

# Environmental & Chemical Update

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

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## Litigation and Regulatory Enforcement

- [1] **Air:** D.C. Circuit Strikes Down EPA Fine Particulate Matter Standard . . . . . 1
- [2] **Air:** Sixth Circuit Upholds EPA's Determination in Title V Permit Challenge . . . . . 1
- [3] **Natural Resource Damages:** Federal Court Finds Right to Jury Trial in Oil Pollution Act NRD Case . . . . . 2
- [4] **RCRA:** Citizen Suit Cannot Be Pursued Against Former Owner . . . . . 2
- [5] **CERCLA:** Federal Court Orders EPA to Address Financial Assurance Requirements . . 3
- [6] **Envtl. Crime:** Kansas Fertilizer Manufacturer Pleads Guilty to CWA Criminal Violation . . . . . 3
- [7] **Envtl. Crime:** Electrical Contractor Pleads Guilty to Defrauding EPA at CERCLA Site . . . . . 4
- [8] **Radioactive Waste:** Oregon to Join Washington in Lawsuit over Hanford Nuclear Reservation Cleanup . . . . . 4

## Legislation, Regulations and Guidance

- [9] **Air:** EPA Publishes Final Rule Requiring Emissions Monitoring on Heavy-Duty Trucks . . . . . 4
- [10] **Air:** EPA Releases Proposed Rule on Air Emissions from Stationary Diesel Engines . . . . . 4
- [11] **Climate Change:** California Air Board Adopts Climate Change Regulations . . . . . 5

## Scientific/Technical Items

- [12] **Chemical Exposure:** CDC Study Addresses Exposure to Persistent Organic Chemicals . . . . . 5
- [13] **Climate Change:** UNEP Reports on Environmental Food Crisis . . . . . 5

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## Litigation and Regulatory Enforcement

### [1] Air: D.C. Circuit Strikes Down EPA Fine Particulate Matter Standard

The D.C. Circuit Court of Appeals has ruled that EPA's fine particulate matter standard is "contrary to law and unsupported by adequately reasoned decision making." *Am. Farm Bureau Fed'n v. EPA, No. 06-1410 (D.C. Cir. 2/24/09)*. According to the court, EPA failed to adequately explain why an annual fine particulate matter level of 15 micrograms per cubic meter ( $\text{ug}/\text{m}^3$ ) was sufficient to protect public health when the agency's staff of scientific advisors had recommended a standard between 13 and 14 micrograms. The court upheld EPA's coarse particulate matter standard, also known as the "rural dust rule."

Thirteen states, the electric utility industry and a coalition of industry groups challenged EPA's revised air quality standards for particulate matter in 2006. In September of that year, EPA changed the daily air quality standard for fine particulate matter—particles smaller than 2.5 microns in diameter—from  $65 \text{ ug}/\text{m}^3$  to  $35 \text{ ug}/\text{m}^3$ . The agency chose not to raise the primary and secondary standards for fine particulate matter as averaged annually, which are both set at  $15 \text{ ug}/\text{m}^3$ , or its 24-hour standard for coarse particulate matter—smaller than 10 microns in diameter—which was set at  $150 \text{ ug}/\text{m}^3$ . 40 C.F.R. Part 50. The states argued that EPA's decision to leave the annual fine particulate matter standard

unchanged was insufficient to protect public health. Industry groups argued that EPA lacked a scientific justification to tighten the daily standard. Farming and agriculture groups unsuccessfully argued that the standard for coarse particulate matter—or dust—in rural areas had no scientific basis.

### [2] Air: Sixth Circuit Upholds EPA's Determination in Title V Permit Challenge

The Sixth Circuit Court of Appeals has ruled that EPA did not act arbitrarily and capriciously by not objecting to a Clean Air Act Title V permit issued by the Kentucky Division of Air Quality to the East Kentucky Power Cooperative despite EPA's previous enforcement actions against the facility. *Sierra Club v. EPA, No. 07-4485 (6th Cir. 2/26/09)*.

