

Environmental & Chemical Update

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Issue 266 • February 13, 2009

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Litigation and Regulatory Enforcement

[1] Toxic Tort: Sixth Circuit Upholds Denial of Class Certification over Train-Related Chemical Leak

The Sixth Circuit Court of Appeals has upheld the denial of class certification sought by a Tennessee resident evacuated after a train-related chemical leak. [*Turnage v. Norfolk S. Corp.*, No. 07-6033 \(6th Cir. 1/22/09\)](#).

During the 2002 incident, a train owned and operated by Norfolk Southern Corp., derailed in Knox County, causing a tanker filled with sulfuric acid to leak, which created an acid cloud. Emergency workers required all residents within a 1.3-mile radius of the site to leave. A voluntary evacuation was issued for those living within a 3-mile radius. Local resident Bret Freeman and another resident filed a lawsuit against the railroad for private nuisance and sought to certify a class of plaintiffs that could involve as many as 15,000 people. Freeman was the only plaintiff whose claims were tried, and his motion for class certification was before the court on appeal.

Both the district and appellate courts held that plaintiff's figure was speculative and that it would be difficult to join to the lawsuit everyone who suffered economic damages from the leak, which was limited to a two-day period and a 3-mile radius. According to the court, "[t]he plaintiff in the instant case cites large numbers, but his numbers include

not just the members of his proposed class, but every resident of the three-mile radius." Without "some evidence of the size either of the excluded group or of the remaining class, plaintiff's evidence of numerosity remains speculative."

[2] CERCLA/RCRA: Proposed Remedial Investigation and Feasibility Study Bar RCRA Citizen Suit

A federal judge in New York has ruled that a state's proposed CERCLA remedial investigation and feasibility study (RI/FS) is sufficient to bar a RCRA citizen suit where the state has incurred costs and is diligently proceeding with a remedial action. [*Inc. Vill. of Garden City v. Genesco, Inc.*, No. 07-5244 \(E.D.N.Y. 1/27/09\)](#).

The site at issue in Garden City Park, New York, was the former location of a fabric cutting mill and a dry cleaning operation. The defendant/operator used tetrachloroethylene (PCE, or perc) as a dry cleaning solvent, which found its way into an on-site injection well. When defendant closed its plant, it failed to close the injection well.

Beginning in the 1980s, state and local investigators determined that PCE contamination had spread from the site to the underground aquifer used by the Village of Garden City for drinking water. The New York Department of Environmental Conservation (NYSDEC) identified defendant and the current property owner as potentially responsible parties (PRPs) and, in 1997, entered into a consent decree with defendant, requiring the company to



perform an RI/FS. In 1998, the site was placed on the National Priorities List, and NYSDEC and EPA approved defendant's RI/FS.

The Village of Garden City incurred costs installing a treatment system to remove PCE from its drinking water supply and, in 2006, notified defendant that it would file a RCRA citizen suit against it. The Village sought an order requiring the defendant to investigate and remediate the discharge of PCE into groundwater to eliminate the danger to the environment and public health. Defendant moved to dismiss, arguing that the RCRA claim was barred.

The court agreed, holding that RCRA, 42 U.S.C. § 6972, bars the filing of a citizen suit if the state or EPA has "incurred costs to initiate an RI/FS under section 104 of CERCLA ... and is diligently proceeding with a remedial action ..." The court noted that October 1997 correspondence between EPA and NYSDEC was sufficient to establish a "cooperative agreement between the EPA and NYSDEC," which is required by section 104 of CERCLA.

[3] CERCLA: Federal Court Upholds EPA Authority to Issue Section 106 Unilateral Orders

A federal judge in Washington, D.C. has upheld EPA's authority to unilaterally order potentially responsible parties (PRPs) to clean up contaminated sites under section 106 of CERCLA. [*Gen. Elec. Co. v. Jackson*, No. 00-2855 \(D.D.C. 1/27/09\)](#).

