

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

- [1] **CERCLA:** Federal Court Rules PRP May Not Obtain Double Recovery 1
- [2] **CERCLA/Bankruptcy:** W.R. Grace Agrees to Pay \$250 Million to Settle EPA Cost Recovery Action 1
- [3] **CERCLA:** Groups Sue EPA and DOT over Failure to Issue Financial Assurance Regulations Under CERCLA 2
- [4] **NEPA:** Lawsuit Challenges Livermore Microbe Research 2
- [5] **Water:** Lexington, Kentucky, to Improve Sewer System Under Consent Decree . . 2
- [6] **Toxic Tort:** California State Court Dismisses \$2.5 Million Punitive Damages Award in Fumigant Exposure Case 3
- [7] **Env't'l Crime:** Ship's Pilot Charged with Environmental Crimes over San Francisco Bay Bridge Collision 3

Legislation, Regulations and Guidance

- [8] **Air:** EPA Sets New Ozone NAAQS 3
- [9] **Air:** EPA Issues Final Rule Setting Emission Controls for Locomotives and Ships . . 4
- [10] **Env't'l Crime:** EC Proposes Draft Legislation on Criminalizing Ship Discharges . . . 4

Scientific/Technical Issues

- [11] **Nanotechnology:** Friends of the Earth Issues Report on Nanotechnology in Food and Agriculture. 4
- [12] **Climate Change:** New NRC Report Addresses Impact of Climate Change on Transportation 4

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Litigation and Regulatory Enforcement

[1] CERCLA: Federal Court Rules PRP May Not Obtain Double Recovery

A federal judge in Nevada has ruled that a CERCLA potentially responsible party (PRP) whose insurer paid its cleanup costs cannot seek cost recovery or contribution from other PRPs for those same costs because that would allow the party to profit from the contamination. *Basic Mgmt., Inc. v. U.S., No. 02-884 (D. Nev. 2/25/08)*. The court also ruled that such “double recovery” would violate section 114 of CERCLA, which precludes the recovery of costs that have been recovered “pursuant to any other Federal or State law”

The lawsuit involved three Nevada companies that sued the United States, Atlantic Richfield and others in 2002, alleging that defendants were liable for a portion of the costs of cleaning up volatile organic compounds (VOCs) and other hazardous substances from a site in Henderson, Nevada, known as the BMI Complex. One of the plaintiffs, Basic Management, had once owned the site and argued that the United States, as both the former owner and as a party that arranged for the disposal of hazardous waste, should be held liable under CERCLA sections 107 and 113 for some of the more than \$22 million required to clean up the site. According to the complaint, the U.S. government owned the site from 1941 to 1949 and used it to manufacture magnesium for aircraft construction, bombs and other non-related materials.

Under the terms of two insurance policies issued in 1999 and 2002, American International Specialty Lines Co. agreed to pay for soil and groundwater contamination of the site and paid \$22 million under the policies directly to the vendors who cleaned it up. Agreeing with defendants, the court ruled that Basic Management could not recover any of the \$22 million in cleanup costs already paid by the insurer. The court rejected plaintiff’s argument that the “collateral source rule” should apply to CERCLA. According to the court, that rule was preempted by section 114 of CERCLA.

[2] CERCLA/Bankruptcy: W.R. Grace Agrees to Pay \$250 Million to Settle EPA Cost Recovery Action

W.R. Grace, a global supplier of specialty chemicals, has agreed to pay \$250 million to reimburse EPA for the costs of the investigation and cleanup of asbestos contamination in Libby, Montana. *In re W.R. Grace & Co., No. 01-01139 (Bankr. D. Del. filed 3/11/08)*. The action settles a bankruptcy claim that the federal government filed to recover money for past and future costs to clean up contaminated schools, homes and businesses. The settlement is reportedly the largest ever under CERCLA.

W.R. Grace owned and operated a vermiculite mine and processing facilities in and near Libby from 1963 to 1990. The vermiculite ore was contaminated with asbestos, and both substances have been found in numerous locations in and around Libby. W.R. Grace and 61 affiliated companies filed for bankruptcy in April 2001. In March 2003, EPA filed a



bankruptcy claim against the company. The settlement is subject to court approval. *See EPA Press Release*, March 12, 2008.

