

# Environmental & Chemical Update

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SUSTAINABILITY • TOXIC TORT • WASTE • WATER

Issue 259 • December 12, 2008

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## Litigation and Regulatory Enforcement

### [1] CERCLA: Federal Court Considers Divisibility Defense to Section 113 Liability

A federal judge in New Jersey has ruled that divisibility of harm is not a defense to liability in a CERCLA section 113 contribution action.

*U.S. v. Kramer, No. 89-4340 (D.N.J. 11/19/08).*

EPA and the state environmental agency filed a lawsuit in 1989 under CERCLA seeking to cover response costs at the Helen Kramer Landfill in Mantua, New Jersey. In 1998, a group of potentially responsible parties (PRPs) entered into a consent decree with the state and federal governments and then sued other non-settling PRPs for contribution under section 113. One of the contribution-litigation defendants argued that, because waste it sent to the landfill did not contain phenol and chromium (although it did contain copper and zinc), it had “a strong divisibility defense to liability under CERCLA.”

Citing *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489 (11th Cir. 1996), the court held that the “divisibility” defense to joint and several liability, which is frequently involved in cost recovery actions brought under section 107 of CERCLA, is not a defense to a contribution action under section 113. According to the court, defendant’s admission that it sent copper and zinc in its waste to the landfill makes it responsible for the release of a hazardous substance as a matter of law.

### [2] Air: Federal Court Orders New Analysis for Coal-Fired Power Plant

A federal judge in North Carolina has ordered Duke Energy to initiate and participate in a full maximum achievable control technology (MACT) public process with the state environmental agency before it can obtain approval to build a new coal-fired boiler at its Cliffside power plant. *S. Alliance for Clean Energy v. Duke Energy Carolinas, LLC, No. 08-318 (W.D.N.C. 12/2/08).*

The court rejected Duke Energy’s motion to dismiss a Clean Air Act (CAA) citizen suit filed against it in July 2008 claiming that construction of the Cliffside unit without a MACT determination was illegal.

According to the court, “Cliffside Unit 6 is an electric generating unit under construction which has the potential to emit in excess of 10 tons per year of an individual HAP (hydrochloric acid) and over 25 tons of a combination of HAPs,” and as such, is subject to the requirements of section 112 of the CAA. Despite ordering Duke Energy to undergo the MACT process within 10 days, the court refused to grant plaintiff’s request to halt construction at Cliffside.

### [3] CERCLA: Federal Court Denies Request for Attorney’s Fees

A federal judge in California has denied a claim for attorney’s fees in a CERCLA action in which the court held that plaintiff had not entirely prevailed in its attempt to enforce a settlement agreement



against the city of Emeryville. *City of Emeryville v. Elements Pigments, Inc.*, No. 99-03719 (N.D. Cal. 11/25/08). Plaintiffs sought to enforce the settlement agreement after the city filed an action in state court seeking cleanup damages for property adjacent to the site involved in the agreement. The court in that action ruled that the terms of the settlement agreement released plaintiff from direct liability for contamination at the adjoining site. The court also denied plaintiff's argument that the agreement protected it from contribution, ruling that the city did not qualify as a "state" under CERCLA.

The settlement agreement specified that the prevailing party in a dispute over the terms of the agreement would be entitled to attorney's fees, but California law allows the court to determine whether a party has prevailed. Denying plaintiff's request for fees, the court ruled that plaintiff did not obtain a "simple, unqualified victory," that is, plaintiff was not automatically deemed to be the prevailing party.

#### **[4] Natural Resources: Federal Court Modifies Previous Roadless Rule Decision**

A federal magistrate judge in California has modified a decision she issued in 2006 that declared the Bush administration's attempt to repeal the Roadless Area Conservation Rule invalid. *Cal. v. USDA*, No. 05-03508 (N.D. Cal. 12/2/08). The Clinton-era Roadless Rule, enacted in 2001, protected 58.5 million acres of roadless areas in national forests from road construction and logging.

In 2005, the U.S. Department of Agriculture altered the rule so that protections would have to be set on a state-by-state basis. A Wyoming federal court recently determined that the roadless rule violated NEPA and the Wilderness Act and permanently enjoined the rule in all 50 states.

*Wyo. v. USDA*, 570 F. Supp. 2d 1309 (D. Wyo. 2008). Thereafter, the California court limited the scope of its prior ruling to Alaska, Arizona, California, Guam, Hawaii, Idaho, the Northern Mariana Islands, Montana, Nevada, New Mexico, Oregon, and Washington, pending the outcome of appeals taken from both the Wyoming and California decisions.

