

# Environmental & Chemical Update

AIR • CLIMATE CHANGE • NANOTECHNOLOGY • RENEWABLE FUELS  
SUSTAINABILITY • TOXIC TORT • WASTE • WATER

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## Litigation and Regulatory Enforcement

### [1] **Water: Ninth Circuit Vacates EPA Rule Exempting Oil and Gas Construction Activities from CWA Construction Storm Water Requirements**

In a 2-1 decision, the Ninth Circuit Court of Appeals vacated a June 12, 2006, EPA rule that exempted oil and gas construction activities from Clean Water Act (CWA) permitting requirements for sediment-laden storm water discharges. [NRDC v. EPA, No. 06-73217 \(9th Cir. 5/23/08\)](#). At issue was EPA's interpretation of an amendment to the CWA in the Energy Policy Act of 2005 that exempted all oil and gas field activities and operations from National Pollutant Discharge Elimination System (NPDES) permit requirements. EPA interpreted the amendment to exempt all oil and gas activities, including sediment-laden storm water discharges, from the CWA-permitting requirements. The court's majority disagreed, saying that the amendment made no mention of "sediment discharges" and that EPA had long ago taken the position that storm water discharges contaminated only by sediment contribute to a violation of a water quality standard. The court therefore held that EPA's rule was "arbitrary and capricious." The dissenting judge argued that the court should have deferred to the agency's expertise under *Chevron v. NRDC*, 467 U.S. 837 (1984).

### [2] **CERCLA: Third Circuit Rules Civil Action Requirement in CERCLA Section 113(f) Is an Element of a Contribution Claim**

The Third Circuit Court of Appeals has ruled that the prior enforcement action requirement under sections 106 or 107 of CERCLA is "an element of the claim" that can be raised as a defense in a contribution lawsuit, rather than a jurisdictional threshold. [Beazer East v. The Mead Corp., No. 06-4993 \(3d Cir. 5/13/08\)](#). The court also ruled that defendant waived its right to raise that defense in this case because it failed to raise it at earlier stages of the proceedings. So ruling, the Third Circuit upheld a 2006 district court decision.

The court cited *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), for the proposition that "the requirement that a Section 113(f)(1) plaintiff must have been sued under Section 106 or 107(a) is an element of the claim. Failure to meet that requirement does not deprive the court of jurisdiction to decide the validity of the Section 113(f)(1) claim." Defendant had argued that because plaintiff was not the subject of the "civil action" required by *Cooper*, the district court lacked subject matter jurisdiction. According to the court, defendant could not show language in section 113(f)(1) indicating that Congress intended the "civil action" requirement to be jurisdictional.



### [3] Atomic Energy Act: Ninth Circuit Finds Federal Preemption of State Law Radioactive Waste Restrictions

The Ninth Circuit Court of Appeals has ruled that the Atomic Energy Act preempts a Washington state law imposing restrictions on the importation of mixed radioactive waste to the Hanford Nuclear Reservation. *U.S. v. Manning, No. 06-35613 (9th Cir. 5/21/08)*. The appellate court affirmed a June 2006 district court decision which found that the state law unconstitutionally “regulates” radioactive waste subject to the Atomic Energy Act. The Washington Cleanup Priority Act, established by voter approval of Initiative 297 in the November 2004 general election, imposed several restrictions on shipping of radioactive waste to Hanford, including a ban on such shipments until existing wastes are cleaned up. Although the court noted that the Department of Defense and its contractors “have been cited numerous times” for violating federal and state hazardous and mixed waste laws and requirements at Hanford and that there are currently 53 million gallons of radioactive and hazardous waste in leaking underground storage tanks at Hanford, the court held that the Atomic Energy Act preempts the state law because its purpose is to regulate radioactive hazards and it directly affects DOD’s decision on radiological safety.

### [4] Prop. 65: Company Fined \$10 Million for Selling Lead-Tainted Lunch Boxes

A California state court has reportedly fined a Los Angeles company \$10 million for allegedly selling lead-tainted lunch boxes to the state Department of Public Health. *Ctr. for Env’tl. Health v. Ross Stores, Inc., No. 05-444522 (Cal. Super. Ct. 5/20/08)*. Plaintiffs filed the lawsuit under the state Safe Drinking Water and Toxic Enforcement Act of

1986, otherwise known as Prop. 65, against several retailers of soft-sided lunch boxes and food and beverage coolers, alleging violations of its warning requirements. Prop. 65 requires companies to provide “clear and reasonable warning” when exposing the public to chemicals that the state has identified as a carcinogen or reproductive toxicant. Lead is noted on both lists. In addition to the fine, the company was ordered to pay plaintiffs’ legal fees and costs. See *BNA Daily Environment Report*, May 23, 2008.

