

Environmental & Chemical Update

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

Issue 252 • October 17, 2008

Litigation and Regulatory Enforcement

- [1] **CERCLA:** Federal Court Rules CERCLA Hazardous Substance Sold Below Market Value May Be Evidence of Disposal. 1
- [2] **Envtl. Crime:** Furniture Restoration Business Owner Indicted for RCRA/CWA Criminal Violations 1
- [3] **Water:** States Sue EPA over Water Transfer Rule. 1

Legislation, Regulations and Guidance

- [4] **RCRA:** EPA Issues New Final Solid Waste Rule. 2
- [5] **FIFRA:** EPA Proposes Rule Revising Data Requirements for Antimicrobial Pesticides . 2
- [6] **Radioactive Waste:** EPA Finalizes Yucca Mountain Radiation Standards 3
- [7] **Safe Drinking Water Act:** EPA Issues Preliminary Determination Not to Regulate Perchlorate Under SDWA 3
- [8] **HAZMAT:** DOT Proposes Rule Allowing Inspectors to Open and Detain Suspicious Packages in Transport 3
- [9] **REACH:** EDF Report Warns of REACH Impact on U.S. Companies 4
- [10] **PCBs:** Canada Issues Final PCB Rules. 4
- [11] **REACH:** ECHA Publishes List of Chemicals That May be Restricted Under REACH. . 4
- [12] **Renewable Energy/NEPA:** USDA to Assess Environmental Impact of Biomass Energy Program 5

Scientific/Technical Items

- [13] **Chemical Exposure:** Study Finds High Levels of PBDE in Blood of Californians . . . 5
- [14] **Chemical Exposure:** EPA Issues Handbook on Child-Specific Exposure Factors . . 5
- [15] **Nanotechnology:** Study Claims Nanomaterials in Consumer Products May Damage Human Lung Cells 6

Shook,
Hardy &
Bacon_{LLP}

www.shb.com

Environmental & Chemical Update

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

Litigation and Regulatory Enforcement

[1] CERCLA: Federal Court Rules CERCLA Hazardous Substance Sold Below Market Value May Be Evidence of Disposal

Denying a defendant's summary judgment motion, a federal judge in Texas has ruled that a product containing a CERCLA hazardous substance sold at a price far below its market value may have been a disposal rather than the sale of a product. *Tex Tin Settling Defendants Steering Comm. v. Great Lakes Carbon Corp.*, No. 96-0247 (S.D. Tex. 9/22/08). The court declined to dismiss a CERCLA cost recovery claim filed against a chemical manufacturer, finding evidence to support allegations that the company engaged in a "sham sale."

According to the court, sales records showed that spent nickel residues were sold for a fraction of what nickel was actually worth at the time. The company had been sued by the Tex Tin Settling Defendants Steering Committee, a group of potentially responsible parties (PRPs), seeking to recover their cleanup costs under section 107(a) of CERCLA. Defendant had "sold" more than 325,000 pounds of nickel residues to the former operator of the site. Defendant argued that it was not liable as an "arranger" under CERCLA, because it sold nickel residues to the site's former operator as a "useful product" for the recovery of nickel.

[2] Envtl. Crime: Furniture Restoration Business Owner Indicted for RCRA/CWA Criminal Violations

A federal grand jury in Utah has reportedly indicted a furniture restoration business and its owner for allegedly dumping hazardous liquids into a public sewer system in violation of RCRA and the Clean Water Act. *U.S. v. Atwater*, No. 08-114 (D. Utah 10/1/08). According to the indictment, defendant and his employees used a solution containing 70 to 76 percent methylene chloride to strip paint from furniture. After stripping the furniture, defendant washed the furniture with water and, from 2000 until April 2007, dumped the rinse water containing the solution into sub-surface soil. After April 2007, he allegedly discharged contaminated rinse solution down a sink that led to Central Davis Sewer District facilities. See *BNA Daily Environment Report*, October 6, 2008.

[3] Water: States Sue EPA over Water Transfer Rule

Nine states have reportedly sued EPA, alleging that the agency violated the Clean Water Act when it created a final rule that exempted from CWA permitting requirements the transfers of water from one body of water to another. *New York v. EPA*, No. 08-08430 (S.D.N.Y. 10/2/08). The rule, codified at 40 C.F.R. part 122, defines a water transfer as an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial or commercial use. *73 Fed. Reg.* 33,697 (6/9/08).



