

# Environmental & Chemical Update

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SUSTAINABILITY • TOXIC TORT • WASTE • WATER

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## Litigation and Regulatory Enforcement

### [1] CERCLA: Eleventh Circuit Applies Bar on Pre-Enforcement Review to Non-NPL Sites on Federal Property

According to the Eleventh Circuit Court of Appeals, CERCLA section 113(h), which contains a jurisdictional bar on pre-enforcement review, applies to all removal or remedial actions “selected under” section 104 and is written broadly enough to apply to non-National Priority List (NPL) cleanups on federal property. *OSI, Inc. v. U.S., No. 07-10941 (11th Cir. 5/5/08)*. The district court had ruled that the bar does not apply to cleanups on federal property because they are not conducted under section 104 but under section 120, a separate provision specifically covering “federal facilities.” Rejecting that analysis, the appellate court examined the text of section 120 and determined that the provision deals exclusively with remediation of federal property sites that are listed on the NPL. As a result, the court reasoned, “cleanups of federal property sites not listed on the NPL are selected under the broader section 104, thereby triggering the section 113(h) jurisdictional bar to challenging ongoing cleanups.” The court therefore dismissed plaintiff’s RCRA challenge to EPA’s CERCLA cleanup. The court cited *Pollack v. DOD*, 507 F.3d 522 (7th Cir. 2007), as authority for its ruling that section 104, and not 120, governs cleanups of non-NPL federal CERCLA sites.

### [2] Water: Second Circuit Upholds State Agency Denial of Water Quality Permit

The Second Circuit Court of Appeals has upheld a decision by the Connecticut Department of Environmental Protection denying a water quality permit to a natural gas company that wanted to build a pipeline under the waters of Long Island Sound. *Islander E. Pipeline Co., LLC v. Conn. DEP, No. 05-4139 (2d Cir. 5/2/08)*. The state agency had denied permits in 2004 that would have allowed the company to build a natural gas pipeline from Connecticut to New York. The company challenged that denial, and in October 2006, the Second Circuit remanded the permit denial to the agency on the ground that the agency decision failed to explain why the permit to build the pipeline was denied, did not acknowledge information that would have supported granting the permit and neglected to consider important aspects of the project. The state agency again denied the permit, and the company once again challenged the denial.

Finding that the agency had complied with the APA on remand, the court said that the record supported its conclusion that various techniques to be employed by the company in constructing the proposed pipeline “would violate state water quality standards by eliminating a significant area of near-shore waters from their existing and designated use of shellfishing.”



### [3] Toxic Torts: State Appeals Court Dismisses Nuisance Claim Alleging TCE Contamination

A state appeals court in Texas has reportedly dismissed a nuisance claim, ruling that expert testimony about plaintiffs living in an area affected by a trichloroethylene (TCE) plume was insufficient to survive the motion to dismiss filed by defendant owners of an aluminum manufacturing facility. *Adamcek v. Reynolds Metals Co.*, No. 06-240 (Tex. App. 4/24/08). The court, affirming the trial court's ruling, held that plaintiffs failed to present "more than a scintilla of probative evidence for their claim that appellees damaged their property under theories of nuisance, negligence, and gross negligence." See *BNA Daily Environment Report*, May 8, 2008.

### [4] Toxic Torts: Oil Companies Settle MTBE Litigation for \$422 Million

Thirteen oil companies have reportedly agreed to pay \$422 million to settle claims brought by 153 public water providers over drinking water contamination allegedly caused by the gasoline additive methyl tertiary butyl ether (MTBE). *In re MTBE Prods. Liab. Litig.*, MDL No. 1358 (S.D.N.Y. 5/7/08). The settlement will be reviewed by a federal judge presiding over hundreds of MTBE actions consolidated for pretrial proceedings in a multidistrict litigation court in New York. Settling defendants include BP Amoco, Atlantic Richfield, Chevron, ConocoPhillips, Shell, Marathon, Valero, CITGO, Sunoco, Hess, Flint Hills, El Paso Merchant Energy, and Tesoro. Defendants ExxonMobil and Lyondell are not parties to the settlement.

In return for plaintiffs releasing the settling defendants from liability for current and future MTBE contamination, the settling defendants

agreed to provide the funds that will be used to pay treatment costs for the wells that plaintiffs owned or operated as well as attorney's fees and other costs.

Beginning in 1979, MTBE was added to gasoline nationwide as an octane booster to replace lead. The Clean Air Act Amendments of 1990 required the use of reformulated gasoline, which contained 2 percent of an oxygenate to reduce emissions of volatile organic compounds, in parts of the country that did not meet the air quality standard for ozone. To meet the requirement, refiners added either ethanol or MTBE with EPA's blessing. MTBE made its way into drinking water sources and did not readily dissipate. See *Mealey's Pollution Liability Report*, May 8, 2008; and *BNA Daily Environment Report*, May 9, 2008.

