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FEDERAL INTERAGENCY TASK FORCE ANNOUNCES NATIONAL STRATEGY FOR ELECTRONICS STEWARDSHIP

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On July 20, 2011, the U.S. Interagency Task Force on Electronic Stewardship (Task Force) announced the release of its National Strategy for Electronics Stewardship (National Strategy). President Obama

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LETTER FROM THE EDITOR

Dear Subscribers,

This month's *The Environmental Counselor* covers a broad range of federal environmental law. Authors from Beveridge & Diamond, P.C. discuss the Federal Interagency Task Force on Electronic Stewardship's recently released national strategy. Adam Orford of Marten Law analyzes the recent United States Supreme Court's decision on EPA's pesticide regulation. Authors from Van Ness Feldman update readers on EPA's latest effort to regulate air pollution.

The Updates section covers recent developments in environmental law including the gulf oil spill litigation and hydraulic fracturing. The highlights section gives readers a quick summary of recent cases and provides a link for more information.

As always, we thank the authors for sharing their expertise in environmental law with our readers.

Very truly yours,
Rowan C. Seidel
Attorney Editor

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created the Task Force by Presidential Proclamation in November 2010 to develop a national strategy for electronics stewardship and improve the federal government's management of used electronics products and electronic waste. The Task Force is cochaired by the White House Council on Environmental Quality, U.S. Environmental Protection Agency (EPA) and General Services Administration (GSA).

EPA Administrator Lisa Jackson, GSA Administrator Martha Johnson, and CEQ Chair Nancy Sutley announced the National Strategy with representatives from several electronics companies that voluntarily committed to participate in an EPA-industry partnership aimed at promoting environmentally sound management of used electronics. *See* EPA Press Release (July 20, 2011).

The federal government is the world's largest consumer of electronics products. To address management of the its used electronics, the Task Force identified four overarching goals:

1. Build incentives for design of greener electronics, and enhance science, research, and technology development in the United States.
2. Ensure that the federal government leads by example.
3. Increase safe and effective management and handling of used electronics in the United States.
4. Reduce harm from US exports of e-waste and improve safe handling of used electronics in developing countries.

Under each goal, the Task Force also identified a number of Action Items, which are further supported by specific projects identified in an on-line annex of benchmarks (Benchmarks Annex). Some notable action items include; for example:

- In support of the first goal, the Task Force commits to federal agency engagement in expansion of the Electronic Product Environmental Assessment Tool (EPEAT) program, a procurement standard that allows manufacturers to register products according to their performance against numerous environmental criteria. EPEAT currently applies only to laptops, desktops, and monitors, though a standard for printers and other imaging devices is under development.
- Under the second goal, the Task Force recognizes that the federal government is the largest generator of used electronics in the United States and commits to strengthening policies that govern the disposition of used electronics by the federal government. This action item aims to create a comprehensive and transparent government-wide policy that, among other things, ensures that all federal electronics are processed by certified recyclers and aligns federal management of used electronics with best management practices that favors reuse of functional devices, requires use of certified recyclers for nonfunctioning devices and consistent data destruction procedures, and prohibits the disposal of any used federal electronics devices in landfills.
- In support of the third goal, increasing the safe and effective management and handling of used electronics in the United States, the Task Force commits to launching a voluntary partnership with the electronics industry to increase the collection and handling of used electronics using recyclers that have been certified under a third-party certification program (R2 or e-Stewards). The Task Force indicates that use of certified recyclers will be "a floor" for voluntary initiatives to increase the safe handling and management of used electronics.
- Under the fourth goal, the Task Force commits to supporting ratification of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

The Benchmarks Annex identifies specific projects directed at achieving each action item and goal. For each project, the Benchmarks Annex also identifies lead agencies and target dates for completion. Notable near-term projects include:

- EPA will seek commitments from the electronics industry to use certified recyclers and provide data in a transparent manner by summer 2011;
- EPA and other agencies will convene stakeholder groups to address green design of electronics in fall 2011;

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- EPA and GSA will support development of new standards addressing products not currently covered by EPEAT;
- EPA and other agencies will share with exporters concerns on the unsafe handling of used electronics exports abroad by December 31, 2011; and
- EPA will work with the US Department of State to "explore options for strengthening US participation in the Basel Convention, including options that would enable ratification" through ongoing efforts.

The National Strategy expands the federal government's efforts to promote product stewardship for electronics. It complements existing federal green procurement initiatives addressing many types of electronic devices and EPA rules governing the management and export of used cathode ray tube devices. In the absence of a comprehensive federal regulatory framework for e-waste, 25 states have enacted e-waste legislation covering the recovery and disposition of certain IT and consumer electronics such as computers, televisions, monitors, and printers. In Congress, H.R. 2284 has recently been introduced with a companion bill in the Senate to restrict the export of certain used electronic equipment and e-waste to developing countries.

At the international level, parties to the Basel Convention are preparing new technical guidelines aimed at improving the management of e-waste under the Convention. While the U.S. is not a party to the Convention, the U.S. has become more active in negotiations on the new e-waste technical guidelines. The guidelines are aimed at ensuring the environmentally sound management of used and end-of-life electrical and electronic equipment and will be taken up at the COP-10 meeting planned for Cartagena, Columbia, in October 2011.

U.S. SUPREME COURT REITERATES DEFERENCE GIVEN EPA PESTICIDE DECISIONS**

By Adam Orford

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The U.S. Supreme Court has closed the door on a challenge to EPA's decision to ban residues of carbofuran, a once commonly used pesticide, in domestically produced food. Declining to review the D.C. Circuit's decision in *National Corn Growers Association v. EPA*,[1] the Court let stand regulatory interpretations that make it difficult, if not impossible, to challenge EPA's pesticide decisions. For now, process, not substance, continues to be the major impediment to such challenges.