The complaint, filed by Connecticut, Delaware, Illinois, Maine, Michigan, Minnesota, Missouri, New York, and Washington, alleges that the rule creates an illegal loophole in the CWA by failing to control the transfer of polluted water from one water body to another and seeks to have the rule invalidated. A companion challenge to the rule was reportedly filed in the Second Circuit Court of Appeals. See *BNA Daily Environment Report*, October 6, 2008.

Legislation, Regulations and Guidance

[4] RCRA: EPA Issues New Final Solid Waste Rule

EPA has issued a **final rule** on solid waste that establishes a new regulatory exclusion under RCRA for material that is not discarded if it is legitimately reclaimed by either the generator or, under specific conditions, another company. Materials can also be excluded from the definition of solid waste if EPA or an authorized state determines through a petition process that the material is a non-waste. Materials eligible for the RCRA exclusion include spent materials, listed sludge and listed byproducts that are generated, legitimately reclaimed and stored in non-land-based units such as tanks, containers and containment buildings. The new rule revises 40 C.F.R. parts 260 and 261.

The agency originally proposed a new solid waste definition in 2003. The proposal would have allowed the exclusion of certain spent materials, byproducts and sludge listed as hazardous that are “generated and reclaimed in a continuous process within the same industry.” That proposal was criticized by interest groups and others and, in March 2007, EPA issued a new proposed rule. The new proposal contained exclusions based on the

idea that if hazardous secondary materials are not “discarded,” they should not be regulated as wastes. The final rule adopts that concept.

The rule also contains provisions on how to determine which recycling activities are legitimate. First, the hazardous secondary material must make a useful contribution to the recycling process. Second, the recycling must result in a valuable new intermediate or final product. Two other non-mandatory factors should be considered, according to EPA: (i) whether the recycled material is managed as a valuable product; and (ii) whether the product contains toxic constituents at significantly greater levels than a non-recycled product made from virgin materials. The new rule will be effective 60 days after it is published in the *Federal Register*.

[5] FIFRA: EPA Proposes Rule Revising Data Requirements for Antimicrobial Pesticides

EPA has proposed new data **requirements** for registering antimicrobial pesticides. *73 Fed. Reg.* 59,381 (10/8/08). The proposed rule would apply to disinfecting and sanitizing chemicals, marine anti-fouling coatings and wood preservatives, and would apply to anyone seeking to register new products as well as to products under EPA review when the regulations take effect. The proposed rule would require data, such as oral, dermal and inhalation studies, to be provided on antimicrobial uses with a high probability of human exposure.

The uses would include applications in barns, milk houses, vehicles for transporting animals, restaurants, storage containers, home-based day care facilities, hospitals, and public water systems. The proposal would establish nine new data requirements for registering antimicrobials on the following: (i) developmental neurotoxicity, (ii) immunotoxicity, (iii) photodegradation in soil,



(iv) soil residue dissipation, (v) non-dietary ingestion exposure, (vi) activated sludge sorption isotherm, (vii) ready biodegradability, (viii) porous pot studies, and (ix) modified activated sludge/respiration inhibition. EPA will accept comments on the proposal until January 6, 2009.

[6] Radioactive Waste: EPA Finalizes Yucca Mountain Radiation Standards

EPA released final standards September 30, 2008, for radiation exposure from spent nuclear fuel and high-level radioactive waste at the planned nuclear repository at Yucca Mountain, Nevada. The standards replace a rule that a federal appeals court vacated in 2004. *Nuclear Energy Inst. v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004). The court said that the rule was not based on nor was it consistent with findings and recommendations of the National Academy of Sciences (NAS), which had recommended that EPA set a standard to limit exposure to individuals at the time of peak risk beyond the 10,000-year time frame adopted by EPA.

The new standards will (i) retain a dose limit of 15 millirem per year for the first 10,000 years after disposal; (ii) establish a dose limit of 100 millirem per year between 10,000 years and 1 million years; (iii) require the Department of Energy to consider the effects of climate change, earthquakes, volcanoes, and corrosion of the waste packages to safely contain the waste during the 1-million-year period; and, (iv) be consistent with NAS recommendations by establishing a radiological protection standard at the time of peak dose up to 1 million years after disposal. The rule will be published in the *Federal Register*.

