

Environmental & Chemical Update

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

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Litigation and Regulatory Enforcement

[1] Toxic Torts/Punitive Damages: U.S. Supreme Court Limits Punitive Damages in Exxon Valdez Oil Spill

The U.S. Supreme Court has slashed the punitive damages award in the Exxon Valdez oil spill lawsuit from \$2.5 billion to \$507.5 million, ruling that a 1:1 ratio of punitive to compensatory damages is the “fair upper limit” in federal maritime cases where the defendant did not act intentionally or maliciously and had no desire for gain. *Exxon Shipping Co. v. Baker, No. 07-219 (S. Ct. 6/25/08)*. In March 1989, the Exxon Valdez, an oil supertanker, hit a reef in Prince William Sound in Alaska, ripping the hull and spilling 11 million gallons of crude oil into the water. Plaintiffs presented evidence that the ship’s captain had been drinking heavily before the accident. Exxon spent about \$2.1 billion in cleanup costs, paid \$125 million in federal criminal fines and restitution, \$900 million in natural resource restoration costs and \$303 million in voluntary settlements with private parties. This lawsuit was brought by commercial fisheries, Native Alaskans and landowners. The district court certified a class of 32,000 plaintiffs seeking punitive damages.

A jury hearing plaintiff’s claims for economic losses from the spill had imposed a \$5 billion punitive award in 1994. In 2001, the Ninth Circuit Court of Appeals ruled that the punitive award violated due process and remanded the case for further proceedings.

In re Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001). In 2004, the district court reduced the punitive damages award to \$4.5 billion. *In re Exxon Valdez*, 296 F.Supp.2d 1071 (D. Alaska 2004). On December 26, 2006, the Ninth Circuit reduced the award further to \$2.5 billion. *In re Exxon Valdez*, 472 F.3d 600 (9th Cir. 2006).

The U.S. Supreme Court unanimously ruled that the Clean Water Act does not preempt maritime punitive damages law. The Court split 4-4 on whether punitive damages are available against a ship owner for a shipmaster’s recklessness, thus leaving in place the appeals court ruling that a corporation may be liable for punitive damages under maritime law for the recklessness of its managers acting within the scope of their employment. By a 5-3 margin, the court held that punitive damages under maritime law should be the same as compensatory, or actual damages, which, in the Exxon Valdez case, amounted to \$507.5 million. The dissenters argued against the restriction on punitive damages. Justice Samuel Alito did not participate in the decision.

[2] Air/Greenhouse Gases: D.C. Circuit Denies Petition Seeking Writ of Mandamus to Compel EPA to Regulate GHG Emissions

The D.C. Circuit Court of Appeals has denied a request from states and environmental groups that EPA be ordered to comply with *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), in which the U.S. Supreme Court ruled that EPA must either



regulate carbon dioxide and other greenhouse gases (GHG) based on a finding of endangerment or provide a reasoned basis why it is not doing so. *Massachusetts v. EPA, No. 03-1361 (D.C. Cir. 6/26/08)*. Although the order did not elaborate on the reasons for denying the request, Judge Tatel, one of the three judges ruling on the mandamus petition, issued a separate statement concurring in part and dissenting in part.

According to Judge Tatel, mandamus is not yet appropriate because neither the U.S. Supreme Court nor the D.C. Circuit's remand order imposed "a specific deadline by which EPA must determine whether a particular air pollutant poses a threat to public health or welfare." EPA has taken no action to regulate carbon dioxide, but reportedly plans to issue an advance notice of proposed rulemaking soon that will seek comment on a number of issues related to GHG and how to regulate them. *See BNA Daily Environment Report*, June 27, 2008.

[3] Air/Greenhouse Gases: Federal Court Rejects Automobile Industry Motions to Expand Injunction on California GHG Rules

A federal judge in California has denied the automobile industry's attempt to delay compliance with California's vehicle-related greenhouse gas (GHG) regulations. *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene, No. 04-6663 (E.D. Cal. 6/24/08)*.

The industry was concerned that if the courts reverse EPA's refusal to grant the state a federal preemption waiver under the Clean Air Act, automakers would not have time to comply with the regulations. The lawsuit challenged an executive order issued by Cal/EPA's Air Resources Board

that makes clear the agency's plan to enforce the regulations once all legal obstacles are removed. Plaintiffs asked the court to expand an injunction issued in January 2007 and to reinterpret section 209 of the CAA to preclude EPA from granting the state a waiver once it has denied the waiver request.

The court denied both motions, finding that nothing before the court merits the expansion of the injunction or reinterpretation of its earlier preemption decision. According to the court, "[t]he Executive Order ... merely states what has been assumed, or should have been assumed by the parties all along – California intends to enforce its ... regulations if and when it can."