BACKGROUND: PESTICIDE REGULATION UNDER FIFRA AND THE FFDCA

Pesticides are principally regulated under two federal laws.[2] The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[3] regulates the distribution, sale, and use of all pesticides in the United States. Prior to any use, a pesticide must be "registered" by EPA for that use.[4] In addition, the Federal Food, Drug and Cosmetic Act (FFDCA)[5] requires EPA to set limits (called "tolerances") on the amount of pesticide residue that may remain in or on agricultural food products marketed in the United States.

EPA's decisions regarding pesticide registration and tolerances are currently governed by standards that incorporate environmental and human health assessments. EPA will register a pesticide only if it determines that the pesticide's proposed use will "not generally cause unreasonable adverse effects on the environment"[6]—defined as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of [the] pesticide."[7] For pesticides used on food crops, EPA must determine that the tolerance will be "safe,"[8] meaning "that there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue" from dietary and other sources.[9]

Although pesticides have been registered with the federal government since 1947, the registration standard just described—incorporating environmental and human health elements—was not in force until the early 1970s, and has been strengthened since then. Consequently, since 1972 EPA has been required to review all previously registered pesticides to ensure conformance to current standards. This process ("reregistration" in FIFRA parlance) proceeded at a glacial pace until 1988, when Congress set out a five-stage, 10-year plan for the approximately 1,000 active chemicals yet to be reviewed.[10] Similarly, although tolerances have been set since 1954, the process was significantly revised in 1996, and Congress consequently required EPA to incorporate a reassessment of all existing food tolerances into its reregistration decisions. In 2008, 36 years after its first instruction to do so and 10 years after its original 10-year deadline, EPA completed its reregistration decisions for all pesticides. EPA's efforts are now focused on implementing its decisions.

BACKGROUND TO *NATIONAL CORN GROWERS*: EPA ACTIONS AGAINST CARBOFURAN

Cases like *National Corn Growers* arise from one possible outcome to the reregistration process: where EPA determines that a previously registered pesticide does not meet current standards, either because its use will cause "unreasonable adverse effects to the environment" or the established tolerances are not "safe" as defined by the FFDCA. In that event, EPA takes action to remove the pesticide from the market, using somewhat arcane[11] procedures set out in FIFRA and the FFDCA.

The *National Corn Growers* case involved the pesticide carbofuran. Marketed as Furadan and first registered in 1969, carbofuran is a cholinesterase inhibitor—a neurotoxin—that can be fatal to humans and wildlife after acute exposure, and has harmful effects even at lower doses, although its chronic low-level exposure effects are disputed.[12] Opponents of its use focus on impacts to wildlife and farm workers during crop application, and to sensitive populations of the general public through ingestion, both in food and drinking water.[13] However, the chemical is also a highly effective and low-cost broad-spectrum crop pesticide that, until EPA's actions described below, was widely used on many common crops, including corn and potatoes, and for which, in many applications, few equally effective alternatives exist.[14]

In 2006, after completing an acute dietary risk assessment and concluding (over objections) that dietary exposure to carbofuran posed health risks, EPA moved to eliminate carbofuran as a pesticide. Its first action towards this end was under FIFRA's reregistration process. Despite receiving many comments from growers supporting continued availability, EPA determined that, even for major crops, adequate alternatives existed such that "minimal impacts would … be expected if carbofuran were no longer available for use on those crops."[15] Consequently, given its conclusion on dietary risk, EPA determined that registrations for most uses were not eligible for reregistration, and that all other uses would be phased out after four years.[16] However—given the intricacies of FIFRA's cancellation procedures (see below)—this did not result in the immediate cancellation of registrations. Two years later, EPA moved under its FFDCA authority to set all tolerances to "zero," i.e., to ban carbofuran residue in food, effectively eliminating its use on food crops.[17] This triggered a process that lead, ultimately, to the D.C. Circuit's decision in *National Corn Growers*.

NATIONAL CORN GROWERS: REQUEST FOR HEARING DENIED

The *National Corn Growers* decision involved the procedural intricacies attendant to revoking a pesticide tolerance. In brief, the FFDCA requires that this be done in a specialized rulemaking process that includes an opportunity to request a hearing on disputed factual issues.[18] In the first stage, EPA publishes a proposed rule revoking the tolerance and explaining its reasons for doing so, and affected parties submit comments on the proposed revocation rule. After considering the public comments, EPA then publishes a final regulation. Once the final regulation is published, however, affected parties are allowed to file objections on the final rule and request a public evidentiary hearing on any disputed factual issues, and EPA must issue an order ruling on the hearing request. EPA is instructed to conduct a hearing in "summary judgment-like" situations where material facts are in dispute.

In the case of carbofuran, EPA determined that the carbofuran tolerances were "not safe" under the applicable standards, issued a proposed rule revoking all tolerances for food produced in the U.S.,[19] considered comments, and issued a final regulation to the same effect.[20] Industry associations representing corn, sunflower, and potato growers, as well as the sole manufacturer of carbofuran, requested a hearing on the scientific underpinnings of EPA's conclusion, and EPA denied the request.[21]

Although the petitioners were seeking to engage in the merits of EPA's decision—to argue that EPA's science was wrong, challenging EPA's conclusions regarding current concentrations of carbofuran in surface and ground water, and carbofuran toxicity—the hearing request was denied on process grounds. EPA denied the request because (1) the petitioners had *not* raised certain arguments in their comments on the proposed rule, and (2) the petitioners had *already* raised their remaining arguments in

their comments on the proposed rule, and EPA had rejected those arguments in its final rule. EPA's hearing denial was appealed to the courts, where the petitioners argued that EPA had created a "Catch 22" situation, where EPA would never have to hold a hearing, even though the rules specifically contemplate one.

On July 23, 2010, the D.C. Circuit in *National Corn Growers* affirmed EPA's decision not to hold a hearing.[22] While the decision briefly discussed the merits of the challengers' scientific arguments, importantly, the Court's decision was based largely on its determination that the agency's disagreements with the petitioners' comments and hearing request objections were due substantial deference. The decision left challengers in a difficult position. Parties must present their entire case in their comments to a proposed rule, but—although the statute allows for a hearing whenever a "summary-judgment-like" dispute of material fact is before the agency—the D.C. Circuit had ruled that EPA is not required to hold a hearing over a "mere" dispute between experts whenever the agency's conclusions are due deference, which, given EPA's unique regulatory expertise in regulating pesticides, is almost always the case.