[7] Safe Drinking Water Act: EPA Issues Preliminary Determination Not to Regulate Perchlorate Under SDWA

EPA has issued a preliminary regulatory determination announcing that a national primary drinking water regulation for perchlorate under the Safe Drinking Water Act (SDWA) “would not present a meaningful opportunity for health risk reduction for persons served by public water systems.” 73 Fed. Reg. 60,262 (10/10/08). The SDWA requires EPA to make determinations every five years about whether to regulate at least five contaminants on the Contaminant Candidate List (CCL). EPA included perchlorate in its first and second CCLs in 1995 and 2005. Perchlorate, a rocket fuel that has been found in public water supply systems and groundwater, does not, according to EPA, occur at levels high enough to pose a threat to public health. Studies have claimed that perchlorate can inhibit the thyroid gland’s iodine intake, interfering with fetal development. EPA will accept comments on its preliminary determination until November 10, 2008.

[8] HAZMAT: DOT Proposes Rule Allowing Inspectors to Open and Detain Suspicious Packages in Transport

The U.S. Department of Transportation (DOT) has proposed a rule that would allow agency inspectors to open and detain suspicious packages in transport. 73 Fed. Reg. 57,281 (10/2/08). The proposed rule specifies procedures under which inspectors could gain access to, open and examine a package offered for or in transportation if they had a reasonable belief that the package contained a hazardous material. It would amend 49 C.F.R. part 109 and cover all transportation modes. The agency is proposing the rule as a way to crack down on hidden shipments of hazardous



materials, characterized by the agency as “a frequent and persistent problem.” Currently, DOT must coordinate with DOJ to file a civil action seeking a restraining order or preliminary injunction against a shipper or offeror committing a HAZMAT safety violation. DOT will accept comments on the proposal until December 1, 2008.

[9] REACH: EDF Report Warns of REACH Impact on U.S. Companies

A recent Environmental Defense Fund (EDF) [report](#) warns that under the European Union’s (EU) chemical regulation—Registration, Evaluation, Authorization and Restriction of Chemicals (REACH)—U.S. chemical manufacturers will be pressured to find substitutes for chemicals deemed to be substances of very high concern in the EU.

Under REACH, such chemicals can only be used if a proposed use is specifically authorized. The report compares chemicals listed on the U.S. Toxic Substances Control Act inventory with those on the “Substitute it Now” (SIN) list published recently by a coalition of environmental, labor and other advocacy groups known as the International Chemical Secretariat (Chem Sec). The coalition list contains 267 chemicals that Chem Sec concluded pose sufficient risk that alternatives should be sought for them. According to the EDF report, more than 200 SIN chemicals are currently being produced or imported into the United States above 10,000 pounds each year. The report also identifies U.S. companies that manufacture or import chemicals that the EU lists as hazardous.

[10] PCBs: Canada Issues Final PCB Rules

The Canadian environmental agency, Environment Canada, has published final [regulations](#) that (i) specify deadlines for ending

the use of polychlorinated biphenyls (PCBs) in concentrations of 50 milligrams per kilogram or greater; (ii) eliminate all PCBs and equipment containing them currently in storage; and (iii) limit the period of time PCBs can be stored before being destroyed. The new regulations would also meet Canada’s PCB obligations under the United Nations Stockholm Convention on Persistent Organic Pollutants and the Persistent Organic Pollutants Protocol. They include a number of changes based on comments received after they were published in draft on November 4, 2006, in the *Canada Gazette*.

[11] REACH: ECHA Publishes List of Chemicals That May be Restricted Under REACH

The European Chemicals Agency (ECHA) has added a [Registry of Intentions](#) to its Web site containing information about seven chemical substances that could be banned or restricted under the European Union’s (EU) Registration, Evaluation, Authorization and Restriction of Chemicals (REACH) regulation. The registry contains a list of chemicals that the European Commission (EC) or EU member states are considering for classification as “substances of very high concern,” meaning their continued use would be subject to authorization under REACH. The seven listed substances include fire coal tar substances, listed by the EC; the flame retardant tris (2-chloroethyl) phosphate, listed by Austria; and arsenic and its salts, listed by Norway. The registry also includes 21 substances nominated for EU-wide harmonization of their classification and labeling. These include pesticides such as abamectin and acequinocyl, listed by the Netherlands; the mineral cryolite, listed by Germany; and chloroform and formaldehyde, listed by France.



