

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] Water: Ninth Circuit Rules EPA Must Set Construction Stormwater Rules

According to the Ninth Circuit Court of Appeals, EPA must set standards to control stormwater discharges caused by the construction and development industry. [NRDC v. EPA, No. 07-55183 \(9th Cir. 9/18/08\)](#).

The decision affirmed a 2006 district court finding that EPA had a duty under section 304 of the Clean Water Act (CWA) to establish the discharge standards.

In 2000, EPA published a final notice of an effluent guidelines plan that listed construction activities as a point-source category requiring guidelines under the CWA, but in 2004 the agency withdrew a proposal to issue such standards saying that it had decided not to promulgate effluent guidelines for the construction industry. NRDC filed the lawsuit on behalf of the Waterkeeper Alliance seeking to compel the agency to set stormwater limits for the construction industry. New York and Connecticut were co-plaintiffs in the action.

The appeals court rejected EPA's argument that the district court lacked jurisdiction to hear the lawsuit. Because the lawsuit did not challenge a specific EPA rulemaking but rather focused on the agency's failure to promulgate a rule, the court held that the district court was the appropriate venue.

[2] Attorney's Fees: Enhanced Hourly Rate Reduced in Sonar Litigation

The Ninth Circuit Court of Appeals has vacated and remanded an award of attorney's fees to NRDC in litigation in which the environmental group sued the U.S. Navy over disruptions to maritime life allegedly caused by mid-frequency active sonar during training programs. [NRDC v. Winter, No. 07-55294 \(9th Cir. 9/16/08\)](#).

The district court awarded an enhanced hourly rate above the statutory cap of \$125 per hour set by the Equal Access to Justice Act, 28 U.S.C. § 2412, ruling that attorneys for NRDC brought "distinctive skills" to the litigation because (i) environmental litigation requires specialized knowledge and (ii) the lawyers acquired "highly specialized skills" from their involvement in a related case that preceded the current one.

Reversing the district court, the appeals court ruled that the lower court "abused its discretion" when it enhanced the fees for certain junior attorneys on the NRDC team who never showed that they had a practice specialty, let alone the "distinctive skills" necessary to the litigation. The NRDC "team" consisted of two senior and two junior in-house lawyers and one senior attorney and three associates from the law firm of Irell & Manella. The court's reversal of attorney's fees applied only to fees awarded to two junior in-house attorneys and outside counsel. The appeals court refused to reverse awards to the senior Irell & Manella lawyer and the in-house junior attorneys.



[3] CERCLA: Federal Court Dismisses City's Cost Recovery Claims as Time Barred

A federal judge in Illinois has dismissed as untimely the city of Waukegan's CERCLA cost recovery action, filed more than six years after the cleanup of Waukegan Harbor began, which exceeds the limitations period set forth in section 113(g)(2) for remedial actions, *City of Waukegan v. National Gypsum Co., No. 07-5008 (N.D. Ill. 9/8/08)*. The court declined to accept the city's argument that the cleanup was started in 1992 as an ongoing removal action rather than a past remedial action.

Dismissing the city's cost recovery action, the court cited a 1988 consent decree which showed that a "remedial action" began in the harbor at least 15 years before the city filed its claims under section 107 of CERCLA. The "removal action" versus "remedial action" distinction is significant because if a cleanup is categorized as a "removal action," plaintiff has three years after completion of the removal action to file suit. The court noted that although section 9601 of CERCLA defines "remedial action" as "those actions consistent with a permanent remedy," "[p]ermanency ... does not involve returning the site to its pre-conditioned state." The city had argued that because the site did not have a "permanent remedy," the cleanup must be a "removal action."

[4] Asbestos: Federal Court Rules City of St. Louis Violated Asbestos Demolition Requirements at Lambert Field

A federal judge in Missouri has ruled that the city of St. Louis violated federal asbestos demolition and renovation regulations when the airport authority demolished asbestos-containing buildings in connection with an airport expansion project at Lambert St. Louis International Airport.

Families for Asbestos Compliance, Testing and Safety v. City of St. Louis, No. 05-719 (E.D.