The petitioners presented the case to the Supreme Court largely on the grounds that it was contrary to the Supreme Court's decision in *Weinberger v. Hynson, Wescott & Dunning, Inc.*,[23] where the Court had affirmed the role of "summary judgment-type" proceedings under the FFDCA, and made much of the fact that EPA has never once held a hearing in response to objections to tolerance decisions.[24] EPA responded that it had only ever ruled on such requests a few times, and in any event that the case was too factually dependent to serve as a vehicle for the issues raised. Ultimately, the Supreme Court declined to hear the case.

PROCESS, NOT SUBSTANCE, IMPEDES CHALLENGES TO EPA PESTICIDE DECISIONS

National Corn Growers is one of several recent decisions by federal courts that have highlighted the procedural difficulties confronting those—whether industry, labor, or environmental groups—who would challenge EPA's pesticide decisions. In *United Farm Workers of America, AFL-CIO v. EPA*, labor groups hoped to challenge EPA's decision to allow azinphos-methyl (AZM) to remain in limited use. While seeking review of the merits of EPA's decision, the groups ran afoul of FIFRA's bifurcated judicial review provision, which grants different courts jurisdiction depending on whether there has been a public hearing on the challenged issue.[25] A split Ninth Circuit panel ruled that the opportunity to submit comments *was* a hearing, and dismissed a challenge brought before the district court. Since FIFRA requires suits brought directly in the circuit courts to be filed within 60 days, the petitioners had missed their opportunity and, like in *National Corn Growers*, the case was lost without a serious examination of the merits.

Things worked out differently in *Reckitt Benckiser Inc. v. EPA*, although not at first.[26] There, EPA had circumvented FIFRA's pesticide registration cancellation proceedings by threatening to bring an enforcement action for misbranding against products that it had determined would not be reregistered, without first moving to cancel the registrations.[27] While the district court dismissed the challenge on jurisdictional grounds (similar to *United Farm Workers*), the D.C. Circuit reversed. On remand, the district court finally reached the merits and held that EPA had violated FIFRA, which "entitles the registrant to notice, a hearing and other procedural protections before EPA can make a final decision on cancellation," and enjoined enforcement action until those procedures were followed.[28]

The common thread in these decisions is that EPA has taken every opportunity to avoid conducting hearings on its technical conclusions, even though FIFRA and the FFDCA contemplate that this be done. In two (and almost three) of the three most recent cases, the challenges to these actions have been lost not on the merits, but in EPA's procedural thicket. As the Supreme Court has declined to review *National Corn Growers*, the situation is unlikely to change.

ENDNOTES

NOTE: The author assisted in representing the petitioner in proceedings prior to *Reckitt Benckiser Inc. v. E.P.A.*, 613 F.3d 1131 (D.C. Cir. 2010), discussed in this article.

1. *National Corn Growers Ass'n v. E.P.A.*, 613 F.3d 266 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 2931 (2011).
2. States can, and do, impose additional limitations.
3. 7 U.S.C.A. § 136 *et seq*.
4. 7 U.S.C.A. § 136a (FIFRA § 3).
5. 21 U.S.C.A. § 301 *et seq*.
6. 7 U.S.C.A. § 136a(c)(5)(D).
7. 7 U.S.C.A. § 136(bb).
8. 21 U.S.C.A. § 346a(a)(1) (FFDCA § 408).
9. 21 U.S.C.A. § 346a(b)(2).
10. 7 U.S.C.A. § 136a-1 (FIFRA § 4).
11. A review of the decisions discussed in this article confirms this generalization. *Cf.* 3 Rodgers' Environmental Law §§ 5:21(B) (describing the "strangulation of substance by process" in tolerance setting);

5:22 (remarking on FFDCA § 408's "awkward," "haunt[ed]" and even "Procrustean" processes).
12. Carbofuran: Proposed Tolerance Revocations, 73 Fed. Reg. 44,864, 44,869 (July 31, 2008).
13. *See*, *e.g.*, George Fenwick, American Bird Conservancy, End the pesticide threat to wildlife, humans (Gainesville Sun, June 13, 2011).
14. As of 2006, carbofuran was registered for use on alfalfa, artichoke, banana, barley, coffee, corn (field, pop, and sweet), cotton, cucurbits (cucumber, melons, and squash), grapes, oats, pepper, plantain, potato, sorghum, soybean, sugar beet, sugarcane, sunflower, and wheat, as well as a number of non-food uses including tobacco, against alfalfa weevil, aphids, banana root borer, Colorado potato beetle, corn rootworm, cribrate weevil, cucumber beetles, European corn borer, flea beetles, grasshoppers, leafhoppers, nematodes, potato tuberworms, Southwestern corn borer, thrips, and wireworms. EPA, Interim Reregistration Eligibility Decision: Carbofuran [IRED], 4 (August 3, 2006). EPA estimated that about 1 million pounds of active ingredient were used in 2006. EPA, Interim Reregistration Eligibility Decision: Carbofuran [IRED], 5 (August 3, 2006).
15. IRED, 6. EPA acknowledged at the time that some of these uses had no equally effective alternative, but proposed to phase in limits in a manner that would allow development of replacements.
16. IRED, 31.
17. Carbofuran; Proposed Tolerance Revocations, 73 Fed. Reg. 44,864 (July 31, 2008).
18. *See* 21 U.S.C.A. § 346a(e), (g); 40 C.F.R. § 178.32
19. 73 Fed.Reg. 44,864.
20. Carbofuran: Final Tolerance Revocation, 74 Fed. Reg. 23,046 (May 15, 2009).
21. Order Denying FMC's Objections and Requests for Hearing, 74 Fed. Reg. 59,608 (Nov. 18, 2009).
22. *National Corn Growers Ass'n v. E.P.A.,* 613 F.3d 266 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 2931 (2011).
23. *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 93 S. Ct. 2469, 37 L. Ed. 2d 207 (1973).
24. Petition for Writ of Certiorari, *National Corn Growers Ass'n v. EPA*, Case No. 10-1031 (Feb. 16, 2011). Certiorari-stage documents are available at http://www.scotusblog.com/2011/05/petitions-to-watch-conference-of-05-26-11/.
25. 7 U.S.C.A. § 136n (FIFRA § 16). If there has been a hearing, a challenge must be brought in the circuit courts within 60 days. If not, the challenge is brought in the district court.
26. *Reckitt Benckiser Inc. v. E.P.A.*, 613 F.3d 1131 (D.C. Cir. 2010).
27. *Reckitt Benckiser Inc. v. E.P.A.,* 613 F.3d 1131 at 1136 (D.C. Cir. 2010). The rodenticides that were at issue are not used directly on food crops, and so EPA could not revoke tolerances.
28. *Reckitt Benckiser, Inc. v. Jackson,* 762 F. Supp. 2d 34 (D.D.C. 2011).

