

Environmental & Chemical Update

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Shook,
Hardy &
Bacon_{L.L.P.}

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Litigation and Regulatory Enforcement

[1] CERCLA: Federal Court Rules Ongoing Cleanup Bars Citizen Suit

A federal judge in Colorado has ruled that an ongoing CERCLA cleanup at a site bars a private party from seeking civil penalties for hazardous waste violations under RCRA and the Clean Water Act (CWA). [Wason Ranch Corp. v. Hecla Mining Co., No. 07-267 \(D. Colo. 3/31/08\)](#). According to the court, such an action is barred by section 113(h) of CERCLA as a “challenge” to an ongoing EPA cleanup. In 1999, a group of residents near Creede, Colorado, formed a committee to clean up the Willow Creek Watershed, which was contaminated with mining waste. EPA began investigating the area in 2003, and, in March 2008, EPA proposed putting part of the watershed on CERCLA’s National Priorities List.

In 2007, the owner of a nearby guest ranch sued Hecla Mining Co. and several other current or former mining operators alleging that discharges of heavy metals and other waste at various sites in the watershed endangered the environment and public health. Plaintiff alleged RCRA and CWA violations and sought an injunction as well as civil penalties for the alleged RCRA violations. Defendants moved to dismiss, citing section 113(h) of CERCLA, which bars challenges to ongoing removal or remedial actions being carried out under CERCLA. Granting

the motion, the court ruled that allowing plaintiffs claims to continue would require the court to determine whether defendants are liable for contamination under RCRA and the CWA and would interfere with EPA’s remedial action, which will address whether defendants are potentially liable under CERCLA.

[2] RCRA: EPA’s Duty to Review State Solid Waste Management Programs Is Discretionary

A federal judge in Oklahoma has dismissed claims filed against EPA under RCRA for failure to state a claim, finding that the agency did not breach a nondiscretionary duty. [Stephens v. City of Anadarko, No. 06-1357 \(W.D. Okla. 3/28/08\)](#). The trustee of a family trust that owned property in Caddo County sued EPA under RCRA’s citizen suit provisions alleging that various items such as used tires and discarded metal were improperly disposed of on the trust property during the time it was leased to the City of Anadarko for use as a municipal landfill. The plaintiff alleged that (i) the improper dumping turned a portion of the property into an illegal open dump, and (ii) the city and others failed to carry out various capping and other closing and post-closing requirements for the site in violation of RCRA.

EPA argued that the agency should be dismissed from the lawsuit because the site was operating under permits and regulations issued under the Oklahoma Solid Waste Management Plan and that



the agency with enforcement authority over the plan was the Oklahoma Department of Environmental Quality. Plaintiff countered that EPA had a mandatory duty under RCRA section 4007 to periodically review the state's Solid Waste Management Plan and had failed to do so. The court rejected plaintiff's argument, holding that EPA's review duties related to a state's solid waste programs were discretionary and could not be subject to a RCRA citizen suit claim. According to the court, section 4007's language that state programs be reviewed "from time to time" does not identify a readily-ascertainable deadline nor does it impose on EPA a mandatory duty of review.

[3] CERCLA: Federal Court Refuses to Void Settlement Agreement When Cleanup Costs Exceed Expectations

A federal judge in New York has ruled that unanticipated CERCLA cleanup costs do not constitute a sufficient basis to void a settlement agreement. *Consol. Edison Co. v. Fyn Paint & Lacquer Co.*, No. 00-3764 (E.D.N.Y. 3/28/08). In 2000, Con Ed sued defendant alleging that volatile organic compounds had been released from the paint manufacturer's property and contaminated the utility's neighboring property. In a 2003 settlement agreement, defendant agreed to pay up to \$792,000 to carry out a state-approved cleanup for the site, while Con Ed agreed to pay up to \$3.2 million. One of the agreement's provisions allowed the parties to reopen it if the site's total cleanup exceeded \$4 million. Although the settlement agreement was signed in court, the parties never finalized it because they had not completed environmental investigations at the site.

Following a series of disagreements, defendant was ordered to submit agreed-upon terms to be

entered as a judgment to implement the 2003 settlement agreement. Con Ed responded to the proposed judgment by filing a memorandum of law, arguing that the court should either declare the settlement unenforceable or rescind it because the utility's share of expected cleanup costs to be incurred under the settlement had increased substantially. Rejecting Con Ed's arguments and citing a Third Circuit opinion, the court stated, "underestimating damages or entering into a settlement before damages are adequately assessed is not a mutual mistake of fact that would permit rescission of a settlement agreement." *CONRAIL v. Portlight Inc.*, 188 F.D. 93 (3d Cir. 1999). According to the court, this rule "is necessary to prevent parties from backing out of settlement agreements anytime their injuries turned out to be greater than anticipated."