Mo. 9/15/08). Plaintiffs filed a citizen's suit under section 7604 of the Clean Air Act (CAA) and section 7002 (a)(1)(B) of RCRA in 2005 alleging violations of both statutes and that the demolition activity "may have presented an imminent and substantial endangerment to health and/or the environment."

They filed the complaint after learning that the city used the wet demolition method on hundreds of homes and other buildings demolished as part of the airport expansion, i.e., wetting down the asbestos during demolition instead of removing it beforehand. The expansion required the purchase and demolition of approximately 1,900 parcels of land, consisting of vacant lots and residential and commercial buildings. Many of the buildings contained asbestos in walls and joint compound and in sprayed-on ceiling material.

Demolition of such buildings required defendants to comply with the National Emission Standards for Hazardous Air Pollutants (NESHAP), 40 C.F.R. part 61, which prescribes work practices for demolition and renovation of buildings found to contain asbestos. EPA delegated its authority to administer the asbestos NESHAP to the Missouri Department of Natural Resources (MDNR), which in turn delegated its permitting authority to the St. Louis Department of Health.

Both the Department of Health and MDNR approved the wet demolition method at various times, and approximately 100 structures were demolished using that method. Although the city argued that single family homes are exempt from the asbestos NESHAP, the court ruled that "the airport expansion project site was a single demolition site similar to a highway project, shopping mall or amusement park" and that the residential exemption did not apply to



the site. The court then ruled that the Department of Health and MDNR violated the asbestos NESHAP when they approved the wet demolition method to demolish structurally sound buildings. According to the court, that method violated the asbestos NESHAP and section 7412 of the CAA. The court granted plaintiffs' motion for summary judgment as to 99 violations of the NESHAP but declined to rule on the RCRA claim, saying that plaintiffs have "shown a possibility exists that there is asbestos contamination at the site that may pose a future risk of harm."

[5] NEPA/ESA: Groups Sue Navy over Weapons Disposal Training in Puget Sound

Two environmental groups have sued the Navy claiming that explosives ordinance disposal training sessions being conducted in Puget Sound violate NEPA and the Endangered Species Act (ESA). *Pub. Employees for Env'tl. Responsibility v. U.S. Navy, No. N/A (W.D. Wash. filed 9/15/08).*

According to the complaint, during the training, powerful explosives are detonated, which result in "substantial fish kills" and other negative impacts on marine life and the environment. The training is designed to prepare divers to dispose of underwater mines and involves using explosives to destroy dummy mines. The Navy has conducted three to five such sessions each month for the past several years in three different Puget Sound locations.

The complaint alleges that the Navy has never prepared environmental impact statements and seeks to enjoin the Navy from continuing the testing until it complies with NEPA. The complaint also alleges that the Navy and two federal agencies have

violated ESA by failing to prepare adequate "biological opinions" about the impact of the testing on threatened species in the testing area.

[6] Air: Sierra Club Sues Ohio EPA over Alleged Failure to Enforce CAA

The Sierra Club and three individuals have sued the director of the Ohio Environmental Protection Agency (Ohio EPA) for violating the Clean Air Act (CAA) by allegedly failing to enforce federally required air pollution regulations. *Sierra Club v. Korleski, No. N/A (S.D. Oh. filed 9/16/08).*

The complaint alleges that Ohio EPA is circumventing the EPA-approved State Implementation Plan (SIP) and the CAA by failing to (i) enforce and implement provisions of Ohio's SIP that are aimed at achieving the National Ambient Air Quality Standards (NAAQS); (ii) comply with federal SIP-revision mandates, including but not limited to, notice and hearing requirements; and (iii) comply with the federal prohibition against adopting or enforcing standards or limitations contrary to the SIP.

The lawsuit targets a regulation that Ohio EPA issued in December 2006 exempting sources that emit less than 10 tons of certain air pollutants per year from a federal requirement that such sources install the "best available technology" (BAT) to reduce air emissions. Plaintiffs also allege that Ohio EPA failed to obtain EPA's approval when it issued the regulation. The complaint seeks an injunction forcing the agency to enforce the BAT standard against emitting sources, attorney's fees and costs.



