

# Environmental & Chemical Update

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

Issue 265 • February 6, 2009

## Litigation and Regulatory Enforcement

- [1] **CERCLA:** Costs to Identify PRPs Recoverable Only When Linked to Cleanup . . . . . 1
- [2] **RCRA:** Federal Court Finds No Statutory Remedy for Groundwater Contamination of Undeveloped Property . . . . . 1
- [3] **CERCLA:** Reconsidering Contribution Claim, Court Reverses Previous Ruling . . . . . 1
- [4] **FOIA:** Federal Court Finds EPA Environmental Documents Not Privileged or Protected from Disclosure . . . . . 2
- [5] **Air/Greenhouse Gases:** Lawsuit Challenges Regional GHG Initiative Cap and Trade Program . . . . . 2
- [6] **FIFRA:** New Jersey DEP Fines Tomato Grower \$1 Million for Alleged Pesticide Violations . . . . . 3
- [7] **EU/Air:** EC Initiates PM-10 Standard Infringement Action Against Member States . 3

## Legislation, Regulations and Guidance

- [8] **Air/Greenhouse Gases:** President Requests Reevaluation of EPA Denial of California GHG Waiver Application . . . . . 3
- [9] **Regulatory Review:** EPA Withdraws Pending Environmental Regulations from OMB for Review . . . . . 4
- [10] **RCRA:** EPA Extends Comment Period in Pharmaceutical Waste Rule . . . . . 4
- [11] **Nanotechnology:** California DTSC Requests Toxicity Information from Carbon Nanotube Manufacturers . . . . . 4

## Scientific/Technical Items

- [12] **Nanotechnology:** British Report Addresses Nanoparticle Characteristics That May Mimic Asbestos . . . . . 5
- [13] **Chemical Exposure:** Study Claims BPA Stays in Body Longer Than Expected . . . . 5
- [14] **Water:** NACWA Releases Analysis of Recession's Impact on Wastewater Treatment Facilities . . . . . 5

Shook,  
Hardy &  
Bacon<sub>L.L.P.</sub>

[www.shb.com](http://www.shb.com)

---

# Environmental & Chemical Update

---

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

## Litigation and Regulatory Enforcement

### [1] CERCLA: Costs to Identify PRPs Recoverable Only When Linked to Cleanup

A federal judge in California has ruled that costs spent identifying potentially responsible parties (PRPs) at CERCLA sites are recoverable only if the identification actually contributes to the sites' cleanup. *BNSF Ry. Co. v. California*, No. 08-2225 (E.D. Cal. 01/07/09). The case involved two rail-road companies that sought to recover attorney's fees allegedly incurred in identifying PRPs at a CERCLA site. Defendants claimed that the fees were litigation-related costs and not recoverable under *Key Tronic Corp. v. U.S.*, 511 U.S. 809 (1994). The court agreed, finding that the companies were unable to demonstrate that the attorney's work was done for anything other than protecting the companies' own liability-related interests. According to the court, the companies were not able to show that their identification costs were a "necessary cost of response" under *Key Tronic*, because the cost "did not arise during, nor does it appear to benefit, any cleanup process."

### [2] RCRA: Federal Court Finds No Statutory Remedy for Groundwater Contamination of Undeveloped Property

A federal judge in New York has ruled that contaminated groundwater under property slated for residential development does not pose an

"imminent and substantial" endangerment to human health under RCRA because the law does not protect "hypothetical occupants." *Scotchtown Holdings LLC v. Goshen*, No. 08-4720 (S.D.N.Y. 01/05/09). A land developer had filed the lawsuit, alleging that Goshen's use of sodium chloride in road salt used to de-ice the town's roads had contaminated a 33.4-acre tract of land that was to be developed into residences.

Dismissing the developer's RCRA citizen suit, the court held that, because contaminants in the property's groundwater were discovered before the land was developed, the groundwater would never be approved for human consumption. As a result, according to the court, the contamination does not constitute an "imminent" threat to human health under 42 U.S.C. 6972 (a)(1)(B). While the court acknowledged that the developer might have other causes of action to pursue, it explained that RCRA did not provide a remedy.

