

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] Air: Ninth Circuit Affirms Injunction Against California's Marine Vessel Rules

The Ninth Circuit Court of Appeals has affirmed a district court decision enjoining California from requiring ships to use cleaner fuels to power onboard diesel engines, ruling that the federal Clean Air Act (CAA) preempts regulations promulgated by Cal/EPA's Air Resources Board. *Pac. Merch. Shipping Ass'n v. Goldstene*, No. 07-16695 (9th Cir. 2/27/08). Beginning January 1, 2007, the state sought to regulate emissions of particulate matter, nitrogen oxides and sulfur oxide from auxiliary engines of ocean-going vessels within 24 miles of California's coast. According to the court, the CAA requires the state to obtain an EPA waiver before enforcing the rules because they are emissions standards that set maximum levels for specific pollutants. The state rules would have required the ships to use low-sulfur diesel instead of bunker fuel in auxiliary engines. The engines are used for generating power for onboard electricity needs and not for propulsion. The court rejected the state's argument that the rules were aimed at fuel use and not at regulating emissions.

[2] CERCLA: Federal Court Denies CERCLA Innocent Landowner Defense Where Developer Exacerbated Existing Contamination

A federal judge in California has rejected a residential developer's attempt to assert the CERCLA "innocent landowner" defense because his actions worsened the contamination on property he was developing even though he had no reason to know that the soil on the property contained high levels of arsenic. *U.S. v. Honeywell Int'l, Inc.*, No. 06-387 (E.D. Cal. 2/22/08). In 1978, the developer purchased undeveloped property with the intent of turning it into a residential subdivision. Over the next four years, he excavated and trenched the land for roads, underground utilities and finished lots. In 1995, EPA tested soil on the property for arsenic contamination because of its proximity to a mound of mine tailings produced by a former gold mine. After the tests found high levels of arsenic, EPA added the property to what would become the Central Eureka Mine CERCLA site. EPA spent \$4.5 million cleaning up the site with a portion of the costs spent removing contaminated soil from the developer's land. In 2006, EPA filed a CERCLA cost recovery action against several companies and former operators of the gold mine. One of the defendants in that action filed a third-party contribution claim against the developer and others.



In his defense, the developer asserted that he was an innocent landowner, citing CERCLA section 107(b)(3), which states: “There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by: ... (3) an act or omission of a third party other than an employee or agent of the defendant....” Rejecting the developer’s argument, the court said, “the threshold question, and the issue that is ultimately fatal to Third-party Defendant’s defense, is whether a third party was the sole cause of the arsenic contamination in the ... subdivision.” According to the court, by excavating the land, the developer worsened the contamination at the site, and his actions constituted “disposal” of hazardous substances under CERCLA.

[3] **Climate Change: Native Alaskan Village Sues Oil and Power Companies over Global Warming**

A native village in northwestern Alaska has sued 24 major oil and energy companies alleging that their greenhouse gas emissions have caused global warming resulting in rising Arctic waters that threaten the village’s existence. [*Native Vill. of Kivalina v. ExxonMobil Corp.*, No. 08-1138 \(N.D. Cal. filed 2/26/08\)](#). The complaint argues that defendants’ greenhouse gas emissions resulted in a public nuisance that has caused damage to the villagers; it also alleges that some defendants conspired to muddle scientific debate on climate change and to mislead the public about the science of global warming. According to news sources, defendants were selected according to the amounts of carbon emissions they produce.

Located about 625 miles northwest of Anchorage, Kivalina is located on a barrier island that borders the Chukchi Sea. In recent years, the complaint asserts, warming temperatures have caused the sea ice that has traditionally protected the village from Arctic ocean storms to form later and melt earlier, leaving the village increasingly vulnerable to coastal storm waves and surges that could destroy it. In an April 2006 report, the U.S. Army Corps of Engineers estimated that relocating the village farther inland would cost between \$95 and \$125 million. A separate Government Accountability Office estimated the costs to be as high as \$400 million. Press reports indicate that several more Alaskan villages may join the lawsuit. *See Greenwire*, February 27, 2008; and *BNA Daily Environment Report*, February 29, 2008.