EPA FINALIZES AIR POLLUTION TRANSPORT RULE**

By Kyle Danish and Henry Stern

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On July 6, 2011, exactly one year after proposing a replacement for the vacated Clean Air Interstate Rule (CAIR), the Environmental Protection Agency (EPA or the "agency") finalized the Cross-State Air Pollution Rule (CSAPR)—a national regulatory framework for reducing sulfur dioxide (SO2) and nitrogen oxide (NOx) emissions from 1,081 power plants in 27 "upwind" states in the eastern United States. According to EPA emissions inventories and air quality modeling, SO2 and NOx emissions from power plants in these upwind states significantly contribute to nonattainment with, or impair maintenance of, certain National Ambient Air Quality Standards (NAAQS) for ozone and fine particulate matter (PM2.5) in "downwind" states. The Clean Air Act requires states to take action to mitigate such cross-border air pollution.

At the same time that it finalized the CSAPR (which was titled the "Clean Air Transport Rule" in the proposed rule), EPA also issued a Supplemental Notice of Proposed Rulemaking that would subject an additional six states to seasonal ozone reduction requirements under the rule.

The CSAPR is one component of a suite of impending EPA regulations affecting the power sector. Within the next two years, the agency is expected to finalize additional rules addressing emissions of toxic pollutants and greenhouse gases; environmental impacts of cooling

water intake structures; and disposal of coal combustion residuals. In addition, EPA is in the process of updating the NAAQS for ozone and PM2.5, which is likely to lead to additional rules to address pollution transport.

A copy of the final Cross-State Air Pollution Rule and other supporting documentation is located at: http://www.epa.gov/airtransport/.

BACKGROUND

EPA promulgated the CAIR in 2005 to address interstate transport of SO2 and NOx emissions. In the summer of 2008, the U.S. Court of Appeals for the District of Columbia Circuit vacated the entire CAIR, holding that the CAIR has "more than several fatal flaws." *North Carolina v. E.P.A.*, 531 F.3d 896 (D.C. Cir. 2008), on reh'g in part, 550 F.3d 1176 (D.C. Cir. 2008). The D.C. Circuit subsequently decided to reinstate the CAIR on an interim basis, but directed EPA to develop a new rule to replace the CAIR and rectify its legal defects. The CSAPR is designed to address the D.C. Circuit's orders and supersede the CAIR.

THE CROSS-STATE AIR POLLUTION RULE

The final rule is broadly similar to EPA's proposed rule, as it establishes SO2 and NOx emission "budgets" for each of the 27 affected states. Like the proposed rule, the final CSAPR distributes the state budgets to individual units in the form of tradable allowances and allows unlimited intrastate trading and limited interstate trading. Interstate trading is subject to certain constraints, referred to as "assurance provisions," that are intended to ensure that no state exceeds its emissions budget.

These budgets will apply starting in 2012. In addition, some states will be subject to more stringent SO2 budgets starting in 2014. A subset of states have a NOx budget that applies for the summertime ozone season. These compliance deadlines are intended to coordinate with the deadlines provided in the Clean Air Act for achieving attainment with the 1997 eight-hour Ozone NAAQS, the 1997 Annual PM2.5 NAAQS, and the 2006 24-Hour PM2.5 NAAQS.

The final rule imposes Federal Implementation Plans (FIPs) on the states in order to ensure that the program can begin starting in 2012, but allows states to replace these plans with their own versions starting in 2013.

The CSAPR departs from the proposed Clean Air Transport Rule in several significant ways. For example, the agency updated conclusions regarding which states significantly contribute to or interfere with maintenance of the NAAQS in other states. EPA added Texas to the annual SO2 and NOx programs, and removed Connecticut, Delaware, District of Columbia, Florida, Louisiana, and Massachusetts from such obligations. In addition, the final rule adds Iowa, Missouri, and Wisconsin to the ozone-season NOx program, and removes Connecticut, Delaware, and the District of Columbia.

The final rule also reflects a new approach to allocating allowances to individual units; the new approach is based on historic heat input and a unit's maximum historic emissions. EPA also somewhat liberalized the interstate assurance provisions in order to provide more emissions trading flexibility.

Finally, in a separate but related rulemaking, EPA has issued a supplemental notice of proposed rulemaking to require Iowa, Kansas, Michigan, Missouri, Oklahoma, and Wisconsin to meet summertime NOx emission limits. The agency seeks to finalize the proposal by late fall 2011.

EPA estimates annual benefits from the CSAPR at $120 billion to $240 billion, including benefits attributable to reductions in premature deaths, hospital visits and lost work days. The agency further estimates that the cost of the rule, including both new controls and retirements of plants, will be $800 million annually, on top of approximately $1.6 billion in costs of pollution controls already being installed as a result of the CAIR.

