

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] CERCLA: PRPs Conducting Voluntary Cleanup Must Seek Cost Recovery Under Section 107

The Ninth Circuit Court of Appeals has ruled that potentially responsible parties (PRPs) under CERCLA who voluntarily incur cleanup costs should file for cost recovery under section 107(a) instead of filing contribution claims under sections 107(a) or 113(f). [*Kotrous v. Goss-Jewett Co. of N. Cal., Inc.*, No. 06-15162 \(9th Cir. 4/17/08\)](#). The court specifically acknowledged that *U.S. v. Atlantic Research Corp.*, 127 S. Ct. 2331 (2007), overturned the Ninth Circuit's prior opinion that PRPs can sue only for contribution. *Pinal Creek Group v. Newmart Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997).

Rather than deciding whether the plaintiffs' claims for implied contribution under section 107 were viable, the court remanded the matter for the plaintiff PRPs to be given the opportunity to amend their complaints so that their implied contribution claims are replaced with claims for cost recovery under section 107. According to the court, under *Atlantic Research*, a PRP "that incurs costs voluntarily, without having been subject to an action under Section 106 or Section 107, may bring a suit for recovery of its costs under Section 107(a); a party in such a position does not need a right to implied contribution under Section 107."

[2] Air: Second Circuit Rules EPA Administrator Not Liable for Erroneous Reassuring Post-9/11 Statements

The Second Circuit Court of Appeals has determined that former EPA Administrator Christine Todd Whitman cannot be held personally liable for erroneous statements she made about the health risks of World Trade Center dust in the aftermath of the September 11, 2001, attack. [*Benzman v. Whitman*, No. 06-1166 \(2d Cir. 4/22/08\)](#).

The court reversed a district court order denying the defendant's motion to dismiss, *Benzman v. Whitman*, No. 04-1888 (S.D.N.Y. 2/2/06), in a class action lawsuit brought on behalf of people who lived, attended school or worked in lower Manhattan or Brooklyn following the attack.

Citing *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), the court ruled that although EPA's performance "was flawed" after the 9/11 attacks, legal remedies are not always available for every instance of arguably deficient governmental performance. The court said personal liability for government officials is limited to two factual situations, i.e., special relationship cases and state-created danger cases, neither of which applied here, according to the court.

[3] CERCLA: Section 114(b) Preempts State Claims for Nuisance

A federal judge in Ohio has ruled that CERCLA section 114(b), which bars the double recovery of cleanup-related costs, also prevents a party from



simultaneously pursuing claims seeking duplicate damages under state law. [Ashtabula River Corp. Group II v. Conrail, Inc., No. 07-3311 \(N.D. Ohio 4/14/08\)](#). In 2007, 14 companies sued Conrail, Inc. and several other companies alleging that they were liable for some of the estimated \$23 million in costs the plaintiff's group anticipated spending to clean up contamination from a portion of the Ashtabula River. Plaintiffs sued for cleanup costs under section 107(a) of CERCLA and also asserted state law claims for public nuisance. Defendants moved to dismiss the nuisance claims arguing that they were preempted under section 114(b) because plaintiffs were seeking the same damages under section 107 of CERCLA.

Agreeing with defendants, the court ruled that because the nuisance claims were identical to the section 107 claims, they were preempted under section 114(b). According to the court, where "a plaintiff's CERCLA and state law claims seek recovery of the same response costs, courts have found that CERCLA preempts the plaintiff's right to recover under the state law."

[4] Water: Minnesota Court Orders State Environmental Agency to Regulate Ballast Water Discharges

A state district court judge in Minnesota has ordered the state's Pollution Control Agency to regulate ballast water discharges on Lake Superior to prevent the spread of a deadly fish virus. [Minn. Ctr. for Emtl. Advocacy v. MPCA, No. 07-2224 \(Minn. Dist. Ct. 4/22/08\)](#). Plaintiffs sought to compel the state agency to move quickly to regulate ballast water discharges under the Clean Water Act to prevent the spread of viral hemorrhagic septicemia (VHS), which has been responsible for massive fish kills throughout the Great Lakes.

The court noted that while Minnesota has no current regulation to protect state waters from ballast water discharges, it has taken an official position in federal court litigation that ballast water discharges should be subject to NPDES permitting. The court order requires all ships with ballast water entering state waters as of October 1, 2008, to have an NPDES permit before discharging any ballast water.

