

# Environmental & Chemical Update

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SUSTAINABILITY • TOXIC TORT • WASTE • WATER

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## Litigation and Regulatory Enforcement

### [1] NEPA: DOE Decision to Split Nuclear Cleanup Not a Violation of NEPA, Says Second Circuit

The Second Circuit Court of Appeals has ruled that the U.S. Department of Energy (DOE) did not violate NEPA by conducting a two-stage decommissioning of the West Valley Nuclear Service Center near Buffalo, New York. [\*Coalition on West Valley Nuclear Wastes v. Chu\*, No. 07-5243 \(2nd Cir. 8/31/08\)](#). Plaintiffs alleged DOE violated NEPA by conducting separate environmental assessments and environmental impact statements (EIS) for each stage of a two-stage project. After a 1987 settlement with plaintiffs in a lawsuit that argued that DOE had to prepare an EIS before it could decommission the commercial nuclear fuel processing plant, state and federal agencies decided to split the EIS process and address short-term waste management issues in the first stage and long-term closure and management issues in a second stage. Plaintiffs sued, arguing that DOE could not segment the EIS into two segments and thereby not address closure issues for the entire 3,345-acre site at one time. They also argued that DOE violated the terms of the 1987 settlement by issuing an EIS that did not address long-term closure issues. The district court granted DOE's motion for summary judgment, and plaintiffs appealed.

In affirming the district court, the appeals court ruled that DOE acted properly in segmenting the EIS process and said “not all agency decisions to break a project into stages are impermissible segmentation” under NEPA regulations. The three-judge panel noted that “agencies must often undertake multi-faceted actions that have complex, independent environmental impacts” and that DOE did not exceed its “wide discretion” to redefine the scope of an EIS” if warranted. The court felt the decision to address stored nuclear waste before addressing closure was a reasonable decision by the agency under the circumstances.

### [2] RCRA: Ninth Circuit Upholds \$45 Million Judgment Against Illegal Waste Facility

The Ninth Circuit Court of Appeals has upheld a \$45 million judgment for cleanup costs, penalties and damages against a company that illegally operated a solid waste disposal facility on Indian land in California. [\*U.S. v. Torlaw Realty, Inc.\*, No. 06-56057 \(9th Cir. 9/02/09\)](#). In an *en banc*, unpublished ruling, the appeals court affirmed a decision by the U.S. District Court for the Central District of California. Court records show that defendant entered into an agreement in 1992 with several members of the Torres Martinez Desert Cahuilla Indian Tribe to operate a solid waste disposal facility on a parcel on the tribe's reservation in Riverside County. The defendant, however, never obtained a commercial lease for operation of the facility as required by the Bureau of Indian Affairs (BIA), which holds title to the property in trust for the tribe.



Defendant accepted and burned huge amounts of solid waste, including construction debris, plastics, automobiles, computers, and household garbage at the facility for more than 14 years. The county spent more than \$1.8 million in fire responses at the site. The BIA issued a cease and desist order to the facility in 2003, and EPA issued a unilateral order to the facility the same year. The RCRA order said the facility's open burning of waste presented an imminent and substantial endangerment. By 2006, the facility encompassed 40 acres and more than 1 million cubic yards of waste. Records indicate that defendant never complied with either the BIA or EPA orders. In affirming the district court judgment, the appeals court said, "trial testimony and exhibits admitted into evidence support the district court's findings of fact and mixed questions of law and fact regarding harm to the government, public health, and the environment, as well as proximate causation."

### **[3] Env't'l Crime: Second Circuit Affirms Asbestos Criminal Verdict**

The Second Circuit Court of Appeals has affirmed a \$25 million verdict against a New York asbestos abatement contractor found guilty of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), the Clean Air Act and TSCA and three violations of the CAA. *U.S. v. Salvagno, No. 09-0043 (2nd Cir. 9/01/09)*. Defendant, his son, his company AAR Contractor Inc. and several other alleged co-conspirators were indicted in February 2002 on grand jury charges of conspiring to perform asbestos abatement without adhering to regulations from January 1990 onward. Defendant was found guilty in March 2004 and subsequently sentenced to 235 months in prison and ordered to pay \$1.7 million in forfeiture and \$22.9 million in restitution. Defendant appealed,

arguing that his Sixth Amendment right to conflict-free counsel was violated because the same law firm represented both him and his son.

The appeals court disagreed, finding that defendant had knowingly and intelligently waived his right to conflict-free counsel. The court also termed "entirely speculative" defendant's claims that he and his counsel had conflicting interests concerning certain documents improperly withheld during discovery.

### **[4] Env't'l Crime: Liberian Shipping Company Agrees to Pay \$1 Million Criminal Fine for Inadequate Records**

Dalnave Navigation Inc., a Liberian-incorporated ocean shipping company, has reportedly pleaded guilty in federal court in New Jersey to violating the Act to Prevent Pollution from Ships for failing to maintain accurate oily water discharge records and using falsified records to conceal the discharge of untreated bilge from one of its cargo ships.