[4] Air: EPA Announces Settlement of Challenge to Emissions Standards for Fossil Fuel-Fired Power Plants

EPA has settled coke manufacturers' challenge to new emissions standards for fossil fuel-fired electric power plants. *73 Fed. Reg.* 19,838 (4/11/08). An industry trade group challenged the regulations, which set new monitoring and emissions requirements for particulate matter, sulfur dioxide and nitrogen oxides for new fossil fuel-fired electric power plants. *72 Fed. Reg.* 32,710 (6/13/07). Under the regulations, coke oven gas, a coke by-product, is subject to the same emissions standards as coal. The industry argued that coke oven gas does not produce significant amounts of particulate matter or nitrogen oxides when burned. As part of the settlement, EPA will issue a direct final rule or a proposed rule by May 31, 2008, clarifying the emissions monitoring standards and relieving coke oven



gas-powered boilers and plants from the burden of monitoring particulate matter and nitrogen oxide emissions. As part of the settlement, plants would continue to monitor sulfur oxide under proposed amendments offered by the coke oven gas industry.

[5] Air: Arizona State Judge Overturns New State HAP Regulations

A Maricopa County Superior Court judge has reportedly overturned new hazardous air pollutant (HAP) regulations promulgated by the Arizona Department of Environmental Quality (DEQ). The Arizona Chamber of Commerce had challenged the rules, alleging that they are “based on extreme and unrealistic assumptions” about public exposure to HAPs. According to the complaint, the new regulations were based on “assumptions that members of the public reside inside industrial private property virtually around the clock for 30 years.” The invalidated HAP rules required companies to install new pollution-control equipment every time they start, expand or alter operations if such activity would result in anything but a minimal increase in any of 73 HAPs on the state’s list. The court held that the state agency exceeded its legal authority under the state’s air statute. According to the court, language in the state statute that allowed the agency to set “de minimis” limits for pollutants not regulated by EPA under the Clean Air Act does not give DEQ the authority to set limits for air pollutants that EPA regulates. *See Arizona Daily Star*, April 5, 2008.

[6] FIFRA: Groups Sue EPA over Continued Use of Four Pesticides

Several environmental and farmworker groups have sued EPA over the continued use of four organophosphate pesticides – methidathion, oxydemeton-methyl, methamidophos and etho-

prop – which the groups allege are putting farmworkers and their families at risk. *Pesticide Action Network N. Am. v. EPA*, No. N/A (N.D. Cal. filed 4/4/08). The complaint alleges that EPA has violated FIFRA and the Endangered Species Act by failing to remove the pesticides from the market. Plaintiffs further allege that exposure to the pesticides can cause chronic effects, such as permanent nerve damage, loss of intellectual functions and neurobehavioral effects, as well as developmental and reproductive effects, endocrine disruption and carcinogenic effects. The four pesticides are used primarily in California on a variety of fruit, vegetable and nut crops.

[7] Toxic Tort: W.R. Grace to Settle Current and Future Asbestos Claims for \$3 Billion

W.R. Grace will reportedly settle all current and future asbestos litigation claims for \$3 billion. *In re W.R. Grace & Co.*, No. 01-1139 (Bankr. D. Del. 4/7/08). The proposed settlement was filed in U.S. Bankruptcy Court for the District of Delaware. The company filed for bankruptcy in April 2001, after it had been sued by 110,000 people who claimed to have been sickened by exposure to asbestos. Under the agreement, which needs court approval, Grace would pay \$250 million into a trust account and would make deferred payments into the trust of \$110 million annually for five years starting in 2019, and \$100 million annually for 10 years starting in 2024. Claimants would also have the right to purchase 10 million shares of W.R. Grace common stock at \$17 per share. The value of the settlement includes contributions of Grace subsidiaries Sealed Air Corp. and Fresenius Medical Core Holdings Inc. The settlement follows by one month the announcement that Grace agreed to pay \$250 million to reimburse EPA for cleaning up



asbestos contamination in Libby, Montana, where the company operated a vermiculite mine from the 1930s until 1990. See *Washington Post* and *BNA Daily Environment Report*, April 8, 2008.

