. *S. Utah Wilderness Alliance v. Allred*, No. 08-2187 (D.D.C. 1/17/09). Seven environmental, conservation and historic preservation groups sued BLM, alleging that the agency violated NEPA, the National Historic Preservation Act (NHPA) and the Federal Land Policy and Management Act (FLPMA) by failing to prepare a thorough environmental impact statement (EIS) and by not adequately determining whether the leases posed threats to historic properties. Specifically, plaintiffs alleged that BLM failed to carry out quantitative ozone dispersion modeling—a process for predicting the ambient concentrations of a given pollutant taking into account factors such as emission rates and weather—and, thus, it could not accurately measure the air pollution the lease sales could cause.

According to the court, "... the plaintiffs have made the requisite likelihood of success showing as to their NEPA claim" in that "BLM cannot rely on EISs that lack air pollution and ozone level statistics." The court also found that the NHPA and FLPMA require BLM to determine whether a lease sale poses threats to historic properties and to protect the public land's quality of scientific, scenic, historic, ecological, and environmental values. Plaintiffs included NRDC, the National Parks Conservation Association, the Grand Canyon Trust, the Sierra Club, the National Trust for Historic Preservation, and the Southern Utah Wilderness Alliance.

[4] Air/Preemption: Federal Court Dismisses Claims Against Railroad for Alleged Idling Violations

A federal judge in New Jersey has dismissed claims filed by a county health department against a railroad company, alleging violations of the New Jersey Air Pollution Control Act for excessive idling. *Middlesex County Health Dep't v. Consol. Rail Corp.*, No. 08-4547 (D.N.J. 1/9/09). The complaint cited four separate incidents over a 15-month period during which defendant allegedly idled locomotives for excessive periods of time thereby emitting diesel exhaust fumes in violation of the state air act. Plaintiff contended that the state act applied to atmospheric emissions released from "idling" train locomotives. Defendant argued that the complaint failed to state a claim and that the court lacked jurisdiction over the subject matter.

Dismissing the complaint, the court ruled that the state anti-idling provision is preempted by federal law, specifically the Clean Air Act, which has vested authority in EPA to regulate emissions from locomotive engines. 42 U.S.C. §7401. The court also cited federal regulations which explain that "state



attempts to regulate this sphere of environmental legislation are preempted.” 63 *Fed. Reg.* 18,978 (April 16, 1998).

[5] RCRA: Federal Court Refuses to Overrule State EPA on Waste Determination

A federal judge in Ohio has dismissed a challenge to a state agency’s determination that masonry blocks produced by plaintiff, containing hazardous waste byproducts, are themselves hazardous waste when “applied to or placed on the land.” *U.S. Tech. Corp. v. Johnson, No. 08-00082 (S.D. Ohio 1/13/09).*

The state’s Environmental Protection Agency informed plaintiff that when its blocks are placed below grade in building foundations they are waste materials “used in a manner constituting disposal.” The decision was upheld by the state Environmental Review Appeals Commission. Plaintiff then filed a declaratory judgment action against EPA and the Ohio EPA, seeking an order that the Ohio EPA misapplied state law and RCRA, on which it is based.

The court noted that Ohio EPA operates under an EPA-authorized state hazardous waste law and that Ohio EPA “does not enforce federal law; nor does USEPA enforce state law.” The court also said that Ohio EPA’s “authorized RCRA enforcement does not involve a federal question because its program operates in lieu of federal law.” Because the issues plaintiff raised were “merely issues of state law,” the court determined that it lacked jurisdiction to consider them.

[6] Preemption: Colorado Supreme Court Rules State Mining Statute Preempts County Ordinance Banning Use of Toxic Chemicals

The Colorado Supreme Court has ruled that the state Mined Land Reclamation Act (MLRA) preempts a Summit County ordinance which prohibits the use of toxic or acidic chemicals, such as cyanide, for mineral processing in vat or heap leach operations in the county. *Colorado Mining Ass’n v. Bd. of County Comm’rs, No. 07-497 (Colo. en banc 1/12/09).* The ordinance, passed by the county board in 2004, was based on a finding that the use of chemicals for mining processing, especially the use of cyanide, posed unacceptable environmental and health risks. The state mining association challenged the ordinance, arguing that it was a reclamation standard that the MLRA expressly preempted. The district court agreed, but the appeals court reversed, finding that the ordinance was not a reclamation standard preempted by the MLRA. The state supreme court granted certiorari.

