

# Environmental & Chemical Update

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SUSTAINABILITY • TOXIC TORT • WASTE • WATER

Issue 245 • August 15, 2008

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## Litigation and Regulatory Enforcement

### [1] CERCLA: Third Circuit Allows Monetary Judgments for Future CERCLA Cleanup Costs

The Third Circuit Court of Appeals has upheld a district court ruling that a monetary judgment may be entered against a party found liable for CERCLA contribution based on a site's expected future cleanup costs. *Action Mfg. Co., Inc. v. Simon Wrecking Co., Inc.*, No. 06-3679 (3rd Cir. 7/28/08). The court rejected appellant's argument that it lacked the discretion to issue a monetary award based on future cleanup costs. The court affirmed a \$1.5 million contribution award, holding that section 113(g)(3) of CERCLA contains no requirement that a declaratory judgment must be issued in cost recovery actions. The district court had awarded appellee \$1.5 million in 2006 by taking already-incurred past cleanup costs (\$4.2 million) and adding its estimate of the site's future expected cleanup costs. The court then multiplied that number by 9.38 percent, the proportion for which the court determined the appellant was responsible.

### [2] Water: Ninth Circuit Reverses District Court Construction Injunction

The Ninth Circuit Court of Appeals has reversed a district court judgment enjoining the construction of a condominium resort on the shoreline of California's

Big Bear Lake. *Ctr. for Biological Diversity v. Marina Point Dev. Co.*, No. 06-56193 (9th Cir. 8/6/08). The district court also assessed a civil penalty against the developer, holding that the company violated the permitting requirements of sections 402 and 404 of the Clean Water Act and the Endangered Species Act (ESA) due to impingement on bald eagle habitat.

The appellate court ruled that plaintiffs failed to establish jurisdiction because their 60-day citizen suit notice letter "lacked the specificity required to give the developer notice of violations alleged under sections 402 and 404 of the CWA." According to the court, section 402 was not listed at all in the notice letter. The court also found that the ESA allegation was moot because the bald eagle had been removed from the endangered species list. The court vacated the district court decision and ordered the court to dismiss both the CWA and ESA claims.

### [3] CERCLA: Federal Court Rules PRP May Not Pursue 113 Claim Unless Liability Is Established or 107 Claim Still Pending

According to a federal judge in Missouri, a CERCLA potentially responsible party (PRP) that has been sued for cost recovery under section 107 may not pursue a section 113 contribution claim unless its liability has been established or the section 107 action is still pending. *Westinghouse Elec. Co. v. U.S.*, No. 03-861 (E.D. Mo. 7/29/08). In June 2003, Westinghouse sued the United States and several other parties, alleging both section 107 and 113



claims under CERCLA at a former fuel-production plant in Hematite that Westinghouse owned. The complaint alleged that the United States was liable as an “arranger” because the facility was regulated by the Atomic Energy Commission and the nuclear fuel produced at the plant was produced for the United States. The other defendants operated the plant at various times. In 2003 and 2004, Missouri filed two separate section 107 cost recovery suits against Westinghouse related to the Hematite site. The first suit was dismissed soon after filing for procedural reasons. The second lawsuit was voluntarily dismissed in July 2008 after Missouri and Westinghouse entered a settlement agreement that a state court approved in June. *Nixon v. Westinghouse Elec. Co.*, No. 08-00856 (Cir. Ct., Jefferson County 2008).

The non-U.S. defendants in the federal lawsuit moved to dismiss Westinghouse’s section 113 contribution claim, arguing that the company could not maintain such an action under the U.S. Supreme Court’s decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004). Agreeing with defendants, the court ruled that under *Cooper Industries* and *U.S. v. Atlantic Research Corp.*, 127 S.Ct. 2331 (2007), “CERCLA liability must have been established in a qualifying civil action for a party to either bring or maintain a section 113 (f)(i) claim after that civil action is closed.” Westinghouse still has section 107 claims pending against the United States and the other defendants.

#### **[4] Env'tl. Crime: St. Louis Environmental Professional Sentenced to Prison for Criminal Violations of RCRA**

A professional environmental responder and waste hauler from St. Louis, Missouri, was reportedly sentenced to one year and a day in

prison for illegally disposing of hazardous waste. *U.S. v. Becks*, No. 08-198 (E.D. Mo. *sentenced* 8/7/08). The defendant, who pleaded guilty to one RCRA count, was also ordered to pay \$29,000 in restitution to EPA. According to court documents, the defendant was hired in January 2008 to perform a Phase I environmental assessment at the site of a former tire dealership in St. Louis. During the site assessment, defendant found several 55-gallon drums of commercial paint and solvent waste and agreed to dispose of the drums. Instead of disposing of them legally, he transported six drums to a rural site and abandoned them there. *See BNA Daily Environment Report*, August 11, 2008.

