

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] **Water/NEPA: D.C. Circuit Finds No CWA Violation by FERC for Discharges to Lake of the Ozarks**

The D.C. Circuit Court of Appeals has ruled that the Federal Energy Regulatory Commission (FERC) did not violate the Clean Water Act (CWA) when a power company it regulates allowed wastewater to discharge into the Lake of the Ozarks in central Missouri. *Duncan's Point Lot Owners Ass'n v. FERC, No. 05-1421 (D.C. Cir. 4/15/08)*. FERC granted power company AmerenUE a license to operate Bagnell Dam and Osage Hydroelectric Power Plant on the lake in 1981. In 2004, FERC wrote the company a letter alleging that Ameren had violated two provisions of its license by granting a developer an easement for an effluent discharge pipe and permission to build a 2,232-foot seawall. FERC ordered construction of the seawall to cease and Ameren to take steps to mitigate the harm caused.

Homeowners in the Duncan's Point area filed a complaint with FERC, alleging violations of the CWA and NEPA. FERC ruled against the homeowners on the grounds that NEPA did not apply to private companies and that the agency did not have statutory jurisdiction over CWA claims. The homeowners next filed a request for a hearing, arguing that FERC itself violated NEPA, the CWA and the National Historic Preservation Act. When FERC denied the hearing request, the homeowners petitioned the D.C. Circuit for review.

Denying the petition for review, the court ruled that FERC's responsibilities with respect to the discharge pipe and the seawall extended no further than its obligations under the license it granted to Ameren. According to the court, FERC did not violate the CWA because it properly verified that Ameren had complied with its license duties and confirmed that the developer had obtained the necessary permits allowing the discharge pipe. The court further held that NEPA was not violated because mere federal control over a project was insufficient to trigger NEPA's environmental study requirement and that the National Historic Preservation Act was not violated because the discharge pipe and seawall did not have a detrimental impact on the historic value of Duncan's Point, which was eligible for listing in the National Register of Historic Places.

[2] **CERCLA: Federal Court Rules CERCLA Operator Liability Not Applicable to Companies Hiring Ships That Caused Release**

A federal judge in Illinois has ruled that companies which hired ships to transport goods in Waukegan Harbor are not liable as operators under CERCLA for releases caused by the ships when they disturbed contaminated sediments in the harbor. *City of Waukegan v. Nat'l Gypsum Co., No. 07-5008 (N.D. Ill. 4/7/08)*. The City of Waukegan sued several companies that hired the ships alleging they were liable under CERCLA as "owners and operators of a facility."



Citing *U.S. v. Bestfoods*, 524 U.S. 51 (1998), the court said the city failed to assert that defendants “exercised any direction over any aspect of these shipping activities claimed to have caused the releases at issue in this case – specifically, the use of deep-draft vessels that caused the PCB-contaminated sediments on the Harbor floor to be stirred up and redistributed.” According to the court, while the companies that owned the vessels could be liable as owners or operators, “CERCLA does not undercut the principle that one who hires an independent contractor is not, without more, liable for the contractor’s torts.”

[3] Toxic Torts: California Jury Rejects Claims That Exposure to Herbicide Caused Highway Worker’s Death

A California jury has reportedly rejected claims that a state Department of Transportation employee died due to exposure to the herbicide paraquat, which he mixed and applied along highways in the state from 1972 to 2000. *Turner v. Chevron Corp.*, No. BC 256293 (Cal. Super Ct. 2/21/08). Plaintiff was diagnosed with pulmonary fibrosis and multiple myeloma in 1998 and subsequently sued 25 defendants. All but Chevron settled and, during the first trial, Chevron obtained a nonsuit on preemption grounds under FIFRA. During a second trial, after defendant died, his family pursued a defective design theory. Plaintiffs alleged that the deceased’s dermal and respiratory exposure to paraquat resulted in a progressive pulmonary fibrosis that did not manifest until the late 1990s. Chevron argued that paraquat was not responsible for the lung disease because the deceased’s exposure levels had been too low and the 20-year onset delay ruled out the product as a cause. The jury’s special verdict

findings specified that paraquat’s design was not a substantial factor in causing harm to the deceased. See *BNA Daily Environment Report*, April 17, 2008.