[7] Whistleblower Protections: Administrative Board Rules Mine Safety Whistleblower Protected

The U.S. Department of Labor's Administrative Review Board (ARB) recently approved an administrative law judge's (ALJ) decision that a Bureau of Land Management (BLM) employee, who complained about waste problems at a mine, is protected by whistleblower provisions of the Safe Drinking Water Act (SDWA) and CERCLA. *Dixon v. DOI, No. 06-147 (DOL ARB 8/28/08)*. The ARB also approved a back pay award and \$10,000 in compensatory damages.

The employee was an environmental protection specialist who managed the cleanup of Nevada's Yerlington Copper mine, which was abandoned in 1999. In 2000, EPA placed the site on CERCLA's National Priorities list, but the Nevada state agency disagreed and developed a memorandum of understanding with EPA that provided for inter-agency cooperation and community involvement in the 3,500-acre site cleanup. In March 2004, the employee filed a report stating that uranium had leaked from the mine into groundwater and could affect residential areas. The report apparently upset the BLM state director, who then terminated the employee. The ex-employee filed a whistleblower retaliation complaint with OSHA. Although OSHA dismissed the complaint, an ALJ concluded after a hearing that BLM discharged the employee because of the protected activity. BLM appealed to the ARB.

Upholding the ALJ's decision, the ARB held that both the SDWA and CERCLA generally prohibit an employer from firing or otherwise discriminating against an employee because the employee has notified the employer of a statutory violation. Here, the ARB ruled, the employee's report qualified under both statutes.

Legislation, Regulations and Guidance

[8] Water: EPA to Vacate Long-Standing Rule and Bring Vessels into NPDES System – Summary Prepared by SHB Tort Partner Stephen Darmody

In response to an order from the U.S. Court of Appeals for the Ninth Circuit, the U.S. EPA has announced that it will soon vacate a regulation that has for 30 years exempted the discharges of pollutants incidental to the normal operation of vessels from the Clean Water Act's (CWA) permitting requirement. The CWA generally prohibits the discharge of a pollutant into the waters of the United States unless the discharge is permitted by the EPA under the National Pollutant Discharge Elimination System (NPDES). Since 1979, EPA's regulations have exempted from the permitting requirement all discharges incidental to the normal operation of a vessel. 40 C.F.R. 122.3(a).

In March 2005, the U.S. District Court for the Northern District of California determined that the exclusion exceeded the EPA's rulemaking authority and issued an order requiring the agency to revoke the rule by September 30, 2008. In July 2008, the Ninth Circuit affirmed the lower court's order, *Northwest Environmental Advocates v. EPA*, No. 06-17187 (9th Cir. July 23, 2008), and the EPA has issued a notice of its intent to vacate the regulation. *Development of Clean Water Act National Pollutant Discharge Elimination System Permits for Discharges Incident to the Normal Operation of Vessels*, 72 *Fed. Reg.* 34,241 (June 21, 2008).

EPA is now considering the best way to regulate the discharge of pollutants incidental to the normal operation of a vessel, which discharges generally



include, among other things, ballast water that could contain oil, chipped paint, sediment, toxins, and non-indigenous plant and animal species; graywater from sinks and showers; and deck runoff. In June 2008, EPA issued a draft general permit for vessels and expressed the desire to have those general permits in place by the date of *vacatur*. Draft National Pollutant Discharge Elimination System (NPDES) General Permits for Discharges Incidental to the Normal Operation of a Vessel, 72 *Fed. Reg.* 34,296 (June 17, 2007). On August 31, the district court granted the parties' request for an extension, giving the EPA until December 19, 2008, to complete its work on these general permits before the old rule is vacated.

The EPA initially believed that, in addition to the approximately 8,400 vessels equipped with ballast water tanks that may be affected by the vacation of this rule, as many as 13 million recreational vessels, 81,000 commercial fishing vessels and 53,000 freight and tank barges operating in U.S. waters may also be affected by the changes.