[3] CERCLA: Groups Sue EPA and DOT over Failure to Issue Financial Assurance Regulations Under CERCLA

Several environmental groups have reportedly sued EPA and the Department of Transportation (DOT) alleging that the agencies have failed to issue financial assurance regulations for facilities that handle or transport hazardous substances, as required by CERCLA. *Sierra Club v. Johnson*, No. N/A (N.D. Cal. *filed* 3/12/08). The complaint alleges that EPA and DOT should have issued regulations governing financial responsibility requirements for mines, hazardous waste generators, hazardous waste recyclers, metal finishers, wood treatment plants, and other facilities. Section 108 of CERCLA required the agencies to publish by December 1983 priority categories for such regulations, promulgate the regulations beginning in December 1985 and incrementally impose financial responsibility requirements “as quickly as can be reasonably achieved but in no event more than 4 years after the date of promulgation.” According to the complaint, since 1980, significant releases of hazardous substances have occurred at many facilities that have been unable to pay the cleanup costs. *See BNA Daily Environment Report*, March 13, 2008.

[4] NEPA: Lawsuit Challenges Livermore Microbe Research

An anti-nuclear group has reportedly sued the National Nuclear Security Administration (NNSA) of the U.S. Department of Energy seeking to halt operations at a high-security Livermore laboratory

building where scientists are storing and growing deadly microbes to develop new defenses against terrorist attacks. NNSA oversees the Livermore site and a new biology lab known as Biosafety–Level 3 that contains three separate laboratories designed for scientists to work with living microbes that cause bubonic plague, Q fever and tularemia. The lawsuit, filed in federal court by Tri-Valley Cares, charges that NNSA violated NEPA by failing to conduct an environmental assessment before the work began and failing to circulate for public review and comment a finding of “no significant impact” from the lab’s operations. *See San Francisco Chronicle*, March 11, 2008.

[5] Water: Lexington, Kentucky, to Improve Sewer System Under Consent Decree

Kentucky’s Lexington–Fayette Urban County Government has agreed to spend more than \$290 million to improve its sewer system. *U.S. v. Lexington – Fayette Urban County Government, No. 06-00386 (E.D. Ky filed 3/14/08)*. The proposed consent decree, if approved by the court, will resolve an enforcement action, which EPA and the Kentucky Environment and Public Protection Cabinet brought in 2006, charging the local government with multiple Clean Water Act violations by allegedly allowing sewage to discharge into area streams. Under the settlement’s terms, the local government is required to comprehensively overhaul its sewer system over a period of 11 to 13 years. In addition, the metropolitan government must pay a \$525,000 civil penalty and execute two federal and two state environmental projects valued at \$2.73 million. The proposed consent decree is open for public comment until April 14, 2008.



[6] Toxic Tort: California State Court Dismisses \$2.5 Million Punitive Damages Award in Fumigant Exposure Case

A Los Angeles County Superior Court judge has reportedly dismissed a \$2.5 million punitive damages award in a case involving five Nicaraguan field workers who alleged that exposure to a soil fumigant used on a Dole Food Co. banana plantation caused their sterility. *Tellez v. Dole Food Co., Inc.*, No. 312852 (Cal. Super. Ct. 3/7/08). In November 2007, jurors awarded six of 12 plaintiffs \$3.3 million in compensatory damages and then awarded plaintiffs a total of \$2.5 million in punitive damages, finding that the company had acted with malice. The alleged activity occurred between 1966 and 1982.

Dismissing the award, the court said plaintiffs offered “no explanation how any punishment effected by imposition of punitive damages almost 30 years after defendants’ malicious and oppressive conduct would further the goal of ensuring a safer environment in California for residents and non-residents.” The case was the first of several scheduled for trial involving foreign agricultural workers’ claims against multinational corporations over the use of the fumigant. See *BNA Daily Environment Report*, March 17, 2008.

[7] Env’t Crime: Ship’s Pilot Charged with Environmental Crimes over San Francisco Bay Bridge Collision

The pilot of the *Cosco Busan*, the 65,131-ton container ship that collided with the San Francisco Bay Bridge on November 7, 2007, has reportedly been charged with criminal violations of the Clean Water Act (CWA) and the Migratory Bird Treaty Act

(MBTA). Specifically, he was charged with negligently causing the discharge of approximately 58,000 gallons of heavy fuel oil from the ship in violation of the CWA, as amended by the Oil Pollution Act. As a result of the discharge of heavy fuel oil, approximately 2,000 birds died. The maximum penalty for a misdemeanor violation of the CWA is one year in prison and a \$100,000 fine, and the maximum penalty for a misdemeanor violation of the MBTA is six months in prison and a \$15,000 fine. See *DOJ Press Release*, March 17, 2008.