LOOKING AHEAD

The question remains whether EPA's approach will meet the legal standards established by the D.C. Circuit when CAIR was remanded. There is also uncertainty about the feasibility of meeting the 2012 and 2014 emission reduction deadlines, which will in many cases require power plants to install new pollution control equipment.

The CSAPR is one of several pending EPA actions that will tighten air emissions regulations for the power sector in years to come. EPA is also expected to:

- Finalize its reconsideration of the ozone NAAQS by July 2011;
- Propose New Source Performance Standards for greenhouse gas emissions from new and existing electric utility steam generating units in September 2011, and finalize those standards by May 2012;
- Finalize Maximum Available Control Technology (MACT) standards for mercury and other hazardous air pollutants from coal-fired power plants in November 2011;
- Propose in Summer 2011 and finalize in Summer 2012, a new CSAPR for controlling NOx emissions from power plants and perhaps other source categories under a revised ozone NAAQs;
- Propose in Summer 2011 a new NAAQS for particulate matter;

- Finalize regulations for cooling water intake structures at power plants by July 2012; and
- Finalize regulations for the disposal of coal combustion residuals from coal-fired power plants in 2012.

In addition, EPA may propose successors to the CSAPR if the updated NAAQS for ozone and PM2.5 indicate that more stringent controls on emissions from upwind states are required to prevent significant contributions to air quality problems in downwind states.

This suite of regulations has drawn fire from some members of Congress for imposing multiple environmental requirements on the power sector along a rigorous compliance timeline.

ENDNOTE

UPDATES

CLIMATE CHANGE

AMERICAN ELECTRIC POWER COMPANY PUTS CARBON CAPTURE PROJECT ON HOLD

On July 14, American Electric Power Company (AEP) announced it would be putting on hold its groundbreaking project to capture 90% of the carbon produced at Mountaineer, a coal fired plant in West Virginia. This decision terminates its cooperative agreement with the U.S. Department of Energy to develop a carbon capture and sequestration system on a commercial scale.

Carbon capture and sequestration (CCS) is a process whereby carbon dioxide is captured from the emissions of fossil fuel power plants and then stored in underground rock formations. Backed by the U.S. Department of Energy's agreement to pay half of the $668 million project, AEP had begun to install CCS technology and expected it to become fully operational in 2015.

AEP cited the current uncertain status of U.S. climate policy and the continued weak economy as factors in the decision to abandon the project. In addition to the fact that there are no federal regulations that require carbon reduction, public utility commissions have determined that CCS and associated costs are not "reasonable and prudent." This determination may prevent the company from being able to recoup its costs through utility rate hikes. Therefore, the company put the project on hold "until economic and policy conditions create a viable path forward."

GULF OIL SPILL

ENVIRONMENTAL CLAIMS REJECTED IN BP OIL SPILL LITIGATION

A Louisiana federal judge has dismissed claims seeking injunctive relief against BP and rig owner Transocean Ltd. for alleged violations of environmental laws in connection with the Deepwater Horizon oil spill. *In re Oil Spill by Oil Rig »Deepwater Horizon» in Gulf of Mexico, on April 20, 2010,* 2011 WL 2448206 (E.D. La. 2011).

U.S. District Judge Carl Barbier of the Eastern District of Louisiana, presiding over the multidistrict litigation stemming from the massive 2010 spill, held that the plaintiffs lacked standing to bring their claims.

The ruling applies to a "bundle" of claims for injunctive relief filed by environmental groups and certain individuals alleging violations of the Clean Water Act, 33 U.S.C.A. § 1365, and other environmental laws.

Judge Barbier determined that an injunction at this stage in the litigation would not redress the injuries the plaintiffs have alleged. To achieve standing, plaintiffs must show that the relief they seek would rectify alleged injuries, the opinion said.

The judge stressed that the plaintiffs were not seeing monetary damages, which potentially could have a deterrent effect, but only prospective injunctive relief to stop future violations of the statutes.

"[N]o future-oriented injunction can provide any meaningful relief for plaintiffs in terms of stopping discharges that already concluded in mid-July 2010," he said.

"[N]ot only is there no ongoing release from the well, but there is also no viable offshore facility from which any release could possibly occur," he said, noting that the well has been permanently sealed and the rig lies on the ocean floor.

Furthermore, Judge Barbier said, BP and the agencies charged with responding to the oil spill have been carrying out cleanup efforts, and the plaintiffs have not alleged any deficiency in those cleanup efforts.

"An injury is not redressable by a citizen suit when the injury is already being redressed," he said.

The consolidated litigation consists of hundreds of cases, with more than 100,000 individual claimants, arising from the April 2010 explosion on the Deepwater Horizon rig that led to the release of millions of gallons of oil into the Gulf of Mexico.

The case has been divided into "pleading bundles" for purposes of filing master complaints, answers and motions to dismiss.

In addition to claims under the Clean Water Act, the bundle dismissed in the June 15 order alleged violations of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9603; Endangered Species Act, 16 U.S.C.A. § 1538; and Emergency Planning and Community Right-to-Know Act, 42 U.S.C.A. § 11004.

Judge Barbier said his ruling does not affect claims by the same plaintiffs for trespass and nuisance under general maritime law and state law. He said he will consider those claims, grouped under a different pleading bundle, separately.

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CLEAN WATER ACT

SUPREME COURT TO REVIEW CLEAN WATER ACT CASE

The U.S. Supreme Court has agreed to review whether a government order requiring the removal of fill material from wetlands is subject to pre-enforcement review. *Sackett et al. v. Environmental Protection Agency*, No. 10-1062, *cert. granted* (U.S. June 28, 2011).

In a case of first impression, the Ninth U.S. Circuit Court of Appeals ruled in September 2010 that an Environmental Protection Agency compliance order under the Clean Water Act, 33 U.S.C.A. § 1311, is not subject to such review.