#### **[5] NEPA: Groups Sue State Department to Stop TransCanada Pipeline**

Several environmental groups have reportedly sued the U.S. Department of State to stop construction of the TransCanada Keystone Pipeline, arguing that the government, in approving the pipeline, failed to fully consider its public health and environmental impacts, as required by NEPA. The 30-inch diameter pipeline, which will carry crude oil from Alberta, Canada, through the United States to Oklahoma, will eventually carry up to 590,000 barrels per day. The crude oil will be extracted from Alberta’s tar sands fields starting in late 2009. The complaint was filed August 6, 2008, in the U.S. District Court for the District of Columbia; plaintiffs allege that the 2,148 mile pipeline could significantly harm the ecosystem of both Canada and the United States. *See Dickinson (North Dakota) Press*, August 8, 2008.



## [6] **Endangered Species Act: Alaska Challenges FWS Decision to List Polar Bear Under ESA**

Alaska has reportedly challenged the U.S. Fish and Wildlife Service's (FWS) decision to list the polar bear as a threatened species under the Endangered Species Act (ESA). *Alaska v. Kemphorne*, No. 08-01352 (D.D.C. filed 8/4/08). The complaint alleges that the FWS did not base its decision on the best scientific and commercial data available and that the listing will deter activities such as commercial fisheries, oil and gas exploration and development, transportation, and tourism within and offshore Alaska. A lawsuit by environmental groups against the FWS prompted the listing. *Ctr. for Biological Diversity v. Kemphorne*, No. 08-1339 (N.D. Cal. injunction issued 4/28/08). The Pacific Legal Foundation also announced an intent to sue the FWS over the listing under the citizen suit provision of the ESA on July 23, 2008. Additional information about that challenge can be found in issue 244 of this Update. See *BNA Daily Environment Report*, August 8, 2008.

## Legislation, Regulations and Guidance

### [7] **Water/Pharmaceuticals: EPA Seeks Comments on Unused Pharmaceutical Disposal Methods at Health Care Facilities**

EPA is [seeking comments](#) on a planned study examining how hospitals, long-term care facilities and hospices dispose of unused pharmaceuticals.

The agency has asked health care industry officials for data that might lead to future regulation and the development of best management and disposal practices in efforts to keep pharmaceuticals from entering public water supplies. The National

Academy of Sciences will also advise EPA on the potential risk to human health from low levels of pharmaceutical residues in drinking water.

Other actions EPA announced include (i) expanding a recent fish-tissue study to sample nationally to determine whether residues from pharmaceuticals and personal care products may be present in fish and waterways; (ii) developing a methodology to establish water quality criteria to protect aquatic life from pharmaceutical residues; and, (iii) conducting studies to examine the potential occurrence of pharmaceuticals and personal care products in sewage sludge and wastewater. EPA will accept comments for 90 days after publishing its Information Collection Request in the *Federal Register*. See *EPA Press Release*, August 6, 2008; *BNA Daily Environment Report*, August 7, 2008.

### [8] **Renewable Fuels: EPA Denies Request to Reduce Nationwide Renewable Fuel Standard**

EPA has denied Texas Governor Rick Perry's (R) request to relax the federal standard for renewable fuels (RFS) in the U.S. gasoline supply for 2008 and 2009. Filed on April 25, 2008, the request for the waiver cited rapidly rising food prices partly attributed to the expanded use of corn to produce ethanol. EPA, however, stated that even if it relaxed the RFS established by the Energy Policy Act of 2005, there would be no impact on ethanol production and therefore no impact on corn, food or fuel prices. The agency noted that the average increase in corn prices due to the ethanol requirement was 7 cents per bushel of corn, an amount EPA said does not satisfy the high threshold of harm to the economy required for the agency to waive the RFS. See *EPA Press Release*, August 7, 2008; *BNA Daily Environment Report*, August 8, 2008.



### [9] Self-Reporting: EPA Launches Web-Based Self-Disclosure System Pilot Program for EPCRA Violations

EPA recently announced a pilot program enabling facility owners to electronically disclose certain environmental violations under the agency's audit policy. The audit policy, titled "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," creates incentives for facility owners to self-report environmental violations. Violations have been resolved at nearly 10,000 facilities under the policy since 1995, according to EPA. The pilot program will allow companies nationwide to electronically report violations of the Environmental Planning and Community Right-to-Know Act (EPCRA).

The information collected will be saved to a secure database, routed to the appropriate agency contact and evaluated against the agency audit policy conditions. EPA then will determine the appropriate enforcement response. Based on the result of the pilot project, EPA may expand the electronic self-reporting program to other statutes as is the case in EPA's Region 6 (Arkansas, Louisiana, New Mexico, Oklahoma and Texas), where facilities are able to electronically disclose violations under all environmental statutes. See *EPA Press Release*, August 7, 2008.

### [10] Nanotechnology: FDA Announces Public Meeting on Nanomaterials

The U.S. Food and Drug Administration (FDA) has **announced** that it will hold a public meeting on September 8, 2008, to continue gathering information to develop policies and guidance on nanomaterials and nanoengineered products. 73 *Fed. Reg.* 46,022 (8/7/08). According to FDA, "[t]he primary purpose of the meeting is to determine what

factors the agency should consider in providing guidance on: (1) The information and data that may be needed to demonstrate the safety and effectiveness of FDA-regulated products containing nanoscale materials and (2) The circumstances under which a product's regulatory status might change due to the presence or use of nanoscale materials."