[4] Toxic Torts: Rhode Island Supreme Court Reverses Lead Paint Public Nuisance Award

The Rhode Island Supreme Court has reversed a 2006 jury award that found three companies—Sherwin-Williams, NL Industries and Millennium Holdings—liable for creating a public nuisance by manufacturing and selling lead paint more than 30 years ago. *Rhode Island v. Lead Indus. Ass'n, No. 2004-63 (R.I. 7/1/08)*.

In a 4-0 decision, the court held that "public nuisance law simply does not provide a remedy for this harm." The court added that the paint companies did not have control over how their lead-based products were used and that the burden of making properties safe from lead-based paint contamination should rest with landlords and property owners. Cleanup costs for lead-based paint contamination in the state had been estimated at \$2.4 billion. Appellate courts in Illinois, Missouri and New Jersey have rejected similar public nuisance claims.



[5] Envtl. Crime: Danish Shipping Company to Pay \$4.75 Million to Settle Criminal Violations of MARPOL

Clipper Marine Services AS, a Danish shipping company, will reportedly pay a \$4.75 million criminal fine and install state-of-the-art monitoring equipment and pollution controls on certain ships to settle criminal charges that it violated the International Convention for the Prevention of Pollution from Ships (MARPOL), an international treaty regulating disposal of wastes generated by the normal operation of vessels. *U.S. v. Clipper Wonsild Tankers Holding A/SD*, No. 07-264 (D. N.J. guilty plea 6/19/08).

The company pleaded guilty to charges that it illegally discharged oily waste from an oceangoing vessel that entered Port Newark in June 2006 and that it conspired to defraud the U.S. Coast Guard by maintaining a false record book onboard the M/T Clipper Trojan concealing discharges of oil sludge and oil-contaminated bilge between February and June 2006. Under the plea agreement's terms, the company will retrofit four of its oldest vessels with new, higher capacity oil/water separators to keep discharges within limits allowed under MARPOL and U.S. law. The company also agreed to implement a remote monitoring system aboard five of its ships to monitor waste levels and the use of oil waste processing equipment in real time, using data transmitted by satellite. See *BNA Daily Environment Report*, June 23, 2008.

[6] Water: Groups Challenge EPA Water Transfers Rule

Earth Justice has filed a [petition](#) before the Eleventh Circuit Court of Appeals on behalf of the Florida Wildlife Federation to vacate EPA's National Pollutant Discharge Elimination System (NPDES)

Water Transfers Rule, published at 73 *Fed. Reg.* 33,697 (6/13/08). The rule exempts transfers of water from one meaningfully distinct navigable water to another from the point-source permitting requirements of section 402 of the Clean Water Act (CWA) so long as the transfers are not for industrial, municipal or commercial purposes. According to the petition, EPA failed to review the actual and potential adverse impacts associated with transfers of polluted water, and the rule was promulgated in excess of CWA authority. The petition asks the court to vacate the rule and seeks reasonable litigation costs including attorney's fees.

[7] Water: Pipeline Company Settles CWA Enforcement Action for \$5.3 Million

Magellan Midstream Partners, the owner and operator of a 6,700-mile petroleum pipeline network and 39 terminal facilities in 11 Midwestern states, has reportedly agreed to settle an EPA Clean Water Act civil enforcement action for \$5.3 million. The alleged violation included illegally discharging gasoline and fuel oil from pipelines in Arkansas, Illinois, Iowa, Kansas, and Minnesota into nearby waterways over a period of 10 years. According to the complaint, the company allegedly discharged more than 17,000 barrels of gas and fuel oil on 11 different dates between March 1999 and May 2006. Most of the spills were caused by third-party damage from farm equipment and bulldozers, corrosion, leaks, and pipeline-operator error.

In addition to the civil penalty, the company has agreed to spend \$750,000 on removing or minimizing any external threats along selected segments of its pipeline. The company also agreed to implement systemwide changes to improve employee training, leak-response procedures and protocols for detecting and responding to leaks



and ruptures. The consent decree, lodged in the U.S. District Court for the District of Kansas, is subject to a 30-day comment period and court approval. *See EPA Press Release*, June 17, 2008.

[8] Air: Groups to Sue EPA over CAA Plans in Parks

Earth Justice, on behalf of the Environmental Defense Fund and the National Parks Conservation Association, has notified EPA of its intention to file a citizen suit under section 304 of the Clean Air Act over the agency's alleged failure to force states to submit clean air plans for national parks and wilderness areas. According to a notice letter dated June 25, 2008, EPA has failed to enforce a regional haze rule promulgated in 1999 that required states to turn in the plans by December 2007. The letter alleges that only North Carolina submitted a plan before the deadline, although Indiana, Iowa, Louisiana, Missouri, and South Carolina have since submitted blueprints to the agency. The letter threatens that if EPA fails to enforce the deadline against delinquent states within 60 days, the lawsuit will be filed. *See E & E News PM*, June 25, 2008.

