

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] NEPA: U.S. Supreme Court Vacates Preliminary Injunction on Navy's Use of Sonar in Training Exercises

The U.S. Supreme Court has vacated a preliminary injunction that prevented the U.S. Navy from using “mid-frequency active” (MFA) sonar during integrated training exercises in waters off southern California.

[Winter v. NRDC, No. 07-1239 \(U.S. 11/12/08\)](#).

Plaintiff environmental groups had sought the injunction to protect marine mammals and ocean habitats from MFA sonar, which, the groups alleged, causes serious injuries. The complaint alleged violations of NEPA and other federal laws.

The district court entered a preliminary injunction prohibiting the Navy from using MFA sonar during its training exercises. The Ninth Circuit Court of Appeals held that the injunction was overbroad and remanded the case to the district court for a narrower remedy. The district court then entered another injunction, imposing restrictions on the Navy's use of sonar, including requiring the Navy to shut down MFA sonar when a marine mammal was spotted within 2,200 yards of a vessel and to power down sonar by 6 decibels during conditions known as “surface ducting.” The Navy then sought relief from the Executive Branch's Council on Environmental Quality (CEQ), which authorized the Navy to implement “alternative arrangements” to NEPA in light of “emergency circumstances.”

The Navy moved to vacate the district court injunction in light of the CEQ's actions, but the district court and then the appeals court refused to do so.

In a 5-4 decision, the U.S. Supreme Court vacated the injunction, holding that the balance of equities and the public interest strongly favored the Navy. The Court ruled that the lower court abused its discretion by entering a preliminary injunction based on a “possibility” of irreparable harm when the correct standard was that irreparable injury was “likely.” The Court also held that the district court (i) failed to give appropriate deference to the professional judgment of military authorities concerning the relative importance of the military's interest in sonar training; (ii) failed to consider the balance of equities and public interest; (iii) failed to provide persuasive justifications for entering the preliminary injunction; and (iv) also exceeded the remedies the plaintiffs sought, that is, that the Navy should prepare an environmental impact statement, not that it cease sonar training.

[2] Toxic Tort: Second Circuit Reinstates Bhopal Drinking Water Pollution Case

The Second Circuit Court of Appeals has reinstated a groundwater pollution case in which injury was allegedly caused by contaminated groundwater linked to an inadequate cleanup of the 1984 Bhopal disaster. [Sabu v. Union Carbide Corp., No. 06-5694 \(2d Cir. 11/3/08\)](#). The appellate court reversed the district court which had converted a motion to dismiss into a motion for summary judgment without giving plaintiffs sufficient notice.



Residents and property owners in Bhopal, India, filed the lawsuit in November 2004, seeking injunctive relief and monetary damages under New York law. The complaint alleged injury due to inadequate precautions undertaken to prevent groundwater contamination by wastes generated during the manufacture of pesticides before the 1984 accident that killed 2,000 people and injured 200,000 and to the company's response after it occurred. Plaintiffs sought to "pierce the corporate veil" and establish personal liability of Union Carbide's then chief executive.

Plaintiffs' allegations include that the cleanup was "undertaken at minimal expense" and was intended to "conceal both the seriousness of the on-site pollution and potential risks of off-site contamination." The appeals court decision was entirely procedural in nature and did not address the water pollution issue. The contaminated groundwater was discovered within New York's three-year statute of limitations, and thus, the claims were not time barred.

[3] EU/Air: EU High Court Overturns EC Decision Preventing the Netherlands from Exempting Diesel Vehicles from Certain Emission Standards

The European Court of Justice (ECJ) has overturned a European Commission (EC) decision invalidating a Dutch law that required all new diesel-fueled vehicles to be equipped with a soot filter. [*Netherlands v. Comm'n, Case C-405/07 \(ECJ 11/6/08\)*](#).

The Netherlands wanted to require the filters in an attempt to reduce particulate matter emitted into the air by passenger vehicles. The European Court of First Instance ruled in June 2007 that the Dutch law would negatively affect the free market and that the Netherlands did not have "a specific problem of ambient air quality" that would justify the law. The Netherlands appealed.