Legislation, Regulations and Guidance

[4] FIFRA: EPA Seeks Public Comments on Revised PCP Risk Assessment

EPA is seeking public comments on its revised **risk assessment** for the wood-preserving pesticide pentachlorophenol (PCP) and associated micro-contaminants, dioxins/furans and hexachlorobenzene (HCB). *73 Fed. Reg.* 20,638 (4/16/08). PCP was once a widely used pesticide and wood preservative, but in 1984 EPA prohibited its use in all but some building interiors with low risk of human exposure and limited its purchase to certified applicators. EPA’s Science Advisory Board has classified PCP as a probable human carcinogen. While no longer available to the general public, PCP is still used industrially as a wood preservative on utility-owned wood poles in the United States as well as for railroad ties and wharf pilings. Its commercial uses also include fences, shingles, walkways, building components, piers, docks, porches and flooring, and laminated beams. Comments are due by June 16, 2008.

[5] RCRA/Fire Code: Chemical Safety Board Recommends National Fire Code for Hazardous Waste Facilities

The U.S. Chemical Safety and Hazard Investigation Board recommended April 16, 2008, in the context of a case study **report**, that a national fire code for hazardous waste facilities be developed along with improvements in information given to



emergency planners concerning chemicals stored at those facilities. Such facilities are currently regulated by RCRA, which requires “fire control equipment” but does not specify what equipment or systems are required. RCRA regulations also require hazardous waste facility operators to “familiarize” local emergency responders with facility hazards, but do not specify what information must be shared nor define the frequency of communications.

To improve fire protection and response at these facilities, the board recommended that EPA require permitted hazardous waste facilities to periodically provide specific, written information to state and local emergency response officials on the type, approximate quantities and location of hazardous materials. The board also recommended that the Environmental Technology Council, a trade association representing 80 percent of the U.S. hazardous waste industry, (i) develop standardized guidance on waste handling and storage to prevent releases and fires and (ii) petition the National Fire Protection Association to develop a specific standard for the hazardous waste industry.

[6] Air: EU Member States Adopt Ambient Air Quality Directive for Fine Particles

European Union (EU) member states have adopted an Ambient Air Quality **Directive** that will place a 20 micrograms per cubic meter limit on fine particle emissions, effective by 2015. In addition to setting a limit on fine particles (PM 2.5), the directive integrates five other directives into a single text, retaining existing limits on coarse particulate matter (PM – 10) and on other air pollutants, such as sulfur dioxide, nitrogen dioxide, lead, benzene, and carbon monoxide. According to the European Commission, the final text will be published in the

Official Journal of the European Union in May 2008, and member states will have two years from the date of publication to transpose it.

[7] REACH: ASTM Panel Approves EU REACH Guide and Testing Standard

The American Society for Testing and Materials (ASTM) reportedly gave provisional approval to a standard guide and testing standard for the European Union’s (EU) Registration, Evaluation, Authorization and Restriction of Chemicals (REACH) regulations on April 17, 2008. The guidance sets out how all companies manufacturing and trading in chemical substances or preparations, or products containing them, should identify “the specific information elements that must be specified, requested and exchanged in communication between actors in the supply chain” under REACH. According to ASTM, the guidance is “the first international voluntary consensus standard that will be available to the market.” See *BNA Daily Environment Report*, April 18, 2008.

[8] Chemical Exposure: Canada Proposes Ban on Bisphenol A in Baby Bottles

Canada has **proposed** banning the use of bisphenol A in baby bottles based on the results of a draft toxicity assessment that is currently available for a 60-day comment period. The draft assessment, conducted under the Canadian Environmental Protection Act, found that most Canadians need not be concerned about exposure to the chemical, but that exposure to bisphenol A can cause harm to newborn children. The proposed ban would apply to the “import, sale, or advertising of polycarbonate baby bottles.” According to the government, adults can safely use products that contain bisphenol A. The chemical is used in a range of other products, but



those products are not subject to the proposed ban. Health Canada and Environment Canada will accept comments on the proposed ban until June 19, 2008.

