

Environmental & Chemical Update

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SUSTAINABILITY • TOXIC TORT • WASTE • WATER

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Litigation and Regulatory Enforcement

- [1] **Alien Tort Claims Act:** Ninth Circuit Upholds Dismissal of Genocide Claims Based on Pesticide Exposure 1
- [2] **CERCLA:** Seventh Circuit Rules “Owner” Status Must be Determined Under State Law in Suit to Recover Cleanup Costs 1
- [3] **Food Quality Protection Act:** Ninth Circuit Orders EPA to Justify Pesticide Tolerance Levels 2
- [4] **RCRA:** Federal Court Refuses to Block Army’s Liquid Waste Shipment 2
- [5] **Air:** Federal Court Upholds California Air District Fees on Large-Scale Developments . . 2
- [6] **Natural Resource Damages/Oil Pollution Act:** Tank Barge Operator Enters Consent Decree for Oil Spill Damages 3
- [7] **Air:** Beef Processor Agrees to Penalty for Air Violations 3

Legislation, Regulations and Guidance

- [8] **Water:** EPA Announces New NPDES General Permit for Industrial Stormwater Discharges 3
- [9] **Oil Pollution Act:** Coast Guard Proposes Increased Liability Limit for Vessels and Deepwater Ports 4
- [10] **CAFOs:** GAO Report Claims EPA Lacks Sufficient Data to Effectively Regulate Wastes 4
- [11] **Air/Greenhouse Gases:** RGGI Completes First Auction of Carbon Dioxide Emissions .4
- [12] **Green Chemistry:** California Governor Signs Legislation to Regulate “Chemicals of Concern” in Consumer Products 5
- [13] **Environmental Trends:** EPA Issues 2008 Report 5

Scientific/Technical Items

- [14] **Nanotechnology:** Irish Report Addresses Food Industry Applications 5
- [15] **Nanotechnology:** Insurance Company Announces Nanotechnology Exclusion . . . 6
- [16] **Chemical Exposure:** Study Claims Chemicals from Cosmetics and Body Care Products Found in Adolescent Girls 6

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Litigation and Regulatory Enforcement

[1] Alien Tort Claims Act: Ninth Circuit Upholds Dismissal of Genocide Claims Based on Pesticide Exposure

The Ninth Circuit Court of Appeals has upheld the dismissal of an Alien Tort Claims (ATC) Act lawsuit brought by nearly 700 Ivory Coast farm workers, who, alleging they became sterile from exposure to a U.S.-made pesticide, claim they were victims of genocide. [*Abagninin v. AMVAC Chem. Corp.*, No. 07-56326 \(9th Cir. 9/24/08\)](#).

Defendants include AMVAC Chemical Corp., Dole Food Co., Dow Chemical, and Shell Oil Co. The pesticide, dibromochloropropane (DBCP), has been banned in the United States since 1979. The complaint alleged that DBCP's manufacturers and the fruit company that used it on overseas crops committed genocide and crimes against humanity.

A three-judge panel upheld the district court's earlier dismissal, ruling that, to sustain a claim of "genocide," a party must demonstrate "specific intent" to destroy a population, an element found lacking in this case. The ATC Act allows aliens to bring tort claims for violations of the law of nations or treaties of the United States. Several similar lawsuits, pending in other state and federal courts, seek damages for exposure to DBCP in Africa, Central America and the South Pacific. AMVAC settled a case involving 13 Nicaraguan plaintiffs in 2007 for \$300,000.

[2] CERCLA: Seventh Circuit Rules "Owner" Status Must be Determined Under State Law in Suit to Recover Cleanup Costs

The Seventh Circuit Court of Appeals has ruled that courts must consider state law in determining whether a property owner is liable as an "owner" under CERCLA. [*U.S. v. Capital Tax Corp.*, No. 07-3744 \(7th Cir. 9/19/08\)](#).

The court vacated and remanded a district court decision that failed to review Illinois state property law when it granted the government's summary judgment motion based on tax deeds defendant held on contaminated property. The appeals court ordered the district court to review the state's doctrine of equitable conversion and determine whether defendant may have transferred equitable title to a third party before it received tax deeds on the property.

In 2001 and 2002, defendant obtained tax deeds on five Chicago properties after the previous owner failed to pay its property taxes; the properties were formerly used for various paint-related operations. In 2003, EPA investigated reports of contamination on the properties and ordered defendant to clean them up. EPA later conducted its own cleanup and then sued defendant, seeking to recover more than \$2 million in cleanup costs. Finding defendant liable as an "owner," the district court rejected the company's argument that it merely held a security interest in the properties because a third party had agreed



to buy the properties before defendant obtained the tax deeds and had actually paid money to defendant to do so.

