

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] Land Use: Supreme Court Finds States' Authority to Control Extraordinary Construction Projects Along River Overlaps

The U.S. Supreme Court has ruled that New Jersey and Delaware have “overlapping authority” to control extraordinary construction projects along the Delaware River based on a law that gives Delaware control of the land up to New Jersey’s low-water mark. [*New Jersey v. Delaware, No. 134 \(U.S. 3/31/08\)*](#).

New Jersey filed a lawsuit against Delaware in 2005 over British Petroleum’s plans to build a liquefied natural gas (LNG) plant on New Jersey’s side of the Delaware River. Delaware refused to approve construction of a 2,000-foot pier that would serve the facility and extend beyond the low-water mark into its territory, claiming that it would be a safety hazard and came within the state’s authority to manage its shoreline. New Jersey argued that it had exclusive jurisdiction over projects on its shoreline under a 1905 compact between the states.

In a 6-2 decision, the Court held that Delaware has regulatory authority over the pier because the LNG project “goes well beyond the ordinary or usual” projects contemplated by the 1905 compact. According to the Court, “New Jersey and Delaware have overlapping authority to regulate riparian

structures and operations of extraordinary character extending outshore of New Jersey’s domain into territory over which Delaware is sovereign.”

[2] Toxic Torts: Federal Court Refuses to Certify Class Due to Lack of Evidence on Geographic Scope

A federal judge in Kentucky has refused to certify a class of people owning or residing in homes within a two-mile radius of a coal-burning power plant, finding the named plaintiffs’ failure to produce evidence to support the specified geographic boundaries fatal to class definition requirements under Rule 23 of the Federal Rules of Civil Procedure. [*Burkhead v. Louisville Gas & Elec. Co., No 06-282 \(W.D. Ky. 3/21/08\)*](#).

According to the court, “Plaintiffs bear the burden of producing something more than their wholly subjective belief that their property is affected by Defendants’ emissions and that all those in a two-mile radius must be similarly affected.” In 2006, named plaintiffs and 70 others living near a Louisville Gas & Electric Co. power plant filed the lawsuit against the electric utility, alleging that emissions from the coal-powered plant left pollutant-containing ashes and other particulate matter on their properties.

The complaint contained numerous claims under Kentucky law, including nuisance, negligence and strict liability and a claim that the plants’ emissions created bad odors. Plaintiffs sought monetary damages and an injunction ordering the utility to



reduce the plants' emissions. The residents moved to certify a property damages class consisting of all individuals owning or residing in single-family residences within a two-mile radius of the plant. Refusing to certify the class, the court said that while plaintiffs had put forth evidence supporting their claim that some sort of fallout on some properties near the plant had occurred, no scientific or other objective criteria supported the proposed two-mile demarcation.

[3] Hazardous Substance Cleanup: U.S. Government Ordered to Indemnify Parties Incurring Cleanup Costs at Former Military Facilities

The U.S. Federal Claims Court has ruled that section 330 of the National Defense Authorization Act (NDAA) provides indemnity rights to parties incurring hazardous substance cleanup costs on former military property. *Richmond Am. Homes of Colorado, Inc. v. U.S.*, No. 05-280C (Fed. Cl. 3/11/08). In a previous decision, the same judge imposed indemnity liability against the government for money that four home developers spent complying with two administrative orders the Colorado Department of Health issued regarding the former U.S. Air Force base near Denver. *Richmond Am. Homes of Colorado, Inc. v. U.S.*, No. 05-280C (Fed. Cl. 2/22/07). In this case, the court ordered the government to reimburse the same homebuilders \$6.5 million in damages related to the cleanup of extensive asbestos contamination at the base.