[9] Nanotechnology: Swiss Retailer's Association Adopts Code of Conduct for Nanotechnology in Consumer Products

The Swiss Retailer's Organization has adopted a **Code of Conduct** for the handling of nanotechnology in consumer products. The code requires that nanospecific aspects of materials be taken into account in the workplace and during storage and transport. It also requires that new health-related or environmentally related findings be communicated quickly and openly by manufacturers and suppliers. Under the code, retailers are responsible for requesting relevant information from their manufacturers and suppliers. Most major retailers in Switzerland have reportedly indicated they would comply with the code. *See BNA Daily Environment Report*, April 21, 2008.

Scientific/Technical Items

[10] Chemical Exposure: NTP Seeks Comments on Draft Report on Risks of Bisphenol A

The National Toxicology Program (NTP) is seeking public comments on a draft **report** that agrees with a 2007 expert panel finding that it had "concerns" that the neurological system and behavior of fetuses, infants and children might be affected by exposure to bisphenol A, a chemical in plastics used in food and beverage packages, water and infant bottles, compact discs, and medical devices. In preparing the draft report, NTP researchers reviewed about 500 laboratory animal experiments including animal studies involving (i) reproductive toxicity, (ii) high-dose developmental toxicity studies, and (iii) low-dose developmental

effects studies. They also reviewed the small number of studies that have looked at associations between bisphenol A exposure and disorders of reproduction or developmental effects in humans. The draft report will undergo scientific peer review at the NTP Board of Scientific Counselors meeting scheduled for June 11-12, 2008, at Research Triangle Park, North Carolina. Public comments on the draft are due by May 23, 2008.

[11] Air/Greenhouse Gases: EPA Releases Final GHG Emissions Report

EPA released the **final version** of its "Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2006," on April 15, 2008, reporting that emissions fell 1.1 percent in 2006 from the previous year. The draft report, released in early March, was adjusted slightly to reflect revised data and to comply with international reporting guidelines. The final report attributed the slight drop in emissions in 2006 to several factors, including a warmer winter and rising fuel prices. Overall, emissions have risen by 14 percent since 1990.

[12] Nanotechnology: White House Advisory Panel Issues Second Assessment on Nanotechnology

The National Nanotechnology Advisory Panel (NNAP), established under the President's Council of Advisors on Science and Technology, has issued a **report** titled "The National Nanotechnology Initiative: Second Assessment and Recommendation of the National Nanotechnology Advisory Panel." Under the 21st Century Nanotechnology Research and Development Act of 2003, NNAP is required to periodically review federal research and development in the area of nanotechnology. In the first assessment, published in 2005, the NNAP looked at



how the federal nanotechnology program, known as the National Nanotechnology Initiative (NNI), was spending its money and how it could be improved.

In that report, NNAP set forth recommendations for improving the program in the areas of technology transfer; environmental, health and safety (EHS) research and its coordination; education and workforce preparation; and societal dimensions. In the second report, NNAP focused on updating its first report and recommends that (i) NNI participating agencies should improve coordination and management and support international coordination through effective international forums, such as the Organization for Economic Cooperation and Development; (ii) federal agencies should engage in national and international standards development activities; (iii) NNI should fund world-class research to promote technology transfer; (iv) EHS research should be coordinated with, not segregated from, applications research to promote the simultaneous consideration of risks and benefits; (v) research on societal and ethical aspects of nanotechnology should be integrated with technical R & D; and (vi) NNI should expand outreach and communication activities with the public and others.

[13] Nanotechnology: NIST Publishes Guidelines for Measuring Single-Walled Carbon Nanotubes

The National Institute of Standards and Technology (NIST) has published guidelines for making essential measurements on samples of single-walled carbon nanotubes. The guidelines, according to NIST, constitute the current “best practices” for characterizing these unique nanoscale materials. Because of their unique electronic, thermal, optical, and mechanical properties, carbon nanotubes are being studied for a wide and expanding range of applications, including ultra-strong fibers for nanocomposite materials, circuit elements in molecular electronics, hydrogen storage components for fuel cells, and light sources for compact flat-panel displays. The guidance is part of an international effort to develop standards for how to measure carbon nanotubes. *See NIST Press Release*, April 15, 2008.



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

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