CASE NOTES

recent environmental cases and final rules

Environmental and Natural Resources Section OREGON STATE BAR
Editor: Micah Steinhilb March 2010

Editor's Note: This issue contains selected summaries of cases and administrative final rules issued in November and December 2009, and January 2010. Please contact me if you have any comments or suggestions about the newsletter, or would like to recommend a case or rule for inclusion in future issues. Thank you to all of the volunteer authors in this issue and to those who have signed up to write summaries for future newsletters. If you are interested in summarizing cases and rules for this newsletter, please contact me.

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Northwest Envtl. Def. Ctr. v. Envtl. Quality Comm'n, 232 Or. App. 619 (2009).
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Recently, the Oregon Court of Appeals determined that the Oregon Environmental Quality Commission (EQC) exceeded its authority when it adopted a rule relating to small suction dredge mining—an in-stream mining process by which sediment and water are vacuumed from the streambed and separated, discharging waste sediment back into the stream. Instead, the court found that discharges from small suction dredge mining falls within the exclusive regulatory authority of the Army Corps of Engineers (Corps) under the Clean Water Act (CWA) § 404.

The rule allowed the issuance of a general permit under EQC's authority to implement the National Pollution Discharge Elimination System (NPDES) permit program under CWA § 402. A mining interest group, Eastern Oregon Mining Association, challenged the rule on the grounds that the permit exceeded EQC's authority because the discharge at issue is a discharge of "dredged material" which is within the exclusive authority of the Corps under the CWA § 404, rather than § 402. As the Supreme Court explained in *Couer Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458 (2009), the two schemes are mutually exclusive. "The Act is best understood to provide that if the Corps has authority to issue a permit for a discharge under §404, then the EPA lacks authority to do so under § 402." *Id.* at 2467.

Here, the court looked to the regulatory history of the EPA and the Corps, within which both agencies have regulated small suction dredge operations at different times. The court found that the two agencies have distinguished between discharges of dredged material, which are permitted by the Corps, and discharges of turbid wastewater, which are permitted by EPA and, by extension, EQC. The EQC permit covered both types of discharges. Hence, because the permit did not make a distinction and instead regulated all discharges, it exceeded EQC's authority by encroaching upon the Corps exclusive authority. Therefore the rule is invalid.

Northwest Environmental Defense Center (NEDC) also challenged the rule, but the court did not reach NEDC's claims.

John Benjamin v. Douglas Ridge Rifle Club, ___ F.Supp.2d ___, No. CIV 07-1144-HA, 2009 WL 4582990 (D. Or. Dec. 12, 2009).
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The facts of this case arise from the operations of Douglas Ridge Rifle Club (DRRC), a shooting range that has operated for over 54 years, and is located on a site that includes several wetlands and Corps Creek (which flows into Dry Creek and, in turn, into the Clackamas River). The site also is known to flood. Plaintiff alleged that DRRC's failure to remove spent lead bullets from earthen berms and filling of wetlands violated the Clean Water Act (CWA), Resource Conservation and Recovery Act (RCRA), and ORS 196.810 (requiring a permit to remove material from the bed or banks of waters).

DRRC moved for summary judgment, arguing that Corps Creek and the wetlands are not "waters of the United States" under *Rapanos v. U.S.*, 547 U.S. 715 (2006), and the CWA, nor are the spent bullets "solid waste" under RCRA. DRRC also asserted that plaintiff's state law claim was moot because DRRC and Oregon Department of Environmental Quality (ODEQ) entered into a Consent Agreement requiring defendant to prepare additional wetland delineations, restore wetlands that were illegally filled, and pay a fine.

The district court rejected that Justice Kennedy's "significant nexus" test in *Rapanos* applies to Corps Creek because, in light of the alignment of the justices in *Rapanos*, the significant nexus test applies only to federal jurisdiction over adjacent *wetlands*, not *tributaries*. The court also pointed to the fact that the Ninth Circuit originally concluded that the significant nexus test was the *exclusive* test for federal jurisdiction of waters, but that the Ninth Circuit amended its conclusion and determined that the significant nexus test "provided the controlling rule of law *for our case*." Ultimately, the court determined that a genuine issue of material fact existed as to whether Corps Creek is in fact a "tributary" under the CWA, because the parties disputed whether Corps Creek is "relatively permanent."

The district court also determined that a genuine issue of material fact existed about whether the wetlands fell under federal jurisdiction under the significant nexus test. The court acknowledged that plaintiff demonstrated past and current physical connections between the wetlands and the Clackamas River, as well as ecological connections to critical salmon habitat, and chemical connections from high concentrations of lead in the wetlands, which flood frequently, and high levels of lead in the bed of Corps Creek. But the court concluded that a genuine issue of material fact remained regarding whether wetlands, such as those at issue here, where the hydrological connection was destroyed, are connected enough to the Corps Creek to constitute a significant nexus.

As for plaintiff's other claims, the district court determined that, although a genuine issue of material fact remained, the facts suggest that the spent bullets were "discarded material" and, therefore, subject to RCRA. The court also concluded that the state law claims were not moot, because, although defendant and ODEQ entered a Consent Agreement addressing DRRC's impact on wetlands, plaintiffs argue that defendants filled other wetlands in additional to those addressed by the Agreement.

United Farm Workers of America, AFL-CIO v. Adm'r, EPA, 592 F.3d 1080 (9th Cir. 2010).

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The background of this case is the litigation centering on the continued use of Azinphos-Methyl (AZM), a pesticide. This case concerned a single procedural issue—whether an appeal from the EPA's decision under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.*, was filed in the right court.

In 2001 and 2006, the EPA issued decisions under FIFRA permitting some uses of AZM. The decisions were made in response to data furnished by the manufacturers of AZM, written comments from growers, environmental groups, and the United Farm Workers (UFW). UFW challenged those decisions in federal district court. The manufacturers intervened and moved to dismiss for lack of jurisdiction. EPA did not join the motion. The district court granted the motion and this appeal followed.

In an opinion written by Judge Noonan, the court held that the district court correctly dismissed the suit for lack of jurisdiction. The court reasoned that under sections 16(a) and 16 (b) of FIFRA, the appellate court has jurisdiction if a hearing has been held, and the district court has jurisdiction if a hearing has not been held. The court reasoned that the EPA had held a hearing by considering the data furnished by the manufacturers of AZM, written comments from growers, environmental groups, and UFW, and therefore, jurisdiction was proper in the court of appeals.