Section 330 of the NDAA requires the U.S. Secretary of Defense to indemnify persons who acquire former military property for any action arising out any claim for personal injury or property damage that results from "the release or threatened

release of any hazardous substance or pollutant or contaminant as a result of [Defense Department] activities at any installation (or portion thereof) that is closed pursuant to a base closure law." Plaintiffs had acquired their properties as "finished lots" from the Lowry Redevelopment Authority, which purchased property on the former Lowry Airforce Base to improve and convey it to various homebuilders.

The court allowed plaintiffs to recover direct costs they spent investigating, testing for and cleaning up their properties, as well as money spent addressing homeowner concerns about the contamination. Additionally, the court held that plaintiffs could recover "unabsorbed overhead" costs incurred during the delay in their construction work caused by the cleanup efforts. The court denied recovery for attorney's fees and "lost profits."

[4] EU Hazardous Substances Regulation: European Court of Justice Rules EC Erred in Exempting deca-BDE in Electronics Directive

The European Court of Justice has ruled that the European Commission (EC) erred in exempting the brominated flame retardant deca-BDE, from Directive 2002/95/EC on the Restriction of Hazardous Substances in Electronics. *Denmark v. Comm'n*, No. C-14/06 (Eur. Ct. of J., 4/1/08). In its decision, the court gave the EC until June 30, 2008, to cancel the deca-brominated diphenyl ether (deca-BDE) exemption.

In 2005, the EC exempted deca-BDE from the directive, which banned lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls (PBB), and polybrominated diphenyl ether (PBDE) from electrical and electronic equipment placed



on the EU market after July 1, 2006. The European Parliament, supported by a number of EU member states, applied to the European Court of Justice in 2006 seeking annulment of the exemption. Ruling in the applicants' favor, the court found that the EC violated Directive 2002/95 Articles 5(1) and 4(2), which taken together allow for exemptions for applications of substances and not for any substance *per se*. The court left open the possibility that the EC could reissue the exemption after correcting the "procedural errors" that led to the annulment decision.

[5] Water: NPDES Permit Remanded for Inclusion of Compliance Schedule

EPA's Environmental Appeals Board (EAB) has denied in part the District of Columbia Water and Sewer Authority's (Authority) appeal of an NPDES discharge permit, but remanded it to the EPA for the inclusion of a compliance schedule, which was required by local law. *In re: D.C. Water & Sewer Auth., Appeal No. 05-02 (E.A.B. 3/19/08)*. In 2005, EPA Region III issued a revised NPDES permit for the Blue Plains Wastewater Treatment Plant without a compliance schedule for implementation of the District's long-term control plan (LTCP) to control combined sewer overflow discharges. The Authority appealed the permit on the ground that EPA erred in not including a compliance schedule.

In April 2007, EPA issued a modified permit, again without a compliance schedule. Additionally, while the new permit required significant nitrogen reductions, it did not outline the timeframe within which the Authority would have to bring the nitrogen levels in its effluent down to the permitted levels. The Authority then appealed the modified permit both because it lacked a compli-

ance schedule for the LTCP's implementation and because it lacked a compliance schedule for implementation of nitrogen reductions. A number of environmental groups also appealed the permit. The Authority argued that the District of Columbia's own water quality regulations require that a compliance schedule must be included in a discharge permit.

Agreeing with the Authority's argument, the EAB ruled that where a state or local regulation, such as the District's, requires the inclusion of a compliance schedule, EPA must include one. The EAB remanded the permit to EPA with instructions to add compliance schedules to the permit for both the LTCP and the nitrogen reductions. The EAB rejected the Authority's argument that calculations EPA used to derive the nitrogen limit were incorrect; but agreed with the Authority that some language in the final permit, which had not been included in the previously issued draft permit and for which the Region failed to provide adequate notice and opportunity for comment, had to be removed.