The ECJ found that expert testimony provided by the Netherlands demonstrated the law's positive benefits that the lower court did not properly take into account. The ECJ criticized the lower court's failure to consider data submitted by the Netherlands on the ground that they were "outside the time limit," saying that the lower court considered other data that were provided even later. The ECJ held that the lower court had an obligation to consider "all the relevant evidence and explain, in its final decision, the essential considerations which led it to adopt that decision." Rather than sending the dispute back to the lower court, the ECJ issued a final judgment and ordered the EC to pay both sides' costs.

[4] Toxic Tort/CERCLA: Federal Court Refuses to Block State Toxic-Tort Suit; Plaintiffs Not Notified About CERCLA Settlement Agreement

A federal judge in California has ruled that a CERCLA settlement agreement involving contamination at a former pesticide plant may not be used to block a state toxic-tort lawsuit addressing additional contamination discovered later near the plant. [*Emeryville v. Elementis Pigments Inc., No. 3-3719 \(N.D. Cal 10/29/08\)*](#).

The \$6.5 million settlement, for response costs, was entered in February 2001. After elevated arsenic levels were found at an adjacent site in 2005, the owners sued several defendants in state court alleging liability for the contamination. Sherwin-Williams, the plant's former owner and a party to the settlement, filed a motion in federal court to enforce the 2001 settlement agreement, arguing that CERCLA's section 113(f) contribution bar bans all cross-claims asserted against it for matters covered by the agreement. The federal court allowed the



plaintiffs in the state toxic-tort action to intervene in the Sherwin-Williams enforcement action because their contribution and/or indemnity claims in state court could be extinguished by an adverse federal court decision.

The court determined that the contamination on the adjacent property was linked to the contamination at the plant site. The court then held that because Sherwin-Williams failed to provide notice of the settlement to the adjacent property owners under California procedure, which was cited in the settlement agreement, CERCLA's bar did not prevent the state court lawsuit.

[5] Toxic Tort/CERCLA: Federal Court Refuses to Dismiss Toxic-Tort Action

A federal judge in Illinois has rejected a motion for summary judgment filed by a pigment maker in a toxic-tort action involving claims of strict liability and negligence in connection with a developer's effort to recover costs and damages associated with the cleanup of hazardous substances at a site in Chicago. *Grand Pier Ctr. LLC v. Tronox LLC*, No. 03-7767 (N.D. Ill. 10/31/08). The plaintiff also brought claims under CERCLA.

From 1915 to 1932, defendant's predecessor manufactured gaslight mantles from thorium in the then-industrialized Streeterville neighborhood. The thorium was extracted from sand using an acid-stripping process. In 2007, plaintiff purchased property between the two manufacturing sites to develop into a hotel, condominiums and retail stores. Upon excavation, thorium was discovered, and EPA ordered plaintiff to stop digging and remove contaminated soil.

Plaintiff seeks \$2.3 million in cleanup costs, a declaration of liability and strict liability under federal law associated with the disposal of hazardous materials and under state contribution laws, and a judgment of negligence. Plaintiff also seeks \$20 million in damages from losses associated with being unable to develop the land. Rejecting defendant's motion, the court held that Illinois' economic-loss doctrine does not bar plaintiff's strict liability and negligence claims.

[6] Toxic Tort: Florida Supreme Court Rules Laboratory Owes Duty of Care to Public for Ultrahazardous Materials

On a question certified to it by the Eleventh Circuit Court of Appeals, the Florida Supreme Court has ruled that state negligence law imposes a duty on a laboratory engaged in the production of an ultrahazardous material to protect the public from exposure to the material. *U.S. v. Stevens*, No. 07-1074 (Fla. 10/30/08).

Maureen Stevens alleged that the United States, the Battelle Memorial Institute and Bioport Corp., were liable for the death of her husband Robert, who was exposed to anthrax mailed in 2001 to American Media Inc., where he worked. The court analyzed *Restatement (Second) of Torts* §§ 302, 302A and 302B to rule that, under Florida law, "a laboratory that manufactures, grows, tests or handles ultrahazardous materials does owe a duty of reasonable care to members of the general public to avoid an unauthorized interception and dissemination of the materials."