The investigation leading to the guilty plea began in September 2008, when Coast Guard inspectors conducted an inspection of the M/V Myron N, following the ship's arrival in Gravesend Anchorage, New York and subsequently in the Port of Newark, New Jersey. The inspections revealed that crew members had installed pipes to bypass the ship's pollution-control system and pump untreated bilge directly into the ocean. They also knowingly failed to record those discharges in the ship's official oil record books and presented false record books to the Coast Guard. *See DOJ Press Release, September 3, 2009.*



**[5] Env'tl Crime: Missouri Pesticide Company Executive Sentenced to Prison for Criminal Violations of CWA**

The president of a Missouri pesticide company has reportedly been sentenced in federal court in Kansas City to six months in prison for violating the Clean Water Act by discharging pesticide wastes into the sewer system of St. Joseph, Missouri. *U.S. v. Garvey, No. 09-00023 (W.D. Mo. sentenced 9/01/09)*. William Garvey, president of HPI Products Inc., pleaded guilty to discharging a pollutant into the city's sewer system without a permit and to violating federal pretreatment standards. The company also pleaded guilty to a charge of storing hazardous waste without a permit, a violation of RCRA.

In a related matter, the company's vice president pleaded guilty August 31, 2009, to two criminal violations of FIFRA. *U.S. v. Nielson, No. 09-00189 (W.D. Mo. plea entered 8/31/09)*. The company president admitted that he instructed employees to wash spills, wastes and equipment rinses down floor drains that were connected to the city sewer system. In addition to prison time, Garvey was sentenced to six months of home confinement and ordered to pay a \$100,000 fine. Sentencing for the company and its vice president will be later this year. See *BNA Daily Environment Report, September 3, 2009*.

**[6] Chemical Exposure: Putative Class Action Filed over Aluminum Bottles Containing BPA**

A putative class action has been filed in federal court in Kentucky against SIGG Switzerland (USA), a manufacturer of aluminum bottles, alleging that consumers who purchased reusable aluminum bottles manufactured by SIGG, were unknowingly

exposed to bisphenol A (BPA). *Johnson v. SIGG Switzerland (USA) Inc., No. 09-669 (W.D. Ky. filed 8/28/09)*. The complaint alleges that defendant represented that their aluminum bottles were BPA-free, when in fact they contained the chemical. It further alleges that SIGG engaged in unfair, misleading or deceptive acts or practices regarding its marketing and sale of its bottles. The complaint seeks compensatory and punitive damages as well as attorney's fees.

**[7] NEPA: Groups Sue State Department over Canada/U.S. Tar Sands Oil Pipeline**

Several environmental groups have sued the U.S. State Department seeking to halt construction of a cross-border pipeline that would transport large volumes of oil from Canadian tar sands into the United States. *Sierra Club v. Clinton, No. 09-4086 (N.D. Cal filed 9/03/09)*. The complaint alleges that the State Department failed to conduct a thorough environmental assessment of the project as required by NEPA.

The proposed 1,000-mile Alberta Clipper pipeline will begin in Hardisty, Alberta, run through North Dakota and Minnesota, and end at a terminal in Superior, Wisconsin. The pipeline will carry an initial 450,000 barrels per day of heavy crude oil with the capacity of 800,000 barrels per day by adding additional pumping facilities. Ultimately, the project is expected to deliver 1.2 million barrels of crude oil daily from Alberta to eastern Canadian markets and U.S. refineries in the Midwest and Gulf Coast regions. Plaintiffs allege that tar sands oil production has three times the global warming impact per barrel of conventional crude oil and contains 11 times more sulfur and nickel, six times more nitrogen and five times more lead than



conventional crude. The State Department issued a presidential permit June 20, 2009 to the pipeline developer, Enbridge Energy L.P. of Alberta, Canada after a review process that took two years. See *LAW360, September 4, 2009*.

### [8] Toxic Tort: Landowner Group Seeks \$1.76 Billion in Damages over Petroleum Contamination

A group of Ohio landowners are seeking damages of \$1.76 billion over petroleum contamination allegedly caused by the former Gulf Oil Company refinery, now owned by Chevron U.S.A., in Hamilton County, Ohio. [\*Brockman v. Chevron U.S.A., Inc., No. N/A \(S.D. Oh. filed 9/08/09\)\*](#). The complaint alleges that Chevron and other operators of the refinery since the 1980s, have allowed gasoline products and other toxic substances to seep from the refinery into groundwater, creating a plume that contaminated land owned by the 16 plaintiffs. It seeks compensatory damages of \$5 million per plaintiff and punitive damages of \$10 million each for gross negligence and reckless disregard for public safety. Claims include negligence, strict liability, conspiracy and fraud, trespass, conversion and failure to warn.

Gulf Oil operated the refinery from 1931 to 1985. According to reports, the underground plume was discovered in 1985 after a "hydrocarbon sheen" was seen seeping into the Great Miami River near the facility. See *LAW360, September 9, 2009*.