[6] Air/Greenhouse Gas: States/Groups Seek EPA's Compliance with Supreme Court Ruling on GHG Emissions

Seventeen states, 11 environmental groups and others have reportedly filed a writ of mandamus in the D.C. Circuit Court of Appeals seeking an order giving the EPA 60 days to determine whether greenhouse gas (GHG) emissions endanger public health or welfare. *Massachusetts v. EPA*, No. 03-1361 (D.C. Cir. filed 4/2/08). The U.S. Supreme Court ruled on April 2, 2007, that EPA has authority under the Clean Air Act to regulate GHG emissions from new motor vehicles. *Massachusetts v. EPA*, No. 05-1120 (U.S. 4/2/07). The petitioners ask the court to order



EPA to comply with the Supreme Court's decision. Other states joining the petition are Arizona, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Minnesota, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. Other petitioners include the District of Columbia, New York City, Baltimore and Earth Justice on behalf of the Sierra Club, the Center for Biological Diversity, the Center for Food Safety, the Conservation Law Foundation, Environmental Advocates, the Environmental Defense Fund, Friends of Earth, Greenpeace, the International Center of Technological Assessment, NRDC, and the U.S. Public Interest Research Group. *See BNA Daily Environment Report* and *Reuters*, April 2, 2008.

[7] RCRA: Groups Challenge RCRA Rule That Would Exclude Waste Gasified at Petroleum Plants

According to a news source, several environmental and industry groups have filed petitions for review challenging an EPA final rule that would exclude hazardous waste, which is gasified at petroleum plants to generate power, from being defined as solid waste under RCRA. *Sierra Club v. EPA*, No. 08-1144 (D.C. Cir. filed 4/1/08). The exemption was contained in the final rule on hazardous secondary materials codified at 40 C.F.R. parts 260 and 261. The rule was designed to help petroleum refineries reduce waste and more fully realize the energy potential in each barrel of oil by allowing the gasification of materials that would have previously been considered waste, according to EPA. *See BNA Daily Environment Report*, April 3, 2008.

[8] Env't'l Crime: Shipping Company to Pay \$1.7 Million for Ocean Dumping and Falsifying Records

An international shipping company has reportedly pleaded guilty to obstructing justice and falsifying records to conceal improper discharges of oil-contaminated waste from two of its vessels. *U.S. v. PACCSHIP (UK) LTD.*, No. 08-00016 (E.D.N.C. 4/4/08). The Department of Justice brought the charges after investigators at a port in Morehead City, North Carolina, found evidence that crew members improperly handled and disposed of the ship's oil-contaminated waste and falsified records to conceal those activities. Crew members also lied to inspectors. The company agreed to pay a \$1.7 million criminal fine and was sentenced to four years' probation. It will also make a \$400,000 community service payment. *See BNA Daily Environment Report*, April 7, 2008.

Legislation, Regulations and Guidance

[9] Workplace Lead Standards: EPA Releases New Lead-Safe Work Practice Standards for Contractors

EPA has submitted to the *Federal Register* a final **rule** setting lead-safe work practice standards for contractors to reduce potential exposure to dangerous levels of lead during renovation and repair activities. The rule, which takes effect in April 2010, applies to residences inhabited by a child younger than age 6 or a pregnant woman and includes common areas, such as apartment building exteriors or other multi-unit buildings. It also applies to "child-occupied" facilities constructed before 1978 that are buildings, or portions of buildings, visited at least two different days within any



week by the same child younger than 6. The rule requires trained contractors to take several actions, including posting warning signs, restricting occupants from work areas, containing work areas to prevent dust and debris from spreading, conducting a thorough cleanup, and verifying that the cleanup was effective.

[10] Wetlands: EPA/Corps Issue Final Rule on Compensatory Mitigation for Losses of Aquatic Resources

The EPA and the U.S. Army Corps of Engineers (Corps) released a joint final [rule](#) on March 31, 2008, that sets standards under section 404 of the Clean Water Act for mitigating the loss of wetlands and associated aquatic resources. The rule also expands public participation in compensatory mitigation decision-making and increases the efficiency and predictability of the mitigation review process, according to the agencies. The rule emphasizes a “watershed approach” under which states and localities are encouraged to use watershed plans to evaluate the utility of wetlands mitigation projects, when that approach is “practicable and appropriate” as determined by the Corps.

