

Environmental & Chemical Update

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Issue 243 • August 1, 2008

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Litigation and Regulatory Enforcement

[1] **Water: EPA Exceeded Authority in Exempting Certain Vessel Discharges, Ninth Circuit Rules**

According to the Ninth Circuit Court of Appeals, EPA violated the Clean Water Act when it exempted discharges that occur during normal vessel operations from the CWA's permitting requirements.

Nw. Env'tl. Advocates v. EPA, No. 06-17187 (9th Cir. 7/23/08). The exemption, which was promulgated in 1973 and is codified at 40 C.F.R. § 122.3(a), provides that the following vessel discharges into navigable waters do not require permits: (i) discharge of effluent from properly functioning marine engines; (ii) discharge of a vessel's laundry, shower and galley sink wastes; and (iii) any other discharge incidental to a vessel's normal operation, including ballast water discharge.

Affirming a district court ruling, the appeals court held that the CWA does not provide an NPDES program permitting exemption for discharges from marine engines, graywater or other discharges incidental to normal vessel operations. The court noted that marine engine discharges can include unburned fuel and various kinds of oil, while graywater can carry pathogens like fecal coliform and *E. coli* and pollutants such as ammonia, arsenic, copper, lead, nickel, and zinc. The category "other discharges" includes ballast water, which has been linked to the introduction of invasive species into the Great Lakes and other water systems.

[2] **Natural Gas Act: D.C. Circuit Denies LNG Expansion over Environmental and Safety Concerns**

The D.C. Circuit Court of Appeals has reversed a Federal Energy Regulatory Commission (FERC) decision and denied the intervenor's plan to expand the liquefied natural gas (LNG) capacity of its terminal in Cove Point, Maryland, because FERC failed to ensure that the expansion could proceed without causing unsafe leakage. *Washington Gas Light Co. v. FERC, No. 07-10157 (D.C. Cir. 7/18/08)*.

Under the Natural Gas Act, FERC must approve any application for the "construction of facilities for transportation or sale of natural gas if the project is or will be required by the present or future public convenience and necessity." Plaintiff, a distributor of natural gas it purchased from intervenor, argued that the expansion would "cause severe leakage throughout the distribution system." Ruling that system repairs which would prevent leakage could not be accomplished before expansion, the court reversed FERC's approval.

[3] **Air: Federal Court Grants Partial Summary Judgment to Defendant in NSR Enforcement Case**

A federal judge in Alabama has granted partial summary judgment to Alabama Power Co., a defendant in an EPA enforcement action in which EPA alleged the company violated the Clean Air Act's New Source Review (NSR) provisions at five coal-fired power plants. *U.S. v. Ala. Power Co.*, No. 01-152 (N.D. Ala. 7/25/08). NSR requires power plant



modifications that result in significant increases in air emissions to be individually permitted as if they were a new emissions source. EPA had alleged that Alabama Power violated NSR because some of its maintenance work did not conform to earlier repairs and maintenance at some of the plants. The company argued that, although it performed a variety of maintenance on its plants, all of the work adhered to general industry norms and therefore did not violate NSR.

The court agreed with the company, ruling that the “routine maintenance, repair and replacement” question should be analyzed broadly with reference to the entire utility sector and not as to an individual unit. According to the court, should EPA decide to continue to pursue an enforcement action against the company, “genuine issues of material fact” remain to be decided. A status meeting has been scheduled for August 28, 2008, during which the parties will determine whether the case will continue in light of the court’s decision.

[4] CERCLA: Purchase Agreement That Pre-Dated CERCLA May Shield Buyer from Assuming Liability, Federal Court Rules

A federal judge in New York has ruled that a real property purchase agreement, which pre-dated CERCLA and stated that the buyer assumes only those seller’s liabilities existing on the date of sale, does not subject the buyer to liability that arose later. *Georgia-Pacific Consumer Prods. L.P. v. Int’l Paper Co., No. 07-9627 (S.D.N.Y. 7/16/08)*. International Paper, the seller, argued that although the agreement was entered in 1972, eight years before CERCLA was enacted, the broad language in the agreement on assumption of liability transferred seller’s liability to buyer. The court disagreed, finding that the agreement unambiguously stated that liabilities were to be limited to those existing at the time of the 1972 closing. The court cited *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401 (1st Cir. 1993), for the proposition that “...where a

pre-CERCLA contract for the sale of assets required a buyer to assume only those liabilities in existence on the date of the sale, the buyer did not assume later-arising CERCLA liabilities.”