### [3] CERCLA: Reconsidering Contribution Claim, Court Reverses Previous Ruling

A federal judge in Washington has reversed his own decision and, applying a broader interpretation of *U.S. v. Atlantic Research Corp.*, 551 U.S. 128 (2007), determined that "a plaintiff cannot seek contribution under §9613(f)(1) unless first directly sued under §9606 or §9607" of CERCLA. *Port of Tacoma v. Todd Shipyards Corp.*, No. 08-5132 (W.D. Wash. 01/14/09). When the court ruled on the same issue in September 2009, it held that Todd Shipyards, the defendant and third-party claimant,



could proceed with a section 113 contribution claim based on a section 113 claim filed against it by the Port of Tacoma, which was seeking to recover costs it agreed to pay under a consent decree with the federal government under section 9607. Ruling that it had committed “manifest error” in its narrow interpretation of *Atlantic Research* and its improper application of the statute, the court agreed with the third-party defendant, the United States, that Todd Shipyards’ contribution claim must be dismissed. The court cited both *Atlantic Research* and *Cooper Industries Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004) in its latest decision.

#### **[4] FOIA: Federal Court Finds EPA Environmental Documents Not Privileged or Protected from Disclosure**

A federal court in Washington, D.C. has ordered EPA, under the Freedom of Information Act (FOIA), to release a document that sets forth the “vadose zone model,” which was developed to analyze contamination at a site in Rialto, California. [\*Goodrich Corp. v. EPA\*, No. 08-1625 \(D.D.C. 01/16/09\)](#). As described in the decision, the model “simulate[es] the downward movement of perchlorate through the vadose zone at [a] site (i.e., the zone, approximately 420 feet down, between the ground surface and the underlying groundwater).” The FOIA request also sought the agency’s “groundwater flow model,” which “simulates the movement of groundwater at [a] site under varying conditions.”

EPA argued that release of the vadose zone model should be withheld under exemptions 5 and 7(A) of the FOIA. Exemption 5 applies to inter- or intra-agency documents that would be privileged in the civil discovery process, 5 U.S.C. §552(b)(5), and exemption 7(A) applies to “records or information compiled for law enforcement purposes, but only to

the extent that production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. §552(b)(7)(A). The court rejected EPA’s arguments, ruling that EPA had waived any privilege protecting the vadose zone model because the agency shared it with the California Regional Water Quality Control Board, which shared it with plaintiff’s counsel.

As to the groundwater flow model, EPA argued that the model was a “draft” and should therefore be withheld under a line of cases including *City of Virginia Beach v. Department of Commerce*, 995 F.2d 1247 (4th Cir. 1993), and *Dudman Communications Corp. v. Department of the Air Force*, 851 F.2d 1565 (D.C. Cir. 1987). The court agreed saying “EPA has properly withheld the groundwater flow model, even though it plans to release the complete or final model in the future.”

#### **[5] Air/Greenhouse Gases: Lawsuit Challenges Regional GHG Initiative Cap and Trade Program**

The owner of a natural gas plant in Corinth, New York, has reportedly filed a lawsuit challenging the legal authority of New York state agencies to create the Regional Greenhouse Gas (GHG) Initiative, a carbon-trading system established by 10 northeastern states aimed at limiting carbon dioxide emissions from power plants. The lawsuit, which was filed in a county court in New York, names Governor David Paterson (D), the New York State Department of Environmental Conservation, New York State Energy Research and Development Authority, and New York Public Service Commission as defendants. The complaint alleges that the regional initiative program was created in New York without necessary legislation and that it



“arbitrarily discriminates against a few electric generators bound by long-term fixed-price contracts.” It also alleges that the program “levies an unlawful tax on electric generators.” *See The New York Times*, January 29, 2009.