Recognizing the breadth of coming change, Congress undertook legislative action to limit its effect on recreational vessels, fishing vessels and smaller commercial vessels. Even with the recent legislative changes, however, EPA estimates that approximately 50,000 vessels will remain subject to the new permitting requirement. The CWA authorizes civil and criminal enforcement for violations of the prohibition against discharges and allows for citizen suits against violators.

If you operate a vessel in the waters of the United States and need an update on the status of the Clean Water Act's permit requirements as they apply to vessels, please contact [Stephen Darmody](#) in the Miami office of SHB.



In addition to his environmental and toxic tort litigation practice, Steve has developed significant expertise handling all aspects of civil and criminal matters of maritime environmental law

[9] RCRA: EPA Proposes Revisions to Transboundary Shipment Rules

EPA is proposing [revisions](#) to RCRA's hazardous waste transboundary shipment regulations to make them more consistent with Organization for Economic Cooperation and Development (OECD) standards. The proposed revisions would amend 40 C.F.R. parts 262, 264, 265, 266, and 271. Specifically, the proposed revisions would amend (i) the existing RCRA regulation regarding the transboundary movement of hazardous wastes for recovery among countries belonging to the OECD to conform to legally required revisions made by the OECD; (ii) the RCRA regulations for spent lead-acid batteries to add export notification and consent requirements; (iii) the hazardous waste import requirements under RCRA; and (iv) the address to which export exception reports are sent. The proposed revisions would affect all entities that export or import hazardous waste or universal waste or export spent lead-acid batteries destined for recovery in OECD countries except for Mexico and Canada where bilateral agreements are in place. EPA will accept comments on the proposed revisions for 60 days after it is published in the *Federal Register*.

[10] Water: EPA Report Concludes Mandatory Standards for Dental Mercury Discharges Not Necessary

A recent EPA [report](#) concludes that mandatory categorical pretreatment standards for dental mercury discharges under the Clean Water Act are unnecessary.



The report, which included a survey of state and local efforts to reduce releases of dental mercury, identifies a number of successful voluntary programs that EPA says demonstrate that pollution prevention and adoption of best management practices are available without federal regulation. The report also cites several studies estimating that publicly owned treatment works (POTWs) can effectively remove 90 to 99 percent of solid and dissolved mercury from wastewater.

The EPA report contradicts a report released September 10, 2008, by the majority staff of the House Government Reform Subcommittee on Domestic Policy. That report found that a mandatory program, or a voluntary program “underpinned with the threat of a mandatory provision,” is the most effective model for reducing mercury releases. *See BNA Daily Environment Report*, September 16, 2008.

[11] Recycling: Illinois Enacts E-Waste Recycling Law

Illinois Governor Rod Blagojevich (D) signed [legislation](#) (SB 2313) September 17, 2008, banning electronic waste from state landfills and requiring manufacturers of electronic products to participate in comprehensive reuse and recycling activities. Illinois is the 16th state to enact legislation to remove significant volumes of e-waste from waste streams according to the governor’s office.

The Illinois Electronic Product Recycling and Reuse Act imposes a ban on electronic waste from landfills beginning January 1, 2012, and it contains a series of requirements and incentives for manufacturers for the collection, transportation and reuse of obsolete electronic products beginning January 1, 2010. The law sets annual recycling targets for manufacturers that the Illinois EPA will adjust each year based on various performance measures and consumer participation rates.

Manufacturers will receive credits for activities such as donating refurbished electronic products to schools and not-for-profit organizations and coordinating e-waste collection projects in rural areas. The new law also permits Illinois EPA to impose penalties on manufacturers that fail to meet program targets and imposes requirements on sellers of electronic products. Retailers would have to provide customers with information on e-waste recycling and would be barred from selling products manufactured by a company that has not registered with the state and paid all associated fees.