[7] Envtl. Crime: Ice Cream Maker Pleads Guilty to Criminal Violations of CAA Risk-Management Provisions

A Pennsylvania ice cream manufacturer has been sentenced to pay a \$100,000 fine and was placed on one year of probation for failing to develop and implement risk-management programs at its two facilities. *U.S. v. Hershey Creamery Co.*, No. 08-353 (M.D. Pa. *sentencing* 10/31/08). According to press reports, the case was the first Clean Air Act (CAA) prosecution in the nation involving risk-management programs. Regulations promulgated in 1999 required facilities that use regulated substances in amounts that exceed specific thresholds to develop programs to protect workers, minimize the chances of an accidental release and respond in the event of a release. Hershey was required to develop and implement a risk-management program for anhydrous ammonia because it uses the refrigerant in amounts greater than the 10,000-pound regulatory threshold. The record apparently showed that the company certified to EPA in 1999 and 2004 that it had such a program in place, but a 2005 EPA inspection found that no functioning program was in effect at either plant. See *BNA Daily Environment Report*, November 4, 2008.

[8] Air: Fuel Maker Fined for Selling Improperly Registered Additive

A California company that manufactures various types of fuel has agreed to pay a \$1.25 million civil penalty for selling an unregistered fuel additive in violation of the Clean Air Act (CAA). *U.S. v. Biofriendly Corp.*, No. N/A (C.D. Cal. *filed* 10/30/08).

According to the consent decree, the company sold "Green Plus," an unregistered fuel additive claimed to reduce emissions in diesel fuel, from

September 2002 to May 2006. According to EPA, the CAA requires that motor fuel and fuel additives meet stringent standards to ensure that fuel additives do not increase emissions of harmful air pollutants or interfere with vehicle emissions control devices.

Before additives may be marketed, companies must provide the agency with information about the chemical composition and structure of the additive and may also be required to test products before obtaining agency registration. The company claims that it registered the additive with EPA in 2001 but failed to properly describe all of the product's constituents when it was originally registered. EPA has approved new product registrations for Green Plus. See *BNA Daily Environment Report*, November 4, 2008.

[9] Water: Pipeline Company Agrees to \$725,000 CWA Civil Penalty for Fuel Spills

A Georgia-based oil pipeline company has reportedly agreed to pay a \$725,000 civil penalty and implement \$1.3 million of new spill prevention safeguards to settle a Clean Water Act (CWA) enforcement action involving four jet fuel and gasoline spills over a six-year period in Georgia, North Carolina and Virginia. *U.S. v. Plantation Pipe Line Co.*, No. 08-500 (W.D.N.C. *filed* 11/4/08). Most of the civil penalty will be deposited in the federal Oil Spill Liability Trust Fund, which is used to cover the costs of cleaning up and repairing damage caused by oil spills.

According to the consent decree, the company spilled 42,210 gallons of fuel in two incidents in January 2000 when jet fuel leaked from a pipeline near Newington, Virginia. Another spill occurred in March 2002 when 840 gallons of jet fuel leaked from a pipeline near Alexandria, Virginia. A third incident occurred in February 2003 when more than 33,000 gallons of gasoline spilled from a line



in Hull, Georgia. On November 27, 2006, 4,074 gallons leaked from a line in Mecklenburg, North Carolina. The proposed consent decree is subject to a 30-day comment period. *See DOJ Press Release*, November 4, 2008.

[10] NEPA: NRDC Challenges Government Approval of Oil and Gas Project

NRDC and Wilderness Workshop have sued the U.S. Forest Service (FS) and the Bureau of Land Management (BLM) alleging the agencies' failure to adequately consider the environmental and health effects of an oil and gas project on the western slope of the Rocky Mountains in Colorado. *NRDC v. Schafer, No. N/A (D. Colo. filed 10/31/08)*.

The complaint appeals the agencies' decisions to approve the Hell's Gulch North Phase 2 project in White River National Forest. Plaintiffs accuse the agencies of violating NEPA and the Federal Land Policy and Management Act. The complaint asks the court to bar the project and award plaintiffs costs and legal fees.

