

Environmental & Chemical Update

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

Issue 277 • May 8, 2009

Litigation and Regulatory Enforcement

- [1] **CERCLA:** U.S. Supreme Court Finds Shell Lacked Intent to Dispose of Hazardous Substances; Not Responsible for Cleanup 1
- [2] **Wetlands:** Ninth Circuit Blocks Development, Orders Wetlands Study 2
- [3] **Water Rights:** Federal Court Holds Sacramento River Water Rights Contracts Must Be Preserved Despite ESA 2
- [4] **Toxic Tort:** California Court Finds Fraud and Dismisses Class Action in Alleged Fumigant Exposure Case 2
- [5] **NEPA:** Groups Sue BLM, FS over Smog from Oil and Gas Drilling in New Mexico . 3

Legislation, Regulations and Guidance

- [6] **Air:** EPA Issues Final Rule Limiting Particulate Matter Emissions from Nonmetallic Minerals Processing 3
- [7] **Air:** EPA to Reconsider Three New Source Review Rules 4
- [8] **Endangered Species Act:** EPA and DOI to Reverse Rule Allowing Federal Agencies to Avoid Consultation with Fish and Wildlife or Marine Fisheries Services 4
- [9] **CERCLA:** Inspector General Finds EPA Needs Better Cost Recovery Controls 5
- [10] **Vapor Intrusion:** Cal/EPA Issues Vapor Intrusion Mitigation Advisory 5

Scientific/Technical Items

- [11] **Nanotechnology:** Report Urges New Federal Agency to Address Nanotechnology. 5
- [12] **IAQ:** Study Finds Semivolatile Compounds in Indoor Air 6
- [13] **Air:** American Lung Association Releases Report on U.S. Air Pollution 6
- [14] **Chemical Exposure:** Study Claims Traffic-Related Air Pollution Leads to Premature Deaths 6

Shook,
Hardy &
Bacon_{LLP}

www.shb.com

Environmental & Chemical Update

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

Litigation and Regulatory Enforcement

[1] CERCLA: U.S. Supreme Court Finds Shell Lacked Intent to Dispose of Hazardous Substances; Not Responsible for Cleanup

The U.S. Supreme Court has ruled in an 8-1 decision that liability under CERCLA as an “arranger” for the disposal of hazardous substances requires “intentional steps to dispose of a hazardous substance.” *Burlington N. & Santa Fe Ry. Co. v. U.S.*, No. 07-1601 (U.S. 5/4/09).

The Court overturned a Ninth Circuit Court of Appeals decision which found Shell Oil Co. liable, as an arranger, for soil and groundwater contamination at property owned by an agricultural chemical distributor in Arvin, California.

As part of its business, the distributor purchased and stored various hazardous chemicals, including the pesticide D-D, which it purchased from Shell. Many of these chemicals spilled during transfers and deliveries and as a result of equipment failures. EPA and the California Department of Toxic Substances Control spent more than \$8 million cleaning up the facility by 1998 and filed a lawsuit against Shell and two railroad companies seeking to recover their costs.

The district court conducted a six-week bench trial in 1999 and later entered judgment in favor of the plaintiffs finding that the railroads were liable as

“owners” of a portion of the facility and that Shell was liable as an “arranger.” The court apportioned liability based on contribution to the contamination, finding the railroads liable for 9 percent and Shell liable for 6 percent of the total response costs. The Ninth Circuit acknowledged that Shell did not qualify as a “traditional” arranger under CERCLA because it had not contracted with the distributor to directly dispose of hazardous substances, but ruled that Shell could be liable as an arranger if the disposal “was a foreseeable byproduct of, but not the purpose of, the transaction giving rise to” arranger liability.

The U.S. Supreme Court reversed, holding that Shell was not liable as an arranger. According to the Court, under the plain language of section 9607(a) (3), an entity may qualify as an arranger when it takes intentional steps to dispose of a hazardous substance. To qualify as an arranger under that provision, Shell must have entered into D-D sales with the intent that at least a portion of the product be disposed of. The facts demonstrated that Shell was aware of minor, accidental spills occurring after the distributor took possession of the product and that Shell took numerous steps to encourage its distributors to reduce the likelihood of spills. Shell’s mere knowledge of continuing spills and leaks was found to be insufficient grounds for concluding that it “arranged for” D-D’s disposal.



[2] Wetlands: Ninth Circuit Blocks Development, Orders Wetlands Study

The Ninth Circuit Court of Appeals has reversed and remanded a district court decision that had allowed a planned development in Buckeye, Arizona, to go forward without a wetlands assessment under section 404 of the Clean Water Act. *White Tanks Concerned Citizens v. Strock*, No. 07-15659 (9th Cir. 4/29/09).