Judge Pregerson dissented, arguing that FIFRA required a public hearing and that the process provided by EPA did not amount to a public hearing.

Hells Canyon Pres. Council v. U.S. Forest Serv., 593 F.3d 923 (9th Cir. 2010).

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Plaintiffs-Appellants Hells Canyon Preservation Council and The Wilderness Society (HCPC) brought suit against the United States Forest Service (USFS) seeking a judgment declaring that (1) USFS failed to retain the original map of the Hells Canyon Wilderness (Wilderness) in violation of the Hells Canyon National Recreation Area Act, 16 U.S.C. § 460gg(b); (2) USFS's description of the Wilderness boundary is arbitrary and capricious in violation of 5 U.S.C. § 706(2)(A); and (3) USFS's failure to close the Lord Flat Road (Road) to motorized vehicle use is an "agency action unlawfully withheld or unreasonably delayed" under 5 U.S.C. § 706(1). Plaintiffs also sought an injunction to close the Road to motorized vehicle use. The district court held that each of plaintiffs' claims was barred by the Administrative Procedure Act's (APA) six-year statute of limitations. Relying on different reasoning, a majority of the Ninth Circuit panel affirmed the district court's decision.

Both the Hells Canyon Act and the Wilderness Act govern the Wilderness, and when in conflict, the more restrictive controls. The Hells Canyon Act requires, among other things, that USFS define the Wilderness via two sources: (1) a map to "be on file and available for public inspection in the office of the Chief" of USFS, 16 U.S.C. § 460gg(b); and (2) a boundary description, maintained in the same fashion. *Id.* The Wilderness Act, among other things, essentially prohibits the use of motor vehicles within the area designated by the map and boundary description as the Wilderness. 16 U.S.C. § 1133(c). The unpaved Road runs along fifteen miles of the Wilderness's western boundary as defined by the map and boundary description created to comply with the Hells Canyon Act. Motor vehicles are allowed to traverse the entirety of the Road.

HCPC first claimed that USFS violated the Hells Canyon Act by failing to produce the original 1978 map that the statute requires be on file in the USFS Chief's office. USFS argued on appeal that HCPC lacked standing to challenge any improper filing of the map. The court agreed, finding that while neither the map nor the boundary description was ever published in the Federal Register, the boundary description was available for review at the USFS office in Washington, D.C. and in regional offices throughout the west, and that both the map and the boundary description were available in committees in the House of Representatives and the Senate. Thus, while not in strict compliance with the statute, the map and boundary are available to the HCPC. As such, the court held that there was no discernable injury HCPC could claim to support standing under Article III.

HCPC also contended that the language describing the boundary of the Wilderness was arbitrary and capricious in violation of section 706(2) of the APA. HCPC pointed to the lack of publication of the map and boundary description in the Federal Register or, alternatively, a 2002 USFS "reinterpretation" of the boundary to prevent a statute-of-limitations bar to their challenge. The court rejected both of HCPC's arguments against the time bar. The court found that in 1981, the USFS-published map and boundary description were available for review, giving HCPC constructive notice of their contents; that notice was sufficient to start the running of the statute of limitations. As to the 2002 "reinterpretation" of the boundary, the court found that the language at issue, whether the boundary was a "rim" or a "hydrologic divide," was consistent with the original language used as early as 1978. Therefore, there was no "reinterpretation" of the 1981 description and HCPC's challenge was barred by the statute of limitations.

Third, HCPC claimed that portions of the Road encroach on the Wilderness and the USFS's refusal to close the Road to motor vehicles was and continues to be a failure to act to comply with the Wilderness Act. Thus, according to HCPC, section 706(1) granted to the Ninth Circuit the power to compel USFS to close the road. The court stated *Norton v. Southern Utah Wilderness Alliance (SUWA)* controlled the issue of when a federal court could compel an agency to act. 542 U.S. 55 (2004). The *Norton* court held that judicial review of actions alleged to be unlawfully withheld or unreasonably delayed "can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." *Id.* at 64. In rebutting HCPC's contention that USFS wasn't taking discrete actions required under the Wilderness Act, the majority pointed to a specific instance in 1989 where USFS found that 1.5 miles of the Road encroached on the Wilderness. USFS closed the road, relocated the encroaching stretch to outside the wilderness, blocked off the encroaching section to motor vehicles, and then reopened the Road. Extolling the action of USFS, the court found that what HCPC was in fact trying to accomplish, was to convince the court to redraw the western boundary to HCPC's liking. The majority saw this as HCPC trying to use section 701(6) as an end-run to accomplish the "arbitrary and capricious" section 706(2) claim that was barred by the statute of limitations. Because of this, the court held that HCPC failed to state a claim under section 706(1).

In dissent on the final issue, Judge Graber posited that the majority missed the mark when holding that HCPC failed to state a claim under section 706(1). First, Judge Graber was troubled by the majority's logic that because USFS at one time took action (the 1989 relocation), they were protected from judicial review to meet similar obligations, in different locations, at different times. Second, Judge Graber noted that neither the majority nor the district court investigated whether portions of the Road did, in fact, encroach on the Wilderness as asserted by

HCPC. Judge Graber urged reversal and remand on HCPC's final claim to determine whether portions of the Road lie within the boundaries of the Wilderness.

Upper Skagit Indian Tribe v. Washington, 590 F.3d 1020 (9th Cir. 2010).
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Plaintiff filed a Request for Determination that Skagit Bay and Saratoga Passage on the eastern side of Whidbey Island in the Puget Sound were not within the usual and accustomed fishing grounds (U&A) of the Suquamish Tribe and that the Suquamish Tribe began fishing there in only 2004. The district court, which has continuing jurisdiction for sub-proceeding determinations under *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (Boldt, J.) and *United States v. Washington*, 459 F. Supp. 1020 (W.D. Wash. 1978) (Boldt, J.), granted plaintiff's motion for summary judgment and ruled that Judge Boldt had not included those areas in the Suquamish Tribe's U&A. The Court of Appeals initially reversed that grant of summary judgment and remanded for entry of summary judgment in favor of the Suquamish Tribe, concluding that the district court erred in interpreting Judge Boldt's description of the Suquamish Tribe's U&A and erred in failing to place the burden of proof on the Upper Skagit Indian Tribe to show that the area in dispute was not the Suquamish Tribe's U&A. *Upper Skagit Tribe v. Washington*, 576 F.3d 920 (9th Cir. 2009). The court then granted a petition for rehearing and reversed itself, vacating the earlier opinion. *Upper Skagit Indian Tribe v. Washington*, 590 F.3d 1020, 1022 (9th Cir. 2010) (withdrawing earlier opinion).