According to the appeals court, the district court erred because it failed to review Illinois' doctrine of equitable conversion to see if the company qualified as an "owner" under state law. The court said CERCLA does not adequately define the term "owner," and, therefore, the property law of the state where the properties are located should govern.

[3] Food Quality Protection Act: Ninth Circuit Orders EPA to Justify Pesticide Tolerance Levels

The Ninth Circuit Court of Appeals has ordered EPA to review child safety levels it set in 2001 and 2002 for three pesticides used on fruit and vegetable crops. *Nw. Coal. for Alternatives to Pesticides v. EPA*, No. 05-75255 (9th Cir. 9/19/08).

Petitioners challenged a final order EPA issued August 12, 2005, denying a series of petitions filed by environmental organizations claiming that the agency failed to fully address the health threats to children when setting legal residue limits for seven pesticides—acetamiprid, mepiquat, pymetrozine, fenhexamid, halosulfuron-methyl, isoxadifen ethyl, and zeta-cypermethrin. The court upheld EPA tolerance methods for the latter four. The pesticides are used on cotton, prunes, plums, celery, broccoli, asparagus, cabbage, and onions.

According to the court, EPA's final order was vague, making it impossible for the court to determine whether reliable data supported the agency's deviations from the Food Quality Protection Act's requirement that the agency, in setting food pesticide tolerance levels, assume that the risk to children is 10 times greater than that of adults.

The court rejected petitioner's arguments that EPA acted arbitrarily by using computer models to calculate the safety of drinking water and that the agency erred in not waiting for the results of developmental neurotoxicity studies before issuing its rules.

[4] RCRA: Federal Court Refuses to Block Army's Liquid Waste Shipment

A federal judge in Indiana has dismissed a lawsuit filed by several environmental groups seeking to block the U.S. Army from shipping liquid waste from an Indiana chemical weapons plant to a treatment facility in Texas. *Sierra Club v. Gates*, No. 07-00101 (S.D. Ind. 9/22/08). The Army began shipping a liquid waste byproduct of the chemical nerve agent VX to a hazardous waste incinerator in Port Arthur, Texas, in April 2007. After plaintiffs filed their lawsuit in June 2007, the Army voluntarily stopped shipments pending a hearing. During the July hearing, the court denied plaintiff's motion for a preliminary injunction, and the shipments resumed. In its most recent decision, the court ruled that the liquid waste was a hazardous waste under RCRA and not a munition or chemical agent as the plaintiffs alleged. The court also held that the Army adequately considered the risks of transporting hazardous waste to Texas for disposal.

[5] Air: Federal Court Upholds California Air District Fees on Large-Scale Developments

A federal judge in California has upheld San Joaquin Valley Unified Air Pollution Control District Rule 9510 which imposes fees on developers who fail to adequately mitigate air pollution impacts of large projects. *Nat'l Ass'n of Home Builders v. San Joaquin Valley Unified Air Pollution Control Dist.*, No. 07-820 (E.D. Cal. 9/19/08). The court rejected plaintiffs' arguments that Rule



9510 was an attempt to establish emissions standards and regulations for on-road and off-road mobile sources that only the federal government has authority to set. The rule, which was adopted in December 2005, requires project developers in the eight-county air basin to quantify emissions produced by their construction projects and during the habitation phases. They can offset emissions by adding features such as sidewalks, electric plug-in stations, bicycle lanes, and green space that encourage alternatives to driving. If the added features are inadequate, developers are assessed fees used to reduce emissions elsewhere.

According to the court, Rule 9510 “is not a standard or other requirement” subject to preemption under the Clean Air Act. It targets “individual developments, not individual vehicles or engines” and “uses emissions fees as an incentive to developers on a project-by-project basis to reduce mobile source emissions.

[6] Natural Resource Damages/Oil Pollution Act: Tank Barge Operator Enters Consent Decree for Oil Spill Damages

A Washington tank barge operator has agreed to pay \$382,123 in natural resource damages (NRD) under the Oil Pollution Act of 1990 (Act), resulting from the discharge of oil into Puget Sound from a tank barge on December 30, 2003. [U.S. v. Foss Mar. Co., No. N/A \(W.D. Wash. lodged 9/12/08\)](#).