### [9] RCRA: EPA Alleges Illegal Overseas Shipment of CRTs

Under an enforcement order reportedly issued by EPA, ZKW Trading must recover 38 pallets of cathode ray tubes (CRTs) that it allegedly tried to illegally ship to Hong Kong and submit a plan

detailing how it will reuse, recycle or discard the CRTs or face a fine of up to \$37,500 for each day of violation. Under RCRA, exporters shipping CRTs to another country for recycling must notify EPA and obtain written consent from the receiving country before making the shipment. The company allegedly attempted to ship nearly 32,000 pounds of CRTs, the video displays in televisions and computer monitors, but Hong Kong customs officials rejected the shipment. See *BNA Daily Environment Report, September 9, 2009*.

### [10] Air: Group Sues EPA over SIP Deadlines

An environmental group has sued EPA over the agency's alleged failure to review State Implementation Plans (SIPs), which detail how the states plan to meet federal clean air standards. [\*Wildearth Guardians v. Jackson, No. N/A \(D. Colo. filed 9/09/09\)\*](#). The Clean Air Act requires EPA to determine within 60 days whether a submitted SIP is complete. Within 12 months of finding that a SIP submission is complete, EPA must act to approve or disapprove the submission. 42 U.S.C. § 7410(c) (2). According to the complaint, EPA has violated the statutory deadline multiple times in Colorado, Montana and Utah. The complaint asks the court to set deadlines for EPA to take final action on those submissions.

## Legislation, Regulations and Guidance

### [11] HAZMAT: DOT Inspector Critical of PHMSA/Industry Relationship

The Inspector General (IG) of the U.S. Department of Transportation (DOT) has issued a [report](#) critical of DOT's Pipeline and Hazardous Materials Safety Administration (PHMSA) and its relationship with industry.



PHMSA oversees the transportation of hazardous materials and issues special permits and approvals that allow a company or individual to transport, package or ship hazardous materials in a manner that varies from its regulations.

According to the report, the agency issues permits and approvals “without exercising its regulatory authority to review applicant’s safety histories and without coordinating with partner safety agencies,” such as the Federal Aviation Administration and the Federal Motor Carrier Safety Administration. The report also notes that PHMSA does not review applicants’ incident and enforcement histories before authorizing special permits and at times has authorized special permits even though review of permit requests do not always demonstrate that applicants will “provide a level of safety equal to the regulations from which they seek relief.” See *BNA Daily Environment Report*, September 11, 2009.

### **[12] Chemical Exposure: EPA Releases Draft Recommendation to Adopt TEFs for Dioxin and Dioxin-Like Compounds**

EPA released a [draft recommendation](#) September 2, 2009, that proposes to adopt toxicity equivalency factors (TEFs) for dioxin and dioxin-like compounds for human health risk assessments. In the draft, EPA proposes to adopt the TEFs for 2,3,7,8 – tetra-chlorodibenzo-p-dioxin (TCDD or dioxin) and 28 dioxin-like compounds that have been accepted by the World Health Organization.

In a 2006 report, an expert panel of the National Academies’ National Research Council recommended that EPA use the internationally accepted approach to comparing the potencies of dioxin-like chemicals. The TEFs would be used as risk assessors to evaluate the human health risks posed by exposures to dioxin and dioxin-like chemicals. EPA will accept comments on the draft proposal through October 2, 2009.

## **Scientific/Technical Items**

### **[13] Chemical Exposure: Study Claims Hanford Construction Workers at Risk of Cancer**

A recent study by researchers at Duke University Medical Center claims that former construction workers at the Hanford Nuclear Reservation near Richland, Washington, have an increased risk of death from cancer. John Dement, *et al.*, “Mortality of Older Construction and Craft Workers Employed at Department of Energy (DOE) Sites,” *American Journal of Industrial Medicine*, September 2009. The researchers looked at 8,976 workers who participated in the building trades screening program at four U.S. Department of Energy sites before 1980. About 31 percent of the workers in the study – 2779 – had done construction work at Hanford. Of 266 Hanford workers who had died by 2004, 94 had cancer. According to the study, deaths from mesothelioma were 11 times more than expected in the general population. The study also found Hanford workers had an elevated risk of multiple myeloma and cancers of the trachea, bronchus and lungs.



**[14] Chemical Exposure: Childhood Lead Exposure May Alter Brain Structure, Study Suggests**

A recent study suggests that childhood lead exposure may result in abnormalities in brain structure that persist into adulthood. CJ Brubaker, *et al.*, "Altered Myelination and Axonal Integrity in Adults with Childhood Lead Exposure: A Diffusion Tensor Imaging Study," *NeuroToxicology*, Vol. 10, 1016 (2009). The researchers used magnetic resonance imaging (MRI) to look for changes in the white matter of the brain in 91 participants, who ranged in age from 20 to 25 who were part of the Cincinnati Lead Study and had been followed since before birth for lead exposure. The study found that exposure to low to moderate levels of lead before birth and as a child can permanently change the brain's structure in a way that may alter if and how it transmits messages. More differences in nerve cells and the thickness of their coverings were found in adults who had higher exposure during development and as children.



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