On rehearing, the court reviewed Judge Boldt's findings of fact concerning the Suquamish Tribe's U&A ("the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River"). The court noted that under *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429 (9th Cir. 2000) ("*Muckleshoot III*"), to prevail against Judge Boldt's findings of fact plaintiff must show that the finding was ambiguous or that there was "no evidence before Judge Boldt" to support his finding of fact. The court then examined the basis for Judge Boldt's finding that the Suquamish Tribe's U&A included the Puget Sound and concluded that Judge Boldt meant only particular areas of Puget Sound. The court also found that there was no evidence before Judge Boldt that indicated that Skagit Bay and Saratoga Passage were part of the Suquamish Tribe's U&A. The court also stated that its conclusion did not effect other U&As that used the term "Puget Sound," because Judge Boldt could have used that term to mean different areas in his findings of fact for other U&As.

The dissent wrote a brief and biting criticism of determination proceedings brought under Judge Boldt's 1970s decrees. Judge Kleinfeld, who had authored the withdrawn opinion, stated that it was an "extremely burdensome and expensive . . . [and] fundamentally futile undertaking" to continually revisit Judge Boldt's 1970s findings of fact that were based, primarily, on the work of one anthropologist concerning the fishing patterns of tribes 150 years earlier.

Klamath Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt., 589 F.3d 1027 (9th Cir. 2009).
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At issue here is whether an environmental organization is entitled to attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, when the BLM, before judgment, withdraws a challenged decision to conduct a timber sale. The court held that the organization did not qualify as a "prevailing party" under the EAJA and therefore was not entitled to fees. EAJA provides statutory fees to prevailing parties in certain litigation. A "prevailing party" under EAJA must have achieved "a material alteration in the legal relationship of the parties" that is "judicially sanctioned." *Buckhannon Bd. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 604-605 (2001); *Carbonell v. INS*, 429 F.3d 894, 898 (9th Cir. 2005). A plaintiff is not a prevailing party if it only "achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Buckhannon*, 532 U.S. at 601.

Here, plaintiffs filed suit to enjoin BLM from going forward with a proposed timber sale and a stipulated judgment staying the sale was entered until cross-motions and objections were ruled on. Meanwhile, in a different lawsuit, the same plaintiffs challenged two other proposed BLM sales on similar grounds to those raised here. Plaintiffs prevailed on the merits in the second lawsuit, leading the magistrate in the case at hand to file Findings and Recommendations concluding that the second case was directly on point and that Klamath was entitled to summary judgment on some of its claims. That same day, BLM vacated its earlier rulings and granted Klamath's protest of the timber sale.

The court rejected Klamath's arguments that the temporary stay in the form of the stipulated judgment or BLM's voluntary dismissal of the case conferred prevailing party status on plaintiffs. The court reasoned that a "material alteration" of the parties' legal relationship under EAJA case law required "actual *relief*, not merely a determination of legal merit. . . . A moral victory, in other words, is not enough." (Emphasis in original.) The fact that plaintiffs may be entitled to fees in the case decided on the merits did not change the prevailing party analysis in the case at hand.

United States v. Washington, 593 F.3d 790 (9th Cir. 2010).

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(NOTE: This summary is not intended to represent the views of the Confederated Tribes of the Umatilla Indian Reservation)

This decision involves appellant Samish Tribe's attempt to reopen litigation regarding tribal treaty fishing rights in the Pacific Northwest. The Samish Tribe had initially intervened in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) ("*Washington I*"), *aff'd*, 520 F.2d 676 (9th Cir. 1975) in 1974. At that time, the district court denied the tribe's claim to treaty fishing rights, finding that the tribe "had not functioned since treaty times as continuous separate, distinct and cohesive Indian cultural or political community" and was not descended from any of the signatories to the Treaty of Point Elliott. *United States v. Washington*, 476 F. Supp. 1101, 1106 (W.D. Wash. 1979) ("*Washington II*"), *aff'd*, 641 F.2d 1368 (9th Cir. 1981).

The Samish Tribe was subsequently awarded federal recognition, and moved to reopen Washington II pursuant to Federal Rule of Civil Procedure 60(b). The district court denied relief, but the 9th Circuit reversed, holding that the federal recognition of the Samish Tribe constituted

an extraordinary circumstance justifying Rule 60(b) relief. *United States v. Washington*, 394 F.3d 1152, 1161 (9th Cir. 2005) ("*Washington III*").

On remand, the district court again denied the Samish Tribe's motion to reopen *Washington II*, relying upon Ninth Circuit precedent holding that the federal recognition process has no effect on the existence of treaty rights. Specifically, the district court relied upon *Greene v. United States*, 996 F.2d 973 (9th Cir. 1993) ("*Greene I*") and *Greene v. Babbitt*, 64 F.3d 1266, 1270-71 (9th Cir. 1995) ("*Greene II*"), in which the Tulalip Tribes were denied intervention in the Samish recognition proceedings for the purpose of opposing recognition. The Tulalip Tribes were concerned that a grant of federal recognition to the Samish Tribe could dilute their own treaty fishing rights by undermining *Washington II*, but the Ninth Circuit held that federal recognition alone has no effect on the existence of treaty rights.

On appeal, the Ninth Circuit, sitting *en banc*, resolved what it characterized as a "clear conflict" in its precedent between *Washington III*, and *Greene I* and *Greene II*. The court overruled *Washington III*, stating that while federal recognition is not a prerequisite for the existence of treaty rights, it is also not sufficient to establish the existence of treaty rights. The court further emphasized a proceeding may only be reopened pursuant to Rule 60(b) under the most extraordinary circumstances. Since federal recognition of the Samish Tribe did not alter the factual determinations in *Washington II*, the court held that it was not an extraordinary circumstance justifying interference with that decision's finality.

South Fork Band Council of Western Shoshone of Nevada v. U.S. Dept. of the Interior, 588 F.3d 718 (9th Cir. 2009).