In August 2006, the Sierra Club petitioned EPA to object to the permit, claiming it had "demonstrated non-compliance because EPA previously issued a notice of violation to the same company (about the same plant) in January 2003 and had filed a federal-court complaint against the same company (about the same plant) in January 2004."

Under Title V of the CAA, both the states and EPA play roles in the issuance of permits. After a state gives the public an opportunity to comment on a proposed permit, but before it goes into effect, the state must submit the permit to EPA, which has 45 days to review it. If EPA concludes that the permit does not comply with federal requirements, it must "object to [the permit's] issuance." 42 U.S.C.



§ 7661d(b)(1). If EPA takes no action within the review period, “any person” may petition the agency to object, as the Sierra Club did in this case.

In July 2007, EPA and the power company reached a settlement of the enforcement action and submitted a proposed consent decree to the district court. In August, EPA granted the Sierra Club’s petition in part but declined to object to the permit. In September, the district court approved the consent decree. *U.S. v. E. Ky. Power Corp., Inc.*, No. 04-34 (E.D. Ky. 9/24/07). In December, the Sierra Club petitioned the Sixth Circuit for review of EPA’s refusal to object to the permit.

Rejecting the petition for review, the court found that the consent decree resolved all claims EPA had raised in the enforcement action, including the claim related to the Sierra Club’s permit objection. Under these circumstances, EPA acted within its discretion in addressing the Sierra Club’s petition. According to the court, under § 7661d(b)(2) of the CAA, the agency may alter its position about a power plant’s compliance with the CAA based on intervening events.

### **[3] Natural Resource Damages: Federal Court Finds Right to Jury Trial in Oil Pollution Act NRD Case**

A federal judge in Texas has ruled that a defendant in a natural resource damages (NRD) action brought under the Oil Pollution Act (OPA) has a constitutional right to a jury trial. *U.S. v. Viking Res., Inc.*, No. [08-1291 \(S.D. Tex. 2/11/09\)](#).

According to the court, although there is no right to a jury trial in a cost recovery action under the OPA, that right exists when the government is also seeking damages for injury to natural resources because at least some of the NRD claims are “legal” as opposed to equitable in nature.

While the statute itself does not provide this right, the Seventh Amendment does when it applies to “legal rights or remedies.” The court said, as far as it could determine, this was an issue of first impression under the OPA, and cited as persuasive authority *In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 994 (D. Mass. 1989).

The court in that case found that a constitutional jury right attaches when NRD are sought under CERCLA, because such damages involve the loss of use of resources, which can be considered the equivalent of a “legal” remedy.

The government sued the companies under the OPA for releasing more than 9,450 gallons of oil from an oil storage tank in Hitchcock, Texas, in December 2004. The oil allegedly spilled not only onto the property where the tank was located but also onto wetlands adjacent to a local bayou which is a navigable tributary to Galveston Bay. The government sought \$650,000 in damages related to the spill, \$271,000 of which was due to alleged injuries to natural resources.

### **[4] RCRA: Citizen Suit Cannot Be Pursued Against Former Owner**

A federal judge in Colorado has ruled that a citizen suit alleging a permit violation under section 6972 of RCRA cannot be pursued against a party that no longer owns or operates the facility. *La Plata County Bd. v. Brown Group Retail*, No. [08-855 \(D. Colo. 2/18/09\)](#). In 2008, La Plata County sued defendant Brown Group alleging that during an eight-year period when it owned a property in the county, it released TCE and other solvents into soil and groundwater on the property. Those releases, according to the complaint, endangered the property’s current residents.



Defendant moved to dismiss, arguing among other matters that the section 6972 claim cannot be pursued against a former owner.

The court agreed, citing section 6972(a)(1)(A), which provides that such a lawsuit “can only be brought against the owner or operator of a polluting property who is alleged to be in violation of the RCRA at the time the suit is brought.” So ruling, the court rejected contrary authority, cited by plaintiff, that litigation can be pursued against a former owner when the hazardous waste allegedly released has not been cleaned up. *City of Toledo v. Beazer Materials & Servs., Inc.*, 833 F. Supp. 646 (N.D. Ohio 1993). The court dismissed plaintiff’s section 6972(a)(1)(A) claim but allowed the county to pursue an allegation of “imminent and substantial endangerment” under section 6972(a)(1)(B), which, the court said, allows actions against parties who “contributed” to causing the endangerment.