**[6] FIFRA: New Jersey DEP Fines Tomato Grower \$1 Million for Alleged Pesticide Violations**

A Florida company that grows tomatoes has reportedly been fined nearly \$1 million for improperly using pesticides on 17 of its fields, allegedly placing workers and consumers in jeopardy. The New Jersey Department of Environmental Protection (NJ DEP) called the alleged violations “the most serious ... ever uncovered.” The NJ DEP cited the company for hundreds of violations, including that the company denied state investigators access to facilities, applied pesticides to tomatoes more frequently than permitted and on numerous occasions harvested and shipped pesticide-sprayed tomatoes before they were safe for public consumption. NJ DEP also charged defendant Ag-Mart Produce, Inc. with careless record-keeping, failing to properly ventilate areas during pesticide use, failing to post pesticide-safety information for workers, using banned mixtures of pesticides, and losing a 2.5 gallon container of toxic insecticide. Ag-Mart has about 700 employees on 17 farms in New Jersey. *See New Jersey Star Ledger*, January 30, 2009.

**[7] EU/Air: EC Initiates PM-10 Standard Infringement Action Against Member States**

The European Commission (EC) has reportedly initiated infringement proceedings against 10 European Union (EU) member states for allegedly failing to comply with the EU’s air quality standard for fine airborne particles, or PM-10. The action

follows a new air quality directive that became effective in June 2008 that allows member states to request extensions of time to comply with the EU’s PM-10 standard, in force since 2005. The 10 member states have failed to request extra time to meet the standards in air quality zones where PM-10 limit values have been exceeded. The member states concerned are Cyprus, Estonia, Germany, Italy, Poland, Portugal, Slovenia, Spain, Sweden, and the United Kingdom.

The infringement process allows the member states to respond to the EC notice letter, usually within two months of receipt. The EC may then issue a “Reasoned Opinion” that sets out the reasons why it considers that EU law was infringed and calls on the member states to comply within a specific time period. If the member state fails to comply, the EU may decide to bring the matter before the Court of Justice. *See European Commission Press Release*, January 29, 2009.

## Legislation, Regulations and Guidance

**[8] Air/Greenhouse Gases: President Requests Reevaluation of EPA Denial of California GHG Waiver Application**

President Barack Obama (D) has signed a [memorandum](#) directing the EPA administrator to reevaluate the agency’s denial of a California waiver request that sought an exemption from the general statutory prohibition on state adoption or enforcement of Clean Air Act emissions standards. *74 Fed. Reg.* 4,905 (01/28/09). The waiver would have allowed California to adopt emissions limitations on greenhouse gas (GHG) emissions from motor vehicles.

The state has been seeking EPA’s approval since 2002 to enforce a state law that would require automakers to reduce by 30 percent carbon dioxide



emissions from new vehicles by 2016. In March 2008, EPA denied the state's application, citing as legal justification the arrival of new federal automobile efficiency standards. The Alliance of Automobile Manufacturers and the Association of International Automobile Manufacturers are on record as opposing California's waiver application. *See Greenwire*, January 26, 2009.

### **[9] Regulatory Review: EPA Withdraws Pending Environmental Regulations from OMB for Review**

EPA has reportedly withdrawn for further review all rule makings and notices submitted to the White House Office of Management and Budget (OMB) during the prior administration. Among the items withdrawn were (i) a review of the national ambient air quality standard for nitrogen dioxide; (ii) a proposed rule to establish a program for mandatory reporting of greenhouse gas emissions; (iii) a proposed rule to establish regulations to implement the renewable fuels standard; (iv) a notice of policy and procedures for initial screening under the Endocrine Disruption Screening Program; (v) a proposed rule for a regulatory determination on financial test criteria under Title C of RCRA; (vi) a notice of modifications to RCRA rules associated with solvent-contaminated industrial wipes; (vii) a proposed rule exempting milk containers and associated piping under the oil spill prevention program; and (viii) a proposed rule setting effluent limitation guidelines and standards for airport de-icing operations. *See BNA Daily Environmental Report*, January 29, 2009.

### **[10] RCRA: EPA Extends Comment Period in Pharmaceutical Waste Rule**

EPA has extended until March 4, 2009, the public comment period for the proposed rule on pharmaceutical waste published December 2, 2008. *74 Fed Reg. 5,633 (1/30/09)*. The extension follows requests from the Environmental Technology Council, Harbors Environmental Services, Healthcare Distribution Management Association, Northeast Waste Management Officials' Association, PharmEcology Associates UC, and Waste Management.