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This case was an appeal from a denial of preliminary injunction in a Federal Land Policy Management Act (FLPMA) and National Environmental Policy Act (NEPA) challenge to a major gold mining project on the side of Mt. Tenabo in Nevada, a site of religious significance for Indian tribes. Plaintiffs-appellants, the South Fork Band Council of Western Shoshone of Nevada and other tribes and organizations ("the Tribes"), originally filed this action against the United States Department of the Interior and the Bureau of Land Management (BLM) after the BLM issued its final Environmental Impact Statement (EIS) approving the project. In determining whether preliminary injunction can be issued, a court is bound by the Supreme Court's decision in *Winter v. Natural Resources Defense Council*, 129 S.Ct. 365 (2008). In seeking a preliminary injunction, the Tribes must show that (1) they are likely to succeed on the merits of their claims; (2) that they are likely to suffer irreparable harm if a preliminary injunction is denied; (3) that the balance of the equities tips in their favor; and (4) that an injunction is the public interest. *Id.* at 374. To succeed on claims under the Administrative Procedure Act (APA), the Tribes must show that the BLM's action was arbitrary and capricious or contrary to the law. 5 U.S.C. §706(2)(A). In this case, the Ninth Circuit affirmed the denial of injunctive relief on the FLPMA claims, but reversed the denial of injunctive relief on the NEPA claims. The court remanded for the entry of an injunction pending preparation of an EIS that adequately considers the environmental impacts of the extraction, transportation, and processing of millions of tons of refractory ore, mitigation of the adverse impact on local springs and streams, and the extent of fine particulate emissions.

For the FLPMA claims, the Ninth Circuit determined that the Tribes failed to show a likelihood of succeeding on the merits of their claims. The Tribes contended that the BLM arbitrarily focused on the specific sites identified during the study of potential effects to the Tribes' religious uses and practices, and that the BLM should have treated the entire mountain as sacred to the Tribes. However, the court found that the BLM had adequately consulted with the Tribes and recognized the need to accommodate religious practices and reduced the scope of the project based on the impact to the Tribes. Also, the Tribes claimed that the BLM acted arbitrarily and capriciously by failing to find an unnecessary or undue degradation of scenic resources as a result of the mining operation, but the court held that the Tribes failed to point to any relevant action on BLM's part that was arbitrary or unreasonable.

For the NEPA claims, the Ninth Circuit held that the BLM failed to analyze the air quality impact of the transportation of ore to an off-site processing facility. The court held that this type of impact was a "prime example" of the type of indirect effect that requires NEPA consideration. Also, the Ninth Circuit held that the BLM did not adequately consider mitigation for effects to streams and springs caused by mine dewatering. The court held that while NEPA does not require that the harms actually be mitigated, it does require that an EIS discuss mitigation measures with sufficient detail to ensure that there is a fair evaluation of environmental consequences. The court further stated that even if the discussion is tentative or contingent, NEPA requires the agency to discuss whether effects to the water resources could be avoided. Lastly, the court held that the BLM must revise its particulate emissions study, which used PM_{10} emissions modeling as a surrogate, by using separate modeling for $PM_{2.5}$ emissions in order to determine the environmental consequences caused by particulate emissions.

Ctr. for Biological Diversity v. Kempthorne, 588 F.3d 701 (9th Cir. 2009).

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The United States Fish and Wildlife Service (Service) promulgated regulations under Marine Mammal Protection Act (MMPA) § 101(a)(5) that authorize for a five-year period the non-lethal incidental take of polar bears and Pacific walrus by oil and gas activities in and along the Beaufort Sea on the Northern Coast of Alaska. The Center for Biological Diversity and Pacific Environment alleged that the regulations violated the MMPA and National Environmental Policy Act (NEPA). The United States District Court for the District of Alaska granted summary judgment to the defendants, upholding the regulations, and the plaintiffs appealed. After concluding that the plaintiffs had standing and the challenge to the regulations was ripe for review, the Ninth Circuit dispensed with the plaintiffs' arguments and affirmed the district court.

Plaintiffs argued that (1) the authorized activities are too broad to qualify as a "specified activity" under MMPA § 101(a)(5); and (2) the Service's negligible impact finding under that authority was arbitrary and capricious because the Service failed to consider the combined effects on polar bears of oil and gas operations as well as climate change. The Ninth Circuit focused on legislative history and the Service's definition of "specified activity," which both provide that the activity should be identified based on "substantially similar" effects. *See* 50 C.F.R. § 18.27(c). Here, the Service found that the impacts of the authorized activities are

substantially similar, and the Ninth Circuit held that the authorized activity was not too broad to qualify as a "specified activity." On the Service's negligible impact finding, the Ninth Circuit gave deference to the Service's scientific predictions within the scope of its expertise and concluded that the finding was not arbitrary and capricious for failing to account for the reduced physical fitness of polar bears due to climate change.

Regarding NEPA, plaintiffs argued that (1) the Services finding of no significant impact was arbitrary and capricious because it failed to address the impacts to polar bears from disturbance by oil and gas activities in the context of climate change; and (2) the Service was required to produce an Environmental Impact Statement (EIS) because the effects of the regulations on polar bears were highly uncertain. The Ninth Circuit concluded that the analysis under the Environmental Assessment was not arbitrary and capricious because plaintiffs alleged only a generalized threat to polar bears due to climate change, the administrative record showed that the oil and gas industry in the area has little impact on polar bears, and the authorizations included mitigating guidelines to minimize impact of takes. In addition, the Ninth Circuit concluded that the Service did not commit clear error in deciding not to produce an EIS, because it made reasonable predictions based on data from prior authorizations, and climate change did not add enough uncertainty to make the Service's predictions highly uncertain.

Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt., 586 F.3d 735 (9th Cir. 2009).

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This case involved a challenge under the Federal Land and Policy Management Act ("FLPMA") and the National Environmental Policy Act ("NEPA") to a proposed land exchange that would allow the development of what would be the largest landfill in the United States. The site of the proposed landfill is adjacent to and surrounded on three sides by Joshua Tree National Park.

The Ninth Circuit first held that the agency action under review was the decision of the Board of Land Appeals, not the Record of Decision of the Bureau of Land Management ("BLM"). Because the Record of Decision had been appealed and subsequently stayed, it had never become effective and was not a final agency action.

Next the court addressed the FLPMA claims. Before agreeing to exchange lands, the BLM must appraise them. An appraisal must estimate the market value of the land, taking into account a number of factors, including the highest and best use of the property. Here, the BLM's highest and best use analysis erred by expressly excluding from consideration the potential value of the land as a landfill. On the other hand, the BLM had adequately considered whether the public interest would be well-served by the proposed land exchange.