Other issues the agency would like to address at the meeting include (i) the characteristics of nanoscale materials in FDA-regulated products that should be identified and evaluated to ensure the safety and, where relevant, effectiveness of these products; (ii) the assessment tools that are available to evaluate the characteristics of nanoscale materials that may affect the safety, effectiveness and quality of FDA-regulated products; (iii) the reliability of these tools; (iv) additional tools that FDA and industry should consider developing to evaluate the characteristics of nanoscale materials; and, (v) how potentially unique features of nanoscale materials, such as particle size, shape and surface charge, may affect what should be considered in the development of controls, standards and specifications for manufacturing. Those wishing to attend the meeting, which will be held at the University of Maryland's Shady Grove Conference Center, must register by September 2, 2008.

### [11] Climate Change: USDA Seeks Comments on Climate Change Strategic Plan

The U.S. Department of Agriculture (USDA) is **seeking** public comment on its strategic plan that will guide the agency in research and education efforts directed at climate change. 73 *Fed. Reg.* 45,693 (8/6/08). The agency recently completed a detailed study on how climate change would affect agriculture, land and water resources and biodiversity. The study,



which was completed in May 2008, concluded that changes in the climate are likely to (i) affect livestock mortality due to higher summer temperatures, (ii) reduce high-altitude snowpacks that support water supplies in the West, and (iii) increase the growth of weeds due to elevated levels of carbon dioxide.

The strategic plan sets out the agency's future research and education initiatives focusing on how climate change might affect the spread of invasive species, weeds, pathogens, and insects. It also would address the impact of climate change on wildfires, as well as on water, soil and other natural systems. The agency also plans to emphasize how climate-related effects--including changing precipitation, temperature and water availability--may influence crop and other agricultural productivity. The agency will accept comments on the plan until September 19, 2008.

#### **[12] Climate Change: EPA Announces Peer-Review Workshop on Climate Change Draft Document**

EPA has **announced** an external peer-review workshop to discuss an external draft document titled "Interim Report of the U.S. Global Change Research Program Assessment of the Impacts of Global Change on Regional U.S. Air Quality: A Preliminary Synthesis of Climate Change Impacts on 03." *73 Fed. Reg.* 45,437 (8/5/08). Versar, Inc., an EPA contractor for external scientific peer review, will convene an independent panel of experts to conduct the workshop on August 26, 2008, in Durham, North Carolina. EPA, which first publicized the interim report on July 10, has encouraged the public to register and attend the meeting, (*73 Fed. Reg.* 39,695). The agency will accept comments on

the draft document until August 25, 2008. Further details and a link to the report also appeared in issue 241 of this Update.

#### **[13] EU/Chemicals: EC Issues Regulation on REACH Appeals**

The European Commission (EC) has issued a **regulation** setting forth the organization and procedures that the European Chemicals Agency's Board of Appeals will use in hearing appeals under the European Union's Registration, Evaluation, and Authorization of Chemicals (REACH) rule.

The regulation, which the EC issued on August 1, 2008, addresses (i) how appeals are to be filed, (ii) what information they must contain, (iii) how interested parties can intervene, (iv) hearings that can be held, (v) what languages may be used, and (vi) other procedural matters.

#### **[14] EU/Air: EC Proposes Rule Revisions on Ozone-Depleting Substances**

The European Commission (EC) has proposed **revisions** to its regulations governing the production and use of hydrochlorofluorocarbons (HCFCs) and similar substances to reflect new agreements made by parties to the Montreal Protocol on Substances That Deplete the Ozone Layer. The proposal would (i) set out a revised schedule for phasing out HCFCs, (ii) ban the use of virgin HCFCs in the maintenance and servicing of refrigeration and air conditioning equipment by 2010, (iii) add new candidates to lists of substances that are banned or restricted, and (iv) consolidate the texts of amendments made to the existing law on ozone-depleting substances since 2000.



## Scientific/Technical Items

### [15] Water Resources: Report on Southwestern U.S. Water Resources Urges Water-Saving Technologies

A recent [report](#) by the Environment America Research & Policy Center claims that Arizona, Colorado, Nevada, New Mexico, Texas, and Utah could conserve up to 1.86 trillion gallons of water per year by implementing water saving technologies, such as micro-irrigation and low-water landscaping, and shifting to clean, less water-intensive energy sources.

The report concludes that agriculture is responsible for approximately 70 percent of all water consumption in these drought-ridden states; homes for 15 percent; and electricity generation for 2 percent. The report recommends that (i) any new development or heavy water user be required to demonstrate that it has acquired a sustainable water supply; (ii) states decrease the amount of electricity generated by coal, natural gas and nuclear power plants, which use large amounts of water; (iii) states cap the water use of new houses to ensure water responsibility; and (iv) states develop commercial incentive programs to encourage better use of water-saving technologies and programs in businesses.



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