Court watchers say the high court's decision could have a far-reaching impact on whether pre-enforcement judicial review is available under other environmental statutes, such as the Safe Drinking Water Act, 42 U.S.C.A. § 300i(b). That question has arisen in connection with hydraulic fracturing.

Idaho landowners Chantell and Michael Sackett argued in their *certiorari* petition that "basic principles of due process entitle a landowner who receives a compliance order from EPA pursuant to the Clean Water Act to immediate judicial review."

According to their petition, the Sacketts used dirt and rock to fill in about a half-acre of property in 2007 in order to build a house.

The EPA issued a compliance order against the Sacketts because the parcel purportedly is a wetland subject to the CWA. The order said the couple violated the statute by filling in the property without first obtaining a permit.

The Sacketts were required to remove the fill material and to restore the parcel to its original condition or face civil penalties up to $32,500 per day or administrative penalties up to $11,000 per day for each violation, the petition said.

When the EPA did not grant the Sacketts a hearing, they sued the agency in the U.S. District Court for the District of Idaho, seeking injunctive and declaratory relief.

The district court granted the EPA's motion to dismiss, finding the Clean Water Act bars pre-enforcement judicial review of compliance orders.

The Sacketts appealed to the Ninth Circuit, which affirmed. The panel said Congress' goal of enabling swift corrective action would be defeated by permitting immediate judicial review of compliance orders.

The appeals court also said the civil penalties are subject to judicial, not agency, discretion.

As a result, the panel said the Sacketts would have a full and fair opportunity to present their case in a judicial forum at the penalty phase.

The Sacketts argued to the Supreme Court that the Ninth Circuit's decision "foists an intolerable choice on landowners" who are faced with a CWA compliance order.

In the absence of a pre-enforcement hearing, the Sacketts claim, a landowner is left to either spend hundreds of thousands of dollars and years applying for an unnecessary permit or invite the EPA to bring an enforcement action for potentially hundreds of thousands of dollars in civil and criminal penalties.

The Sacketts acknowledge the Ninth Circuit ruling is consistent with decisions by the Fourth, Sixth, Seventh and Tenth circuits. But they say the decision conflicts with a ruling by the Eleventh Circuit in *Tennessee Valley Authority v. Whitman,* 336 F.3d 1236 (11th Cir. 2003).

In *Whitman* the appeals court found that enforcement of a Clean Air Act compliance order violates due-process considerations because the statute affords no basis for contesting the order, according to the petition.

This update originally appeared in Westlaw Journal Environmental Express 2011 WL 2899356.

ENDANGERED SPECIES ACT

JUDGE UPHOLDS U.S. FISH AND WILDLIFE SERVICE DECISION

A U.S. federal judge upheld the status of polar bears as a species threatened by climate change, denying challenges by a safari club, two cattlemen's organizations and the state of Alaska.

The ruling on Thursday by District Judge Emmet Sullivan confirmed a 2008 decision that polar bears need

protection under the U.S. Endangered Species Act because their icy habitat is melting away.

The legal challenges—some contending polar bears do not need this protection, others maintaining the big white bears need more—were launched after the U.S. Fish and Wildlife Service included this Arctic mammal on its list of threatened species.

The state of Alaska, Safari Club International and two cattlemen's groups claimed the federal government's decision to list the polar bear was "arbitrary and capricious and an abuse of agency discretion," according to a memorandum opinion released with the ruling.

On the other side, environmental groups including the Center for Biological Diversity, urged that polar bears be listed as endangered, which offers greater protection than that provided for wildlife classified as threatened.

The heart of the judge's decision was whether the Fish and Wildlife Service had made a rational decision in its 2008 listing.

The judge noted that the wildlife agency took three years to "evaluate a body of science that is both exceedingly complex and rapidly developing," considering 160,000 pages of documents and some 670,000 comments from a wide range of interested parties."

"The court finds that plaintiffs (who challenged the listing) have failed to demonstrate that the agency's listing determination rises to the level of irrationality," Sullivan wrote.

"... the Court finds the (wildlife) service's decision to list the polar bear as a threatened species ... represents a reasoned exercise of the agency's discretion based upon the facts and the best available science as of 2008 when the agency made its listing determination," the judge wrote.

Environmental activists gave the decision measured praise.

Greenpeace called it "bittersweet," the Natural Resources Defense Council and the Center for Biological Diversity said stronger protections were warranted.

However, Kassie Siegel of the Center for Biological Diversity's Climate Law Institute said in a statement: "This decision is an important affirmation that the science demonstrating that global warming is pushing the polar bear toward extinction simply cannot be denied."

This update originally appeared on Reuters.com on June 30, 2011.

HYDRAULIC FRACTURING

JUDGE STAYS FEDS' CASE AGAINST GAS DRILLING COMPANY

A federal judge in Texas has stayed proceedings in a closely watched case brought by the Environmental Protection Agency against a natural gas drilling company for allegedly contaminating a drinking water aquifer in Parker County. *U.S. v. Range Production Co.,* 2011 WL 2469731 (N.D. Tex. 2011).

Judge Royal Ferguson of the U.S. District Court for the Northern District of Texas issued a stay without a request from either party, pending resolution of a petition filed on January 20 in the Fifth U.S. Circuit Court of Appeals by Range Resources Corp. *Range Res. Corp. et al. v. EPA,* No. 11-60040, *petition filed* (5th Cir. Jan. 20, 2011).

The company asked the Fifth Circuit to decide whether the EPA can enforce an emergency order and obtain civil penalties regarding the alleged contamination of two drinking water wells from the process of hydraulic fracturing without proving that Range caused the contamination.

The EPA filed suit in January against Range Resources and its production company, Range Production Co. The complaint alleged violations of the Safe Drinking Water Act, 42 U.S.C.A. § 300i(b).

Range produces natural gas from the Barnett Shale formation, located in and around Fort Worth, Texas.

The government sought an injunction requiring the companies to comply with an EPA emergency order issued on December 7, 2010, and a $16,500 civil penalty for each day that Range fails to comply.