[12] Air/Greenhouse Gases: New York State Agency Approves RGGI Regulations

The New York State Energy Research and Development Authority approved [final regulations](#) September 15, 2008, that establish a process to implement the Regional Greenhouse Gas Initiative (RGGI) in New York. The new regulations, which will take effect after they are published in the *New York Register*, create a process by which carbon dioxide emissions allowances will be auctioned. They also create a special account for auction proceeds, which will be used to fund energy efficiency and renewable energy programs. Under the RGGI, 10 northeastern states will stabilize emissions from electric power plants from 2009-2014 and then reduce emissions by 2.5 percent per year over the next four years. New York is now scheduled to participate in the second RGGI auction, which is set for December 17; six of the 10 states that are RGGI signatories will participate in the first auction scheduled for September 25.



[13] Air/Greenhouse Gases: Chicago Announces Plan to Reduce GHG Emissions

Chicago Mayor Richard M. Daley (D) recently announced a plan for reducing greenhouse gas (GHG) emissions in the city to three-fourths of 1990 levels by 2020 through more energy-efficient buildings, the use of clean and renewable energy sources, transportation improvements, and industrial pollution reductions. According to news sources, the plan is the first step toward cutting emissions to one-fifth of 1990 levels by 2050, as called for in the 1997 Kyoto global warming protocols. The plan also calls for expanding the number of green rooftops, increasing recycling and car-pooling and promoting alternative fuels. *See Chicago Herald-Tribune*, September 19, 2008.

Scientific/Technical Items

[14] Chemical Exposure: Study Alleges Link Between BPA and Medical Disorders

A recent study by British scientists claims to have found that higher levels of human urinary bisphenol A (BPA) were associated with cardiovascular disease, type 2 diabetes and liver-enzyme abnormalities. Iain A. Lang, et al., "Association of Urinary Bisphenol A Concentration with Medical Disorders and Laboratory Abnormalities in Adults," *JAMA*, September 16, 2008. The researchers examined associations between urinary BPA concentrations and the health status of adults, using data from the National Health and Nutrition Examination Survey from 2003-2004. The survey involved the measured urinary BPA concentrations of 1,455 adults, ages 18 through 74 years. BPA is commonly used in plastic packaging for food and beverages and in the resins used to line food cans.

[15] Children's Health: GAO Report Claims EPA Fails to Protect Children

A recent U.S. Government Accountability Office (GAO) [report](#) claims that EPA has failed to ensure that children's health is adequately protected.

According to the report, EPA has largely ignored recommendations of its own Children's Health Protection Advisory Committee and the Clean Air Act Scientific Advisory Committee, specifically as to their recommendations on lead, fine particulate and ozone standards. In each case, the EPA committee made recommendations to the agency for much more stringent standards than EPA ultimately adopted. The report recommends that the Office of Children's Health Protection complete a cross-agency process to review the EPA committee's key recommendations and that EPA find ways to more proactively use the committees to reinvigorate its focus on protecting children's environmental health.

[16] Alternative Energy: Oregon State University Awarded \$6.25 Million by DOE for Wave Energy Center

The U.S. Department of Energy (DOE) announced September 19, 2008, that it has awarded a five-year, \$6.25 million grant to Oregon State University to establish an ocean energy research center. The center will reportedly use some of the grant money to build a floating berth about 1.5 miles off the coast at Newport where scientists will conduct research on various wind and wave energy technologies. The center will also analyze the environmental impacts of wave energy on marine life and the seabed and seashore. Oregon State University will combine the grant money with money from other funding sources to create a \$13.5 million pool for what will be called the Northwest National Marine Renewable Energy Center. *See DOE Press Release and The Oregonian*, September 19, 2008.



**[17] Air: Chamber of Commerce Report
Opposes CO₂ Regulation**

The U.S. Chamber of Commerce issued a [report](#) on September 16, 2008, claiming that regulation of carbon dioxide (CO₂) as an air pollutant would add to the number of stationary sources regulated by the Clean Air Act (CAA) 1.2 million to 1 million mid-size and larger commercial buildings; 200,000 manufacturing operations and 20,000 large farms. According to the report, small and mid-sized businesses for the first time would be forced to comply with federal CAA regulations and “all the necessary related tracking, reporting and enforcement authorities.”



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We welcome any leads on new developments in environmental law or toxic tort litigation.

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