The court then turned to the NEPA claims. The court first held that the BLM had improperly based the purpose and need section of its EIS on the private goals of the company that sought to develop the landfill. This error in turn resulted in an unreasonable narrowing of the range of meaningfully considered alternatives. The court also held that the BLM had not given the requisite "hard look" at the potential for eutrophication, but had thoroughly considered a number of other potential impacts, including noise and nighttime lighting and impacts to wildlife, aesthetics, groundwater, and air quality.

Finally, the court concluded that plaintiffs lacked standing to pursue claims against the National Park Service, because that agency was merely a cooperating agency and the Plaintiffs had not identified any violation by the agency of a procedural duty.

Requirements for Recording Exempt Groundwater Use

Requirements for Recording Exempt Groundwater Use with the Oregon Water Resources Department, Order WRD 6-2009, 49 Or. Bull. 374 (Jan. 1, 2010), *available at* *http://arcweb.sos.state.or.us/rules/Jan_2010_Bltn.pdf*.

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On July 23, 2009, Governor Kulongoski signed Senate Bill 788, Oregon Laws 2009, chapter 819, section 1, *amending* ORS 537.545, which requires that landowners who drill exempt groundwater wells submit to the Oregon Water Resources Department a map showing the exact location of the well, and a recording fee of $300. In response, on November 23, 2009, the Oregon Water Resources Commission approved by order permanent administrative rules implementing the provisions of SB 788.

By rule, the new requirements apply to all exempt wells completed after July 22, 2009, and those wells converted to allow exempt groundwater use. OAR 690-190-0005(2). The requirements do not apply to wells that are "repaired, deepened, or altered." *Id.* at -0005(3). Within 30 days after well completion, the landowner must submit (i) a tax lot map showing the location of the completed well relative to both the property boundaries or corners, and the nearest driveway, access road and permanent structures, and (ii) a recording fee of $300. *Id.* at -0100(1) - (3). Failure to comply with the requirements of OAR Chapter 690, Division 190, may result in a formal enforcement action and civil penalties as a Class IIII Minor Violation under OAR Chapter 690, Division 260.

New Stormwater Rule for Construction and Development Sites

Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category, 74 Fed. Reg. 62,996 (Dec. 1, 2009) (to be codified at 40 C.F.R. pt. 40), *available at* *http://edocket.access.gpo.gov/2009/pdf/E9-28446.pdf*

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The EPA's regulation on stormwater discharges from construction and development sites is now in effect. On December 1, 2009, the EPA issued its final rule regarding effluent limitation guidelines and new source performance standards for the construction and development source category. The new rule took effect February 1, 2010.

The new rule impacts nearly every development project. It imposes numeric effluent limitations for pollutant turbidity for large construction sites, as well as non-numeric effluent limitations for all construction sites. The rule also requires compliance monitoring at construction sites. The rule is to be phased in over a period of four years.

Who Is Effected:

All construction and development sites greater than one acre must now also comply with the non-numeric effluent limitations as of February 1, 2010. Construction sites disturbing ten or more acres of land at one time are also required to monitor discharges from the site and comply with the numeric effluent limitation starting in February 2014. Construction sites disturbing twenty or more acres at one time are required to conduct monitoring of discharges from the site and comply with the numeric effluent limitation beginning in August 2011.

Prior Regulations:

Although existing stormwater regulations (40 C.F.R. 122.26) require dischargers engaged in construction activity to get NPDES permits and implement measures to manage construction activity discharges, there were no national performance standards or monitoring requirements for stormwater. This new rule creates technology-based minimum requirements on a national level.

New Rule:

All permittees must implement a range of erosion and sediment controls and pollution prevention measures at regulated construction sites. The rule prohibits discharges from dewatering activities and concrete washout activities unless properly managed; wastewater from washout of stucco, paint, form release oils, curing compounds and other construction materials; fuels, oils or other pollutants from vehicle or equipment operation and maintenance; and soaps and solvents used in vehicle and equipment washing. Finally, when discharging from basins and impoundments, the discharger must utilize outlet structures that withdraw water from the surface, unless infeasible.

Sites over ten acres must comply with numeric effluent limitations for turbidity. Permittees are required to sample stormwater discharges at the site and report the levels of turbidity present to the permitting authority. Permitting authorities are required to incorporate these turbidity limitations into their permits. Permittees will have the flexibility to select management practices and technologies based on compatibility with site-specific conditions, assuming permittees are consistently able to meet the limitations and if they are consistent with the permitting authority's requirements. Permittees also have the flexibility to phase their development and construction activities to limit applicability of the monitoring and turbidity requirements. If a storm event occurs that is larger than the local two-year, twenty-four hour storm, the effluent limitations do not apply for that day.

In most cases, state agencies are responsible for administering NPDES permits. The primary exceptions are Idaho, Massachusetts, New Hampshire, New Mexico, the District of Columbia; federal facilities in Colorado, Delaware, Vermont, and Washington; and most Indian land. The new regulations are designed to work in conjunction with state and local laws, where those laws are at least as stringent as the new regulations. Nothing in the new regulation prohibits state or local authorities from promulgating new and more stringent requirements.

Four EPA Rules Relating to National Emission Standards for Hazardous Air Pollutants

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National Emission Standards for Hazardous Air Pollutants: Area Sources: Asphalt Processing and Asphalt Roofing Manufacturing, 74 Fed. Reg. 63,236 (Dec. 2, 2009) (to be codified at 40 C.F.R. pt. 63), *available at* *http://edocket.access.gpo.gov/2009/pdf/E9-27946.pdf*.

The U.S. Environmental Protection Agency (EPA) recently promulgated a final rule relating the national emission standards for hazardous air pollutants (NESHAP) in accordance with the requirements of Section 112 of the Clean Air Act (CAA) regulating major sources of hazardous air pollutants (HAPS). Section 112(c) of the CAA defines a major source to be any source that emits or has the potential to emit 10 or more tons per year of a single HAP or 25 or more tons per year of any combination of HAPS. The new rule, effective December 2, 2009, applies generally to entities and facilities included under classifications 324110 (area source facilities that refine asphalt) and 324122 (area source facilities that manufacture asphalt roofing materials) of the North American Industrial Classification System. EPA promulgated this rule in response to a court-ordered deadline. *Sierra Club v. Johnson*, Case No. 01-1537 (D. D.C. March 2006).

