

# Environmental & Chemical Update

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SUSTAINABILITY • TOXIC TORT • WASTE • WATER

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## Litigation and Regulatory Enforcement

### [1] Chemical Exposure: Fifth Circuit Orders Trial Court to Reassess Expert's Reliability in Light of ATSDR Benzene Report

The Fifth Circuit Court of Appeals has ordered a trial court to reconsider its dismissal of a lawsuit alleging that exposure to benzene caused plaintiff's myelofibrosis in light of a final report by the Agency for Toxic Substances and Disease Registry (ATSDR) linking benzene exposure to aplastic anemia. [\*LeBlanc v. Chevron USA Inc., No. 07-30599 \(5th Cir. 4/22/08\)\*](#). The trial court had dismissed the complaint without a hearing after ruling that plaintiff's expert failed to meet the reliability criteria of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Although the trial court was aware of a draft ATSDR report on benzene, it declined to consider the report because it was in draft form and because it considered the draft's conclusion that benzene exposure causes acute myelogenous leukemia to be irrelevant.

Noting that the ATSDR report is now final, the appellate court said the link between benzene and acute myelogenous leukemia was significant. The court ordered the trial court to hold a hearing to determine whether the testimony of plaintiff's expert is admissible in light of the ATSDR report.

### [2] CERCLA: Federal Court Rules NRD Settlement Triggers Contribution Rights

A federal judge in New Jersey has ruled that a state court-approved settlement of a party's liability for natural resource damages (NRD) under CERCLA and state law triggers the party's CERCLA contribution right under section 113. [\*Champion Labs., Inc. v. Metex Corp., No. 02-5284 \(D.N.J. 4/21/08\)\*](#) (unpublished). Citing *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.*, 423 F.3d 90 (2d Cir. 2005), the court said such a consent judgment could form the basis for a contribution claim under section 113 (f)(3)(B), if the judgment specifically mentions CERCLA. The court rejected defendants' argument that section 113 (f)(3)(B) provides that only a party resolving liability "for some or all of a response action" under an administrative or judicially approved settlement can sue for section 113 contribution based on that settlement. According to the court, the settlement, which specifically mentioned CERCLA and the New Jersey Spill Compensation and Control Act, appeared to have resolved at least some of plaintiff's CERCLA liability. As such, plaintiff could pursue its section 113 contribution claim.

### [3] ESA/Global Warming: Federal Court Orders DOI to Finalize Polar Bear ESA Listing Decision

A federal judge in California has ordered the U.S. Department of the Interior to finalize its proposed decision to list the polar bear as threatened



under the Endangered Species Act (ESA). *Ctr. for Biological Diversity v. Kempthorne, No. 08-1339 (N.D. Cal. 4/28/08)*. The court also ordered that the final decision take effect immediately, bypassing the APA's 30-day waiting period, which can be waived for good cause. The court's ruling arose from a lawsuit filed by the Center for Biological Diversity, Greenpeace and NRDC after DOI missed a one-year statutory deadline for making a final decision to add the polar bear to the ESA list, largely because of the threat that global warming poses to its sea ice habitat. In 2005, the groups petitioned the Fish and Wildlife Service to list the bear under the ESA. In court documents filed April 17, 2008, the government admitted it had violated the ESA when it failed to publish a final rule by the statutory deadline.

**[4] Env't'l Crime: Connecticut Supreme Court Overturns Hazardous Waste Conviction, Finds RCRA Jury Instructions Improper**

The Connecticut Supreme Court has ruled that in a criminal prosecution under state law for the unpermitted disposal or storage of hazardous waste, prosecutors must establish the elements of an alleged violation with reference to state law, not to RCRA. *State v. Cote, No. 18014 (Conn. 4/22/08)*. The state argued that a conviction under its hazardous waste law was proper despite a jury instruction that the defendant should be found guilty if he committed waste violations using RCRA's definitions of "disposal" and "storage."

Because state legislators never exhibited any intent to integrate RCRA's definitions of these terms into the relevant state statute, the court held that the defendant was entitled to a new trial. Finding that the state law's definitions proscribed a narrower range of activities than federal law, the court reversed the conviction of a Norwich man

sentenced to one year in jail for burying lead paint-containing waste. The court rejected the state's argument that the broader federal definitions of "disposal" and "storage" should be read into the state hazardous waste law because RCRA was meant to set minimum standards for the handling, storage and disposal of hazardous waste and any state law must be as strict as RCRA. According to the court, when dealing with a penal statute, we are concerned only with "our" legislature's intent, not the intent of Congress or a federal agency.