The spill occurred during loading of oil onto a tank barge owned by Foss Maritime Co. at a Shoreline, Washington, terminal. The U.S. Coast Guard, after investigating the spill, notified defendant that it was the responsible party. Under the Act and the Washington State Water Pollution Control Act, the responsible party is liable for the costs of conducting an NRD assessment (NRDA) as well as

the costs of implementing the preferred restoration action identified in the final restoration plan.

The settlement was achieved after defendant agreed to participate with federal and state trustees in the NRDA and RDA processes. *73 Fed. Reg. 54,855 (9/23/08)*.

[7] Air: Beef Processor Agrees to Penalty for Air Violations

A Toppenish, Washington, beef processor has agreed to pay \$115,942 to settle violations of the Clean Air Act (CAA) for failing to properly implement a risk-management program to protect workers from hazardous chemicals that are stored at the plant. [In re Wash. Beef, LLC, No. 8-0105 \(EPA Region 10, 9/8/08\)](#).

Under section 112(r)(3) of the CAA and 40 C.F.R. § 68.130, companies that store more than 10,000 pounds of certain hazardous chemicals or flammable materials must submit a risk-management plan to EPA every five years. EPA alleged that the company stored more than 10,000 pounds of anhydrous ammonia at its facility and submitted a risk management plan to EPA but failed to implement it. Specific allegations were that the plant: (i) failed to develop a management system and assign a person to oversee the program; (ii) failed to properly assess potential scenarios that could arise from unavoidable ammonia releases; and (iii) did not document or train employees who handled the hazardous material.

Legislation, Regulations and Guidance

[8] Water: EPA Announces New NPDES General Permit for Industrial Stormwater Discharges

EPA has announced a new [general permit](#) authorizing industrial stormwater discharges for 4,100 industrial facilities in seven states, the District of



Columbia, certain Indian lands and U.S. territories where EPA retains permitting authority.

The seven states are Alaska, Idaho, Massachusetts, New Hampshire, New Mexico, and parts of Oklahoma and Texas. The new permit replaces the existing general permit issued in 2000 that expired October 30, 2005. Changes from the previous permit include (i) electronic filing of notices of intent and monitoring reports; (ii) Web-based tools for locating water bodies and determining impairment status; (iii) updated monitoring, inspection and corrective action schedules; and (iv) different requirements for new and existing dischargers. The notice of availability of the permit will be published in the *Federal Register*.

[9] Oil Pollution Act: Coast Guard Proposes Increased Liability Limit for Vessels and Deepwater Ports

The U.S. Coast Guard has **proposed** increasing the liability limits for vessels and deepwater ports to account for inflation, as required by the Oil Pollution Act of 1990. *73 Fed. Reg. 54,997 (9/24/08)*. The act makes parties liable for removal costs and damages if a vessel releases oil or poses a substantial threat of discharge into navigable waters or onto shorelines. It also requires the periodic increase in liability limits by regulation to reflect significant increases in the Consumer Price Index. Comments on the proposed rule will be accepted for 60 days from the date of publication.

[10] CAFOs: GAO Report Claims EPA Lacks Sufficient Data to Effectively Regulate Wastes

The U.S. Government Accountability Office (GAO) recently issued a **report** claiming that EPA does not have enough information on large livestock and poultry operations to effectively assess or regulate their wastes.

GAO questioned EPA's ability to evaluate whether water and air pollution from concentrated animal feeding operations (CAFOs) is damaging human health and the environment because the agency lacks data about the quantity of wastes generated by CAFOs.

The report also criticizes an EPA proposed rule that would exempt CAFOs from notifying the National Response Center about hazardous substance emissions under CERCLA and EPCRA. The report recommends that EPA (i) reassess current data collection efforts, including its internal controls, to ensure that the ongoing National Air Emissions Monitoring Study (NAEMS) will provide the scientific and statistically valid data that the agency needs for developing air emission protocols; (ii) provide stakeholders with information on the additional data that it plans to use to supplement the NAEMS; and (iii) establish a strategy and timetable for developing a process-based model that will provide more sophisticated air-emissions estimating methodologies for CAFOs.

[11] Air/Greenhouse Gases: RGGI Completes First Auction of Carbon Dioxide Emissions

The Regional Greenhouse Gas Initiative (RGGI) reportedly completed the first auction of carbon dioxide emissions allowances on September 25, 2008. Six RGGI states participated in the auction—Connecticut, Maine, Maryland, Massachusetts, Rhode Island, and Vermont—but Delaware, New Hampshire, New Jersey, and New York did not finalize their regulations in time to participate. Starting January 1, 2009, RGGI requires electricity generators of 25 megawatts and larger to purchase one allowance for each ton of carbon dioxide emissions. RGGI, which set a minimum clearing price



of \$1.86 per allowance, will later release the price for each allowance and the number of allowances purchased at the auction.