#### **[5] Env'tl. Crime: Federal Jury Finds Tanker Fleet Operator Guilty of Environmental Crimes**

A federal jury in Texas has reportedly convicted General Maritime Management (Portugal), the operator of a fleet of tanker vessels, and two engineers for making false statements to the U.S. Coast Guard and failing to maintain an accurate oil record book as required by U.S. and international law. Each defendant was convicted of two felonies. The convictions arose from directions the chief and first engineers of the tanker M/T German Defiance allegedly gave to crew members in November 2007, to assist in bypassing the vessel's pollution-control equipment by connecting a flexible hose between the ship's bilge pump and the overboard discharge valve. This allowed crew members to pump the contents of the bilge tank directly into the sea. The engineers also provided false information to the Coast Guard. The two engineers face a possible sentence of up to five years in prison and fine of \$250,000 each. The company faces a possible fine of \$1 million and up to five years of probation. Sentencing is scheduled for February 10, 2009. See *EPA Press Release*, November 18, 2008.

#### **[6] Alien Tort Claims Act: Federal Jury Clears Chevron of Liability**

A federal jury in San Francisco has reportedly absolved Chevron Corp. of responsibility for alleged human rights abuses under the Alien Tort



Claims Act (ATCA). The alleged abuses occurred in Nigeria in 1998, when the Nigerian military killed two protesters occupying Chevron's oil platform during a demonstration against the company's alleged pollution of local fishing grounds and farms. Chevron argued that it called the Nigerian authorities after plaintiffs and others illegally seized its facility. The lawsuit, filed in 1999, alleged customary violations of international law, such as human rights violations, as the basis for the ATCA claim, as well as common law tort claims. The case went to trial in October 2008, after years of legal maneuvering. Under the ATCA, aliens may sue U.S. companies in federal court for torts committed abroad in violation "of the law of nations or a treaty of the United States." See *Greenwire*, December 2, 2008.

#### **[7] Water Resources: Groups Sue California over Water Diversion**

The California Water Impact Network and other groups have reportedly sued California to halt pumping from the Sacramento-San Joaquin Delta, which funnels water to 25 million people in the state, until certain Central Valley farmers retire hundreds of thousands of acres of contaminated farmland. The lawsuit accuses the State Water Resources Control Board (SWRCB), which issues all water permits in the state, of over-allocating water in areas where it is ill-used. Besides SWRCB, other named defendants are the Department of Water Resources and the U.S. Bureau of Reclamation. The complaint argues that "irrigating agricultural land that is tainted with selenium, mercury, boron and other toxic substances constitutes an unreasonable use of a public resource protected by state laws and has contributed to the sharp decline of endangered fish species." See *San Francisco Chronicle* and *Greenwire*, December 2, 2008.

## **Legislation, Regulations and Guidance**

### **[8] RCRA: EPA Issues Final Rule on Management of Hazardous Wastes at Teaching and Research Laboratories**

EPA has issued a final **rule** establishing an alternative set of requirements for the handling and disposal of hazardous waste generated at college and university laboratories and other eligible academic entities formally affiliated with colleges and universities. *73 Fed. Reg. 72,911 (12/1/08)*. Effective December 31, 2008, the rule provides these institutions the flexibility to make a solid hazardous waste determination and assign the proper code at the laboratory, an on-site central accumulation area or an on-site treatment, storage and disposal facility. Under the rule, trained environmental health and safety officials will make the determinations. The rule sets requirements that unwanted materials must be removed from the laboratory primarily on a time basis and secondarily on a volume basis. It also includes incentives for discarding unneeded or expired chemicals.

### **[9] Air/Ozone: EPA Proposes Rule Exempting Methyl Bromide from Phase-out**

EPA has proposed a **rule** that would allow production of up to 1.6 million kilograms of methyl bromide, an odorless, colorless gas that has been linked to ozone depletion. *73 Fed. Reg. 72,421 (11/28/08)*.

The proposed rule would modify 40 C.F.R. Part 82, Subpart A to reflect critical use categories set forth in the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, an international treaty that regulates ozone-depleting substances.



The protocol required a phase-out of methyl bromide in developed countries by 2005, but allowed exemptions for industries that do not have technologically and economically feasible alternatives.

The proposed rule would authorize the use of methyl bromide for pest control by rice millers, some pet-food manufacturers, bakeries, processors of dry-cured pork products, and growers of cucurbits (melons, gourds, cucumbers, squashes), eggplant, some forest and orchard nurseries, ornamentals, peppers, strawberries, sweet potatoes, and tomatoes. EPA will accept comments on the proposed rule until December 26, 2008.

#### **[10] Chemical Exposure: EPA Releases Draft Exposure Assessment for PBDEs**

EPA has released a [draft exposure assessment](#) for a group of flame retardants known as polybrominated diphenyl ethers (PBDEs). *73 Fed. Reg.* 73,930 (12/4/08). PBDEs are major components of commercial formulations often used as flame retardants in furniture foam (penta-BDE), plastics for TV cabinets, consumer electronics, wire insulation, back coatings for draperies and upholstery (deca-BDE), and plastics for personal computers and small appliances (octa-BDE). According to the agency, PBDEs can persist in the environment for decades and have been detected globally in air, soils, sediments, oceans, and wildlife. The draft states that studies of PBDEs in laboratory animals have suggested potential concerns about liver toxicity, thyroid toxicity, developmental and reproductive toxicity, and developmental neurotoxicity. EPA will accept comments on the draft until January 5, 2008.