In a 3-1 decision, the supreme court reversed the appeals court and reinstated the decision of the district court. The court reviewed the MLRA’s history and concluded that, while counties have broad land-use planning authority, that authority does not generally include the right to ban disfavored uses from all zoning districts. Amendments to the MLRA passed in 1993 vested the county board with an enhanced program to manage mineral processing methods that use acidic or toxic chemi-



icals. According to the court, the board had permitted using cyanide and other toxic/acidic ore-processing reagents under that enhanced program, the same process banned by the ordinance. The board itself has also construed the ordinance as a reclamation standard. The dissenting judge argued that the ordinance was not preempted by the MLRA because the statute did not “completely occupy the field.”

[7] Env'tl. Crime: Plating Company Owner Sentenced to Prison for RCRA and CWA Criminal Violations

On January 15, 2009, a federal judge in Oregon sentenced the owner of a plating company to one year in prison and a \$3,000 fine for criminal violations of RCRA and the Clean Water Act. *U.S. v. Anson*, No. 06-327 (D. Or. 1/15/09). The defendant admitted last year that between 2001 and 2003, he knowingly stored spent cyanide plating bath solutions from electroplating operations without a valid permit. In addition, he pleaded guilty to a misdemeanor violation of the CWA for negligently allowing hazardous waste to enter the city of Portland's sewer system. Defendant was the owner of Columbia American Plating Co., located in Portland, Oregon. See *Denver Post* and *BNA Daily Environment Report*, January 21, 2009.

[8] NEPA: Environmental Coalition Challenges USFS over Idaho Roadless Rule

A coalition of environmental groups has filed a lawsuit in federal court seeking to prevent the U.S. Forest Service (USFS) from opening hundreds of thousands of acres of Idaho wilderness to construction, mining and logging activities. *Jayne v. Rey*, No. N/A (D. Idaho filed 1/16/09).

The complaint claims that the “Idaho Roadless Rule,” which authorizes development of the state's remote back country, violates the National Forest Management Act and NEPA. The USFS determined that the development allowed by the rule would not affect woodland caribou and grizzly bear populations, both of which are protected by the Endangered Species Act. Plaintiffs allege that the construction of roads in connection with future mineral leases and mining activities contemplated by the rule would threaten several endangered animal species. The lawsuit seeks reinstatement of a federal rule that took effect in January 2001 and protected 58.5 million acres of roadless areas in national forests from road construction and logging. 66 *Fed. Reg.* 3,243 (1/12/01). That rule was altered in 2005. 70 *Fed. Reg.* 25,654 (5/13/05).

[9] Air: Groups Sue Maryland DOE over Alleged Failure to Require Air Permits

Several environmental groups have reportedly sued the Maryland Department of Environment (DOE) to force the agency to issue a new air permit for a solid waste incinerator in Baltimore. *Env'tl. Integrity Project v. Maryland DOE*, No. N/A (Md. Cir. Ct. filed 1/22/09). The complaint alleges that several of the state's largest air polluters are operating without necessary Clean Air Act permits and demands that DOE issue a new air permit to a municipal waste incinerator operated by Wheelabrator.

The agency was scheduled to issue a permit to the facility in 2008, but failed to do so, according to the complaint. Plaintiffs also charge that a Luke Paper Co. mill in western Maryland is operating with an expired permit and that a western Maryland coal preparation



plant is operating under a permit without limits on emissions of nitrogen oxides. Plaintiffs reportedly plan several other lawsuits against the agency, alleging similar violations at other plants in the state. *See BNA Daily Environment Report*, January 23, 2009.

[10] Global Climate Change: Center for Biological Diversity Sues Federal Agencies over Endangered Species Concerns

The Center for Biological Diversity has sued six federal agencies in federal court for allegedly ignoring its petition asking the government to factor the impacts of global climate change into its decisions affecting endangered species. [*Ctr. for Biological Diversity v. Kempthorne*, No. 09-00090 \(D.D.C. filed 1/15/09\)](#). The complaint alleges that EPA and the Departments of the Interior, Commerce, Defense, Transportation, Agriculture, and Energy violated the Administrative Procedure Act by failing to respond in a timely manner to its February 1, 2007, petition. The petition asked that the government review “the global warming contribution” of federal projects and their impacts on imperiled species. It also asked the federal government to catalog the endangered, threatened and candidate species that face global warming threats.