Under RGGI, emissions will be capped at 188 tons for each year from 2009 through 2014. The emissions cap will then be reduced by 2.5 percent per year over the next four years. Proceeds from the sale of the allowances are intended to be used for energy conservation and renewable energy programs. News reports indicate that the auction raised nearly \$39 million. *See Law360*, September 25, 2008; *BNA Daily Environment Report*, September 26, 2008; *The Washington Post*, September 30, 2008.

[12] Green Chemistry: California Governor Signs Legislation to Regulate “Chemicals of Concern” in Consumer Products

California Governor Arnold Schwarzenegger (R) has signed legislation establishing the framework for the state’s “green chemistry” program, giving state regulators broad authority to identify, evaluate and, if necessary, ban potentially harmful industrial chemicals. The legislation consists of two bills: [A.B. 1879](#), which gives the California Department of Toxic Substances Control (DTSC) authority to regulate chemicals in consumer products; and [S.B. 509](#), which requires the establishment of an online Toxics Information Clearinghouse to increase consumer knowledge about the toxicity and hazards of everyday chemicals. Senate Bill 509 also requires the Office of Environmental Health Hazard Assessment to develop hazard traits and environmental and toxicological endpoints for the clearinghouse. A.B. 1879 gives DTSC until January 1, 2011, to develop a science-based program to identify and prioritize chemicals of concern and analyze alternatives to the chemicals. The bill also requires

the establishment of a Green Ribbon Science Panel to advise DTSC. According to press reports, the legislation grew out of growing public concern about chemicals in consumer products, especially products for children. *See BNA Daily Environment Report*, September 30, 2008.

[13] Environmental Trends: EPA Issues 2008 Report

EPA recently issued a [report](#) titled “Highlights of National Trends,” focusing on developments in five areas, including air, water, land, human exposure and health, and ecological condition. In particular, the chapter on air covers trends in outdoor air, acid rain and regional haze, ozone depletion, greenhouse gases, and indoor air. Other chapters address similarly relevant issues for each subject area. EPA released the first draft highlights report in 2003; the recently released version has been updated.

Scientific/Technical Items

[14] Nanotechnology: Irish Report Addresses Food Industry Applications

A recent [report](#) by the Food Safety Authority of Ireland (FSAI) addresses the application of nanotechnology to the food industry and urges the European Union (EU) to provide a legislative framework for regulating nanotechnology in food.

Citing a general lack of information concerning the risks of nanoparticles in food, FSAI recommends that (i) food business operators conduct risk assessments on all foods involving introduction of new nanoparticles into food and packaging; (ii) legal provisions be considered at the EU level to ensure that food and feed be reevaluated in terms of safety whenever the properties are changed/re-engineered to the nanoscale; (iii) the FSAI promote



the establishment of a publicly available inventory of nanotechnology-based food products and food contact materials; (iv) urgent consideration be given to whether additional controls are required on the disposal and/or recycling of nanoparticle-containing food and other materials; and (v) food surveillance programs include investigation of the potential for nanoparticles to migrate into foods from packaging and be recycled in the environment and enter the food chain indirectly. The report also calls for mandatory labeling of food and food packaging that contain nanoparticles.

[15] Nanotechnology: Insurance Company Announces Nanotechnology Exclusion

The Continental Western Insurance Group has reportedly announced that its insurance policies will no longer cover bodily injury, property damage or personal and advertising injury from “nanotubes or nanotechnology in any form.” The company said its intent was to “remove coverage for the, as of yet, unknown and unknowable risks created by the products and processes that involve nanotubes.” According to the company, the exclusion would apply to situations including “the use of, consumption of, ingestion of, inhalation of, absorption of, contact with, existence of, presence of, proliferation of, discharge of, dispersal of, seepage of, migration of, release of, escape of, or exposure to nanotubes or nanotechnology.” See *BNA Daily Environment Report*, September 24, 2008.

[16] Chemical Exposure: Study Claims Chemicals from Cosmetics and Body Care Products Found in Adolescent Girls

A recent Environmental Working Group study claims that chemicals commonly used in cosmetics and body care products, including phthalates, triclosan, parabens, and musks, have been detected in blood and urine samples in adolescent girls ages 14 to 19. Researchers took samples from 20 teens and reportedly found 16 chemicals, many of which are hormone-altering compounds. The study recommends that the federal government set comprehensive safety standards for cosmetics and other personal care products. See *Greenwire* and *EWG Press Release*, September 24, 2008.



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