[5] FIFRA: Coalition Sues EPA Seeking Ban on Endosulfan

A coalition of labor and environmental groups has sued EPA in federal court seeking to stop the agency from reregistering the pesticide endosulfan. *Pesticide Action Network N. Am. v. EPA, No. 08-3542 (N.D. Cal. filed 7/24/08)*. The complaint seeks an injunction (i) requiring “EPA to make a new reregistration eligibility decision for endosulfan based on unreasonable adverse effects findings and risk-benefit analyses”; (ii) prohibiting the agency “from reregistering uses of endosulfan unless the pesticide registrants prove that the benefits of the endosulfan use outweigh the specific risks associated with that use”; (iii) imposing “interim protective measures to prevent harm to children, farmworkers, and bystanders in agricultural communities near areas where endosulfan is used”; and (iv) requiring consultation with the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration on potential threats from endosulfan to endangered and threatened species. The complaint alleges that EPA failed to act against the pesticide in 2007 after it released a human health assessment concluding that endosulfan poses risks to workers both during and after application that warrant additional safety measures.

Legislation, Regulations and Guidance

[6] Air: EPA Issues Final NESHAP for Semiconductor Manufacturing

EPA has issued final revisions to the national emissions standards for hazardous air pollutants (NESHAP) for semiconductor manufacturers.



73 *Fed. Reg.* 42,529 (7/22/08). The revisions set an emissions limit of 14.22 parts per million by volume of hazardous air pollutants for new and existing vent streams containing both inorganic and organic pollutants. The final revisions supplement a 2006 proposal that added separate definitions for organic, inorganic and combined air toxics process vent streams and control requirements for combined air toxics vents at new sources. In the 2006 proposal, EPA failed to include requirements for the control of emissions from combined process vents at existing facilities, an omission that a federal appeals court found in violation of the Clean Air Act. *Sierra Club v. EPA*, 64 ERC 1097 (D.C. Cir. 2007). The revisions were effective July 22, 2008.

[7] FIFRA: EPA Proposes to Revoke Tolerances for Carbofuran Residues on Food

EPA is **proposing** to revoke all food tolerances for residues of the pesticide carbofuran, citing “considerable risks” to human health. Under section 408(b)(2) of the Federal Food, Drug, and Cosmetic Act, EPA is authorized to revoke unsafe pesticide tolerances. The act defines safe as “a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary measures and all other exposures for which there is reliable information.”

According to the EPA’s 2007 Interim Reregistration Eligibility Decision, carbofuran presents an acute toxic risk--particularly for children from infancy to age 5. The decision said “acute residues” are anticipated for foods such as artichokes, cucumbers, melons, milk, peppers, potatoes, pumpkin, squash, strawberries, and sweet corn. Carbofuran is a restricted use, broad spectrum N-Methyl carbamate insecticide and nematicide used to control soil and leaf pests on a variety of field, fruit and vegetable crops. It was first

registered in the United States in 1969 under the name Furadan®. EPA will accept comments on the proposed revocation for 60 days after it is published in the *Federal Register*.

[8] Climate Change: EPA Seeks Comments on Public Review Draft on Land Use and Climate Change

EPA is seeking public comments on a draft report titled “Preliminary Steps Towards Integrating Climate and Land Use: The Development of Land-Use Scenarios Consistent with Climate Change Emissions Storyline.” The draft describes the methods EPA’s National Center for Environmental Assessment uses to develop land-use scenarios by decade from 2000 to 2100 that are consistent with population-growth storylines, greenhouse gas emissions and socio-economic changes used by climate-change modelers. The draft uses a demographic model that feeds population projections into another model which distributes housing across the landscape and describes the conversion of housing density to impervious surface cover and provides an initial analysis of changes in watersheds across the United States. Other analyses include regional trends in population growth and housing density. A 30-day comment period began July 25, 2008. 73 *Fed. Reg.* 43,442 (7/25/08).

[9] Greenhouse Gases: Inspector General Criticizes EPA’s Voluntary GHG-Reduction Plans

EPA’s Inspector General recently issued a **report** concluding that the agency’s voluntary greenhouse gas (GHG)-reduction programs do little to combat global warming. The report evaluated 11 of the agency’s voluntary programs and found that the perceived cost of reducing emissions was a significant deterrent for companies considering participation. In addition



to cost, the report concluded that a requirement for providing data to EPA and working with a regulatory agency were also deterrents to participation. Other areas of concern identified in the report were (i) a lack of transparency, (ii) a reliance on third-party providers, and (iii) worries about security. The report recommends that EPA implement written agreements for the programs that lay out standards for emission reporting and establish consequences for failure to report.

[10] MARPOL: President Signs Legislation Implementing Annex VI to MARPOL

President George W. Bush (R) signed legislation ([H.R. 802](#)) on July 21, 2008, that amends a federal law, the Act to Prevent Pollution from Ships, 33 U.S.C. 1901, to implement an annex to an international convention, which sets emissions standards for sulfur dioxide and nitrogen oxides from ships and bans the use of ozone-depleting substances on vessels. The United States had until July 2008 to approve the bill or lose its seat at the October 6-10 meeting of the Marine Environment Protection Committee of the International Maritime Organization at which the convention will be revised. Annex VI to the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL) established a ceiling of 45,000 parts per million for sulfur in diesel fuel in oceangoing vessels with a cylinder displacement greater than 30 liters. According to reports, the United States, if seated, would be expected to push for stricter standards. See *BNA Daily Environment Report*, July 23, 2008.

