

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] Land Management: U.S. Supreme Court Limits Right to Challenge Forest Service Land Management

The U.S. Supreme Court, in a 5-4 decision, has made it more difficult for environmental groups to challenge U.S. Forest Service land-management policies. [*Sumner v. Earth Island Inst.*, No. 07-463 \(U.S. 3/3/09\)](#).

The case involved environmental groups' challenge to a Forest Service rule that limited public participation in certain decisions allowing timber sales in national forests. In 2005, the U.S. District Court for the Eastern District of California blocked the rule's application, which excluded from citizen appeal certain small projects under 250 acres. *Earth Island Inst. v. Pengilly*, 376 F. Supp. 2d 994 (E.D. Cal. 2005).

The Ninth Circuit Court of Appeals reversed, ruling that the Forest Service must allow the public to contest internal administrative decisions on small timber-clearing projects. *Earth Island Inst. v. Rutbenbeck*, 490 F. 3d 687 (9th Cir. 2007). The U.S. Supreme Court majority disagreed and reversed the Ninth Circuit's decision in part. Accepting the government's ripeness and standing argument that any legal review of the rule should

be postponed until after full implementation, the majority held that a "concrete" injury and an element of "imminent" harm must be shown before a group has standing to challenge an agency decision. The majority examined affidavits filed by group members in support of their petition for review and found that none of them met its test. The dissenters argued that the majority's approach was unrealistic.

[2] Air: EPA Determination on PM-10 Attainment in San Joaquin Valley Upheld

The Ninth Circuit Court of Appeals has denied petitions for review challenging EPA's determination that the San Joaquin Valley air basin in California met the federal air quality standard for coarse particulates (PM-10) under the Clean Air Act. [*Latino Issues Forum v. EPA*, No. 08-71238 \(9th Cir. 3/2/09\) \(unpublished\)](#).

Earthjustice filed the petitions on behalf of Latino Issues Forum, Medical Advocates for Healthy Air and the Sierra Club to challenge EPA's proposed finding in 2006 and final attainment determination in 2008. The court rejected petitioners' arguments that EPA acted arbitrarily and capriciously when it excluded certain violations of the standard that were recorded in 2006. The standard is 150 micrograms per cubic meter averaged over 24 hours. According to the court, "[t]his court owes deference to the EPA in the choice of scientific method that is within its own expertise."



[3] **Alien Tort Claims Act: Federal Court Denies Plaintiffs' Motion for New Trial**

A federal judge in California has upheld a December 1, 2008, jury verdict against Nigerian plaintiffs who sued Chevron Corp. under the Alien Tort Claims Act (ATCA) in connection with violence in 1998 aboard an oil barge that was occupied by protestors critical of the company's hiring and environmental practices. *Bowoto v. Chevron Corp.*, No. 99-02506 (N.D. Cal. 3/4/09).

Plaintiffs argued in their motion for a new trial that defense counsel used evidence improperly in closing arguments and that the jury verdict was "against the clear weight of the evidence." Defendant said the case "was largely a credibility contest. The jury resolved the credibility issues in defendant's favor and determined that plaintiffs had failed to carry their burden of proof on any of their claims. The defense verdict was not a mistake or a miscarriage of justice." The judge agreed with defendant, citing the "heavy burden" required to overturn a jury verdict.

[4] **CERCLA: Federal Court Rules Settlement Agreement Is Not Evidence of Successor Liability**

A federal judge in Indiana has ruled that a CERCLA settlement agreement between a private party and EPA cannot be used to establish the settling party's successor liability in a later action. *City of Mishawaka v. Uniroyal Holding, Inc.*, No. 04-125 (N.D. Ind. 2/26/09).

Uniroyal Holding, Inc., a holding company established by the former owner of contaminated property in the city of Mishawaka, entered into a settlement in 1999 with EPA, agreeing to pay

\$100,000 in EPA response costs. The city later purchased the property from a bankrupt subsequent owner and sued Uniroyal for additional clean-up costs, arguing that the company should be held liable as a successor-in-interest based on the EPA settlement agreement. Uniroyal Holding responded that Federal Rule of Evidence 408 bars the use of settlements to demonstrate liability.