**[5] Toxic Torts: Oil Companies Settle Gasoline Vapor Claims for \$16 Million**

Two oil companies have reportedly agreed to settle several lawsuits brought by Missouri residents who claimed that gasoline fumes have been seeping into their homes for decades. The lawsuits were filed in 2003 and 2004 against Shell Oil Products U.S., Premcor Refining Group and other refinery and pipeline companies alleging that defendants caused or contributed to the accumulation of more than 3 million gallons of gasoline and other hydrocarbons beneath the Village of Hartford. The complaints sought damages for negligence, trespass, emotional distress, and medical monitoring. Under the proposed settlement, Shell would contribute \$8.5 million and Premcor \$7.5 million. The settlement would benefit anyone who lived or owned real estate in Hartford between January 1, 1984, and April 3, 2008. Since 2003, a partnership of four oil companies has been working with EPA on short- and long-term measures to combat the fumes. The companies have reportedly removed more than 500,000 gallons of liquid hydrocarbons, as well as vapors equivalent to 450,000 gallons of liquid. *See St. Louis Post-Dispatch*, April 29, 2008.



### [6] **Air: Utah Refinery Agrees to Spend \$17 Million on New and Upgraded Pollution Controls**

Holly Refining & Marketing has reportedly agreed to spend more than \$17 million in new and upgraded pollution controls at its refinery in Woods Cross, Utah, and pay a \$120,000 civil penalty to settle a Clean Air Act enforcement action brought by the Department of Justice. In addition, the company will spend \$130,000 on a supplemental environmental project to help fund the purchase of new emergency response equipment for the South Davis Metro Fire Agency, which provides emergency services in South Davis County, Utah. The consent decree, which was lodged with the U.S. District Court for the District of Utah, requires new pollution controls to be installed that will reduce annual emissions of sulfur dioxide by approximately 315 tons per year. The new controls will also result in additional reductions of volatile organic compounds and particulates. The consent decree is subject to a 30-day public comment period and federal court approval. *See DOJ Press Release*, April 21, 2008.

### [7] **Env't'l Crime: Shipper Will Pay \$7.25 Million Fine for Illegal Ocean Dumping**

Egypt's largest international shipping company has reportedly agreed to pay \$7.25 million in criminal fines after pleading guilty to 15 counts of ocean dumping in Oregon, Washington and Louisiana. The company, National Navigation, has also agreed to an elaborate environmental compliance plan that requires outside audits of its ships and a court-appointed monitor to track its operations. Inspecting one of the company's ships, Coast Guard inspectors found a makeshift bypass hose – called

a “magic line” – used to funnel waste oil into the ocean, and fake entries in log books to make it look like the company had properly incinerated the oil. In subsequent inspections, similar violations were found on five other ships owned by the company. The penalty is apparently the largest assessed in the Northwest for dumping at sea. A federal court in Portland must approve the consent decree. *See The Oregonian*, April 28, 2008.

## Legislation, Regulations and Guidance

### [8] **Air: EPA Issues Proposed Revisions to NAAQS for Lead**

EPA has proposed revising the national ambient air quality standards (NAAQS) for lead for the first time since 1978. EPA has been under a court order to make a final determination by September 15, 2008, as to whether it would revise the standard. *Mo. Coal. for the Env't v. EPA*, No. 04-660 (E.D. Mo. 9/14/05). The proposed revisions would set both primary and secondary standards in a range between 0.10 and 0.30 micrograms per cubic meter, measured as total suspended particles. The current standards, both primary and secondary, are 1.5 micrograms per cubic meter. The primary standard is meant to protect public health, while the secondary standard addresses public welfare and potential environmental impacts. Low-level lead exposure has been linked to developmental problems in children, including lower IQ and learning and behavioral problems.

EPA will conduct two public hearings on the proposed revision, both on June 12, 2008, in St. Louis and Baltimore. The agency will accept comments on the proposed revisions for 60 days after they are published in the *Federal Register*.



## [9] Fuel Economy: DOT Proposes Increase in Fuel Economy Standards for 2011-2015

The U.S. Department of Transportation (DOT) has proposed federal fuel economy **standards** for cars and light trucks for 2011-2015. *73 Fed. Reg. 24,351 (5/2/08)*. The proposal would raise fuel economy requirements under the Energy Independence and Security Act of 2007 (the Act), which establishes a combined average standard for cars and light trucks of 35 miles per gallon by 2020. The current combined average is about 25 mpg, according to DOT. The proposed rule would phase in the higher standards over a five-year period, with the standards rising 4.5 percent a year on the following schedule: (i) 2011: cars 31.2 mpg, trucks 25.0 mpg, combined 27.8 mpg; (ii) 2012: cars 32.8 mpg, trucks 26.4 mpg, combined 29.2 mpg; (iii) 2013: cars 34.0 mpg, trucks 27.8 mpg, combined 30.5 mpg; (iv) 2014: cars 34.8 mpg, trucks 28.2 mpg, combined 31.0 mpg; and (v) 2015: cars 35.7 mpg, trucks 28.6 mpg, combined 31.6 mpg.

