

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] Air: Federal Court Orders TVA to Install Controls at Power Plant

A federal judge in North Carolina has ordered the Tennessee Valley Authority (TVA) to install and continuously operate scrubbers at four power plants in Tennessee and Alabama. [*North Carolina v. TVA, No. 06-20 \(W.D.N.C. 1/13/09\)*](#).

North Carolina alleged that the plants' emissions are harming the state's citizens and economy. TVA filed a motion to dismiss, claiming that it should be protected from the lawsuit by the Supremacy Clause of the U.S. Constitution, the "discretionary function" doctrine and *Ferris v. Wilbur*, 27 F.2d 262 (4th Cir. 1928). The district court denied the motion, and the Fourth Circuit affirmed. *North Carolina v. TVA*, No. 06-2131 (4th Cir. 1/31/08).

According to the court, the four power plants are within 100 miles of North Carolina and contributed to elevated levels of fine particles, which contribute significantly to ozone levels. The court ordered TVA to install and continuously operate scrubbers at its Bull Run, Kingston and John Sevier power plants in Tennessee, as well as at the Widows Creek power plant in Alabama. The court refused to order similar controls at seven other power plants that were farther from North Carolina and did not have the same impact on the state's air.

[2] Toxic Tort: Federal Court Finds Insufficient Evidence to Support Toxic Tort Claim

A federal judge in Nebraska has ruled that the former owner and operator of an industrial property in Grand Island was not liable to any of the 200 former or current nearby residents for injuries or other damages caused by chlorinated solvent contamination. [*Avila v. CNH Am. LLC, No. 04-3384 \(D. Neb. 1/2/09\)*](#). According to the court, plaintiffs failed to offer sufficient evidence that defendant's former use of its property contributed to the area's ground water contamination.

Defendant purchased the property in 1981, but failed to realize that a former property owner, who conducted manufacturing operations there from 1973 to 1980, caused the contamination. The issue was whether defendant had "constructive knowledge" under Nebraska law of prior dumping on the property. In Nebraska, "a landowner can be held liable for a latent condition where the situation suggests an investigation, and the facts indicate to a reasonably prudent man the likelihood of existence of some hidden damages." *Kozloski v. Modern Litho Inc.*, 182 Neb. 270 (1967). The court held that the defendant had inspected the property in 1981, but that the contamination did not appear to have been discovered by reasonable inspection.



[3] Env'tl. Crime: Manufacturer of Bleach and Other Household Products Pleads Guilty to CWA Criminal Violations

A Virginia manufacturer of bleach and other household products has reportedly pleaded guilty in federal court to a misdemeanor violation of the Clean Water Act and agreed to pay a \$75,000 criminal fine and \$25,000 in community service payments. KIK (Virginia) operated a Salem facility that discharged bleach to the sanitary sewer system in 2003 and for an unspecified number of preceding years. An EPA investigation revealed that plant employees washed spilled bleach into the plant's floor drains, which lead via the plant's drainage system to Salem's sanitary sewer system. According to EPA, bleach is a corrosive chemical that, in sufficient concentration, may damage metal and other materials used in the sewer system and is considered a pollutant under the CWA. *See EPA Press Release*, January 13, 2009.

[4] Air: Cal/EPA Fines Auto Supply Retailer for Windshield Washer Fluid Violations

The California Environmental Protection Agency (Cal/EPA) has reportedly imposed a \$600,000 fine on a company that operates several automobile supply retail chains in western states for selling windshield washer fluid that violated the state's air quality standards. Cal/EPA alleged that, between 2004 and 2006, CSK Auto Inc. stores, which include Kragen Auto Parts, sold, throughout California, more than 14,000 gallons of washer fluid formulated for sale only in cold mountainous areas. Under state regulations, washer fluid that contains higher levels of volatile organic compounds (VOCs) to prevent freezing cannot be sold in warmer areas of the state. *See BNA Daily Environment Report*, January 13, 2009.

[5] Air: San Joaquin Valley's Particulate Attainment Designation Challenged

Several environmental groups have challenged EPA's decision to designate California's 25,000-square-mile San Joaquin Valley as in attainment with the federal air standard for coarse particulates. *Latino Issues Forum v. EPA*, No. 09-70113 (9th Cir. filed 1/9/09). Earthjustice filed the petition for review on behalf of Latino Issues Forum, Medical Advocates for Healthy Air and the Sierra Club. Petitioners allege that, in promulgating the Exceptional Events Rule, which allows states to consider one-time circumstances that may be beyond their ability to control when determining whether areas are not in attainment, EPA wrongly excluded certain exceedances of the PM-10 standard recorded in 2006 by declaring them "exceptional events." *See BNA Daily Environment Report*, January 13, 2009.

[6] Water: Groups Challenge EPA Ship Discharge Rules

Three environmental groups have reportedly challenged EPA's vessel ballast discharge rules in the Ninth Circuit Court of Appeals. The petition for review alleges that EPA's permit requirements, under which vessels heading for U.S. ports with full ballast tanks must exchange the water at least 200 miles from shore, are not strong enough to meet Clean Water Act standards. Ships with empty ballast tanks must rinse them with salt water to kill freshwater organisms lurking in residual puddles or sediment. The EPA permit requirements include rules for 26 types of discharges from ships, such as ballast water, oily bilge water and "gray water" from showers and sinks. Petitioners want EPA to require onboard systems for sterilizing ballast tanks.

Ballast water, which keeps vessels stable in rough seas, is blamed for carrying zebra mussels and many other invasive species into U.S. waters where they



have overwhelmed native species and caused other environmental harm. Michigan prohibits ships from dumping ballast at its ports unless they have treatment systems. See *The Los Angeles Times* and *Las Vegas Sun*, January 12, 2009.