#### **[5] CERCLA: Federal Court Orders EPA to Address Financial Assurance Requirements**

A federal judge in California has ordered EPA to prepare and publish a list of industries that would be required to demonstrate that they could establish financial responsibility for environmental cleanups under CERCLA. *Sierra Club v. EPA, No. 08-1409 (N.D. Cal. 2/25/09)*. The Sierra Club and other environmental groups sued EPA and the Department of Transportation alleging that the agencies failed to perform a nondiscretionary duty required by CERCLA. Section 310(a)(2).

CERCLA, section 108(b) enacted in 1980, required that the agency promulgate regulations to ensure that facilities involved in any way with hazardous substances would remain financially

responsible for cleaning up the improper disposal of any substances. The complaint alleged that by failing to issue such regulations, EPA violated CERCLA. “By not promulgating financial assurance requirements, EPA has allowed companies that otherwise might not have been able to operate and produce hazardous waste to potentially shift the responsibility for cleaning up hazardous waste to taxpayers,” argued plaintiffs.

While the court did not rule on the merits of requiring proof of financial assurance, it held the issue in abeyance until EPA publishes a list of affected industries or facilities. The court’s order requires EPA to prepare and publish a list of the kinds of facilities that should be required to establish proof of financial assurance by May 4, 2009.

#### **[6] Envtl. Crime: Kansas Fertilizer Manufacturer Pleads Guilty to CWA Criminal Violation**

The owner of a fertilizer manufacturing plant in Lawrence, Kansas, reportedly pleaded guilty to illegally discharging manufacturing waste into the city’s sewer system. *U.S. v. Sawyer*, No. 08-40045 (D. Kan. plea entered 2/24/09). The owner, who pleaded guilty to a single Clean Water Act felony count, faces a maximum possible sentence of one year in prison and a fine of up to \$25,000 per day of violation. The company, MagnaGro International, Inc., faces a possible fine of \$50,000 per day of violation. According to court documents, agents for EPA’s Criminal Investigation Division found the company discharging waste from the fertilizer operation into the sewer system via a hose inserted into a toilet. The company had evidently been discharging waste from a waste pit surrounding a mixing vat through the hose for 10 years. See *BNA Daily Environment Report*, February 26, 2009.



### [7] **Envtl. Crime: Electrical Contractor Pleads Guilty to Defrauding EPA at CERCLA Site**

An electrical contractor who provided temporary electrical utilities at a New Jersey CERCLA site has reportedly pleaded guilty to participating in a fraud conspiracy against EPA. The contractor and co-conspirators, from approximately spring 2001 until June 2005, thwarted the competitive bidding process and defrauded EPA by inflating invoices at the Federal Creosote site in Manville, New Jersey, and paid kickbacks to an employee of a prime contractor there. As part of the same investigation, on December 15, 2008, Bennett Environmental, Inc. also pleaded guilty to participating in a conspiracy to defraud EPA and was sentenced to pay a \$1 million criminal fine and \$1.66 million in restitution. The electrical contractor in this case faces a maximum penalty of five years in prison and a \$250,000 fine. See *DOJ Press Release*, February 26, 2009.

### [8] **Radioactive Waste: Oregon to Join Washington in Lawsuit over Hanford Nuclear Reservation Cleanup**

Oregon Governor Ted Kulongoski (D) reportedly announced February 25, 2009, that Oregon will seek to join Washington in a lawsuit against the U.S. Department of Energy (DOE) over the agency's delayed cleanup of environmental contamination at the Hanford Nuclear Reservation. Washington filed its complaint against DOE on November 26, 2008, seeking to compel the agency to adhere to schedules in a cleanup agreement for retrieval, treatment and disposal of some 53 million gallons of mixed hazardous and radioactive waste held in underground storage tanks near the Columbia River. *Washington v. Chu*, No. 08-5085 (E.D. Wash. filed 11/28/08). Many of the tanks date from World

War II, are single-walled and are leaking waste into the soil and groundwater. Nuclear weapons were produced at the 586 square-mile Hanford site for more than 40 years. See *Portland Oregonian*, February 25, 2009; and *BNA Daily Environment Report*, February 26, 2009.