The Act requires DOT to institute increases in the average fuel economy standards for cars and light trucks beginning with model year 2011 and ending with model year 2020. It also requires the agency to set separate fuel economy standards for individual models based on their size and other attributes. These individual, model-based standards must ensure that the overall fleet meets the 35 mpg requirement by 2020. DOT will accept comments on the proposal until July 1, 2008.

## [10] CERCLA: IG Critical of EPA's Cleanup Compliance Tracking

EPA's Inspector General (IG) has issued a **report** that criticizes EPA's failure to track compliance with CERCLA settlement agreements and administrative orders. Citing information from

the agency's CERCLA information system, the report says 3,397 active CERCLA settlement agreements and unilateral orders are intended to ensure cleanups at sites on the National Priorities List (NPL) as of September 30, 2007, but because EPA fails to track compliance, the IG was unable to determine how many of these agreements have previous or current compliance violations. The report recommends that EPA's enforcement office: (i) request regional offices, which track compliance with agreements involving their regions, to enter compliance status data in the agency's Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) database; (ii) add data fields to capture dates when significant noncompliance is resolved; (iii) annually review CERCLIS compliance data; and (iv) establish parameters or metrics that indicate acceptable performance ranges.

## [11] Chemical Exposure: EPA Issues Risk Assessment for Children Exposed to CCA - Treated Playsets and Decks

EPA issued a final **report** titled "A Probabilistic Risk Assessment for Children Who Contact CCA-Treated Playsets and Decks" on April 16, 2008. EPA's Office of Pesticide Programs (OPP) conducted the assessment of chromated copper arsenate (CCA)-treated wood playground structures and decks over several years. It reports children's risks to CCA via multiple routes and pathways and provides dose estimates. Among the assessment's conclusions are: (i) risks are greater under warm climate conditions; (ii) exposure to playsets and decks had higher risks than exposure to playsets alone; (iii) non-cancer margins of exposure for arsenic were found to be above EPA guidance levels; (iv) chromium risks were found to be above EPA



guidance; and (v) exposure risks from residues were found to be higher than risks from exposure to soil. EPA is continuing to evaluate risks to children from CCA-treated wood and will update the assessment as appropriate.

### **[12] Water: Report Claims New York DEC Fails to Oversee Discharge Permits**

A recent [report](#) published by Environmental Advocates of New York claims that the New York Department of Environmental Conservation (DEC) has failed to adequately oversee the state's water permitting program and often renews discharge permits without proper review. The report also alleges that DEC is violating the Clean Water Act requirement that water-pollution permits be reviewed every five years. The report attributes much of the problem to the chronic lack of staff and funding. A spokesperson for the agency reportedly acknowledged problems that were attributable to "a crushing workload." See *BNA Daily Environment Report*, April 30, 2008.

### **[13] USTs: EPA Issues List of Known UST Insurance Providers**

EPA recently issued its "[List of Known Insurance Providers for Underground Storage Tank Owners and Operators](#)." Under EPA underground storage tank (UST) rules, owners and operators of USTs may choose from a variety of financial mechanisms to comply with the agency's financial responsibility regulations (40 C.F.R. pt. 280, subpt. H). The EPA list was developed on the basis of information solicited from companies, agents and brokers. EPA will periodically update the list as it obtains additional information.

## **Scientific/Technical Items**

### **[14] Chemical Exposure: Study Finds Correlation Between Autism and Mercury in the Environment**

A recent study by University of Texas Health Science Center researchers claims to have found a correlation between autism and mercury pollution. Raymond Palmer, et al, "Proximity to Point Sources of Environmental Mercury Release as a Predictor of Autism Prevalence," *Health & Place* (2008). The study, which was conducted in Texas, compared 1998 data on mercury releases from 39 coal-fired power plants and 56 industrial facilities with 2002 data on autism from 1,040 school districts located in every county. The study found that for every 1,000 pounds of mercury released into the environment, there was a 3.7 percent increase in autism rates in Texas school districts. The prevalence of autism dropped by 1 percent among children in districts 10 miles from the source and by 2.2 percent for those at a 20-mile distance. The report noted that other factors, such as wind and rain patterns, might also affect exposure.



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