[4] **Water: Retailer to Pay \$1.3 Million and Implement Compliance Program to Settle Alleged Construction Stormwater Violations**

In a proposed settlement lodged in the U.S. District Court for the District of Delaware, Home Depot has agreed to pay \$1.3 million and implement a nationwide compliance program to settle alleged violations of the Clean Water Act’s construction stormwater regulations. *U.S. v. Home Depot USA Inc.*, No. 08-00115 (D. Del. lodged 2/26/08). The proposed settlement would resolve alleged violations at more than 30 construction sites in 28 states where company stores were being built. Under the agreement, the company would implement a comprehensive program to prevent stormwater pollution at each new store it builds nationwide, including developing improved pollution-prevention plans at each site, increasing site inspections and promptly correcting any problems at its sites. The company must also properly train



its construction managers, contractors and their personnel on federal stormwater requirements, implement a management and internal reporting system to improve operations oversight and appoint a high-level company official to oversee compliance at all company construction sites. The settlement agreement is subject to a 30-day comment period. See *EPA Press Release*, February 26, 2008.

[5] Env't Crime: Georgia Man Sentenced to Prison for Illegal Transportation of Hazardous Waste

A federal judge in Georgia has sentenced a man to 16 months in federal prison for transporting 17 drums of hazardous waste in his truck without a RCRA manifest. *U.S. v. Parker*, No. 07-11 (N.D. Ga. 2/26/08). Court documents show that in May 2004, without a manifest or permit, the man transported the drums, which contained a mix of paint thinner and waste paint including the chemicals xylene, acetone and toluene and had an ignitability temperature of less than 100 degrees Fahrenheit. He also transported the waste to a disposal facility without a manifest. EPA records indicate that the man had previously been ordered to pay a civil fine of \$1.6 million for the cleanup of a warehouse site contaminated with paint-related wastes from Atlanta-area auto body and paint shops. EPA removed more than 2,300 containers of hazardous wastes, contaminants and pollutants from the site. See *DOJ Press Release*, February 26, 2008.

[6] Env't Crime: Florida Man Imprisoned, Company Fined for Mail and Wire Fraud in Water Scam

A federal judge in Florida has sentenced the president of a Florida company to 41 months in prison and ordered him and the company to pay \$1.86 million to some of the victims of a scheme that sold water purification systems by falsely claiming that local drinking water contained toxins which presented a health danger. *U.S. v. All County Water Ass'n, Inc.*, No. 07-60208 (S.D. Fla. 2/21/08). The court also sentenced the company to five years' probation and a \$500,000 fine, and a salesman to five years' probation. According to court documents, defendants falsely told South Florida residents their drinking water was potentially life-threatening and then sold them unnecessary water purification systems, which defendants also financed, installed and maintained. Defendants pleaded guilty to conspiracy, mail and wire fraud and misuse of a government seal. See *BNA Daily Environment Report*, February 26, 2008.

[7] NEPA: California Sues U.S. Forest Service over Resource Management Plan

California Attorney General Jerry Brown (D) has reportedly filed a lawsuit in federal court against the U.S. Forest Service, challenging a management plan adopted by the agency that "ignores a state moratorium on road construction in pristine sections of national forests." The plan would open to road construction more than 500,000 acres in the Angeles, Los Padres, Cleveland, and San Bernardino National Forests. It would also allow oil drilling on more than 52,000 acres in or around Los Padres National Forest. The complaint alleges that the plan violates several federal environmental laws requiring the Forest Service to draft management plans in coordination with state laws and policies. See *San Francisco Chronicle*, February 29, 2008.



Legislation, Regulations and Guidance

[8] Air/Greenhouse Gases: EPA Administrator Signs Formal Denial of California's Request for a Waiver for State's GHG Motor Vehicles Emission Standards

EPA Administrator Stephen Johnson signed the agency's **denial** of California's request for a waiver under the Clean Air Act to implement its own limits on greenhouse gas (GHG) emissions from motor vehicles. According to the notice, which was signed February 29, 2008, and forwarded to the *Federal Register* for publication, climate change is a global problem, and the state's GHG emissions have little impact on the global level of emissions. The California standards would have reduced GHG emissions from vehicles by 30 percent between 2009 and 2016. Twelve other states have adopted the California standards and five other states are in the process of adopting them. California and 18 other states have filed a petition for review in the Ninth Circuit Court of Appeals, challenging EPA's denial of the waiver request. *California v. EPA*, No. 08-70011 (9th Cir. filed 1/2/08). According to press reports, numerous environmental groups have criticized the waiver denial. See *BNA Daily Environment Report*, March 3, 2008.