Legislation, Regulations and Guidance

[9] Lead Paint: EPA Releases Small Entity Compliance Guide for Lead-Based Paint

EPA has issued a "[Small Entity Compliance Guide to Renovate Right: EPA's Lead-Based Paint Renovation, Repair, and Painting Program](#)." *73 Fed. Reg.* 36,281 (6/26/08). The compliance guide is for contractors, painters, property managers, maintenance personnel, and other professionals who disturb painted surfaces while working in homes and child-occupied facilities, such as child-care centers and schools, built before 1978 when lead-based paint was commonly used. According

to EPA, the compliance guide is designed to help small entities comply with regulations issued on April 22, 2008, *73 Fed. Reg.* 21,692, that apply to renovations performed in target housing and child-occupied facilities built before 1978. Those regulations require (i) training for renovators, (ii) certification of renovators and firms, (iii) accreditation of training providers, and (iv) use of renovation work-practice standards. The regulations were effective June 23, 2008.

[10] Chemical Exposure: EPA Proposes to Classify PERC as Likely Human Carcinogen

EPA is [seeking](#) comments on a proposed toxicological review of tetrachloroethylene (perchloroethylene or PERC), in which the agency recommends that the chemical be classified as a likely human carcinogen. *73 Fed. Reg.* 36,321 (6/26/08). PERC is commonly used in dry cleaning, textile production and metal-cleaning operations. It is also used as a chemical intermediate in the manufacture of other chemicals. PERC has been detected in groundwater, surface water, air, soil, food, and breast milk and has been found in 771 of 1,430 National Priorities List CERCLA sites. The proposed review states that 10 laboratory animal studies have found that PERC caused cancer when inhaled or ingested and that human studies have consistently found an association between exposure to the chemical and a slight increase in cancer. A 90-day comment period on the proposed review began June 26, 2008.

[11] Air: EPA Finalizes Performance Standards for Petroleum Refineries

EPA has issued new source performance [standards](#) for petroleum refineries that, according to the agency, will reduce particulate matter, carbon monoxide, sulfur oxide, and nitrogen oxide emissions by nearly 31,000 tons annually, *73 Fed. Reg.*



35,837 (6/24/08). EPA was required to finalize the refinery standards as part of a consent agreement settling a lawsuit against the agency. *Our Children's Earth Found. v. EPA*, No. 05-94 (N.D. Cal. 7/22/05). The final rule sets separate standards of performance for new, modified or reconstructed process units at petroleum refineries. The final standards for new process units include emissions limitations and work practice standards for fluid catalytic cracking units, fluid coking units, delayed coking units, fuel gas combustion devices, and sulfur recovery plants. The final rules are effective June 24, 2008.

[12] Nanotechnology: E.C. Issues Policy Paper on Regulation of Nanomaterials

On June 17, 2008, the European Commission (E.C.) published a policy [paper](#) designed to improve nanotechnology regulation. The paper reviews existing EU legislation and regulations that are applicable to nanomaterials. According to the paper, relevant legislation includes directives that apply to chemicals, worker protection, products, and environmental protection. The paper explains that nanomaterials “may expose humans and the environment to new risks” and current legislation, standards and technical guidance therefore need to be reviewed and applied more rigorously. The E.C. intends to open a stakeholder consultation on nanomaterials in the near future. See *BNA Daily Environment Report*, June 24, 2008.

[13] Air: California Adopts Regulations Curbing GHG Emissions from Consumer Products

Cal/EPA's Air Resources Board (ARB) recently adopted statewide consumer-product [regulations](#) that establish volatile organic compound (VOC) limits for skin astringents and toners, fabric softening dryer sheets, floor maintenance products, car wash products, odor removers, tire and wheel

cleaners, windshield water repellent, and pressurized gas dusters. The ARB also tightened VOC limits for a wide range of other products, including skin lotions and soaps containing fragrances, carpet and upholstery cleaners, floor waxes, glass cleaners, spot removers, fabric protectants, multipurpose lubricants, dusting aids, and sealant or caulking compounds. The revised consumer product standards will be phased in over five years. The new regulations also prohibit manufacturers from using methylene chloride, perchloroethylene and trichloroethylene to lower VOC content levels in carpet and upholstery cleaners, fabric protectants, multipurpose lubricants, penetrants, spot removers, sealant and caulking compounds, and spot removers.

[14] Climate Change: California GOPR Releases Technical Advisory on CEQA and Climate Change

The California Governor's Office of Planning and Research (GOPR) has released a technical [advisory](#) on the California Environmental Quality Act (CEQA) and climate change. The advisory was prepared to advise state public agencies on their CEQA obligations to identify, quantify and assess greenhouse gas (GHG) emissions from projects they propose and to identify alternatives and/or mitigation measures if the impact of GHG emissions will be significant. Under CEQA, the lead agency involved in a proposed project is required to prepare an Environmental Impact Report and a Mitigated Negative Declaration, or equivalent document, when it determines the project's impacts on the environment will be significant. The GOPR will conduct public workshops to obtain input from the public and stakeholder groups on the technical advisory's scope and content.



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