[8] Toxic Tort: California Utility to Pay \$24 Million to Settle Hexavalent Chromium Exposure Lawsuit

California's Pacific Gas & Electric Co. (PG & E) has reportedly agreed to pay \$24 million to settle the last of several lawsuits brought by individuals who reside near two PG & E gas compressor stations and alleged that the utility's use of hexavalent chromium as an anti-corrosive agent at the plants caused a variety of adverse health effects including cancers, respiratory problems and, in some cases, death. *Adams v. PG & E*, No. BC 233964 (Cal. Super. Ct. *settlement announced* 4/2/08). According to news sources, the utility had previously resolved 88 cases in a \$20 million settlement in December 2007 and 16 other cases for \$4.3 million earlier in 2007. The utility settled previous hexavalent chromium cases in 1996 (\$333 million) and 2006 (\$295 million). Claims in the complaint included fraud and deceit, negligence, strict liability, battery, misrepresentation, concealment, destruction of evidence, and wrongful death. See *BNA Daily Environment Report*, April 7, 2008.

Legislation, Regulations and Guidance

[9] Chemical Evaluation: EPA Updates IRIS Process for Evaluating Chemicals

EPA has reportedly issued revised procedures that it will use to conduct toxicological reviews for the Integrated Risk Information System (IRIS) database. The revised procedures include: (i) placing literature reviews online for chemicals being reviewed;

(ii) expanding the process for recommending that a substance be assessed under the IRIS program; (iii) increasing opportunities for other agencies and the public to get involved in IRIS assessments earlier; (iv) hosting "listening sessions" for specific IRIS assessments early in the process to allow for broader participation and engagement of interested parties; and (v) increasing scientific peer review of IRIS assessments. See *EPA Press Release*, April 11, 2008.

[10] NEPA: U.S. Forest Service Revises Land Planning Regulations

The U.S. Forest Services (USFS) has **revised** its land planning regulations at 36 C.F.R. part 219 in compliance with a court order requiring analysis of the rule's potential environmental impact.

A federal judge in California previously found that the 2008 rule violated NEPA because USFS did not study its effects on fish and wildlife habitat and other ecological values. *Citizens for Better Forestry v. Department of Agriculture*, No. 05-1144 (N.D. Cal. 3/30/07). The USFS published a study in February 2008 concluding that the rule would have no major environmental impacts.

The revised rule would significantly alter how land plans are developed for national forests and grasslands. Prior to this regulation, federal agencies relied on environmental impact statements filed under NEPA to determine appropriate levels of conservation, logging, mineral development, and other authorized land uses. Under the revised version, environmental management systems (EMS) would serve as the basis for determining appropriate levels of those activities. The rule will be effective April 10, 2008.



Scientific/Technical Items

[11] Nanotechnology: Report Addresses Risk Management Approaches to Nanotechnology for State and Local Governments

The Project on Emerging Nanotechnologies at the Woodrow Wilson International Center for Scholars recently released a [report](#) outlining risk management approaches that state and local governments might use to address environmental, health and safety concerns involving nanotechnology. The report proposes that state and local governments adopt an interim approach until federal agencies develop a national oversight system for dealing with potential nanotechnology risks. In particular, the report advises state and local authorities to consider: (i) stringent air quality laws or regulations to fill a gap in federal laws; (ii) standards for regulating metals in waste that are not covered by EPA regulations; (iii) setting water discharge standards stricter than federal limits; (iv) product labeling requirements more stringent than federal law requirements; (v) requirements for disclosure of potential health, safety and environmental hazards; (iv) adopting workplace standards, such as those being developed by ASTM or ISO; and (vii) establishing joint regional standards or approaches for overseeing the safe development of nanotechnology.

[12] Nanotechnology: Swiss Report Says Nanomaterial Regulation Not Possible Until Development of Exposure Measurement Standards

A recent [report](#) by three Swiss agencies concludes that nano-specific regulations are not possible due to a lack of standard terminology, measurement methods and other concerns. The

Federal Office of Public Health, the State Secretariat for Economic Affairs and the Federal Office for the Environment concluded that based on a lack of standards, “no conclusive requirements for the safety of synthetic nanomaterials can yet be formed.” The report recommends the following actions: (i) introduction of a reporting obligation, or modifying the application of approvals procedure in legislation on pharmaceutical products, chemicals, gene technology, food, or the environment; (ii) setting production limits on the marketing and use of particular synthetic nanoparticles; and (iii) establishing emissions limits for air and water and exposure limits for workplaces for particular synthetic nanoparticles.

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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Jim Neet (jneet@shb.com; 816-474-6550).
We welcome any leads on new developments in environmental law or toxic tort litigation.

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