Legislation, Regulations and Guidance

[11] MARPOL: U.S. Coast Guard Issues IFR on Oil Pollution Prevention Equipment

The U.S. Coast Guard has issued an interim final **rule** (IFR) that adopts international standards for oil pollution prevention equipment on ships and oil tankers. *74 Fed. Reg.* 3,364 (1/16/09). Effective March 17, 2009, the IFR will require all vessels

replacing or installing oil separators and bilge alarms to use equipment that meets revised standards, and all newly constructed vessels carrying oil in bulk to install monitoring systems that meet new International Maritime Organization guidelines issued under the International Convention for the Prevention of Pollution from Ships (MARPOL) Annex 1. The IFR also addresses equipment used on tankers to process oil tanker ballast and tank-washing water. The equipment monitors discharges of oily ballast or other oil-contaminated water from the cargo tank area into the sea. The U.S. Coast Guard is accepting comments through April 16, 2009.

[12] Air: EPA Proposes Rule Revising 8 Hour Ozone NAAQS

EPA has **proposed** revising the rule that implemented the 1997 national ambient air quality standard (NAAQS) for eight-hour ozone because the U.S. Circuit Court of Appeals for the District of Columbia vacated several portions of the rule. *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882 (D.C. Cir. 2006). *74 Fed. Reg.* 2,936 (1/16/09). Published in 2004, the initial rule specified the first phase of requirements for state, tribal and local air agencies to follow in implementing the NAAQS, which set the ground-level ozone standard at 0.08 parts per million. The appellate court vacated the rule “because EPA failed to heed the restrictions on its discretion set forth in the [Clean] Air Act.”

The proposed rule addresses the classification system for initial eight-hour ozone nonattainment areas and the applications of the one-hour standard under anti-backsliding provisions of the implementation rule. The proposal also removes language relating to the vacated provisions that provided exemptions from the requirements of nonattainment



new source review and CAA section 185 penalty fees under the one-hour standard. EPA will accept comments on the proposed rule until February 17, 2009.

[13] Air: EPA Proposes Rule Setting National Emissions Standards for Aluminum Foundries

EPA has issued a proposed **rule** that would set emissions standards for small aluminum and copper foundries. The proposed rule would require the foundries to operate according to written management plans that include procedures for covering or enclosing melting furnaces during the melting process. Foundries would also purchase scrap according to written material specifications or use only clean materials in melting operations. The proposed rule would establish emissions limits for toxic air pollutants such as beryllium, cadmium, chromium, lead, manganese, and nickel, and set area source standards for hazardous air pollutant emissions from aluminum, copper and other nonferrous metal foundries. EPA will accept comments on the proposed rule for 30 days after publication in the *Federal Register*.

[14] Nanotechnology: Canada to Require Reporting on Toxicity of Nanomaterial

The Canadian government is reportedly planning to publish a notice in the *Canada Gazette*, requiring companies to provide information on their use of nanomaterials; details about the quantity of the substance manufactured or imported; data on its physical and chemical properties; available toxicity data; and procedures put in place to minimize its release to the environment. The notice's requirements will be mandatory for companies that manufactured or imported more than 1 kilogram of a nanomaterial, either alone or in a mixture, during 2008. The reporting requirements will apply to materials including graphene, single or multi-walled carbon nanotubes, fullerenes, quantum dots, dendrimers, or any other material manufactured to have one or more spatial dimensions of 1-100 nanometers. See *BNA Daily Environment Report*, January 26, 2009.



Environmental & Chemical Update

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

This Update is distributed by
Shook, Hardy & Bacon's Environmental Law Practice.
If you have questions about this issue or would like to receive supporting documentation,
please contact Dave Erickson (derickson@shb.com; 816-474-6550) or
Jim Neet (jneet@shb.com; 816-474-6550).
We welcome any leads on new developments in environmental law or toxic tort litigation.

Geneva, Switzerland

Houston, Texas

Kansas City, Missouri

London, United Kingdom

Miami, Florida

Orange County, California

San Francisco, California

Tampa, Florida

Washington, D.C.

Shook,
Hardy &
Bacon LLP®