The court agreed with Uniroyal, citing language in the settlement agreement that Uniroyal denied any liability and simply desired "to resolve the Settling Parties' alleged civil liability . . . without litigation and without the admission or adjudication of any issue of fact or law."

[5] **Agriculture: Maryland Court Rules State DOA Must Release Summaries of Nutrient-Management Plans**

A state court in Maryland has reportedly ruled that the state Department of Agriculture (DOA) must release summaries of nutrient-management plans that describe how individual farms manage fertilizer, animal waste and other nutrients. *Maryland Farm Bureau, Inc. v. Maryland Dep't of Agric.*, No. 08-134331 (Md. Civ. Ct. 2/10/09). Even so, the court held that DOA must redact indentifying information from summaries that have been held by the agency for three years or less before they are disclosed under a statute that requires the agency to maintain a summary of each plan "for three years in a manner that protects the identity of the individual" who filed the plan.

The ruling applies to all farms required to submit nutrient-management plans under the state's Water Quality Improvement Act of 1998. The statute requires all farms with \$2,500 or more in gross



agricultural income, or those raising 8,000 pounds or more of livestock, to submit and implement nutrient-management plans aimed at preventing nitrogen and phosphorous from entering local waterways. See *BNA Daily Environmental Report*, March 5, 2009.

[6] Env'tl. Crime: Owner of Abandoned Barrel Recycling Plant Sentenced for RCRA Criminal Violations

According to a news source, the owner of an abandoned Fort Wayne, Indiana, barrel-recycling plant has been sentenced to 15 months in prison and fined \$1.7 million for abandoning the company's 7-acre site, which contained barrels leaking caustic chemicals and open pits where the company had dumped hazardous waste. *U.S. v. Hersb*, No. 07-60 (N.D. Ind. sentencing 2/02/09). The owner of Hassan Barrel Co. pleaded guilty March 17, 2008, to one felony RCRA count of knowingly storing and disposing of RCRA hazardous waste at the facility. When he abandoned the facility in October 2003, thousands of drums were left scattered throughout the site. The facility never obtained a RCRA treatment, storage or disposal permit. See *BNA Daily Environmental Report*, March 5, 2009.

[7] Air: Group Sues EPA over Power Plant Permit

The Sierra Club has sued EPA in federal court in Wisconsin, seeking to force the agency to rule on an objection to a proposed Title V operating permit for Wisconsin Power & Light Co.'s Columbia Generating Station. *Sierra Club v. Jackson*, No. 09-122 (W.D. Wis., filed 3/2/19). According to the complaint, EPA failed to perform a nondiscretionary duty under the

Clean Air Act by not responding to the Sierra Club's petition objecting to the proposed permit. Under the CAA, EPA must grant or deny a petition objecting to a permit within 60 days. The suit seeks a declaration that EPA has a nondiscretionary duty to grant or deny the petition, that its failure to do so was a violation of the CAA, and an order directing the agency to respond to the petition by a date set by the court.

Legislation, Regulations and Guidance

[8] Air/Greenhouse Gases: EPA Seeks Public Comment on Draft Annual U.S. GHG Inventory

EPA is seeking public comments on a draft report titled *Annual Inventory of U.S. Greenhouse Gas Emission and Sinks: 1990-2007*, which tracks annual greenhouse gas (GHG) emissions at the national level. The draft report states that during 2007, total GHG emissions reached 7,125 metric tons of carbon dioxide equivalent (CO₂) and overall emissions increased by 1.4 percent over 2006 levels, primarily due to a rise in CO₂ emissions associated with fuel and electricity consumption. From 1990 to 2007, overall emissions apparently grew by 17.1 percent.