[5] Chemical Exposure: California Plaintiff Sues Manufacturer of Plastic Bottles Alleging Bisphenol A Exposure

A California woman has reportedly sued a manufacturer of hard, plastic sports bottles alleging that she and her family were exposed to bisphenol A. *Felix-Lozano v. Nalge Nunc Int'l Corp.*, No. 08-854 (E.D. Cal. filed 4/22/08). The complaint alleges fraud, concealment and violations of several state laws, including the Unfair Competition Law, False Advertising Law and Consumer Remedies Act. The complaint seeks class action status. According to a news release issued by defendant, "[b]ased on all available evidence, we continue to believe that Nalgene products containing BPA (bisphenol A) are safe for their intended use." See *BNA Daily Environment Report*, April 25, 2008.

[6] FIFRA: EPA Settles FIFRA Enforcement Action with Grocery Chain over Sale of Unregistered Pesticide

Unified Western Grocers, a Los Angeles, California-based grocery distributor, has reportedly agreed to pay a \$270,000 penalty to settle an EPA FIFRA enforcement action for the sale and distribution of an unregistered pesticide. The company allegedly sold and distributed "Western Family Cleanser with Bleach," an unregistered product



which stated on the label that it “wipes out most household germs, including Staph, Salmonella, and Pseudomonas.” FIFRA requires companies to register cleaning products if the cleaning product makes claims about controlling germs, according to EPA. *See EPA Press Release*, April 21, 2008.

[7] Pesticides: EPA Issues Stop Order for the Sale of Unregistered or Misbranded Pesticides

EPA, Region 5, reportedly issued a “stop sale, use or removal” order against Scotts Miracle Gro Co. and three affiliates in Ohio for illegal, unregistered and misbranded pesticides. EPA ordered the companies to immediately stop selling and distributing two products which can be identified by an invalid EPA I.D. number on the package. The products are marketed under the brand names “Garden Weed Preventer + Plant Food” and “Miracle Gro Shake ‘n Feed All Purpose Plant Food Plus Weed Preventer.” The order also applies to products that Scotts Lawn Service uses, including: “Scotts Lawn Service Fertilizer with .28% Halts,” “Scotts Lawn Service Fertilizer 0-0-7 Plus .28% Halts Pro,” “Scotts Lawn Service Fertilizer 14-2-5 Plus .28% Halts Pro” and “Scotts Lawn Service Fertilizer 22-0-8 Plus .28% Halts Pro.” EPA said it will also issue stop orders to Ohio retailers that carry these products. Under FIFRA, all pesticides must be submitted to EPA for review, evaluation and registration to ensure they do not pose an unreasonable risk to human health or the environment. *See EPA, Region 5 Press Release*, April 23, 2008.

Legislation, Regulations and Guidance

[8] Air: EPA Releases Rule Clarifying HAP Emissions Monitoring Requirements for Organic Liquids Distributors

EPA has issued a direct final [rule](#) clarifying requirements for hazardous air pollutant (HAP) emissions monitoring standards for non-gasoline organic liquids distributors. *73 Fed. Reg.* 21,825 (4/23/08). The clarifications apply to benzene, toluene and vinyl chloride emissions from crude oil pipeline stations, petroleum refineries, chemical manufacturing plants, and other liquid storage terminals. Under the original rule, facility operators can apply to EPA for permission to measure emissions using total organic compounds emitted, rather than emissions of HAPs, for units such as condensers that emit compounds substantially different from those that enter the unit. The new rule clarifies that operators of combustion devices do not have to apply for the waiver and can automatically calculate emissions using the total organic compound standard. The new regulations also clarify leak monitoring requirements for vapor-balancing system components used on transfer racks and storage tanks. EPA will accept comments on the rule until June 9, 2008.



[9] Chemical Exposure: EPA Issues Vapor Intrusion Primer for Brownfields Sites

EPA has issued a new [primer](#) addressing vapor intrusion in sites being redeveloped under Brownfields programs. The primer summarizes techniques to quickly and cost effectively assess the potential for vapor intrusion and techniques for mitigating it. It is designed for property owners, municipalities and real estate developers, according to the agency. According to EPA, "Vapor intrusion is an exposure pathway – a way that people may come in contact with environmental contaminants. Vapor intrusion exposes building occupants to potentially toxic levels of vapors when volatile chemicals (those that readily evaporate) present in contaminated soil or groundwater emit vapors that migrate into overlying buildings." The primer recommends early consideration of vapor intrusion beginning during the Phase I environmental site assessment so that mitigation measures can be incorporated as new buildings are constructed, rather than retrofitted later at a much higher cost.