The appeals court ordered the district court to issue an injunction against the issuance of a section 404 dredge-and-fill permit until the additional study is completed.

The proposed development includes 10,000 acres in a desert area near the White Tank Mountains, 787 acres of which constitute washes located on the floodplain of the Hassayampa River. Plaintiffs urged the U.S. Army Corps of Engineers (Corps) to analyze the project's impact and to conduct a full-scale impact study. Using instead a restricted scope of analysis, the Corps issued a finding of no significant impact. Plaintiffs sued soon thereafter.

The district court held that the planned development was factually similar to a development challenged in *Wetlands Action Network v. Corps*, 222 F.3d 1105 (9th Cir. 2000), in which the court found that the Corps properly confined its review to the wetlands themselves and that added study of an upland area was unnecessary. Finding the lower court's reliance misplaced, the Ninth Circuit determined that the facts in this case were more similar to those in *Save Our Sonoran v. Flowers*, 408 F.3d 1113 (9th Cir 2005), in which the Corps was required to consider the entire scope of a development before granting a permit to fill washes.

[3] Water Rights: Federal Court Holds Sacramento River Water Rights Contracts Must Be Preserved Despite ESA

A federal judge in California has ruled that 45-year-old water rights contracts for the allocation of Sacramento River water must be preserved on renewal despite their potential impact on the Endangered Species Act (ESA). *NRDC v. Kemphorne*, No. 05-1207 (E.D. Cal. 4/27/09). The contracts are part of the 1935 Central Valley Project, the largest federal water-management project in the United States. Water allocation was worked out through a series of agreements among water users north and south of the Sacramento-San Joaquin Delta as part of a settlement with Central Valley agricultural producers. According to the court, the older, senior water rights are preserved in full, and the ESA does not apply. Thus, under the court's decision, water agencies lack discretion in determining how to allocate California water during a drought, or in protecting salmon, sturgeon or smelt in the Sacramento River.

According to news reports, plaintiffs plan to appeal the ruling and will argue that the contracts must be rewritten to protect Delta smelt under the ESA. See *BNA Daily Environment Report*, April 29, 2009.

[4] Toxic Tort: California Court Finds Fraud and Dismisses Class Action in Alleged Fumigant Exposure Case

Citing evidence of fraud, a California state court has reportedly dismissed two lawsuits filed against several American food companies on behalf of Nicaraguan agricultural workers who alleged that exposure to a soil fumigant used at banana plantations nearly 30 years ago left them sterile. *Mejia v. Dole Food Co., Inc.*, No. 340049



(Cal. Super. Ct. *oral ruling* 4/23/09). The dismissal capped a three-day hearing the court ordered to determine if the evidence defendants presented warranted dismissal. According to the court, “[t]here is clear and convincing evidence demonstrating the recruiting and training of fraudulent plaintiffs to bring cases in both the Nicaraguan and U.S. courts.” The judge found that plaintiffs had systematically fabricated work certificates, which were signed and filled in later to apply to any plaintiff counsel might choose.

The judge also said that the evidence of fraud in the current cases “tainted ... the plaintiffs’ 2007 case.” That case resulted in a jury verdict awarding six bellwether Nicaraguan plaintiffs \$3.3 million in compensatory damages and five of the group \$2.5 million in punitive damages. At the close of trial, the court tossed out the punitive damages and reduced the award for compensatory damages to \$1.5 million. *Tellez v. Dole Food Co., Inc.*, No. 312852 (Cal. Super. Ct. 3/7/08). Defendants appealed, and that case is now pending before the California Court of Appeals, Second District. See *BNA Daily Environment Report*, April 29, 2009.

[5] NEPA: Groups Sue BLM, FS over Smog from Oil and Gas Drilling in New Mexico

Several environmental groups have sued the Bureau of Land Management (BLM) and the Forest Service (FS) alleging that the agencies failed to limit smog from oil and gas drilling operations in New Mexico. *WildEarth Guardians v. BLM, No. N/A (D.N.M. filed 4/29/09)*. The complaint targets recent agency decisions to authorize more oil and gas drilling in the state’s San Juan Basin.

Plaintiffs argue that the agencies have failed to limit ground-level ozone on some 29,000 acres in auctions over the past three years and still

authorized more than 7,000 acres of new drilling. The groups claim that BLM based its environmental reviews on outdated air quality analyses that relied on the 1997 ozone standard rather than the new standard that EPA adopted in 2008. Although plaintiffs acknowledge that the FS used the new standard, they argue that it failed to consider measures to reduce ozone emissions from increased development. Plaintiffs specifically allege violations of NEPA, the Federal Land Policy and Management Act, National Forest Management Act, and Administrative Procedure Act. They seek both declaratory and injunctive relief.

