

Environmental & Chemical Update

AIR • CLIMATE CHANGE • NANOTECHNOLOGY • RENEWABLE FUELS
SUSTAINABILITY • TOXIC TORT • WASTE • WATER

Issue 230 • April 4, 2008

Litigation and Regulatory Enforcement

- [1] **Water:** Federal Court Rules No Contribution Claims Under CWA 1
- [2] **CERCLA:** Federal Law Does Not Preempt State Time Bar on Lawsuits Against Dissolved Corporations 1
- [3] **CERCLA:** No Liability for Rail Inspector as Owner/Operator Under CERCLA 2
- [4] **State CERCLA:** Massachusetts Supreme Judicial Court Dismisses Claims Against Parent Company; No Ownership Interest When Hazardous Release Occurred . . 2
- [5] **State Hazardous Waste:** Vermont Supreme Court Allows Plaintiff to Recover Fees for Monitoring Cleanup 2
- [6] **Air:** EPA Sued for Failure to Approve Power Plant Permit 3
- [7] **Air:** Groups Seek Review of EPA San Joaquin Valley Attainment Determination . 3

Legislation, Regulations and Guidance

- [8] **Air:** EPA Issues Final Emission Standards for VOCs Used in Aerosol Spray Paints. 3
- [9] **Air:** EPA Amends Emission Standards for Hazardous Waste Combustors. 4
- [10] **Water/Climate Change:** EPA Seeks Public Comments on National Water Strategy for Response to Climate Change 4

Scientific/Technical Items

- [11] **Air/Greenhouse Gases:** Report Claims GHG Emissions from Power Plants Rising. 4
- [12] **Climate Change:** Study Claims Black Carbon Has Greater Impact on Global Warming. 5
- [13] **CERCLA:** EPA Report Says Agency Can Recover More CERCLA Costs with Better Records. 5

Shook,
Hardy &
Bacon_{LLP}

www.shb.com

Environmental & Chemical Update

AIR • CLIMATE CHANGE • NANOTECHNOLOGY • RENEWABLE FUELS
SUSTAINABILITY • TOXIC TORT • WASTE • WATER

Litigation and Regulatory Enforcement

[1] Water: Federal Court Rules No Contribution Claims Under CWA

A federal magistrate judge in Virginia has ruled that the Clean Water Act (CWA) has no provision that would allow for contribution claims. *U.S. v. Savoy Senior Hous. Corp., No. 06-031 (W.D. Va. 3/6/08)*. In 2006, the federal government sued the Savoy Senior Housing Corp. and its president, alleging that their failed development of a retirement community caused dredged soil, fill and other pollutants to be discharged into streams and rivers in violation of section 301 of the CWA. The government sought civil penalties and injunctive relief. In 2008, one of the defendants sought leave to file a second third-party complaint against the property's current owner and several other area property owners seeking contribution under Virginia state law based on the alleged CWA violations. The court denied defendant's motion because it was filed too late and the claims lacked merit. The court found no right of contribution for CWA claims regardless of whether the claims are asserted under the CWA, federal common law or state law.

[2] CERCLA: Federal Law Does Not Preempt State Time Bar on Lawsuits Against Dissolved Corporations

A federal judge in Indiana has ruled that a party bringing a CERCLA cost recovery action against several insurers whose policyholder is a

dissolved Indiana corporation cannot pursue the action because the claims are barred by the state's two-year statute of limitations on claims against voluntarily dissolved corporations. *Sanyo N. Am. Corp. v. Absocold Corp., No. 06-405 (S.D. Ind. 3/6/08)*. The court specifically rejected plaintiff's argument that CERCLA preempts state statutes setting limitations periods on claims against dissolved companies, citing *Citizen Electric Corp. v. Bituminous Fire & Marine Insurance Co.*, 68 F.3d 1016 (7th Cir. 1995).