[11] CERCLA: Building Operator Sues for Cleanup Costs from World Trade Center Dust

The operators of a building located across the street from the World Trade Center (WTC) have sued the Port Authority of New York & New Jersey, Consolidated Edison Co. of New York and American Airlines under CERCLA seeking cleanup costs associated with dust from the WTC collapse on September 11, 2001. *Cedar & Washington Assocs. v. The Port Authority of New York & New Jersey, No. 08-9146 (S.D.N.Y. filed 10/24/08)*. Plaintiff leased the property in 2003 for the purpose of converting the former office building into a business hotel and alleges it was unaware of the contamination.

The complaint seeks at least \$50 million in costs for remediating the property. Plaintiff also filed common law claims for indemnification and contribution alleging that defendants "knowingly, intentionally and purposefully" ignored their obligations to investigate and remedy the site. According to the complaint, the WTC dust that invaded the building contained asbestos, silicon and mercury and other hazardous substances, and EPA and the New York Department of Environmental Protection have required plaintiff to submit to testing and comply with an abatement and demolition plan.

Legislation, Regulations and Guidance

[12] Chemical Security: DHS Issues Draft Guidance on Chemical Plan Security

The U.S. Department of Homeland Security (DHS) has released [draft guidance](#) on chemical security risk-based performance standards for high-risk chemical plants. The draft describes the general level of performance that facilities in each "risk-based tier" created by the chemical facility anti-terrorism standards (CFATS) should attempt to achieve. CFATS were promulgated in April 2007, as interim final regulations setting forth the requirements that covered chemical facilities must meet to comply with section 550 of the Homeland Security Appropriations Act of 2007. CFATS establish 18 Risk-Based Performance Standards that identify the areas for which a facility's security posture will be examined, such as perimeter security, access control, personnel security, and cyber security.

The draft guidance also attempts to help facilities comply with CFATS by describing in greater detail the 18 risk-based performance standards and by providing examples of various security measures



and practices that facilities could consider to achieve the desired level of performance. Comments on the draft guidance are due to DHS by November 26, 2008.

[13] EU/REACH: ECHA Issues Interim List of Chemical Substances Pre-Registered under REACH

The European Chemicals Agency (ECHA) issued on November 7, 2008, an [interim list](#) of chemical substances that have been pre-registered under the European Union's Registration, Evaluation, Authorization and Restriction of Chemicals (REACH) regulation. Under Article 28(4) of REACH, ECHA is required to publish by January 1, 2009, the list of substances that have been pre-registered between June 1, 2008, and December 2008. With more than 50,000 chemical substances, the voluminous interim list covers the period up to November 1, 2008. The list also includes the EC/CAS number and name of each substance.

[14] EU/REACH: ECHA Issues Draft Guidance for Handling Waste and Recovered Substances Under REACH

The European Chemicals Agency (ECHA) has issued [draft guidance](#) on handling waste and recovered substances under the European Union's Registration, Evaluation, and Authorization of Chemicals (REACH) regulation. Although REACH's requirements for registering chemicals and chemical mixtures do not apply to waste, Article 3 (37) of REACH states that exposure scenarios must describe how a chemical is made or used during its life cycle, including risk-management measures that should be taken to reduce or avoid exposure to waste material. In addition, as soon as chemicals in waste begin to be recovered, the material ceases to be waste, and REACH requirements would generally apply.

The guidance lists certain wastes, such as cellulose pulp from recovered paper, that are exempted from REACH's registration and other requirements but stresses that most recovered substances are not exempted from REACH's authorization, restrictions and notification obligations.

Scientific/Technical Items

[15] Env'tl. Risks: Canadian Cancer Society Publishes Handbook on Environmental Cancer Risks

The Canadian Cancer Society has published a [handbook](#) that details the environmental substances known or suspected to cause cancer and what people can do to limit their exposure. The handbook includes information on (i) what substances increase cancer risks; (ii) cancer-causing ingredients in consumer products; (iii) safer alternatives where they exist; (iv) protecting children from exposure to cancer-causing substances; and (v) tips on reducing exposures. The handbook has detailed discussions about asbestos, radon, electromagnetic fields, flame retardants (PBDES), labeling of consumer products, phthalates, Teflon, and chlorination.



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