The EPA said it launched an investigation after residents complained about methane contamination in their private drinking water wells. Residents said problems with their drinking water began soon after Range completed drilling operations on two natural gas wells located near the residents' wells.

Testing confirmed the presence of methane gas and other contaminants in the well water, including benzene, a known human carcinogen, the EPA said.

The agency issued an emergency administrative order to Range under the Safe Drinking Water Act, finding that the contamination in two domestic water wells that draw water from the Trinity Aquifer could present imminent, substantial endangerment to human health.

The agency also found that state and local authorities did not take sufficient action to address the problem. Among the state authorities was the Texas Railroad Commission, the agency charged with investigating such contamination.

The EPA's order directed Range to conduct surveys of private and public water wells in the vicinity. It also ordered the companies to submit plans for field testing to study how the methane and other contaminants might have migrated from the production wells and how to clean up affected portions of the aquifer.

The company refused to comply with the order, according to the EPA.

Range denied that its drilling operations contaminated the water wells.

In March, after conducting a two-day hearing, the Railroad Commission determined that Range did not cause or contribute to the contamination of the water wells.

Shortly after the commission made it findings public, Range moved to dismiss the case brought by the EPA. The company argued that because there had been no final action by the federal agency, the case was not subject to judicial review.

Judge Ferguson denied Range's motion without prejudice, finding that the EPA's issuance of the emergency order is a final agency action that can be reviewed by the court. Since the motion was denied without prejudice, Range can refile the motion in the future.

However, the judge also stayed the case so the Fifth Circuit can evaluate the EPA's emergency order.

"The court shall revisit the issue upon the 5th Circuit's decision, which has the potential to provide the necessary guidance for this litigation," Judge Ferguson said.

He said he was "struggling with the concept" that the EPA could seek civil penalties from Range without having to prove to the court that the company caused the contamination of the wells.

However, the judge said he was satisfied with the agency's response that an appeal to the Fifth Circuit by Range is sufficient for due process purposes.

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FEDERAL ENERGY REGULATORY COMMISSION

FERC ADOPTS ITS FINAL RULE ON TRANSMISSION PLANNING AND COST ALLOCATION

On July 21, 2011, the Federal Energy Regulatory Commission (FERC) issued Order No. 1000, a Final Rule on transmission planning and cost allocation. The Final Rule was adopted by a unanimous vote and is substantially the same as the Notice of Proposed Rulemaking FERC issued in June 2010. The Final Rule establishes three requirements for transmission planning, public utility providers will be required to:

- Participate in a regional transmission planning process;
- Consider transmission needs driven by public policy requirements established by state or federal laws or regulations;
- Coordinate with neighboring transmission planning regions to determine if there are more efficient or cost-effective solutions to their mutual transmission needs.

The Final Rule also establishes new requirements for cost allocation, including requiring public utility providers to:

- Participate in a regional transmission planning process that has a regional cost allocation method for new transmission facilities selected in the regional transmission plan for purposes of cost allocation; and
- Have a common interregional cost allocation method for new interregional transmission facilities that the regions determine to be efficient or cost-effective.

The methods public utilities use to satisfy these cost allocation requirements must meet the six similar interregional cost allocation principles. The principles are: (1) allocate costs in a manner that is at least "roughly commensurate" with estimated benefits; (2) not involuntarily impose costs on entities that receive no benefits from transmission facilities; (3) not utilize benefit-to-cost thresholds that preclude projects with significant net positive benefits from receiving cost allocation; (4) not allocate costs for transmission facilities outside of the planning region in which the facilities are located, unless an agreement is in place to allocate costs among entities in separate regions; (5) provide stakeholders with transparent access to cost allocation methods and data; and (6) allow the use of different cost allocation methods for different types of transmission facilities (i.e., facilities needed for reliability, congestion, or to achieve public policy requirements).

Order No. 1000 takes effect 60 days from its publication in the *Federal Register*. Each public utility transmission provider will be required to make a compliance filing with the Commission within 12 months of the effective date of the Final Rule. Compliance filings for interregional transmission coordination and interregional cost allocation are required within 18 months of the effective date. For more information and the Final Rule see http://www.ferc.gov/industries/electric/indus-act/trans-plan.asp.

AIR POLLUTION

FEDERAL AGENCIES AGREE TO JOINTLY ENFORCE U.S. AND INTERNATIONAL AIR POLLUTION REQUIREMENTS

On June 27, 2011 the United States Coast Guard and the United States Environmental Protection Agency (EPA) jointly signed a Memorandum of Understanding (MOU) to enforce United States and international air pollution regulations for vessels operating in United States' waters. MARPOL, developed by the United Nation's International Maritime Organization, is the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes. Annex VI of MARPOL specifically regulates air pollution from ships and maritime vessels. MARPOL is enacted in the United States by the Act to Prevent Pollution from Ships.

MARPOL regulations have been in effect since January 2009 and all vessels operating within a 200 nautical mile radius of the United States are required to be in compliance. The MOU, which has specific criminal prosecution and penalties provisions, signals more stringent enforcement of these regulations in the future.

EPA's press release stated "[t]oday's agreement forges a strong partnership between EPA and the US Coast Guard, advancing our shared commitment to enforce air emissions standards for ships operating in US waters. Reducing harmful air pollution is a priority for EPA and by working with the Coast Guard we will ensure that the ships moving through our waters meet their environmental obligations, protecting our nation's air quality and the health."

CASE HIGHLIGHTS

CLEAN WATER ACT

The Environmental Protection Agency (EPA) lacked the power to amend or reject the conditions that were set forth in the states' Clean Water Act certifications and incorporated into the EPA's draft nationwide permit for discharges of pollutants incidental to the normal operation of vessels. Therefore, the EPA was not required to provide notice and an opportunity for comment on the state conditions before issuing the final permit. *Lake Carriers' Ass'n v. E.P.A.,* 2011 WL 2936926 (D.C. Cir. 2011).