Applicability and Standards

Under the rule all existing source facilities must comply with the requirements no later than December 2, 2010. Any new sources must comply with the rule by the latter of December 2, 2009 or the start up of the facility. In any case, the owner of the effected source must demonstrate compliance with the rule within 180 calendar days of the applicable compliance date. Under this rule a new source is any source where construction or reconstruction commenced after July 9, 2009. The rule does not apply to hot mix asphalt plant operations used in the paving of roads or hardstand, or operations where asphalt may be used in the fabrication of a built-up roof. Also the rule does not apply to research or laboratory facilities as defined in section 112(c)(7) of the CAA.

The rule establishes standards for monitoring of polycyclic aromatic hydrocarbons (PAH) and particulate matter (PM) emissions for the identified groups. For an asphalt processing facility, the effected source is the collection of blowing stills. The rule requires the owner of a facility to limit PAH emissions to 0.003 lb/ton of asphalt charged to the asphalt refining (blowing still) operation. Alternatively, the owner may comply with a PM emission limit of 1.2 lb/ton of asphalt charged to the refining operations. Operators of asphalt processing operations must demonstrate initial compliance in accordance with section 63.11562 which requires emissions testing and the establishment of operating parameters based upon manufacturer guarantees. If the asphalt processing facility does not require a control device to comply with emissions limits, the owner may use process knowledge and engineering calculations in place of compliance testing for purposes of initial compliance.

For asphalt roofing manufacturing, the rule focuses on the collection of all asphalt coating equipment. The rule considers three subcategories based upon process types used at the facility, which covers all process types used in the industry. For existing coater-only production, the standard requires a PAH limit of 0.0002 lb/ton of product manufactured or a PM emission limit of 0.06 lb/ton of product manufactured. Existing saturator-only productions lines require a PAH limit of 0.0007 lb/ton of product manufactured or a PM emission limit of 0.30 lb/ton. Finally, existing combined saturator and coater lines require a limit on PAH emissions from all saturators, wet loopers, coating mixers and coaters of 0.0009 lb/ton or a PM emissions limit of

0.36 lb/ton. Initial compliance with rule may be established by emissions testing and establishing operating parameters. If an asphalt roofing manufacturing facility does not require a control device to comply with emissions limits, the owner may use process knowledge and engineering calculations in place of compliance testing for purposes of initial compliance.

The rule establishes monitoring requirements for both types of facilities; however the specific requirements vary depending on the presence of an emission control device. A facility using a device must develop and make available for inspection a site-specific monitoring plan that addresses the installation of the probe/interface at point of measurement, performance/equipment specifications for the probe, and performance evaluations procedures. In addition, the facility must include a continuous parameter monitoring system capable of completing a full cycle of operations every 15 minutes. The owner must then determine the three hour averages to establish a baseline emissions result. If the facility does not require a CPMS, the plan must specify the process parameters and describe maintenance to ensure continuous compliance.

Facilities regulated under this rule must submit initial compliance notifications, notification of compliance status, and semi-annual compliance summary reports.

National Emission Standards for Hazardous Air Pollutants: Area Source Standards for Paints and Allied Products Manufacturing, 74 Fed. Reg. 63,504 (Dec. 3, 2009) (to be codified at 40 CFR pt. 63), *available at* *http://edocket.access.gpo.gov/2009/pdf/E9-27947.pdf*.

The U.S. Environmental Protection Agency (EPA) recently promulgated a final rule relating the national emission standards for hazardous air pollutants (NESHAP) in accordance with the requirements of Section 112 of the Clean Air Act (CAA) regulating major sources of hazardous air pollutants (HAPS). Section 112(c) of the CAA defines a major source to be any source that emits or has the potential to emit 10 or more tons per year of a single HAP or 25 or more tons per year of any combination of HAPS. The new rule, effective December 3, 2009, applies generally to entities and facilities included under classifications 32510 (area source facilities engaged in mixing pigments, solvents and binders into paints), 324420 (area source facilities engaged in manufacturing adhesives), 325910 (area sources engaged in manufacturing inkjet inks), and 325998 (area sources engaged in manufacturing indelible ink) of the North American Industrial Classification System. In particular, the rule targets processes (not entire facilities) that process, use, or generate materials containing benzene; methylene chloride; and/or compounds of cadmium, chromium, lead, and nickel. A process is only subject to the particular emission control devices applicable to the HAP(s) in the relevant process.

Applicability and Standards

Under the rule, all existing source facilities must comply with the requirements no later than December 3, 2012. Any new sources must comply with the rule by the latter of December 3, 2009, or the start up of the facility. Generally, the rule applies to four processes commonly used in the regulated industries: (1) preassembly and premix; (2) pigment grinding and milling; (3) product finishing and blending; and (4) product filling and packaging.

In relation to Metal HAP emissions, the rule requires owners/operators of all effected facilities to operate a particulate control device during the addition of pigments and other solids containing metal HAP compounds. Any emissions from a particulate control device venting to

the atmosphere must not exceed ten percent opacity averaged over a six-minute period. The owner/operator must initially verify the set up of the particulate control device and then periodically inspect all pipe work and ducting. Following the initial setup, the effected facility must conduct weekly visual inspections of flexible ductwork and annual inspections for rigidity. Additionally, the facility must conduct visual testing of emissions every three months using Method 22 (40 C.F.R. pt. 60, appendix A-7).

The standards for volatile HAP emissions require secure covering of mixing/storage vessels. Those items used to store volatile HAPs must include covers of a solid or flexible construction that do not warp during the manufacturing process. The covers must maintain contact along at least 90 percent of the vessel rim and be properly maintained. The rule requires similar covers for mixing vessels, except that the rule permits adequate clearance for the mixer shaft. This rule also requires leaks to be cleaned up as soon as possible, but in no case later than one hour after detection.

Owners and operators of an existing effected source must submit initial compliance no later than June 1 2010. New effected sources have until the later of 180 days from startup or June 1, 2010, to establish initial compliance. Continuing reporting and deviation reporting requirements are found in section 63.11603.

National Emission Standards for Hazardous Air Pollutants: Area Source Chemical Preparations Industry; Final Rule, 74 Fed. Reg. 69,194 (Dec. 30, 2009) (to be codified at 40 CFR pt. 63), *available at* *http://edocket.access.gpo.gov/2009/pdf/E9-30500.pdf*.

