

Environmental & Chemical Update

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Issue 261 • January 9, 2009

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Litigation and Regulatory Enforcement

[1] Alien Tort Claims Act: Ninth Circuit Remands Lawsuit for Exhaustion Determination

The Ninth Circuit Court of Appeals has remanded an Alien Tort Claim Act (ATCA) lawsuit brought by residents of Papua New Guinea (PNG) for a determination by the district court whether plaintiffs must first exhaust legal remedies in their own country before being heard in the United States. [*Sarei v. Rio Tinto, PLC, No. 02-56256 \(9th Cir. 12/16/08\)*](#). The lawsuit was brought in federal court in California, alleging that Rio Tinto, a British-based mining company, along with the PNG government, committed international law violations including racial discrimination, environmental devastation, war crimes, and crimes against humanity.

The complaint also alleged that waste from a Rio Tinto PNG mine, which produces 180,000 tons of copper concentrate and 400,000 ounces of gold annually, polluted the waterways and atmosphere of PNG and “undermined the physical and mental health of the island’s residents.” During a 1988 mine-worker uprising, Rio Tinto sought assistance from the PNG government to help quell the uprising and reopen the mine. The PNG army killed many civilians and caused a 10-year civil war. Plaintiffs alleged that the PNG government committed many human rights violations at the behest of Rio Tinto and that, therefore, PNG and Rio Tinto were

partners in causing the alleged atrocities. The ATCA provides U.S. federal courts with jurisdiction over actions brought by aliens for alleged torts that violate the law of nations or a treaty of the United States. Rio Tinto is a British and Welsh corporation that is part of an international mining group that operates more than 60 mines and processing plants in 40 countries, including the United States.

The *en banc* panel majority held that “[w]here the nexus to the U.S. is weak, courts should carefully consider the question of exhaustion, particularly—but not exclusively—with respect to claims that do not involve matters of ‘universal concern.’” Four panel members dissented, arguing that no ATCA case should be dismissed for failure to exhaust available proceedings in a foreign jurisdiction, because Congress did not include an exhaustion requirement in the statute.

[2] Air: D.C. Circuit Vacates EPA SSM Rule for Industrial Facilities

The D.C. Circuit Court of Appeals has vacated an exemption from Clean Air Act rules that allowed refineries, chemical plants and other industrial facilities to exceed emission standards for hazardous air pollutants during startup, shutdown and periods when equipment malfunctions (SSM). [*Sierra Club v. EPA, No. 02-1135 \(D.C. Cir. 12/19/08\)*](#). In a 2-1 decision, the court held that EPA’s application of the exemption “belies the text, history, and structure of Section 112” of the CAA.



EPA had argued that the requirement for sources to limit emissions during SSM events was a “reasonable default standard,” which the agency could supersede where appropriate, creating an alternative emissions standard during those circumstances. The court’s majority disagreed saying that, in requiring sources regulated under section 112 to meet the strictest standards for maximum achievable control technology, “Congress gave no indication that it intended the application of MACT standards to vary based on different time periods.” The dissenting judge wrote that the court lacked jurisdiction to hear the case because petitioners filed their challenge to the 1994 SSM exemptions too late.

[3] Air: D.C. Circuit Reinstates CAIR Pending Replacement

The D.C. Circuit Court of Appeals has reinstated the Clean Air Interstate Rule (CAIR) that it vacated in July 2008 for its “more than several fatal flaws.” *North Carolina v. EPA, No. 05-1244 (D.C. Cir. 12/23/08).*

EPA and North Carolina asked the court to overturn its earlier ruling, arguing that the court had threatened the public health in 29 eastern states when it vacated CAIR, which curbs transmissions of sulfur dioxide and nitrogen oxide in downwind states.

The CAIR created a cap-and-trade program for sulfur dioxide and nitrogen oxide emissions from power plants to combat acid rain. The court had vacated the rule in July on the ground that EPA had failed to show how a trading program would help downwind states reach their air quality standards. The ruling reinstating CAIR is temporary until EPA issues a new rule addressing the “fundamental flaws” the court found in its July 2008 ruling.

[4] Toxic Tort: Fifth Circuit Affirms Dismissal of Toxic Tort Claims as Time-Barred

The Fifth Circuit Court of Appeals has affirmed a district court’s dismissal of claims that Chevron USA Inc. contaminated the site of a former sugarcane farm because plaintiffs lacked a legally acceptable explanation for missing the filing deadline. *Kling Realty Co. Inc. v. Chevron USA Inc., No. 06-1492 (5th Cir. 12/17/08).* According to the appellate court, plaintiffs were aware of the contamination in the 1970s but did not file the lawsuit until 2006.