### [5] Natural Resource Damages: Drainage Ditch Breach in National Park Nets Largest Settlement Under Resource Protection Act

A Colorado water supply company has reportedly agreed to pay \$9 million in a settlement with the Department of Justice over response costs and damages resulting from the May 2003 breach of a drainage ditch in Rocky Mountain National Park. *U.S. v. Water Supply & Storage Co.*, No. 06-1728 (D. Colo. 5/5/08). In 2006, DOJ filed a complaint on behalf of the National Park Service against defendant alleging the drainage ditch breach caused the loss of or injured natural resources within the park in violation of the Park System Resource Protection Act (Act) and a 100-year-old stipulation agreement requiring defendant to pay for damages caused by the Grand River Ditch, which it owned and operated. On May 30, 2003, the ditch breached, causing more than 100 cubic feet per second of water to rush down a mountainside, resulting in significant



damage to an old-growth forest and filling adjacent wetlands with sediment. The settlement agreement is reported to be the largest natural resource damages payment in the history of the Act. *See DOJ Press Release*, May 5, 2008.

#### **[6] Env't'l Crime: Missouri Developer Pleads Guilty to Construction Stormwater Violations**

A St. Louis, Missouri, real estate developer was reportedly sentenced April 19, 2008, to 15 months in prison and ordered to pay \$100,000 in restitution for criminal violations of the Clean Water Act's (CWA) construction stormwater regulations. *U.S. v. Johnson*, No. 07-760 (E.D. Mo. *sentencing* 4/29/08). The developer pleaded guilty to one count of violating the CWA and one felony count of bank fraud. According to court records, the EPA inspected two sites associated with a residential development in August 2004 and found numerous violations of the developer's construction stormwater permits, which had been obtained from the Missouri Department of Natural Resources. The alleged violations included failure to conduct inspections and failure to implement and maintain runoff controls. In addition to the CWA violations, the developer pleaded guilty to misuses of a \$2.6 million escrow account set up to pay subcontractors at a residential subdivision the defendant was developing. *See BNA Environment Report*, May 5, 2008.

#### **[7] Hazardous Waste: Jiffy Lube to Settle California Waste Violations**

Jiffy Lube International, Inc. has reportedly agreed to settle alleged violations of California's hazardous materials and hazardous waste laws for a penalty of \$500,000. *California v. Jiffy Lube Int'l, Inc.*, No. 08-10124 (Cal. Super. Ct. 5/7/08).

The proposed statewide settlement also requires the company to take steps to ensure that motor oil and antifreeze are properly handled and stored at more than 300 facilities in the state. The original complaint came after state inspectors found that employees were not properly inspecting containers where used and unused oil and antifreeze were stored. State law requires oil change facilities to use double-walled tanks, to inspect regularly for leaks and to make sure containers are not overfilled. *See BNA Daily Environment Report*, May 9, 2008.

## **Legislation, Regulations and Guidance**

#### **[8] Air: EPA Finalizes Regulations Governing Implementation of NSR Program for Fine Particles**

EPA has issued a final [rule](#) governing implementation of the New Source Review (NSR) program for particulate matter less than 2.5 micrometers in diameter (PM 2.5). The rule defines a major emissions source as one that emits 250 tons per year or is among 28 source categories that emit 100 tons per year. The rule also sets NSR significant emissions rates at 10 tons of fine particle matter per year, 40 tons of sulfur dioxide per year, 40 tons of nitrogen oxides per year, and 40 tons of volatile organic compounds per year. Under the rule, emitters may trade pollutants between states and regions but not within a given nonattainment area. In states that currently implement EPA's Prevention of Significant Deterioration (PSD) rule by delegation and in nonattainment areas, the rule will apply immediately. States with EPA-approved PSD programs should continue to use the existing interim approach of relying on PM10 as a surrogate for PM 2.5 until their revised state implementation plans (SIPs) are adopted.



**[9] Air: EPA Issues Final Rule Setting Emissions Limits for Diesel Engines in Locomotives and Ships**

EPA has published a final [rule](#) setting emissions limits for particulate matter and nitrogen oxide from locomotives and marine diesel engines. 73 *Fed. Reg.* 25,097 (5/6/08). The rule requires new engine designs starting in 2009 on new locomotives and marine diesels to reduce particulate matter and nitrogen oxide emissions. After 2014 for marine diesels and 2015 for locomotives, the rule imposes requirements for high-efficiency catalytic emissions-reduction systems. The rule also requires ultra-low sulfur diesel fuel for locomotives and marine diesels after 2012 when sulfur content in engines will be capped at 15 parts per million. EPA estimates the rule will result in a 90 percent reduction in particulate matter emissions from the engines and an 80 percent reduction in nitrogen oxides. The rule takes effect July 7, 2008.