The U.S. Environmental Protection Agency (EPA) recently promulgated a final rule relating the national emission standards for hazardous air pollutants (NESHAP) in accordance with the requirements of Section 112 of the Clean Air Act (CAA) regulating major sources of hazardous air pollutants (HAPS). Section 112(c) of the CAA defines a major source to be any source that emits or has the potential to emit 10 or more tons per year of a single HAP or 25 or more tons per year of any combination of HAPS. The new rule, effective December 30, 2009, applies generally to entities and facilities included under classification 325998 (chemical preparation facilities containing metal compounds of chromium, lead, manganese, or nickel) of the North American Industrial Classification System.

Applicability and Standards

Under the rule, all existing source facilities must comply with the requirements no later than December 30, 2010. Any new sources must comply with the rule by the latter of December 30, 2009, or the start up of the facility. The federal government believes most existing sources regulated by the rule are likely already in compliance, thus minimizing the time necessary for compliance.

For all existing facilities, the rule requires the process vent streams for chemical manufacturing processes using the targeted HAPs be routed to a control device with a 95% particulate matter (PM) reduction efficiency, or insure the process meets an outlet concentration of 0.03 gr/dscf without control. Alternatively, on a process-by-process basis, an existing source can avoid use of a control device if the facility can demonstrate and certify that each of the process streams contains the target HAP at a level that will not exceed 0.03 gr/dscf. Existing sources must conduct initial compliance by June 28, 2011.

All new sources must either route vent streams to a control device with a 98% PM reduction efficiency or demonstrate an outlet concentration that does not exceed 0.03 gr/dscf without controls. New sources must conduct initial assessment by the later of June 28, 2010, or 180 days following startup.

Continuing Compliance and Monitoring

Facilities affected by this regulation must use one of three methods to monitor potential emissions. The facility may chose from a bag leak detection system, a control device parameter monitor, or a continuous parameter monitoring system. For all pressure measurement devices used, the facility must locate the pressure sensor in a position providing a representative measurement of pressure. The facility must also inspect the pressure tap for plugging and perform quarterly accuracy checks. If the facility uses a monitoring system the facility must develop site-specific monitoring plans and make them available for inspection. The effected facility must file compliance reports as described at Table 5 (74 Fed. Reg. 69,215-16).

National Emission Standards for Hazardous Air Pollutants: Area Source Standards for Prepared Feeds Manufacturing, 75 Fed. Reg. 522 (Jan. 5, 2010) (to be codified at 40 C.F.R. pt. 63), *available at* *http://edocket.access.gpo.gov/2010/pdf/E9-30498.pdf*.

The U.S. Environmental Protection Agency (EPA) recently promulgated a final rule relating the national emission standards for hazardous air pollutants (NESHAP) in accordance with the requirements of Section 112 of the Clean Air Act (CAA) regulating major sources of hazardous air pollutants (HAPS). Section 112(c) of the CAA defines a major source to be any source that emits or has the potential to emit 10 or more tons per year of a single HAP or 25 or more tons per year of any combination of HAPS. The new rule, effective January 5, 2010, applies generally to entities and facilities included under classification 311119 (other animal feeds, manufacturing) of the North American Industrial Classification System. EPA promulgated this rule in response to a court-ordered deadline. *Sierra Club v. Johnson*, Case No. 01-1537 (D. D.C. March 2006).

The standards apply to prepared feeds manufacturing facilities where manufacture of animal feed makes up at least one-half of the facilities' annual production, and that use any materials containing chromium in an amount greater than 0.1% by weight and/or any material using manganese in an amount greater than 1% by weight. The rule expressly excludes those facilities that do not use any materials containing chromium or manganese. Also, the rule excludes facilities producing only dog and cat food.

Currently, existing facilities must comply with the rule no later than January 5, 2012. Any new source that commenced construction or reconstruction after July 27, 2009, must comply upon the latter of startup or January 5, 2010. Any source that begins using chromium or manganese products in manufacturing processes must establish compliance at the time the facility begins using the compounds.

Applicability and Standards

The rule establishes standards relating to both the management of effected sources and equipment used at an effected source. The rule divides provides for more stringent standards and record keeping for effected sources that produce more than 50 tons per day.

All effected sources must apply two general management practices. The first management practice involves minimizing the ability of dust to escape into the general environment. This practice includes (1) the use of an industrial vacuum system or sweeping to reduce amounts of dust; (2) monthly removal of dust from walls, ledges, and equipment; and (3) keeping doors closed except during normal ingress and egress. The second management practices requires the facility operator to operate all process equipment that stores, processes, or contains chromium or manganese, in accordance with the equipment manufacturer's specifications.

Additionally, the rule establishes specific requirements for certain areas of an effected source. In storage areas, the rule requires that materials containing chromium or manganese are stored in closed containers. In areas where mixing operations using chromium or manganese materials occur, the mixer must remain closed except when adding materials. In areas where bulk loading of products containing chromium and/or manganese occurs, the facility must use a device at the loadout end of each bulk loader to lessen fugitive emissions by reducing the distance between the loading arm and vehicle.

Effected facilities with production levels exceeding 50 tons per day must also install a cyclone to reduce emissions from pelleting and pellet cooling operations. Facilities requiring use of a cyclone must demonstrate the cyclone system is designed to achieve a 95% reduction in emissions. Confirmation of this standard can occur by manufacturer certification, certification by a professional engineer, and/or a one-time Method 5 performance test. The facility must establish operating parameters and monitor to ensure compliance at least one time per day. Finally, the cyclone must be inspected quarterly for corrosion, erosion or any other damage that could result in air leakage.

Notification and Recordkeeping

The rule establishes several notification and recordkeeping requirements for all effected sources. First, each existing facility must submit an Initial Notification due on the latter of May 5, 2010, or 120 days after the facility becomes subject to the rule. The Initial Notification includes basic information regarding the facility, such as the contact information for the facility owner, the physical location of the effected facility, identification of relevant standards, and a brief description of the operations at the facilities.

The Notification of Compliance Status requires demonstration of the information required by 63.11624(a)(2). This document must discuss compliance with all standards and include information regarding initial feed production levels if not the facility does not require a cyclone system. A facility with a cyclone must provide information regarding inlet flow rates, inlet velocity, pressure drop, or other characteristics showing proper operation of the cyclone.