Legislation, Regulations and Guidance

[6] Air: EPA Issues Final Rule Limiting Particulate Matter Emissions from Nonmetallic Minerals Processing

EPA has issued a final **rule** limiting particulate matter emissions from new and modified nonmetallic minerals processing operations. *74 Fed. Reg.* 19,293 (4/28/09). The rule will amend the new source performance standards at 40 C.F.R. Part 60, lowering the particulate matter emissions standard to 0.014 grain per dry standard cubic foot (gr/dscf), from the previous 0.022 gr/dscf. The final rule would also tighten the fugitive emissions opacity limit for crushers without emissions capture systems at processing plants from 15 to 12 percent.

For all other emissions sources, such as grinding mills, screening operations, bucket elevators, belt conveyors, bagging operations, storage bins, and enclosed truck or railcar loading stations, the opacity limit would be 7 percent, down from 10 percent. New source performance standards set the



minimum level of emissions-control technology that must be used at new and reconstructed stationary air pollution sources.

[7] Air: EPA to Reconsider Three New Source Review Rules

EPA reportedly announced April 27, 2009, that it will reconsider portions of three different Clean Air Act (CAA) new source review (NSR) rules that were issued last year. The three rules involve (i) emissions recordkeeping requirements under NSR; (ii) exemptions for some industries from the requirement to count “fugitive” emissions in determining whether NSR applies; and (iii) how the NSR program is implemented for fine particulate matter emissions. NSR requires new or modified emissions sources such as power plants and other industrial facilities to install modern pollution controls when they expand or make modifications that increase emissions.

The recordkeeping rule, known as the “reasonable possibility” rule (40 C.F.R., Parts 51 and 52) allowed power plants and other industrial facilities flexibility in determining whether they need to keep detailed records of increased air emissions. The records would not be required if there is “no reasonable possibility” the emissions increases from a plant modification or expansion would trigger NSR requirements to install updated pollution controls. *72 Fed. Reg. 72,607 (12/24/07)*. The rule triggers the recordkeeping requirements if a change at a plant causes emissions to rise by at least 50 percent of what EPA considers a “significant” increase. EPA will seek public comment on the rule.

EPA has stayed the second rule, known as the “fugitive emissions rule,” for three months. The rule exempted some industries from reporting fugitive emissions when determining if NSR applies. The rule revised regulations (40 C.F.R. Parts 51

and 52) to require that only sources in industries designated through rulemaking under section 302(j) of the CAA include fugitive emissions in their NSR calculations. *73 Fed. Reg. 77,882 (12/22/08)*.

EPA will also stay and then repeal the third rule, which provided state governments with guidance for enforcing NSR for fine particle emissions (PM 2.5). The rule defines a major emissions source as one that emits 250 tons per year with the exception of 28 source categories that will constitute a major emitter at 100 tons per year. The rule also sets NSR significant emissions rates at 10 tons of fine particulate matter per year, 40 tons of sulfur dioxide per year, 40 tons of nitrogen oxides per year and 40 tons of organic volatile compounds per year. *73 Fed. Reg. 28,321 (5/9/08)*. See *EPA Press Release*, April 7, 2009.

[8] Endangered Species Act: EPA and DOI to Reverse Rule Allowing Federal Agencies to Avoid Consultation with Fish and Wildlife or Marine Fisheries Services

EPA and the U.S. Department of Interior (DOI) reportedly announced April 28, 2009, that they will revoke a prior rule that reduced the requirement for other federal agencies to consult with the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) on actions that might affect endangered or threatened species. The prior rule allowed federal agencies to avoid consulting with FWS or NMFS if an action was not anticipated to adversely affect any species listed as endangered or threatened under the Endangered Species Act (ESA). *73 Fed. Reg. 76,272 (12/16/08)*.

The rule not only allowed for a reduction in consultations but also included a provision saying that consultations were not needed if “the effects on a species are the result of global processes and



cannot be reliably predicted or measured or would have an insignificant impact or are such that the potential harm is remote.” See *Law360*, April 28, 2009; *BNA Daily Environment Report*, April 29, 2009.

[9] CERCLA: Inspector General Finds EPA Needs Better Cost Recovery Controls

An EPA Inspector General (IG) report concludes that the agency needs to improve its internal controls to increase recovery of costs from CERCLA potentially responsible parties (PRPs). According to the report, which was issued April 27, 2009, the sample of CERCLA accounts used to capture removal costs revealed as much as \$25 million that EPA could pursue for recovery, but has not. One major problem identified is that oversight of searches for PRPs is too limited and inconsistent. The report also noted “data quality problems” in the databases that track cleanup status and cost recovery.