[12] Renewable Energy/NEPA: USDA to Assess Environmental Impact of Biomass Energy Program

The U.S. Department of Agriculture's (USDA) Commodity Credit Corp. has [announced](#) that it plans to assess the potential environmental impact of a program to promote biomass energy and is seeking public comment on the impact of and alternatives for implementing the program. The program was designed to support the production and harvest of biomass crops for sale to commercial-scale refineries that commit to using biomass to produce fuels or power under the Food, Conservation, and Energy Act of 2008. The program will pay farmers up to 75 percent of the costs of establishing a new energy crop, including the cost of seeds and land preparation. It also pays for harvesting and delivery of crops to a biomass refinery. The program covers plants, trees, crop residues, or vegetable waste material, including wood waste or wood residues. See *BNA Daily Environment Report*, October 1, 2008.

Scientific/Technical Items

[13] Chemical Exposure: Study Finds High Levels of PBDE in Blood of Californians

A recent study by researchers from the Harvard School of Public Health and the University of California claims that Californians have twice the levels of polybrominated biphenyl ethers (PBDEs) in their blood than other Americans. Ami R. Zotta, *et al.*, "Elevated House Dust and Serum Concentrations of PBDEs in California: Furniture Flammability Standards?," *Environmental Science & Technology*, 10:1021 (10/1/08). The study also claims that Californians have household dust levels of PBDEs 200 times higher than have been found in Germany and the United Kingdom, and

four to 10 times the levels of all PBDEs in dust in homes in Ottawa, Canada; Cape Cod and Boston, Massachusetts; Washington D.C.; and Texas.

The researchers studied a variety of flame retardants including PBDEs but focused mostly on forms of the family of 209 chemicals associated with penta-BDE that had been used to meet California's furniture flammability standards since 1975. Use of penta-BDE for products sold in California was banned in 2006. Concerns about human exposure to flame retardants were raised by animal studies that have purportedly shown thyroid disruption and adverse neurodevelopment and reproductive effects following *in utero* exposures to PBDEs, according to the study.

[14] Chemical Exposure: EPA Issues Handbook on Child-Specific Exposure Factors

EPA's National Center for Environmental Assessment (NCEA) has published a "[Child-Specific Exposure Factors Handbook](#)" that focuses on various factors used in assessing exposure, specifically for children ages 0 to 21 years. The handbook discusses non-chemical-specific data on exposure factors for the EPA-recommended set of childhood age groups dealing with (i) water and other select liquids ingestion, (ii) non-dietary ingestion, (iii) soil and dust ingestion, (iv) inhalation rates, (v) dermal exposure, (vi) body weight, (vii) fruit and vegetable intake, (viii) fish and shellfish intake, (ix) meat and dairy product intake, (x) grain product intake, (xi) total food intake, (xii) milk intake, (xiii) activity, and (xiv) consumer products.



**[15] Nanotechnology: Study Claims
Nanomaterials in Consumer Products
May Damage Human Lung Cells**

A recent Swedish study claims that nanomaterials widely used in sunscreens and other consumer products can damage the DNA of human lung cells when tested in the laboratory. H.L. Karlsson, et al., "Copper Oxide Nanoparticles are Highly Toxic: A Comparison Between Metal Oxide Nanoparticles and Carbon Nanotubes," *Chemical Research in Toxicology*, August 19, 2008. Researchers exposed human cells from the surface of lungs to eight different types of nanomaterials and measured DNA damage and indicators of stress. They found that different nanomaterials cause different types of adverse responses in lung cells. Two ingredients found in sunscreens and cosmetics, zinc oxide and titanium dioxide, killed cells or damaged the DNA. Copper-based nanoparticles were the most toxic, causing DNA damage, oxidative damage and cell death. DNA damage also resulted from exposure of the lung cells to carbon nanotubes, even at the lowest dose tested.



Environmental & Chemical Update

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

This Update is distributed by
Shook, Hardy & Bacon's Environmental Law Practice.
If you have questions about this issue or would like to receive supporting documentation,
please contact Dave Erickson (derickson@shb.com; 816-474-6550) or
Jim Neet (jneet@shb.com; 816-474-6550).
We welcome any leads on new developments in environmental law or toxic tort litigation.

Geneva, Switzerland

Houston, Texas

Kansas City, Missouri

London, United Kingdom

Miami, Florida

Orange County, California

San Francisco, California

Tampa, Florida

Washington, D.C.

Shook,
Hardy &
Bacon LLP.®