### [5] Air: California Contractor Agrees to Pay \$6 Million to Settle Air Violations

A California construction company has reportedly agreed to settle a state air violation enforcement action involving the alleged operation of diesel equipment without the required air quality permits for \$6 million. *California v. MCM Constr., Inc., No. 06-00151 (Cal. Super. Ct. settlement filed 5/23/08)*. According to press reports, the settlement is the largest in state history involving state regulations designed to limit emissions from equipment moved from site to site, such as diesel cranes, pile drivers, air compressors, and generators. The settlement agreement requires the company to pay \$4 million in civil penalties and costs and spend another \$2 million on supplemental environmental projects.

Under state law, portable equipment operators must obtain permits from local air quality agencies or register the equipment with the California Air Resources Board. The state regulations also establish emissions standards for 50 horsepower and larger engines. According to a press report, the state attorney general’s office initiated the enforcement action against the company in 2006, after several administrative attempts to bring the company into compliance failed. See *BNA Daily Environment Report*, May 29, 2008.



### [6] **Hazardous Waste: Arizona Company Will Pay \$130,000 Civil Penalty to Settle State Hazardous Waste Charges**

An Arizona aerospace components manufacturer that allegedly stored potentially explosive hazardous waste on-site has reportedly agreed to pay a \$130,000 civil penalty to settle charges of violating state hazardous waste laws. *Arizona v. IMC Magnetics Corp.*, No. 08-11868 (D. Ariz. 5/21/08). The enforcement action was brought after the Arizona Department of Environmental Quality reportedly found numerous violations during an August 2004 inspection, including (i) treatment, storage and disposal of hazardous waste without a permit; (ii) failure to perform hazardous waste assessments; and (iii) failure to inform employees of proper handling and emergency procedures appropriate to hazardous waste. As part of the settlement, the company agreed to adopt an environmental management system and to conduct two annual hazardous waste audits to confirm compliance with state law. See *BNA Daily Environment Report*, May 27, 2008.

### [7] **Air: States, Groups Challenge EPA Air Quality Standards for Ozone**

Five environmental and public health groups and fourteen states have reportedly challenged EPA's air quality standards for ozone, asking the court to require EPA to issue stricter, science-based standards. *New York v. EPA*, No. 08-1202 (D.C. Cir. 5/27/08); *American Lung Ass'n v. EPA*, No. n/a (D.C. Cir. 5/27/08). EPA published the final rule March 12, 2008, setting both the primary and secondary ozone standards at 0.075 parts per million, which was above the 0.060 ppm to 0.070 ppm range unanimously recommended by the Clean Air Scientific Advisory Committee. The petitioners allege that the agency ignored science in setting the standards and

that the White House interfered with the agency's standard-setting process. The petitioners further allege that EPA improperly considered factors such as the economic impact of the standards before issuing them, a consideration the Clean Air Act expressly forbids. See *BNA Daily Environment Report*, May 28 and 29, 2008.

## Legislation, Regulations and Guidance

### [8] **Water: EPA Seeks Comments on Proposed General Permit for Storm Water Discharges from Construction Activities**

EPA is **seeking** public comments on a proposed 2008 National Pollutant Discharge Elimination System (NPDES) general permit for storm water discharges from new dischargers engaged in large and small construction activities. *73 Fed. Reg.* 28,454 (5/16/08). The proposed permit would apply to construction site operators disturbing one or more acres of land and engaging in heavy construction or in building, developing and general contracting. It would be issued for a maximum of two years and would apply in Alaska, Idaho, Massachusetts, New Hampshire, New Mexico, most territories, and most Indian country lands.

The proposed permit would replace the agency's 2003 permit, which is scheduled to expire July 1, 2008. According to EPA, "new dischargers," to which the 2008 permit applies, are those who do not file notices of intent under the 2003 permit before it expires. Dischargers who do file notices of intent before July 1, 2008, will continue to be covered under the 2003 permit. Comments on the proposed permit must be submitted to EPA by June 16, 2008.