Under the rule, all compensation projects must have mitigation plans that include the same components, including (i) objectives; (ii) site selection criteria; (iii) site protection instruments, such as conservation easements; (iv) a mitigation work plan; and (v) a maintenance plan. The rule also encourages the expanded use of “mitigation banking,” where a developer can obtain a permit to discharge if the developer agrees to invest in wetland creation or enhancement elsewhere. Several groups have already criticized the rule, which will be effective 60 days after it is published in the *Federal Register*. See *Seattle Post-Intelligencer*, March 31, 2008.

[11] Water: EPA Proposes Aircraft Drinking Water Rule

EPA has proposed an aircraft drinking water [rule](#) that would tailor existing health-based drinking water regulations to fit the unique characteristics of aircraft public water systems. The proposed rule will require specific types of monitoring, disinfection and public notification that EPA believes are appropriate for the airline industry. In testing that EPA conducted in 2004, the agency found that 15 percent of aircraft tested positive for total coliform bacteria and that air carriers were not meeting existing drinking water regulations, primarily because those regulations were designed for stationary public water systems. The proposed rule will affect aircraft that convey passengers in intra-state commerce and are classified as public water systems that board only finished water. Aircraft that do not provide water for human consumption or those with water systems that do not regularly serve an average of at least 20 individuals daily will not be covered by the proposed rule. EPA will accept comments for 90 days after the proposed rule is published in the *Federal Register*.

[12] HazMat: DOT Proposes Rule on Tank Car Safety

The U.S. Department of Transportation’s (DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA) has issued a proposed [rule](#) designed to improve the crash worthiness protection of railroad tank cars designed to transport poison inhalation materials (PIH). *73 Fed. Reg.* 17,818 (4/1/08). The proposed rule would (i) enhance tank-car performance standards for head and shell impacts; (ii) place operational restrictions on trains hauling tank cars containing PIH; (iii) place interim operational restrictions on trains



hauling tank cars not meeting the enhanced performance standards; and (iv) provide an allowance to increase the gross weight of tank cars that meet enhanced tank-head and shell puncture-resistance systems.

The proposed rule comes in the wake of several rail tank-car accidents in which the car was breached and product lost on the ground or into the atmosphere. According to the agency, accidents involving materials that are poisonous or toxic by inhalation are of particular concern. The Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005, which added section 20155 to the Hazardous Materials Transportation Act, required the Federal Railroad Administration (FRA) to (i) validate a predictive model quantifying the relevant dynamic forces acting on railroad tank cars under accident conditions; and, (ii) initiate a rulemaking to develop and implement appropriate design standards for pressurized tank cars. The proposed rule is the result of cooperative efforts by PHMSA and FRA to comply with the statutory requirements.

Scientific/Technical Items

[13] Nanotechnology: Study Based on International Survey Concludes Most Workplaces Protect Workers from Nanomaterials

A recent study by researchers at the Center for Nanotechnology in Society at the University of California, Santa Barbara, has concluded that most workplaces using nanomaterials reported either implementing a nano-specific environmental, health and safety (EHS) program or provide training for employees on the safe handling of nanomaterials. Joseph A. Conti, et al., "Health and Safety Practices in the Nanomaterials Workplace: Results from an International Study," *Environmental Science &*

Technology, April 1, 2008. The research project surveyed 82 companies located in Asia, Australia, Europe, and North America. Seventy percent (57 companies) of the firms and laboratories surveyed either had a nano-specific EHS program or trained their workers to handle nanomaterials safely. Fume hoods were the most common type of engineering control used in the EHP programs, according to the study. Twenty-five companies also reported monitoring the workplace to determine whether workers were exposed to nanoparticles.



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