Plaintiffs argued that dismissal was not proper because there was a factual dispute about when they became fully aware of the extent and kind of contamination on their land and that defendant misled them about the extent and kind of contamination. Plaintiffs also argued that defendant had a continuous obligation to remediate the contamination it caused. The district court and the appellate court rejected these arguments, ruling that plaintiffs knew about the contamination in the 1970s and that the prescription doctrine prevented the plaintiffs from filing a lawsuit more than three years after they knew about the contamination. The courts also rejected the continuous trespass argument finding that the plugging of a problematic well by defendant and a release agreement signed by the parties in 1973 invalidated that argument.

[5] RCRA: Federal Magistrate Rules Defective Notice Letter No Bar to Enforcement

A federal magistrate judge in Texas has ruled that the failure to use the term “imminent and substantial endangerment” in a RCRA citizen suit notice letter does not bar plaintiff from suing under 42 U.S.C. 6972(a)(1)(B). *Clems Ye Olde Homestead Farms Ltd. v. Briscoe, No. 07-285 (E.D. Tex. 12/8/08).*



Defendant argued that the letter provided insufficient notice of a substantial endangerment allegation because the letter focused on the open-dumping provision of RCRA (42 U.S.C 6972(a)(1)(A)) and not the imminent-and-substantial-endangerment provision. The court disagreed, saying that while the notice letter never used the term “imminent and substantial endangerment,” it did refer to the correct RCRA provision. The lawsuit was filed in 2007, alleging that between 2000 and 2005, defendant contractor placed foundry sand, which contained industrial waste, on his land. The notice letter cited RCRA’s “open dumping” and “imminent and substantial endangerment” provisions but failed to use the terminology for the latter allegation.

[6] NEPA: Groups Seek to Block BLM’s Oil and Gas Lease Auctions

Several environmental groups have sued the U.S. Department of Interior’s Bureau of Land Management (BLM) to halt land-lease auctions for oil and gas exploration in Utah. *S. Utah Wilderness Alliance v. BLM, No. 08-02187 (D.D.C. filed 12/16/08)*. The complaint alleges that BLM is rushing to complete the lease sale before the new administration takes office and accuses the agency of failing to complete NEPA analyses for protection of natural and cultural resources and failing to consult with Native American tribes in the affected areas. The lawsuit specifically challenges a BLM decision to authorize oil and gas development on nearly 110,000 acres of Utah’s redrock country lands. It seeks a declaration that the agency has violated NEPA and an injunction halting sales or leases of the affected land.

[7] NEPA: Groups Sue DOI and EPA over Surface Mining Rule

A coalition of environmental groups has sued the Department of Interior’s Office of Surface Mining (OSM) and EPA seeking to prevent the agencies from changing a rule they say keeps mining waste from entering mountain streams. *Coal River Mountain Watch v. Kempthorne, No. N/A (D.D.C. filed 12/22/08)*. The revisions to the 1983 rule, which restricts where mining waste can be dumped, would let mining companies disregard a 100-foot stream buffer zone if they can convince the agencies that no other option is available and that they had taken steps to minimize environmental harm. The complaint alleges that the rule revisions violate OSM’s mandate under the Surface Mining Control and Reclamation Act to protect streams and that the agencies failed to consider other alternatives as required by NEPA. The complaint also alleges violations of the Clean Water Act and asks the court to vacate the revised rule.

[8] RCRA: State Sues U.S. Army over Contamination at Fort Meade

The Maryland Department of the Environment has filed a lawsuit against the U.S. Army seeking compliance with a 2007 U.S. EPA order requiring the remediation of groundwater at Fort Meade. *Maryland DOE v. Dept. of the Army, No. 08-3443 (D. Md. filed 12/23/08)*. Recent studies have found groundwater contamination from arsenic and perchlorate at the fort, which was established as an Army base during World War I. The site had been on EPA’s CERCLA National Priorities List since 1998, and while the Army negotiated a Federal Facilities Agreement with EPA, it refused to sign it, apparently challenging EPA’s authority. According to the complaint, the Army expressed an



intention to comply with the EPA order but has failed to do so. The order, issued under RCRA's "imminent and substantial endangerment" provision, ordered immediate compliance.

[9] Endangered Species Act: California AG Challenges DOI Rule That Weakens Scientific Review Requirements

California Attorney General Jerry Brown (D) has sued the U.S. Department of Interior and the Department of Commerce over rules, finalized on December 16, 2008, that allow federal agencies to "eliminate or short-circuit" an Endangered Species Act (ESA) requirement that they consult with government experts to assess the impact of projects on endangered species. [California v. Kempton, No. 08-05775 \(N.D. Cal. filed 12/29/08\).](#)

The complaint alleges that the new rule violates the ESA, NEPA and the APA, and that the defendants exceeded the scope of their authority under the ESA by enacting regulations "manifestly contrary to the statute."