The inventory includes CO₂, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. It also calculates CO₂ emissions removed from the atmosphere by "sinks," that is, through the uptake of carbon by forests, vegetation and soils. EPA will accept comments on the draft report for 30 days after it is published in the *Federal Register*. See *EPA Press Release*, March 4, 2009.



[9] Climate Change: Western Climate Initiative Approves 2009-10 Work Plan

The Western Climate Initiative (WCI) has approved a [2009-10 Work Plan](#) outlining tasks for seven U.S. states and four Canadian provinces to accomplish in the next two years. The WCI includes the states of Arizona, California, Montana, New Mexico, Oregon, Utah, and Washington, and the provinces of British Columbia, Manitoba, Ontario, and Quebec. Key tasks listed in the work plan include (i) developing methodologies for establishing a regional emission cap and emissions allowances for each WCI partner; (ii) designing essential elements of the cap-and-trade program; (iii) developing recommendations for offset credits and allowances; (iv) expanding and updating economic models and assumptions; and (v) developing a menu of complementary policies for capped and uncapped sectors to help the region make the transition to a low-carbon economy. WCI also announced that a draft document outlining recommendations for a mandatory reporting program will be released in the next few months.

Scientific/Technical Items

[10] Nanotechnology: Study Recommends Tiered Risk-Assessment Strategy for Nanomaterial Regulation

A recent study has claimed that the current U.S. system for evaluating chemical toxicity burdens two agencies—OSHA and EPA—lacking the resources and authority to require industry to provide sufficient information about their chemicals in general and nanomaterials in particular. Jae-Young Choi, et al., “The Impact of Toxicity Testing Costs on Nanomaterial Regulation,” *Environmental Science*

& Technology, February 20, 2009. The researchers identified 265 different kinds of nanomaterials currently being produced commercially and then examined the cost of testing conventional chemicals, since there is little data on nano-specific tests. They estimated that testing costs would range from \$249 million—assuming nanoparticles are primarily safe and require only basic tests—to \$1.18 billion. The study has recommended a tiered strategy that starts with initial nanomaterial screening using simple, inexpensive tests, which can then lead to prioritizing substances for more intensive testing.

[11] Nanotechnology: Study Claims Small Carbon Nanotubes Can Alter How Lung Cells React to Infections

A recent study has claimed that extremely small carbon nanotubes can move through lung fluid and suppress normal immune responses in human lung cells. E. Herzog, et al., “SWCNT Suppress Inflammatory Mediator Responses in Human Lung Epithelium in Vitro,” *Toxicology and Applied Pharmacology* (2009). The researchers examined how extra-small particles affect life by looking at how lung cells respond when in contact with the particles. They compared the effects from single-walled carbon nanotubes (SWCNTs) to a more widely known asbestos exposure, finding that SWCNTs were more lethal to cells than comparable asbestos samples. After SWCNT exposure, the normal inflammatory immune response diminished in both healthy lung cells and those responding to infection. The toxic effect increased when the nanotubes were mixed in fluid similar to that found in lungs.



SWCNT and other nanomaterials are very small particles measuring approximately 1-billionth of 1 meter. Their small size gives them properties not found in their larger counterparts. SWCNTs are used in electronics, transparent conducting films and building materials and as ultra-tough fibers.

[12] FIFRA: Study Claims Certain Agricultural Pesticides Target Molecules Vital to Cell Function

A recent study by Chinese researchers has asserted that triphenyltin and other organotins target molecules vital to cell function. Guoqing Shi, et al., "The Proteasome Is a Molecular Target of Environmental Toxic Organotins," *Environmental Health Perspectives* (2009). According to the study, the chemicals bind tin atoms to cell structures called proteasomes, inhibiting their ability to degrade unneeded or damaged proteins, which then accumulate and kill normal cells.

Organotins are tin-based chemicals used widely in agricultural pesticides, antifungal agents, polyvinyl chloride stabilizers, industrial catalysts, and anti-fouling additives in boat paints. EPA has noted that organotin residues in drinking water, meat and milk could pose a potential cancer risk to the general population.





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

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