## **Legislation, Regulations and Guidance**

### [9] **Air: EPA Publishes Final Rule Requiring Emissions Monitoring on Heavy-Duty Trucks**

EPA has published a final [rule](#) requiring onboard diagnostic systems on heavy-duty trucks. *74 Fed. Reg.* 8,309 (2/24/09). Beginning with model year 2010, trucks exceeding 14,000 pounds must use onboard diagnostic equipment that can trigger a dashboard indicator light when an emission system problem is detected. These systems also monitor particulate leaks in diesel emissions and the performance of nitrogen oxide-reducing catalysts in gasoline engines. The rule takes effect on April 27, 2009.

### [10] **Air: EPA Releases Proposed Rule on Air Emissions from Stationary Diesel Engines**

EPA has released a proposed [rule](#) that would set national emission standards for older stationary diesel engines at power plants, chemical and manufacturing facilities, and other industrial facilities. The rule would affect existing stationary reciprocating internal combustion engines at facilities or areas that emit hazardous air pollutants. The engines are typically used to generate electricity at large plants and often provide backup power in emergencies. The proposed rule, which would take effect in 2013, would require non-emergency engines to burn ultra low-sulfur diesel and seeks to



cut engine air toxin emissions by up to 90 percent. EPA will accept comments on the proposed rule for 20 days after it is published in the *Federal Register*.

### **[11] Climate Change: California Air Board Adopts Climate Change Regulations**

California EPA's Air Resources Board (ARB) has reportedly adopted climate change regulations to control "potent chemicals" used in the manufacture of computer chips and other industries. The semiconductor regulation sets new maximum allowable emission limits for a variety of greenhouse gases (GHGs) produced during computer-chip manufacturing and related operations. Estimated to cost approximately \$21 per 1-ton reduction of carbon dioxide, this regulation also includes record-keeping and reporting requirements. In addition, a second regulation pertains to the use of sulfur hexafluoride in applications other than for "electric utilities and computer chip manufacture such as magnesium casting and where it is used as a cover gas during production." The agency anticipates the regulation will cost approximately \$2 for each metric-ton reduction of carbon dioxide. See *California Air Resources Board Press Release*, February 26, 2009.

## **Scientific/Technical Items**

### **[12] Chemical Exposure: CDC Study Addresses Exposure to Persistent Organic Chemicals**

A recent study by researchers at the Centers for Disease Control and Prevention (CDC) addresses the U.S. population's exposure to persistent organic chemicals. Donald G. Patterson, et al., "Levels in the U.S. Population of Those Persistent Organic Pollutants (2003-2004) Included in the Stockholm Convention or in Other Long-Range Transboundary Air Pollution Agreements," *Environmental Science & Technology*, January 1, 2009. During 2003-2004, the

researchers measured levels of selected persistent organic pollutants (POPs) from a statistically representative sampling of the U.S. population categorized by age, sex and race. The report lists concentrations of dioxin, PCBs, hexachlorobenzene, DDT, oxychlorodane, trans-nonachlor, heptachlor epoxide, minex, and dieldrin. The concentrations of aldrin, endrin and HCH were below detection limits.

### **[13] Climate Change: UNEP Reports on Environmental Food Crisis**

The United Nations Environment Program (UNEP) has issued a report titled "[The Environmental Food Crisis](#)." According to the report, extreme weather conditions, land degradation and biofuel's intense competition for cropland have caused a significant world food crisis. The report claims that a surge in food prices has driven more than 110 million people into poverty and predicts that the demand for food will continue to increase until 2050 as the world population grows by 2.7 billion people. The report criticizes most countries' burgeoning meat consumption, which is expected to increase, and the worldwide trend of converting cropland into industrial sites and villages. The report recommends the development of alternatives to cereal as animal feed, the development of environmentally friendly agricultural systems and worldwide efforts to limit global warming by mitigating climate change and raising awareness of sustainable consumption patterns.



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