[9] Ballast Water: DOT Issues Final Rule Requiring Saltwater Flushing of Ballast Tanks in St. Lawrence Seaway

The U.S. Department of Transportation (DOT), through its Saint Lawrence Seaway Development Corp. (SLSMC), has issued a final **rule** requiring all oceangoing ships passing through the U.S. end of the 2,340-mile Great Lakes – St. Lawrence Seaway

after operating outside U.S. or Canadian Economic Exclusion Zones to flush ballast water tanks with saltwater. 73 Fed. Reg. 9,950 (2/25/08). The rule requires vessels to add mid-ocean water to ballast water tanks so that salinity levels reach at least 30 parts per thousand (ppt) and to ensure those levels do not drop below 30 ppt. The rule also requires commercial vessels to agree to comply with the Code of Best Practices for Ballast Water Management published by the Shipping Federation of Canada in 2000. Ballast water is carried aboard ships in tanks for stability. These tanks have been found to carry non-indigenous aquatic species, such as zebra mussels, that create significant problems for native species populating the Great Lakes. According to a recent study by the National Oceanic and Atmospheric Administration and the University of Michigan, flushing ballast water tanks with saltwater reduces the risk of introducing non-indigenous aquatic species.

[10] Hazardous Substances: ASTM to Release Voluntary Standard to Assess Potential for Vapor Intrusion

ASTM International (formerly known as the American Society for Testing and Materials) has announced that it will release a voluntary standard to assess the potential for indoor air contamination due to vapor intrusion from hazardous substances migrating from polluted soil or groundwater. According to ASTM, the new standard is for use by those assessing a parcel during a real estate transaction to determine whether there is potential for contamination and to identify the scope of further investigation, if needed. The ASTM Vapor Intrusion Group, which prepared the standard, was formed in October 2005 to define good commercial and



customary practice for conducting a vapor-intrusion assessment on a property involved in a real estate transaction. ASTM is a voluntary standards development organization accredited by the American National Standards Institute. The standard will be available for purchase on the organization's Web site. See *BNA Daily Environment Report*, March 3, 2008.

Scientific/Technical Items

[11] Chemical Exposure: Toy Retailer Sets Lead Limits on Toys and Other Products

Toy retailer Toys "R" Us has reportedly informed vendors which make toys and other products sold by the company that it will enforce lead-content limits more stringent than the current Consumer Product Safety Commission (CPSC) standard. The company standards would limit lead on the surface of a product to 90 parts per million (ppm) or less and limit the amount of lead within the substrate to 250 ppm or less. The current CPSC limit is 600 ppm, although proposed legislation, if passed, would eventually revise the standard to 100 ppm with the requirement that the agency periodically lower it when scientifically and technically feasible. Under the new Toys "R" Us standard, manufacturers of toys and other goods sold at company stores must also significantly increase their use of third-party laboratories to test "each batch of product imported" to the United States by Toys "R" Us and allow the testing laboratory to determine which products will be sampled. Finally, manufacturers must use lead-screening equipment to audit "all products at their point of origin and at various points in the supply chain." In addition to the lead

standard, the Toys "R" Us notice to vendors requires manufacturers to ensure that all products intended for children are phthalate-free by the end of 2008. The company also announced its intention to eliminate polyvinyl chloride (PVC) and nickel-cadmium batteries from company stores by the end of 2008.

[12] Nanotechnology: European Coalition Issues Report on Explosivity and Flammability of Nanopowders

A coalition of European researchers has issued a report titled *Nano Safe: Safe Production and Use of Nanomaterials*, addressing techniques to determine whether a type of nanoparticle would pose explosivity or flammability risks.

Published by NanoSafe, a European Commission-funded coalition studying the safe production and use of nanomaterials, the report asserts that carbon nanotubes exhibit explosive severities and sensitivities of the same order as those found in coal dust, types of flour and other well-known dusty materials. "Lessons learned" in the report include (i) nanopowders that tend to agglomerate show explosive violence characteristics of the same order as those observed in micropowders of the same substance; (ii) onset temperature of carbon materials strongly depends on the specific surface area of those materials; and (iii) for aluminum, combustion mechanisms of nanosized particles are different from those observed in microsized particles and may lead to potential problems for large-scale industrial storage.



[13] Nanotechnology: Report Claims TRI Authorities Could Be Applied to Nanomaterials

A recent [report](#) by Environmental Law Institute lawyers argues that the Toxics Release Inventory (TRI) under the Emergency Planning and Community-Right-to-Know Act (EPCRA) could be applied to nanomaterials. According to the authors, the key unknown is whether EPA will consider certain nanomaterials to be toxic chemicals under EPCRA and therefore reportable pursuant to the TRI. The TRI statutory requirements are relatively straightforward: the owners and operators of certain facilities are required to complete a toxic chemical release form annually for each listed toxic chemical that was manufactured, processed or otherwise used in a certain quantity during the preceding year. The authors of the report assert that if EPA treats nanomaterials the same way as other materials, making appropriate adjustments to account for the size of the smaller materials, such materials may be subject to TRI requirements. The authors suggest additional research on the question of whether the application of the TRI to nanomaterials should be pursued as a policy priority.



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

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