**[10] Air/GHG: API Report Claims Lieberman-Warner Bill Would Raise Fuel Costs**

A recent American Petroleum Institute (API) [report](#) claims that a U.S. Senate proposal to cap greenhouse gas emissions would increase the cost of refining petroleum, sending many of those operations and their jobs overseas and raising fuel costs for consumers. According to the report, the Lieberman-Warner bill (S. 2191), if enacted, would increase the costs of fuel 43 cents per gallon in 2012, the first year the caps would go into effect, and 61 cents by 2020. The report claims that, as a result of the caps, investment in U.S. refineries would “drop over \$3 billion/year in 2012 from the base case and about \$11.5 billion/year in 2020,” in part because investor capital would flow to refineries in other countries

that did not impose similar emissions controls. The Lieberman-Warner bill calls for reducing U.S. greenhouse gas emissions almost 70 percent by 2050 through an emissions trading system that would require firms to purchase or be provided permits, or allowances, to cover their greenhouse gas emissions and to remain under the cap. ICF International, a well-known consulting firm, prepared the report for API.

**[11] Air: CBO Study Says Investment in Nuclear Energy Unlikely Without Limits on Carbon Dioxide Emissions**

A new Congressional Budget Office (CBO) [report](#) claims that investment in new nuclear power plants is unlikely without significant limits on carbon dioxide emissions from coal-fired power plants. According to the report, without a charge on carbon dioxide emissions combined with incentives for the development of nuclear energy approved by Congress in 2005, “conventional fossil-fuel technologies would most likely be the least expensive source of new electricity generating capacity.” The Energy Policy Act of 2005 included up to \$500 million each for six new nuclear plants to cover delays in licensing and construction and new loan guarantees for up to 80 percent of the cost of new plants. Congress also provided \$20.5 billion for loan guarantees for nuclear power projects in 2008. The report says 30 new nuclear power plants have been proposed.

The Lieberman-Warner bill (S. 2191) calls for reducing U.S. greenhouse gas emissions by capping emissions and implementing an emissions trading system that would impose a price on carbon dioxide emissions that could exceed \$45 per metric ton.



### **[12] Electronic Waste: EC Seeks Comments on Proposals to Revise WEEE Directive**

The European Commission (EC) has issued for comment a consultation [paper](#) on the European Union's (EU) Waste Electrical and Electronic Equipment Directive (WEEE Directive, 2002/96/EC) that details recycling target options and other changes to improve the efficiency of the directive's goals. Adopted in 2003, the directive requires EU states to minimize the disposal of electronic waste as unsorted municipal waste by establishing collection and recycling schemes. The original directive stated that member states should ensure by the end of 2006 that at least 4 kilograms of WEEE per inhabitant was separately collected and treated. It required that the EC propose a "new mandatory target" to enter into force by the end of 2008. The directive also required that the EC review a range of recycling and reuse targets by the end of 2008. The consultation paper is an attempt by the EC to begin to address those requirements. Comments on the proposals in the consultation paper should be provided to the EC by June 5, 2008.

### **[13] Chemical Exposure: Cal/EPA Issues 2008 List of Prop. 65 Chemical Safe Harbor Levels**

Cal/EPA's Office of Environmental Health Hazard Assessment has issued its Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65) [list](#) of "safe harbor levels," i.e., no significant risk levels (NSRL) for carcinogens and maximum allowable dose levels (MADL) for chemicals that cause reproductive toxicity for 2008. The NSRL is the daily intake level calculated to result in one excess case of cancer in an exposed population of 100,000, assuming lifetime (70-year) exposure to the level in question. The MADL is the level at which chemicals listed for

reproductive toxicity would have no observable effect assuming exposure 1,000 times that level. The NSRLs and MADLs are promulgated in Title 22, California Code of Regulations, sections 12705 and 12805, respectively, to assist in determining whether warnings are required for exposures to listed chemicals and whether discharges to sources of drinking water are prohibited.

## **Scientific/Technical Items**

### **[14] Nanotechnology: Study Assesses Exposure Risks to Nanoparticle Cerium Oxide**

A recent study by researchers in the United Kingdom assesses exposure risks to a diesel fuel combustion catalyst based on nanoparticulate cerium oxide. Barry Park, et al., "Hazard and Risk Assessment of a Nanoparticulate Cerium Oxide – Based Diesel Fuel Additive – A Case Study", *Inhalation Toxicology*, Vol. 20, Issue 6, 547-566 (April 2008). The study concludes that exposure to nano-size cerium oxide would be "unlikely to lead to pulmonary oxidative stress and inflammation, which are the pre-cursors for respiratory and cardiac health problems." The study was based on data from modeling studies and from airborne monitoring sites in London and Newcastle adjacent to routes where vehicles using the additive passed. According to the study, the additive has been demonstrated to reduce fuel consumption, greenhouse gas emissions and particulate emissions when added to diesel at levels of 5 mg/L.



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