In 1986, plaintiff purchased a 110-acre industrial site in Richmond, Indiana, from Design & Manufacturing, a manufacturer of dishwashers and porcelain fixtures. In 1990, Design & Manufacturing voluntarily dissolved itself under Indiana law. In 2006, after spending more than \$1 million cleaning up contamination on the property, plaintiff filed claims under CERCLA and Indiana state law against a number of companies. Among plaintiff's CERCLA section 107 claims was one against Old Republic Insurance Co. and others that had issued policies to Design & Manufacturing while the company was in business, alleging they were liable for part of the property's cleanup based on the insurance coverage.

In response, the insurance company argued that plaintiff's claims were time barred under Indiana Code Section 23-1-45-7, which bars claims filed more than two years after a corporation voluntarily dissolves. The court agreed, stating "nothing about



CERCLA or the policies that underlie CERCLA override a state's right to determine the capacity of a corporation to be sued."

[3] CERCLA: No Liability for Rail Inspector as Owner/Operator Under CERCLA

A federal judge in West Virginia has ruled that a rail inspector, hired by a company to inspect a railcar, has no liability under CERCLA for a railcar leak because the inspection company had no authority to prevent the spill when it occurred. *Veolia Es Special Servs., Inc. v. Techsol Chem. Co., No. 07-0153 (S.D. W. Va. 3/14/08)*. The leak occurred in October 2004, when a railcar released 22,000 gallons of coal-tar light oil as Techsol Chemical Co. employees tried to transfer the light oil from the railcar to a tanker truck. Techsol retained a contractor to clean up the spill, and the contractor ultimately sued several parties for its cleanup costs, including Marathon Oil, which owned the spilled oil. Marathon filed a cross-claim against the rail inspection company alleging that, because it had authority over operations related to the spill, it could have prevented it. The court dismissed the cross-claim, holding that, because the factual allegations did not support the assertion that the railcar inspection company had authority to prevent the spill when it occurred, Marathon would be unable to show that the company was an "owner or operator" under CERCLA.

[4] State CERCLA: Massachusetts Supreme Judicial Court Dismisses Claims Against Parent Company; No Ownership Interest When Hazardous Release Occurred

The Massachusetts Supreme Judicial Court has ruled that a parent company is liable for a subsidiary's release of hazardous substances under the state's version of CERCLA only if the parent-subsidiary

relationship existed at the time of the release.

Scott v. NG US 1, Inc., No. 09913 (Mass. 3/7/08)

The court affirmed an appellate court decision which granted the defendant's summary judgment motion, ruling that the parent of a gas company that released coal tar and other contaminants from a manufacturing facility in the late 1800s could not be liable for cleanup costs related to the release under state law because the parent had no connection to the gas company or its facility's operations until 1931 when defendant began purchasing the subsidiary's stock. The court framed the issue as "not whether the corporate veil could be pierced at some point after 1931, but rather whether it should be pierced during the time of the release or threatened release...."

[5] State Hazardous Waste: Vermont Supreme Court Allows Plaintiff to Recover Fees for Monitoring Cleanup

The Vermont Supreme Court has ruled that a party that sues another for contribution or indemnification under the state's hazardous waste law may recover attorney's and consultant's fees incurred to monitor a site's cleanup. *Windsor Sch. Dist. v. Vermont, No. 06-082 (Vt. 3/7/08)*. The court rejected the state's argument that costs paid to attorneys and consultants after a party relinquishes principal responsibility for a cleanup could not be recovered through contribution because such costs were not closely related to the cleanup. Instead, the court determined that so long as the party was potentially liable for some of the site's cleanup under the Vermont Waste Management Act and incurred expenses to protect itself from additional future liability under that law, such costs were recoverable. According to the court, the state's hazardous waste statute preserved state common



law remedies; thus, when a party becomes involved in litigation with a third party through the wrongful acts of another, the party can recover those costs that it incurs to protect its interests. In this case, the court found that plaintiff had played no role in contaminating the site but was liable only because it owned the property.