Among other matters, the IG recommends that EPA implement controls to (i) monitor PRP search completions, (ii) document PRP searches consistently, (iii) ensure data quality in agency databases, and (iv) review all appropriate CERCLA accounts to ensure costs are identified for possible recovery.

[10] Vapor Intrusion: Cal/EPA Issues Vapor Intrusion Mitigation Advisory

Cal/EPA’s Department of Toxic Substances Control (DTSC) released new guidance April 28, 2009, titled *Vapor Intrusion Mitigation Advisory*, which provides a framework for determining if mitigation is appropriate for a site and for selecting site-specific mitigation technologies for existing or future buildings.

It also outlines steps for measuring risks to current and future building occupants and provides guidance for public-participation-related activities.

Vapor intrusion occurs when petroleum products, industrial solvents and other volatile chemicals spilled or dumped at a site produce vapors that can travel through soil and enter buildings through crawl spaces, cracks and other openings in foundations. DTSC will accept comments on the guidance until October 31, 2009, and hold workshops related to the guidance June 3-4 in Sacramento and June 9-10 in Los Angeles.

Scientific/Technical Items

[11] Nanotechnology: Report Urges New Federal Agency to Address Nanotechnology

A recent report prepared in conjunction with the Project on Emerging Nanotechnologies, a partnership between the Woodrow Wilson International Center for Scholars and the Pew Charitable Trusts, recommends the establishment of a Department of Environmental and Consumer Protection within the federal government that would oversee product regulation, pollution control and monitoring, and technical assessment.

The report argues that current regulatory oversight is not up to the task of addressing nanotechnologies and other emerging technologies such as synthetic biology, which involves the selection of genes and genetic instructions to create organisms that perform specific tasks like breaking down plants into biofuels. The report calls for a new approach that reflects the speed at which new technologies bring products to market, the diverse risks of products made with the same materials, the global nature of the economy, and the need to address products in myriad life stages.



[12] IAQ: Study Finds Semivolatile Compounds in Indoor Air

A recent study by EPA and U.S. Geological Survey researchers sampled household air in homes in Arizona near the Mexican border and found hundreds of chemicals in the samples. R.W. Gale, *et al.*, "Semivolatile Organic Compounds in Residential Air Along the Arizona-Mexico Border," *Environmental Science & Technology*, Vol. 43 (2009). The researchers placed air-collecting devices in 52 homes for 30 days. Gas chromatography used to identify individual chemicals in the air samples detected a total of 586 individual chemicals.

The pesticides diazinon and chlorpyrifos were found in the greatest amounts and in all of the homes sampled, and 27 organochlorine pesticides were detected. Amounts of PCBs were generally low but were found in more than one-half (56 percent) of the homes. Phthalate chemicals were found at very large concentrations in indoor air, and p, p-DDE, a breakdown product of the now-banned pesticide DDT, was detected in more than 90 percent of homes. According to the study, "[t]he results presented in this study demonstrate unequivocally that the mixture of airborne particles present indoors is far more complex than previously demonstrated."

[13] Air: American Lung Association Releases Report on U.S. Air Pollution

The American Lung Association has issued a [report](#) that addresses ozone and particulate pollution found in EPA monitoring sites across the United States in 2005, 2006 and 2007. According to the report, nearly two-thirds of U.S. residents live in areas that have unhealthy levels of soot or smog pollution. Based on prior measurements, the report says that most cities have improved their ozone levels during the past five years, and many have

improved levels of particle pollution. The report lists Fargo, North Dakota, as having the cleanest air in the United States and Bakersfield, California, as the sootiest. Los Angeles had the highest ozone levels in the country.

[14] Chemical Exposure: Study Claims Traffic-Related Air Pollution Leads to Premature Deaths

A recent study by researchers from Canada and the United States claims that people who experience chronic exposure to traffic-related air pollution may die sooner than those not similarly exposed. Michael Jerrett, *et al.*, "A Cohort Study of Traffic-Related Air Pollution and Mortality in Toronto, Ontario, Canada," *Environmental Health Perspectives*, Vol. 117 (2009). According to the study, which examined the correlation between exposure to nitrogen oxide (NOx) and premature death at locations across Toronto between 1992 and 2002, those with higher exposure to NOx are 17 percent more likely to die for any reason and 40 percent more likely to die from circulatory disease. The study's 2,360 subjects were drawn from a respiratory clinic in Toronto, thereby limiting the finding to populations with high numbers of susceptible individuals. Even so, the study concludes that "the large risks uncovered here and in other studies implicate traffic-related air pollution as a public health risk."



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®