The proposed rule would amend EPA's Universal Waste Rule by adding hazardous pharmaceuticals to the class of waste that includes batteries, pesticides, mercury-containing equipment, and lamps. If implemented, RCRA would specify which pharmaceutical waste is non-hazardous and can be treated as universal waste, as well as setting out a streamlined system for disposing of more hazardous products. The proposed rule would apply to pharmaceutical waste generators such as pharmacies, hospitals, dentists' offices, and veterinary clinics. EPA expects the proposed rule to be finalized by 2010, according to news sources. *See Law360*, February 2, 2009.

### **[11] Nanotechnology: California DTSC Requests Toxicity Information from Carbon Nanotube Manufacturers**

The California Department of Toxic Substances Control (DTSC) has reportedly required 24 private and public carbon nanotube manufacturers to submit toxicity data, identify the analytical tools used to monitor the substance in the workplace and environment, and outline the safeguards they are using to protect workers. The notices were issued under the authority of a state statute enacted in 2006 (Health and Safety Code, Chapter 699, Sections 57018-57020). The city of Berkeley



also adopted a mandatory program in 2006 for companies producing or using nanomaterial, and Canada recently announced that it would adopt a nanomaterials reporting program. In addition, EPA is studying a nanomaterials regulatory program after a voluntary program had few participants. See *California DTSC Press Release*, January 29, 2009.

## Scientific/Technical Items

### [12] Nanotechnology: British Report Addresses Nanoparticle Characteristics That May Mimic Asbestos

A recent report claims that some nanoparticles and carbon nanotubes may have asbestos-like effects. C.L. Tran, et al., "An Outline Scoping Study to Determine Whether High Aspect Ratio Nanoparticles (HARN) Should Raise the Same Concerns as Do Asbestos Fibers," *SAFENANO*, January 23, 2009. Researchers with the U.K. Institute of Occupational Medicine identified many similarities—including diameter, length and biopersistence—between high aspect ratio nanoparticles (HARN) and asbestos with regard to their physicochemical properties and toxicological effects.

The report concluded that sufficient evidence suggests that these nanoparticles are likely to have a pathology similar to asbestos. The report recommends (i) investigation on how best to measure HARN physicochemical properties in suspension and in biological tissue; (ii) the development of respirable aerosols of HARN to allow further inhalation toxicity studies; and (iii) development of occupational, consumer and environmental response to HARN and, consequently, an exposure-dose-response model.

### [13] Chemical Exposure: Study Claims BPA Stays in Body Longer Than Expected

A recent study claims that bisphenol A (BPA), a high-volume industrial chemical used in metal food and drink container linings, polyvinyl chloride pipes and plastic drinking bottles, remains in the body longer than expected. Richard Stahlhut, et al., "Bisphenol A Data in NHANES Suggest Longer Than Expected Half-Life, Substantial Non-Food Exposure, or Both," *Environmental Health Perspectives*, January 28, 2009. Researchers from the University of Rochester Medical Center analyzed a population of 1,469 adults and found that fasting did not predict the speed at which the body eliminates BPA. The study recommended additional research to determine whether there are non-food sources of BPA and whether BPA is stored in fat, which may release the chemical more slowly than expected. The U.S. Food and Drug Administration is studying BPA, which Canada has already banned in baby bottles.

### [14] Water: NACWA Releases Analysis of Recession's Impact on Wastewater Treatment Facilities

The National Association of Clean Water Agencies (NACWA) has released an [analysis](#) of key issues facing public wastewater treatment facilities due to recent economic trends. John Friar, "Impacts of the Current Economy on Public Clean Water Agencies," January 29, 2009. The report discusses the current and potential impact of economic trends on public clean water agencies, as well as the effects from a theoretical perspective. In particular, the report considers (i) recession, (ii) financial crisis, (iii) deflation, and (iv) government response. It also provides a brief overview of public member agency responses to a recent NACWA survey on the economic downturn.



---

# 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](mailto:derickson@shb.com); 816-474-6550) or  
Jim Neet ([jneet@shb.com](mailto: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®