Specifically, the complaint alleges that the rule does not meet the requirement under section 7(a)(2) of the ESA that the Fish and Wildlife Service and National Marine Fisheries Service "shall insure that any action authorized or funded by the federal government will not pose any harm to a protected species." The lawsuit also alleges that DOI failed to provide an adequate environmental analysis and failed to allow for a meaningful public review period. Under the new rule, federal agencies would be allowed to determine whether a project would pose any significant harm to a protected species without consulting with government scientists. Environmental groups filed a similar lawsuit on December 11, 2008. [Ctr. for Biological Diversity v. Kempton, No. 08-05546 \(N.D. Cal. filed 12/11/08\).](#)

Legislation, Regulations and Guidance

[10] Water: EPA Issues General Permit for Vessel Discharges

EPA has issued a final NPDES [general permit](#) to cover discharges incidental to the normal operation of vessels in U.S. waters. *73 Fed. Reg. 79,481 (12/29/08)*. The permit is the result of a 2006 federal court decision that ordered EPA to begin regulating ballast water and other discharges under the Clean Water Act's NPDES program. *Nw. Envtl. Advocates v. EPA*, No. 03-05760 (N.D. Cal. 2006). Effective December 19, 2008, the permit establishes (i) general effluent limits applicable to all discharges; (ii) general effluent limits applicable to 26 specific discharges; (iii) narrative water-quality based effluent limits; (iv) inspection, monitoring, recordkeeping, and reporting requirements; and (v) additional requirements applicable to certain vessel types.

The permit applies to non-recreational vessels more than 79 feet in length, such as cruise ships or oil and cargo tankers, but excludes fishing vessels unless they discharge ballast water. Discharges regulated by the permit include (i) bilge water, (ii) ballast water, (iii) deck washdown, (iv) runoff and above-waterline hull cleaning, (v) antifouling leachate from hull coatings, (vi) aqueous film-forming foam, (vii) hydraulic fluid, (viii) refrigeration and air condensate discharge, and (ix) graywater mixed with sewage from vessels.

According to EPA, the permit affects approximately 61,000 domestically flagged commercial vessels and 8,000 foreign flagged vessels. Owners and operators of vessels weighing more than 300



gross tons or with ballast capacity exceeding 8 cubic meters must file notices of intent to receive permit coverage no later than September 19, 2009.

[11] CERCLA: EPA Publishes DFR Referencing ASTM All Appropriate Inquiry Standard for Larger Rural Tracts

EPA has issued a **direct final rule** (DFR) referencing a new ASTM International standard (E 2247-08) for all appropriate inquiries pertaining to forestland and rural properties. *73 Fed. Reg.* 78,651 (12/23/08). The DFR allows the new ASTM standard to satisfy the statutory requirement for conducting all appropriate inquiry under CERCLA and applies to Phase I environmental assessments for forest or rural tracts of 120 acres or more. It is intended for use in the due diligence process when interested parties want to establish limits on liability for known or suspected contamination of brown-field properties.

The DFR takes effect March 23, 2009, unless EPA receives adverse comments by January 22, in which case EPA will withdraw the rule and initiate a proposed rulemaking. The new standard may be purchased on the ASTM Web site.

[12] Water: EPA, Corps Revise "Discharge of Dredged Material" Definition

EPA and the U.S. Army Corps of Engineers have issued a **rule** clarifying the definition of "discharge of dredged material" after a federal district court vacated the previous rule. *73 Fed. Reg.* 79,641 (12/30/08). In *National Association of Home Builders v. Corps*, No. 01-0274 (D.D.C. 1/30/07), a federal court held that the 2001 rule—known as Tulloch II—violated the Clean Water Act because of how EPA defined "incidental feedback."

The new rule removes this language and deletes instructions that agencies regard the use of mechanized earth-moving equipment as resulting in a discharge subject to regulation. The rule returns to the definition of "discharge of dredged material" that existed in a 1999 dredging rule, which prescribed a case-by-case evaluation to determine when a particular redeposit of dredged materials is subject to Clean Water Act jurisdiction.

[13] Chemical Exposure: EU Revises Directive on Chemical Substances Restrictions in Toys

The European Parliament recently revised a **directive** relating to restrictions on chemical substances that can be used in toys sold in the European Union (EU). The revised directive bans the use of 55 allergenic fragrances as well as carcinogenic, mutagenic or reprotoxic substances unless they are included in non-accessible toy parts and scientific studies show they can be safely incorporated into products. The directive also places restrictions on the use of arsenic, cadmium, chromium, lead, mercury, and organic tin, and introduces labeling requirements for allergenic fragrances not on the banned list. EU member states have 18 months to transpose the rules into their national codes. Transitional periods of up to four years apply for phasing out noncompliant toys.



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