[6] Air: EPA Sued for Failure to Approve Power Plant Permit

EPA has been sued by the Navajo Nation and a company that applied for a permit to construct a power plant on land owned by the Nation for failure to approve a permit to construct a 1500-megawatt power plant known as the Desert Rock Energy Project. *Desert Rock Energy Co., LLC v. EPA, No. N/A (S.D. Tex. filed 3/18/08)*. The lawsuit, a citizen suit to enforce the Clean Air Act (CAA), alleges a failure to perform a mandatory duty under section 304(a). Specifically, plaintiffs allege that the initial permit application was submitted to EPA in February 2004. EPA then notified the applicant that the application was complete by letter dated May 21, 2004. The complaint further alleges that section 165(c) of the CAA required the agency to take final action on the permit within one year of receiving a completed application. Plaintiffs seek (i) an order requiring EPA to immediately grant or deny the permit; (ii) an order requiring the agency to take other actions to remedy, mitigate and offset harm to plaintiffs caused by EPA's disregard of its statutory duty; and (iii) attorney's fees and costs. The complaint alleges that plaintiffs have invested more than \$20 million in the project and that they have lost approximately \$5 million per month in direct governmental revenue every month the project has been delayed.

[7] Air: Groups Seek Review of EPA San Joaquin Valley Attainment Determination

Several environmental groups have filed a petition for review challenging an EPA determination that California's San Joaquin Valley is in attainment with the federal standard for coarse particulates. *Latino Issues Forum v. EPA*, No. N/A (9th Cir. filed 3/25/08). At issue is EPA's decision to exclude certain exceedances of the PM-10 standard recorded in the region during 2006. In a notice published March 19, 2008, EPA denied the group's petition which asked the agency to reconsider an October 30, 2006, determination. *73 Fed. Reg.* 14,687. The EPA notice affirmed the determination that the San Joaquin Valley had attained the PM-10 standard and that the exceedances resulted from exceptional events and should not be considered violations. EPA's Exceptional Events Rule allows exceedances due to such events to be excluded in determining attainment. EPA contends that high winds caused PM-10 spikes and construction near one monitoring station caused PM-10 exceedances. Petitioners dispute the exceptional events finding.

Legislation, Regulations and Guidance

[8] Air: EPA Issues Final Emission Standards for VOCs Used in Aerosol Spray Paints

EPA has issued a direct final rule that sets national emission standards for volatile organic compounds (VOCs) used in aerosol spray paints. *73 Fed. Reg.* 15,604 (3/24/08). The emissions limits are expressed in terms of the amount of ozone generated from the VOC ingredients per unit of coating material. The new federal standard is modeled after state rules issued by Cal/EPA's Air Resources Board that took effect in 1996.



The rule affects manufacturers of lacquers, varnishes, enamels, epoxy coatings, oil and alkyd coatings, plastisols, polyurethane, primers, shellacs, stains, and water-repellant coatings. The rule also applies to aerosol coating processors, can-filling operations, packaging services, and wholesale distributors. The final rule took effect March 24, 2008, with a compliance deadline of January 1, 2009. For manufacturers certifying that they have not previously produced aerosol coatings in compliance with the California rules, EPA may grant a two-year compliance extension. The rule also delays until January 1, 2010, the compliance deadline for companies required to register pesticide products under FIFRA.

[9] Air: EPA Amends Emission Standards for Hazardous Waste Combustors

EPA has issued a final [rule](#) amending the emission standards for hazardous air pollutants generated by hazardous waste combustors. The rule clarifies several compliance and monitoring provisions from an October 2005 rulemaking and revises timelines to reflect the correct dates and time frames associated with compliance activities for hazardous waste emissions sources. The rule also lessens the burden on sources that are required to perform a onetime dioxin/furan test and waives the performance test requirement for sources subject to hazardous waste thermal concentration limits if the sources feed low levels of metals or chlorine into the hazardous waste. Other amendments (i) clarify the procedures to calculate rolling averages for the metals and chlorine standards, (ii) explain the mercury standard for new and existing cement kilns, and (iii) revise the “notice of intent to comply” provision for new units. The amendments, which take effect when they are published in the

Federal Register, do not change the October 14, 2008, compliance date established by the October 2005 rule.