### [9] FIFRA: EPA Announces Final Risk Mitigation Measures for 10 Rodenticides

EPA announced a final risk mitigation [decision](#) on May 28, 2008, for rodenticides containing one or more of the following active ingredients: (i) brodifacoum; (ii) bromadiolone; (iii) bromethalin; (iv) chlorophacinone; (v) cholecalciferol; (vi) difenacoum; (vii) difethialone; (viii) diphacinone; (ix) warfarin; and (x) zinc phosphide.

EPA's decision was based on attempts to minimize children's exposure to rodenticide products used in homes and to reduce wildlife exposures and ecological risks, according to the agency. Among the mitigation risk measures included in the decision are: (i) rodenticide bait products available for sale to consumers must be sold only in bait stations; (ii) loose bait such as pellets are prohibited; (iii) certain products must contain warnings limiting the sale or use of the products to agricultural, farm and tractor stores or directly to professional applicators; (iv) certain packages must be tamper proof and contain specified labels; and (v) additional restrictions are imposed on the sale or use of the products. Persons holding a manufacturing-use or end-use registration for one of the covered rodenticides must provide a letter to EPA by September 2, 2008, declaring an intention to comply with the risk mitigation decision.

### [10] RCRA: EPA Amends F019 Hazardous Waste Definition to Encourage Use of Aluminum in Motor Vehicles

EPA has [amended](#) the RCRA F019 hazardous waste listing to facilitate the use of aluminum in automobiles, light trucks and utility vehicles. F019 wastes are defined as wastewater treatment sludges from the chemical conversion coating of aluminum. The amendment exempts F019 waste from hazardous waste requirements as long as the waste

is not placed outside on the land before shipment to an appropriately lined landfill. Aluminum automotive parts go through a metal finishing or conversion coating process before they are used in motor vehicle manufacturing. The process generates F019 listed waste, which, before the amendment, had to be managed and disposed of as a hazardous waste. According to the agency, the amendment will encourage the use of lighter aluminum parts in motor vehicle manufacturing, while protecting human health and the environment. The amendment will be effective 30 days from the date it is published in the *Federal Register*.

### [11] Chemicals: European Chemicals Agency Issues Guidance on REACH Registration

The European Chemicals Agency issued updated [guidance](#) on May 26, 2008, about registration under the Registration, Evaluation, and Authorization of Chemicals (REACH). The updated guidance includes new information about the "only representative" that chemical manufacturers not located in Europe can use to register their chemicals. New information about the submission number that registrants will receive is also provided. The guidance contains sections on "registration" under REACH, including who must register, what to register and when to register, as well as how to prepare a "dossier" under REACH. The guidance also contains appendices, tables and figures.

### [12] CERCLA/RCRA: EPA Updates Handbook on Liability Concerns in Revitalizing Contaminated Sites

EPA has issued an updated [handbook](#) titled *Revitalizing Contaminated Sites: Addressing Liability Concerns*. The handbook is a compilation of available enforcement tools, guidance and policy documents that promote the cleanup and revitaliza-



tion of contaminated sites. It includes an overview of CERCLA and RCRA and contains chapters on statutory and enforcement tools, lenders and local governments, and other considerations.

## Scientific/Technical Issues

### [13] Nanotechnology: Study Claims Multi-Walled Carbon Nanotubes Exhibit Asbestos-Like Effects in Mice

A recent study by researchers at the University of Edinburgh in Scotland claims that carbon nanotubes injected into mice caused inflammation, lesions and other biological responses similar to asbestos exposures. Ken Donaldson, et al., "Carbon Nanotubes Introduced Into the Abdominal Cavity of Mice Show Asbestos-like Pathogenicity in a Pilot Study," *Nature Nanotechnology*, May 20, 2008. The study focused on multi-walled carbon nanotubes because they are more commercially advanced than single-walled carbon nanotubes and are found at manufacturing sites and in consumer and other products. The researchers divided the nanotube samples into four groups, two of which were primarily long, straight fibers measuring longer than 20 micrometers and two of which were shorter and tangled. The team also used what are called positive and negative controls, in this case fibers that would and would not be expected to cause an asbestos-like reaction. In the study, the long, rigid nanotubes and fibers expected to cause harm reportedly did cause such effects. The short, tangled nanotubes did not cause such effects.



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