ENDANGERED SPECIES ACT

The purported failure of the United States Forest Service (USFS) to develop and implement its own conservation program for the endangered Mexican wolf did not contravene consultation requirements under the Endangered Species Act. Although the USFS did not utilize its own program, it properly acted in consultation with, and with the assistance of, the Fish and Wildlife Service in furtherance of recovery and reintroduction goals previously set out for the wolf. *Defenders of Wildlife v. U.S. Fish and Wildlife,* 2011 WL 2516123 (D. Ariz. 2011).

WETLANDS

The South Carolina Supreme Court has held that a voters association alleged damages sufficient to maintain a private cause of action under the South Carolina Pollution Control Act. The court found this to be so where the association alleged its members had been harmed by landowner's unlawful filling of wetlands, in that the filling destroyed bird and wildlife habitats, impacting association members' ability to enjoy their recreational and aesthetic interests. *Georgetown County League of Women Voters v. Smith Land Co., Inc.,* 2011 WL 2682437 (S.C. 2011).

INJUNCTIVE RELIEF

A preliminary injunction was warranted to halt an electric utility's discharge of dredge or fill into wetlands pursuant to a Clean Water Act (CWA) permit issued by the Corps of Engineers (Corps) for construction of a coal-fired power plant. An environmental organization and a hunting club had a substantial likelihood of success on the merits of their claims of violation of the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA) and would likely suffer irreparable harm absent the injunction. The balance of hardships and public interest supported the grant of preliminary injunctive relief. *Parnell v. U.S. Army Corps of Engineers,* 2011 WL 2718144 (8th Cir. 2011).

CERCLA

New York's common-law claims of public nuisance, restitution, and indemnification against a property owner that operated a chemical storage and redistribution center and the manufacturers that contracted with the owner for redistribution and repackaging services were not preempted by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The state sought cost recovery under CERCLA, rather than contribution under CERCLA. Thus, the potential conflict between state law remedies and the settlement framework applicable to CERCLA contribution actions was not implicated. *New York v. West Side Corp.,* 2011 WL 2342752 (E.D. N.Y. 2011).

SOLID WASTE

The California city of Manhattan Beach acted within its discretion in concluding that its planned ordinance banning distribution of plastic bags at the point of sale would have no significant effect on the environment, in issuing a negative declaration for the ordinance under the California Environmental Quality Act (CEQA). It was undisputed that the manufacture, transportation, recycling, and landfill disposal of paper bags entailed more negative environmental consequences than did the same aspects of the plastic bag "life cycle." However, the Supreme Court warned against overreliance on generic studies of "life cycle" impacts associated with a particular product. The scale of the project was such that the increase in paper bag usage was plainly insignificant, because the city's population was under 40,000, and its retail sector was fewer than 220 establishments. *Save the Plastic Bag Coalition v. City of Manhattan Beach,* 2011 WL 2714056 (Cal. 2011).

NATIONAL PARKS

The Bureau of Land Management's decision to allow a mining company to resume operation of a uranium mine near a national park, pursuant to a 1988 plan of operations, was based upon a permissible interpretation of Federal Land Policy and Management Act regulations, and thus was not arbitrary and capricious. The plan of operations remained effective throughout the life of the project, with the plan covering periods of operation and an interim management plan covering periods of temporary closure. *Center for Biological Diversity v. Salazar,* 2011 WL 2117607 (D. Ariz. 2011).

CLEAN AIR ACT

The Environmental Protection Agency's rule including portions of two Utah counties in a "nonattainment" area as to National Ambient Air Quality Standards (NAAQS) for fine particulate matter was "nationally applicable" within the meaning of the judicial review provision of the Clean Air Act. Therefore, petitions for review challenging the rule were to be filed in United States Court of Appeals for the District of Columbia Circuit. *ATK Launch Systems, Inc. v. U.S. E.P.A.,* 2011 WL 2628295 (10th Cir. 2011).

NEPA

The Forest Service's 2010 acknowledgment that its "not likely to adversely affect" (NLAA) spotted owl findings in its 2003 environmental assessment (EA) for a landscape management project situated in a portion of national forest was incorrect and that project was likely to adversely affect the northern spotted owls and their habitat was both new and significant information requiring the agency to prepare a supplemental EA or environmental impact statement under the National Environmental Policy Act. *Wildlands v. U.S. Forest Service,* 2011 WL 2036969 (D. Or. 2011).

OIL AND GAS

A claim brought by an environmental organization against federal agencies, alleging a failure under the Endangered Species Act (ESA) to ensure "no jeopardy" as to the impact of oil and gas lease sales in the Gulf of Mexico, was ripe for review. The claim was directed exclusively at the reliance of the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) upon faulty opinions of consulting agencies in proceeding with lease sales following a rig explosion and oil spill. *Defenders of Wildlife v. Bureau of Ocean Energy Management, Regulation, and Enforcement,* 2011 WL 2013977 (S.D. Ala. 2011).

HAZARDOUS SUBSTANCES

The discretionary function exception did not bar the Navy's Federal Tort Claims Act liability as to a child's claim stemming from injuries allegedly caused by exposure to thallium from soil dumped by a Navy contractor into a landfill adjacent to the child's residence and school. The Navy's mandatory and specific action was mandated by a manual provision requiring it to review health and safety plans, as well as a Federal Facility Agreement provision requiring officer review. *Myers ex rel. L.M. v. U.S.,* 2011 WL 2816640 (9th Cir. 2011).

ADMINISTRATIVE PROCEDURE ACT

An Environmental Protection Agency (EPA) guidance document addressing the obligations of regions in nonattainment of ozone air quality standards under the Clean Air Act constituted a "legislative rule" triggering notice and comment procedures under the Administrative Procedure Act. Nothing in the statute, prior regulations or case law authorized EPA regional directors to approve implementation plans containing alternatives to fees imposed as to nonattainment regions. *Natural Resources Defense Council v. E.P.A.,* 643 F.3d 311 (D.C. Cir. 2011).