[10] Water/Climate Change: EPA Seeks Public Comments on National Water Strategy for Response to Climate Change

EPA is seeking comments on a public review draft of the [National Water Program Strategy: Response to Climate Change](#). The draft represents the agency’s initial effort at identifying and responding to the potential impacts of climate change for clean water and drinking water programs. The report lists several possible effects of climate change, including: (i) the movement of shorelines as the result of rising sea levels; (ii) changes in ocean chemistry that could alter aquatic habitat and fisheries; (iii) warming water temperatures that could change contaminant concentrations in water and alter aquatic system uses; (iv) new patterns of rainfall and snowfall that could alter drinking water supplies and lead to changes in pollution levels in aquatic systems; and, (v) more intense storms that could threaten water infrastructure and increase polluted storm water runoff. The draft proposes goals and methods for addressing each impact. Comments on the draft are due by May 27, 2008.

Scientific/Technical Items

[11] Air/Greenhouse Gases: Report Claims GHG Emissions from Power Plants Rising

A recent Environmental Integrity Project (EIP) [report](#) claims that greenhouse gas (GHG) emissions from power plants have increased significantly since 1998. The report attributes the increase in emissions to both new coal-powered electricity plants and increased electricity demand. According to the report, power plant emissions have increased by 5.9



percent since 2002 and by 11.7 percent since 1997. The report also ascribes some increase in GHG emissions to a decline in efficiency in some of the older power plants. The report claims that Texas, Georgia, Arizona, California, and Pennsylvania had the largest emissions growth measured in tons of carbon dioxide emitted. Washington, D.C., Rhode Island and South Dakota had the lowest emissions increases, according to the report. The EIP is a nonprofit advocacy organization formed in 2002 by former Environmental Protection Agency enforcement lawyers.

[12] Climate Change: Study Claims Black Carbon Has Greater Impact on Global Warming

A recent study by researchers at the University of California, San Diego and the University of Iowa claims that black carbon, or soot, has a larger effect on global warming and climate change than previously believed. V. Ramanathan, et al., "Global and Regional Climate Changes Due to Black Carbon," *Nature Geoscience*, March 23, 2008. The study asserts that the U.N. Intergovernmental Panel on Climate Change underestimated the impact of black carbon on climate change. Most black carbon emissions come from diesel engines and wood or coal burning. The study analyzed the changes in global black carbon concentrations using data gathered by unmanned aircraft that measured concentrations at varying altitudes. According to the study, atmospheric brown clouds, or brown haze, can heat the lower atmosphere by as much as 50 percent.

[13] CERCLA: EPA Report Says Agency Can Recover More CERCLA Costs with Better Records

EPA's Office of Inspector General (IG) finds, in a recent [report](#), that the agency insufficiently recovers its costs from CERCLA potentially responsible parties and that better record-keeping could increase cost recovery by nearly 50 percent. The report concluded that while PRPs generally paid the amount they were billed, problems with EPA's billing system and other factors hindered the agency's efforts at full cost recovery. IG identified numerous problems, including: (i) the agency's automated data cost recovery system does not include enough information to determine cost recovery efficiency or track corrections; (ii) EPA has not implemented cost recovery performance measures; (iii) EPA reporting does not address dollars actually recovered compared with dollars potentially recoverable; (iv) EPA does not track the timeliness of billings; (v) some EPA regions use billing practices that impede cost recovery; (vi) regional billing and collection practices are not consistent; and (vii) errors have been made in assigning costs to the correct site. Responding to the report, EPA has indicated that it will issue new guidance for reviewing CERCLA site costs that will require each region to track and document unbilled and/or incorrect site costs.



Environmental & Chemical Update

AIR • CLIMATE CHANGE • NANOTECHNOLOGY • RENEWABLE FUELS
SUSTAINABILITY • TOXIC TORT • WASTE • WATER

This Update is distributed by
Shook, Hardy & Bacon's Environmental Law Practice group.
If you have questions about this issue or would like to receive supporting documentation,
please contact Dave Erickson (derickson@shb.com; 816-474-6550) or
Jim Neet (jneet@shb.com; 816-474-6550).
We welcome any leads on new developments in environmental law or toxic tort litigation.

Geneva, Switzerland

Houston, Texas

Kansas City, Missouri

London, United Kingdom

Miami, Florida

Orange County, California

San Francisco, California

Tampa, Florida

Washington, D.C.

Shook,
Hardy &
Bacon LLP.®