[7] Air: Environmental Organizations Seek Updated Air Pollution Standards

Several environmental groups have sued EPA to pressure the agency to update air pollution regulations for nearly 50 industries. [*Sierra Club v. Johnson, No. N/A \(N.D. Cal. filed 1/13/09\)*](#). In addition to the lawsuit, the groups have filed a petition with EPA to amend the agency's Clean Air Act regulations to fix defective standards requiring industries that emit hazardous air pollutants to achieve best possible controls. According to the complaint and the petition, EPA has failed to review and revise the emission standards for hazardous air pollutants as required by sections 112(d)(6) and (f)(2) of the Clean Air Act for numerous industries, including chemical plants, refineries, paper mills, and smelters. The plaintiffs seek both declaratory and injunctive relief and an award of attorney's fees.

Legislation, Regulations and Guidance

[8] Nanotechnology: EPA Publishes Nanoscale Materials Stewardship Program Report

EPA has issued its interim [report](#) on the Nanoscale Materials Stewardship Program (NMSP), which the agency initiated in January 2008 to provide a firmer scientific foundation for regulatory decisions. NMSP comprised two programs that encouraged companies to submit information on risk management practices for nanoscale materials. The basic program invited participants to report

available information on the engineered nanoscale materials they manufacture, import, process, or use. An in-depth program asked volunteers to partner with EPA in the development of data, including testing, on representative nanoscale materials over a longer time frame.

EPA reported that 29 companies or trade associations submitted information on 123 chemicals and nanoscale materials under the basic program, but very few provided manufacturing, processing or use information on either toxicity or fate studies. As a result, EPA will consider how best to apply its regulatory authority under TSCA to require the submission of data on nanomaterials and to mandate testing. NMSP will continue through January 2010, according to EPA, which is still promoting participation in both programs.

[9] Air: EPA Issues Final Rule Modifying NSR Program Policy on Aggregation

EPA is issuing a final [rule](#) that modifies the New Source Review (NSR) program policy on the term "aggregation." Aggregation combines multiple, nominally separate but related, physical or operational changes into a single project for NSR evaluation. The proposed rule had contained suggestions for aggregation, debottlenecking and project netting under the NSR program, but EPA has withdrawn the proposed rule options for "debottlenecking" and is taking no action on "project netting."

With respect to "aggregation," the final rule explains that source owners and permitting authorities should combine emissions when changes are "substantially related," either from an economic or technical standpoint. The rule also specifies that (i) a source cannot group changes based on timing alone; (ii) to be aggregated, changes are required to have more in common than just supporting the plant's overall



basic function; and (iii) sources and permitting authorities can presume that plant modifications that are separated by three or more years are not “substantially related,” unless they can prove otherwise. The final rule will be effective 60 days after publication in the *Federal Register*.

[10] Air: Final Rule Revises EPA’s VOC Definition

EPA has issued a final [rule](#) revising its definition of volatile organic compounds (VOCs) to exclude two compounds that only minimally contribute to ground-level ozone formation. Effective 30 days after publication in the *Federal Register*, the rule deletes propylene carbonate and dimethyl carbonate from the definitions of controlled VOCs at 40 C.F.R. Part 51.100(s). Propylene carbonate is an odorless, non-viscous clear liquid that has a lower evaporation rate than many other organic solvents. Dimethyl carbonate, a paint solvent and fuel additive, is less reactive than ethane, according to EPA.

[11] Air: Flexible Air Permitting Rule Released

EPA has issued a final [rule](#) allowing regulated facilities to obtain approval for operational changes up front without requiring new permits as the changes occur. According to EPA, the “flexible air permitting rule” requires industries to remain subject to emissions limits imposed by state and federal Clean Air Act regulations but allows them to obtain authorization for a predicted number of operational changes. The rule revises EPA’s Title V regulations by adding definitions for “alternative operating scenario” and “approved replicable methodology,” and codifying some clarifications of existing provisions. The rule is effective 30 days after publication in the *Federal Register*.

[12] SPCC: EPA Proposes Amending SPCC Rule for the Dairy Industry

EPA has proposed amendments to the Spill Prevention, Control, and Countermeasure (SPCC) rule for the dairy industry. *74 Fed. Reg.* 2,461 (1/15/09). The agency has suggested exempting milk containers and associated piping and appurtenances from SPCC requirements, provided the equipment is constructed according to the current applicable 3-A Sanitary Standards and subject to Grade “A” Pasteurized Milk Ordinance or an equivalent state dairy regulatory requirement. In addition, the capacity of these milk containers would not be included in a facility’s total oil storage capacity calculation. EPA will accept comments on the proposed amendments until February 17, 2009.

[13] Nanotechnology: Report Claims FDA Incapable of Regulating Nanomaterials in Dietary Supplements

A [report](#) from the Woodrow Wilson International Center for Scholars’ Project on Emerging Nanotechnologies (PEN) claims that the Food and Drug Administration (FDA) lacks the tools to regulate dietary supplements containing nanomaterials. The report recommends that FDA increase its information collection on nanotechnology-based dietary supplements and study their safety. PEN also calls on the agency to consider dietary supplements that use nanomaterials as “new dietary ingredients.” Under the 1993 Dietary Supplement Health and Education Act, a manufacturer is required to inform the agency when it uses a new ingredient before marketing it.

The report also urges Congress to give FDA the authority to require pre-market testing and review, as well as adverse event reporting. PEN has asked lawmakers to increase FDA resources in an effort to improve its scientific expertise and its capacity to evaluate the emerging market.



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We welcome any leads on new developments in environmental law or toxic tort litigation.

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