[10] Air: EPA Proposes Amendments to Standards of Performance for Nonmetallic Mineral Processing Plants

EPA published a proposed [rule](#) that would amend the standards of performance for nonmetallic mineral processing plants. 73 *Fed. Reg.* 21,559 (4/22/08). The proposed rule would revise new source performance standards at 40 C.F.R. part 60 and affect 322 new plants over the next five years. The new standards would set particulate matter emissions from new or refurbished plants at 0.022 grain per dry standard cubic foot a day, down from 0.014 gr/dscf. Fugitive emissions standards for crushers would be lowered from 15 percent to 12 percent and for new grinding mills, screening operations, bucket

elevators, belt conveyors, bagging operations, storage bins, and enclosed truck or railcar loading stations from 10 percent to 7 percent. Smokestack particulate matter emissions standards would be lowered from 0.022 to 0.014 gr/dscf. EPA will accept comments on the proposed rule until June 23, 2008. If a public hearing is requested by May 2, 2008, written comments must be received by June 6, 2008.

[11] Chemical Exposure: Groups Seek EPA Regulation of Formaldehyde in Engineered Wood Sold for Residential Use

Leading a coalition of 25 organizations and 5,000 individuals, the Sierra Club has filed a [petition](#) asking the EPA to regulate engineered wood sold as products for residential use. In the petition, the groups argue that EPA has authority to protect the public from residential indoor air exposure to formaldehyde under section 6 of TSCA. The petition cites a recently promulgated Cal/EPA Air Resources Board rule that regulates air emissions from finished products, although not specifically emissions in indoor air. It applies to composite wood products including hardwood plywood, particle board, medium density fiberboard, and finished pieces that contain formaldehyde. The state rule, which applies to manufacturers, distributors, importers, fabricators, and retailers, took effect April 21, 2008. Comments must be filed before May 12, 2008. *See Inside EPA*, April 24, 2008.

[12] Pesticides: Second Canadian Province to Ban Pesticides

Ontario, Canada, has reportedly prohibited the sale and general use of pesticides; Quebec has a similar prohibition. Taking effect in spring 2009, the law will ban homeowners' use of lawn and garden pesticides for such things as killing



dandelions and other weeds. Exceptions will be made for golf courses, farms and forests. See *Reuters* and *Greenwire*, April 23, 2008.

Scientific/Technical Items

[13] Nanotechnology: GAO Report Says Comprehensive Federal Strategy Needed for Overseeing Nanotechnology Research

A new Government Accountability Office (GAO) [study](#) states that federal agencies need guidance as to when research they are conducting should be deemed to contribute to answering environmental, health and safety (EHS) questions about nanomaterials. According to the report, “the inventory of projects designed to address [EHS] risks is inaccurate and cannot ensure that the highest-priority research needs are met.” The study attributes these inaccuracies to “misclassifications” by federal agencies conducting the research. Of 119 federal research projects that were classed as addressing EHS issues in fiscal year 2006, the GAO report found that 22 were not focused on EHS issues. The report also concluded that federal agencies spent only 3 percent of their fiscal year 2006 nanotechnology research budget on EHS research. The report recommends better guidance on how federal agencies should prioritize their nanotechnology spending and research.

[14] Air/Greenhouse Gases: EDF Position Paper Argues Cap-and-Trade Policy for GHG Emissions Would Have Minimal Economic Impact

The Environmental Defense Fund (EDF) recently released a position [paper](#), “What Will It Cost to Protect Ourselves from Global Warming?,” which claims that a cap-and-trade policy for greenhouse gas (GHG) emissions would have minimal economic impact. The paper contends that if a cap-and-trade policy is put in place soon, substantial cuts in GHG emissions can be achieved without significant adverse consequences to the economy. The authors surveyed eight policy scenarios analyzed by five peer-reviewed economic modeling groups in government and academia in reaching their conclusions. They maintain that models used by those who argue against a cap-and-trade policy on economic grounds fail to take into account the damages that would result from allowing global warming to build up unchecked and the value of avoiding such damages.



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

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