EPA Issues Endangerment and Cause or Contribute Findings for Greenhouse Gases

Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1), *available at* *http://edocket.access.gpo.gov/2009/pdf/E9-29537.pdf*.

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Background

In 2007, the United States Supreme Court found in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that greenhouse gases are "air pollutants" under the Clean Air Act (the Act). Furthermore, the Court held that the U.S. Environmental Protection Agency (EPA) was required to determine whether greenhouse gas emissions from new motor vehicles "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare," 42 U.S.C. § 7521(a)(1), or whether "the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming." *Massachusetts*, 549 U.S. at 534.

Findings

In response to the Court's decision in *Massachusetts v. EPA*, the Administrator of the EPA recently finalized the following two findings regarding greenhouse gases under Section 202(a) of the Act:

1. Endangerment Finding: The Administrator found that elevated concentrations of six well-mixed greenhouse gases in the atmosphere—carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6)—may reasonably be anticipated to endanger the public health and to endanger the public welfare of current and future generations.
2. Cause or Contribute Finding: The Administrator found that emissions of those greenhouse gases from new motor vehicles contribute to the air pollution that may reasonably be anticipated to endanger public health and welfare.

EPA identified numerous effects from climate change that will endanger public health and welfare including, but not limited to, more frequent and intense heat waves and wildfires, sea level rise, more intense storms, increased drought, increased flooding, and harm to agricultural, water, and ecological resources. More detailed information regarding EPA's analysis of the observed and projected effects of elevated concentrations of greenhouse gases in the atmosphere and how they endanger public health and welfare can be found at *http://www.epa.gov/climatechange/endangerment.html*.

Consequences

The EPA Administrator's recent endangerment and cause or contribute findings do not alone impose any requirements on industry; however, EPA is now obligated under Section 202(a) of the Act to set standards for motor vehicle greenhouse gas emissions. 42 U.S.C. § 7521(a)(1). Earlier this year, EPA and the U.S. Department of Transportation's National Highway Traffic Safety Administration (NHTSA) issued a proposed joint rulemaking to establish light-duty vehicle greenhouse gas emission standards and new Corporate Average Fuel Economy (CAFE) standards as part of a national program to reduce greenhouse gas emissions and improve vehicle fuel economy. Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49,454 (Sept. 28, 2009) (to be codified at 40 C.F.R. pts. 86 and 600; 49 C.F.R. pts. 531, 533, 537, and 538), *available at* *http://www.regulations.gov/search/Regs/home.html#docketDetail?R=EPA-HQ-OAR-2009-0472*. The EPA's endangerment and cause or contribute findings were a necessary predicate to

finalizing the joint proposed rulemaking, which would establish greenhouse gas emissions standards for Model Year 2012 - 2016 light-duty vehicles.

The EPA Administrator's findings could also ultimately trigger the requirement that stationary sources obtain operating permits for their greenhouse gas emissions. Once finalized, the EPA's light-duty vehicle standards will render greenhouse gas emissions "subject to regulation" under the Act and, consequently, subject to the Act's "prevention of significant deterioration" (PSD) and Title V operating permit programs. *See, e.g.*, 42 U.S.C. § 7479(3). EPA Administrator Lisa Jackson recently stated in a letter to Senator Jay D. Rockefeller IV that she anticipates that a forthcoming rulemaking "will explain that greenhouse-gas emissions will become 'subject to regulation' under the Clean Air Act, such as to make them a part of the Act's stationary-source permitting programs, in January of 2011, when Model Year 2012 light-duty vehicles will need to comply with EPA's greenhouse-gas emissions standard." Letter from EPA Administrator Lisa Jackson to United States Senator Jay D. Rockefeller IV (Feb. 22, 2010), *available at* *http://epa.gov/oar/pdfs/LPJ_letter.pdf*. In September 2009, EPA proposed a greenhouse gas "tailoring rule" to define when new or existing industrial facilities would be obliged in the future to obtain permits under the Act's PSD and Title V operating permit programs. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292 (Oct. 27, 2009) (to be codified at 40 C.F.R. pts. 51, 52, 70, and 71), *available at* *http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a4c6ba*.

EPA Adjusts Allowance System for HCFC Production

Protection of Stratospheric Ozone: Adjustments to the Allowance System for Controlling HCFC Production, Import, and Export, 74 Fed. Reg. 66,412 (Dec. 15, 2009) (to be codified at 40 C.F.R. pt. 82), *available at* *http://edocket.access.gpo.gov/2009/pdf/E9-29569.pdf*.

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On December 15, 2009, the EPA published a final rule that adjusts the allowances for hydrochlorofluorocarbon (HCFC) consumption and production. The rule went into effect on January 1, 2010. The rule is prompted by both the 1990 amendments to the Clean Air Act and the Montreal Protocol on Substances that Deplete the Ozone Layer. The Act requires the complete phase out of HCFC consumption and production by 2030. The Protocol envisions a phase out of production and consumption over time, culminating in a general elimination by 2020 while permitting a small amount of HCFC production and consumption to continue solely for servicing existing appliances until 2030.

This rule implements the next step in the chemical-by-chemical phase out required under the Protocol. It permits specified percentages of consumption and production baselines for HCFC–141b, HCFC–22, and HCFC–142b for 2010 through 2014. It also establishes company-by-company production and consumption baselines and allows specified percentages of those baselines for 2010 through 2014. The rule additionally amends provisions for HCFC production allowances to meet the general domestic needs of developing countries. Finally, it contains EPA's interpretation of section 605(a) of the Clean Air Act—a self-effectuating ban on the use of HCFCs and their introduction into interstate commerce.

EPA Bans Sale of Certain Appliances

Protection of Stratospheric Ozone: Ban on the Sale or Distribution of Pre-Charged Appliances, 74 Fed. Reg. 66,450 (Dec. 15, 2009) (to be codified at 40 C.F.R. pt. 82), *available at http://edocket.access.gpo.gov/2009/pdf/E9-29560.pdf*.

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On December 15, 2009, the EPA published a final rule that bans the sale of certain air conditioners and refrigerators. The rule went into effect on January 1, 2010. Specifically, the rule bans the sale or distribution of such appliances containing hydrochlorofluorocarbon (HCFC) 22, HCFC-142b, or blends containing one or both of these substances. It similarly prohibits the sale or distribution of appliance components that contain HCFC-22, HCFC-142b or blends containing one or both of these substances. However, the rule does not effect the sale or distribution of appliances or components manufactured before January 1, 2010.