Legislation, Regulations and Guidance

[8] Air: EPA Sets New Ozone NAAQS

EPA has issued a final **rule** setting a new national ambient air quality standard (NAAQS) for ozone. The new standard is 0.075 parts per million (ppm), replacing the existing standard of 0.08 ppm. The new standard applies to both the eight-hour “primary” ozone standard designed to protect public health and the secondary eight-hour ozone standard. After EPA’s Clean Air Scientific Advisory Committee recommended in 2007 that the primary standard be set at a level between 0.060 and 0.070 ppm, EPA proposed a standard of between 0.070 and 0.075 ppm in June 2007. The National Association of Manufacturers immediately criticized the new criteria as too costly, while public health organizations and environmental groups argued that the standard is not protective enough. The rule will be effective 60 days after it is published in the *Federal Register*. See *EPA Press Release*, March 12, 2008; *EPA Daily Environment Report*, March 18, 2008.



[9] Air: EPA Issues Final Rule Setting Emission Controls for Locomotives and Ships

EPA recently announced a final **rule** that sets emission controls for particulate matter and nitrogen oxide emissions from locomotives and marine diesel engines. The rule applies to all line-haul passenger and switch locomotives that operate extensively within the United States, including newly manufactured locomotives and remanufactured locomotives originally made after 1972. It also applies to newly built marine diesel engines with displacements less than 30 liters per cylinder and installed on vessels flagged or registered in the United States.

The rule requires new engine designs starting in 2009, new locomotive engines and new marine diesels to reduce particulate matter and nitrogen oxide emissions. In particular, the rule requires the modification of locomotive engines to reduce emissions when they are built and to decrease motor oil consumption. Marine diesel engines must also undergo modification to reduce emissions when they are built. High-efficiency catalytic emissions-reductions systems are required after 2014 for marine diesels and 2015 for locomotives. The rule will be effective 60 days after it is published in the *Federal Register*.

[10] Env't Crime: EC Proposes Draft Legislation on Criminalizing Ship Discharges

The European Commission (EC) has reportedly proposed draft legislation on criminalizing ship discharge pollution. The draft legislation would require European Union (EU) member states to ensure that ship-source pollution, "if committed with intent, recklessly, or by serious negligence," be subject to criminal, rather than civil, penalties. The proposed draft legislation would take the form

of a directive, once it is agreed to at the EU level by the European Parliament and EU Council. Member states would then have to transpose the directive into their own codes of law as a minimum standard. There has been some controversy in recent years over whether the EC has the power to force EU member states to criminalize certain acts. *See EC Press Release*, March 11, 2008.

Scientific/Technical Issues

[11] Nanotechnology: Friends of the Earth Issues Report on Nanotechnology in Food and Agriculture

Friends of the Earth has released a **report** calling for a moratorium on the use and sale of nanotech materials in foods and food packaging for fear that such substances pose risks to human health and the environment. The report identifies 104 food products that contain nanomaterials or are packaged in containers coated with nanoparticles. The environmental group is urging a moratorium until regulators establish specific safety laws that define nanomaterials as new substances. In addition, the report asks for (i) the size-based definition of nanomaterials to be increased to 300 nm; (ii) transparency in safety assessment and product labeling; (iii) public involvement in the decision-making process; and, (iv) support for sustainable food and farming.

[12] Climate Change: New NRC Report Addresses Impact of Climate Change on Transportation

The National Research Council (NRC) has issued a **report** titled *Potential Impacts of Climate Change on U.S. Transportation*. The report argues that the impact of climate change on infrastructure may be significant, leading to potential coastal flooding of



roads, railways, transit systems, and airport runways. According to the report, the predicted climatic changes likely to affect transportation infrastructure are rising sea levels and increases in very hot days and heat waves, Arctic temperatures, intense precipitation events, and hurricane intensity.

The report recommends that key stakeholders take the following actions to prepare and adapt transportation infrastructure: (i) incorporate climate change into the long-term capital improvement plans, facility designs, maintenance practices, operations, and emergency response plans; (ii) use probabilistic investment analyses that incorporate techniques for trading off the costs of making the infrastructure more robust against the economic costs of failure; (iii) develop a process for better communication among transportation professionals and climate scientists and establish a clearinghouse for transportation-relevant climate change information; (iv) share experiences in responding to climate change, including emergency response and evacuation plans; (v) conduct research on modifying design standards for infrastructure; (vi) encourage development of technology to monitor infrastructure for potential impacts from climate change; (vii) rebuild state and federally funded transportation infrastructure projects in highly valuable locations to higher design standards; (viii) have the DOT develop an interagency working group on adaptation; (ix) have FEMA re-evaluate the National Flood Insurance Program and update flood insurance maps with climate change in mind; and (x) include incentives in federal and state legislation to address and mitigate the impacts of climate change through regional and multi-state efforts.



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Shook, Hardy & Bacon's Environmental Law Practice group.
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please contact Dave Erickson (derickson@shb.com; 816-474-6550) or
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We welcome any leads on new developments in environmental law or toxic tort litigation.

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