#### **[11] Air: EPA Again Proposes Emission Standards for Medical Incinerators**

EPA has [proposed](#) new source performance standards (NSPS) and emissions guidelines (EG) for hospital/medical/infectious waste incinerators under

sections 111 and 129 of the Clean Air Act. *73 Fed. Reg.* 72,961 (12/1/08). EPA first issued standards in 1997 for medical incinerators that burn biological waste, needles, plastic gloves, and batteries, among other items. In November of that year, the Sierra Club and NRDC challenged the rule, claiming that EPA violated section 129 of the CAA in setting the standards. In March 1999, the court in *Sierra Club v. EPA*, 167 F.3d 658 (D.C. Cir. 1999), remanded the rule to EPA for further explanation about how the agency derived minimum regulatory “floors” for new and existing medical waste incinerators. Following the remand, the same court decided a series of other cases addressing issues relevant to how EPA should determine these minimum regulatory “floors.”

To take these rulings into account, EPA decided to reassess an earlier response to the court’s ruling in *Sierra Club*. The new proposed rule represents this reassessment. EPA will accept comments on the proposed rule until February 17, 2009, and, if requested by December 22, will hold a hearing on January 15, 2009.

#### **[12] TSCA: EPA Issues ANPR on Risks from Exposure to Formaldehyde in Composite Wood Products**

EPA has issued an [Advance Notice of Proposed Rulemaking](#) (ANPR) and notice of public meetings about risks to human health and the environment from exposure to formaldehyde in composite wood products, such as hardwood plywood, particleboard and medium-density fiberboard. *73 Fed. Reg.* 73,620 (12/3/08). The ANPR is the result of a March 24, 2008, petition filed by 25 organizations and 5,000 individuals under section 21 of TSCA, requesting that EPA assess and reduce the risks posed by emissions from those products and adopt California’s formaldehyde emissions regulation.



California's regulation, which takes effect January 1, 2009, requires distributors, importers, fabricators, and retailers to purchase and sell panels and finished goods that comply with applicable formaldehyde emissions standards. Under the ANPR process, EPA will investigate whether and what type of regulatory or other action might be appropriate to protect against formaldehyde emissions. EPA will hold five public meetings in January 2009 to receive comments on the issue.

### **[13] Water/Wetlands: EPA/Corps Issue Revised Guidance on *Rapanos***

EPA and the U.S. Army Corps of Engineers (Corps) have issued revised [guidance](#) on how to identify traditional navigable waters and adjacent wetlands since the U.S. Supreme Court decided *Rapanos v. U.S.*, 126 S. Ct. 2208 (2006). The revised guidance, which updates a 2007 document that sought to interpret the *Rapanos* decision, follows the agency's evaluation of more than 18,000 jurisdictional determinations and its review of more than 66,000 comments in response to its earlier effort.

The revisions include (i) outlining examples of "traditional navigable waters"; (ii) providing more detail for determining whether a wetland is adjacent to a traditional navigable water; and (iii) addressing the issue of whether a tributary of a navigable water is subject to the CWA. In *Rapanos*, the U.S. Supreme Court issued multiple decisions about how to establish a nexus to U.S. waters, creating confusion among regulators and those regulated. See *EPA Memorandum*, December 2, 2008.

### **[14] Air: EPA Issues Final Rule Requiring Emissions Monitoring for Heavy-Duty Trucks**

EPA recently announced a final [rule](#) requiring lifetime emissions-monitoring systems for heavy-duty trucks beginning with model year 2010.

The rule will require trucks heavier than 14,000 pounds to carry the onboard diagnostic systems made compulsory in passenger vehicles since the 1990s. The systems monitor engines for signs of emissions leaks as a result of wear, triggering a dashboard indicator light when a leak is detected. The system will also monitor particulate levels in diesel emissions and performance of nitrogen oxides-reducing catalysts for gasoline engines. Each manufacturer must demonstrate at least one engine family's compliance with the monitoring requirements by 2010, and equip all engines with the emissions monitors by 2013. The rule will be effective 60 days after it is published in the *Federal Register*.

## **Scientific/Technical Items**

### **[15] Water: USGS Study Finds Chemicals in Drinking Water**

A recent U.S. Geological Survey (USGS) study has found low levels of man-made chemicals like herbicides and disinfection byproducts in public drinking water systems even after the water has been treated. Thomas Jacobus, et al., *Low Level Organic Chemicals in Surface-Water Sources of Drinking Water*, December 5, 2008. USGS researchers tested water from nine rivers across the country that are public water system sources. The study found that 130 of 250 commonly used chemicals were present in the water before treatment. Those chemicals included pesticides, gasoline byproducts, personal care and household-use products, and manufacturing additives. Nearly two-thirds of the chemicals were also detected after treatment. Testing sites included rivers in Colorado, Georgia, Indiana, Maryland, Massachusetts, Nevada, North Carolina, Oregon, and Texas. See *USGS Press Release*, December 5, 2008.



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