[11] NEPA: USDA Forest Service Codifies Procedures and Adopts NEPA Guidance

The U.S. Department of Agriculture's Forest Service (FS) has issued a final [rule](#) codifying procedures from the Forest Service Manual and Forest Service

Handbook and clarifying and expanding them to incorporate Council on Environmental Quality (CEQ) guidance to better align NEPA procedures with FS decision processes. *73 Fed. Reg. 43,084 (7/24/08)*. Specifically, the new FS regulations incorporate CEQ guidance (i) recognizing that emergency situations sometimes require immediate responses and provide for alternative procedures, (ii) clarifying what past actions to consider in performing a cumulative effects analysis, and (iii) clarifying how to document alternatives considered in environmental assessments. The regulations also incorporate current FS decision-making processes such as more in-depth public engagement and interaction and consolidate in one location descriptions of when FS proposed actions are subject to NEPA. The new regulations became effective July 24, 2008.

[12] Air: California Adopts Stringent Rules Imposing Clean Fuel Standards on Ocean-Going Ships

Cal/EPA's Air Resources Board has adopted [regulations](#) imposing stringent clean fuel standards on ocean-going vessels visiting the state's ports.

Under the new regulations, which were adopted July 24, 2008, all domestic and foreign-flagged cargo ships, tankers and cruise ships sailing within 24 miles of the state's coastline must use low-sulfur marine fuels to power main propulsion engines, auxiliary engines and auxiliary boilers. According to Cal/EPA, the standards will reduce coarse particulate emissions (PM-10) by 12 tons per day, sulfur oxides by 106 tons per day and nitrogen oxides by 8 tons per day. The new regulations will be phased in beginning July 1, 2009, when ships would have to switch to either marine gas oil with a sulfur content that averages 0.3 percent or marine diesel oil with a 0.5 percent sulfur limit.



Scientific/Technical Items

[13] Air: Research Shows Laundry Products and Air Fresheners Emit VOCs

A recent University of Washington study claims that top-selling dryer sheets, fabric softeners, detergents, and air fresheners emit more than 100 volatile organic compounds (VOCs), some of which EPA has classified as “hazardous air pollutants.” Anne C. Steinemann, “Fragranced Consumer Products and Undisclosed Ingredients,” *Environment Impact Assessment Review*, July 23, 2008. The author studied three common air fresheners (a solid deodorizer disk, a liquid spray and a plug-in oil) and three laundry products (a dryer sheet, a fabric softener and a detergent). Each product was placed in an isolated space at room temperature and the surrounding air was analyzed for VOCs. Results showed 58 different VOCs above a concentration of 300 micrograms per cubic meter, many of which were present in more than one of the six products. Among the VOCs detected were acetone, 1,4-dioxane, acetaldehyde, and chloromethane. The author has reportedly submitted a larger study for publication that focuses on 25 cleaners, personal care products, air fresheners, and laundry products. See *UWnews.org*, July 23, 2008.

[14] Air: Report Claims Cement Kilns Emit High Levels of Mercury

Citing a July 2008 EPA data collection, a recent report from Earth Justice and the Environmental Integrity Project claims that cement kilns emit an estimated 23,000 pounds of mercury annually, more than double the amount reported in 2006. The report recommends that (i) EPA issue new mercury emissions limits for kilns, (ii) states take

measures to monitor mercury emissions, and (iii) pollution-control measures and continuous emissions monitoring be required at kilns. The report also identifies what it calls the “highest self-report mercury polluting cement kilns” in the United States and points out “major kilns ignored by EPA.” See *Earth Justice Press Release*, July 24, 2008.

[15] Nanotechnology: Woodrow Wilson Report Proposes Nanotechnology Agenda

A recent [report](#) prepared as part of the Project on Emerging Nanotechnologies at the Woodrow Wilson International Center for Scholars offers more than 35 recommendations for the next administration on addressing nanotechnology, focusing on increasing oversight of the emerging market.

The report recommends initially using existing regulatory agencies and laws--including the Toxic Substances Control Act (TSCA) and the cosmetics, food additive and food packaging provisions of the Federal Food, Drug, and Cosmetic Act (FDCA)--and increasing their oversight of nanomaterials.

The report also recommends increasing funding for environmental, health and safety research and better modeling to prepare adequate risk evaluations for future innovations. As part of a longer term agenda, the report recommends (i) amending TSCA to improve its effectiveness, (ii) revising the FDCA to adequately regulate cosmetics, (iii) giving FDA authority over dietary supplements, (iv) enacting other changes to the FDCA to give FDA authority to review safety tests on food and cosmetics, and (v) amending the 21st Century Nanotechnology Research and Development Act of 2003 to include a requirement for an environmental, health and safety research plan and strengthen coordination authority under the Act.



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