Plaintiff argued that EPA's exercise of its unilateral administrative-order authority under section 106 violated constitutional due process because parties are deprived of protected liberty and property rights without a hearing. Section 106 allows EPA to issue a unilateral order if it finds "that there may be an imminent and substantial

endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." Under CERCLA, a PRP that believes it is not responsible for a clean-up can choose whether or not to comply with a unilateral order. If the PRP complies, it may seek reimbursement from other PRPs or from EPA upon completion of a clean-up. If the PRP does not comply, then EPA may enforce the unilateral order in federal court, seeking \$32,500 for each day of noncompliance, and punitive damages up to three times "the amount of any costs incurred ... as a result of such failure to take proper action."

Instead of focusing on the constitutionality of the process set forth in section 106 of CERCLA, the court decided to address whether EPA's actual pattern and practice of administering section 106 violated due process. Finding it did not, the court ruled in EPA's favor. Plaintiff filed the lawsuit against EPA in November 2000, just before EPA proposed a \$460 million cleanup plan targeting PCBs in New York's Hudson River. According to the agency, plaintiff discharged as much as 1.3 million pounds of PCBs directly into the river from two capacitor manufacturing plants between 1947 and 1977. The Hudson River PCB site encompasses a nearly 200-mile stretch in eastern New York from Hudson Falls to New York City. It includes communities in 14 New York counties, as well as two counties in New Jersey.

[4] CERCLA: Prior Settlements Bar Contribution Claims

A federal judge in Illinois has ruled that prior settlements in environmental litigation over contamination at an industrial park near Chicago bars a potentially responsible party (PRP) that



settled prior contribution claims with prejudice from asserting similar claims now. *Arrow Gear Co. v. Downers Grove Sanitary Dist.*, No. 08-4895 (N.D. Ill. 1/29/09). Plaintiff was among several companies that agreed in June 2006 to drop a series of counterclaims, cross-claims and third-party claims against one another after reaching a \$15.75 million settlement with a class of homeowners. The class-action suit alleged that plaintiffs in this litigation were responsible for leaking trichloroethylene and perchloroethylene into the ground at Ellsworth Industrial Park in Downers Grove, Illinois, contaminating water and soil in the area.

The company argued that its agreements to drop earlier contribution claims with prejudice in the homeowner's litigation did not apply to claims arising out of administrative proceedings before EPA. Defendants argued that the prior settlement agreements barred plaintiff's current CERCLA contribution claims under the doctrine of *res judicata* because they were based on the same core facts that gave rise to the claims in the prior litigation. The court agreed with defendants, ruling that the court lacked jurisdiction to enforce the terms of the settlement agreements because the claims had been dismissed with prejudice. According to the court, "the settlement agreements showed that the parties intended to settle and preclude from future litigation all claims asserted or that could have been asserted ..., [in the prior case]."

[5] Wetlands: Federal Court Invalidates Corps Permits for Everglades Limestone Mining

A federal judge in Florida has ruled that the U.S. Army Corps of Engineers (Corps) acted arbitrarily and capriciously in issuing Clean Water Act dredge-and-fill permits to companies mining

limestone rock near the Everglades National Park. *Sierra Club v. Van Antwerp*, No. 03-23427 (S.D. Fla. 1/30/09). The court invalidated nine Corps permits issued in 2002, ruling that the Corps violated the CWA and NEPA by failing to consider practicable alternatives to mining in the wetlands.

Plaintiffs alleged that deep-pit limestone mining for construction materials on more than 5,000 acres adjacent to the Everglades would endanger the Miami-Dade County drinking water supply and would threaten the Comprehensive Everglades Restoration Plan. In an earlier decision, the same court vacated several Corps permits and chastised the Corps for its "ongoing disregard" for health and environmental risks associated with the mining operations. *Sierra Club v. Strock*, 495 F. Supp. 2d 1188 (S.D. Fla. 2007). On appeal, the Eleventh Circuit Court of Appeals remanded the case with instructions that the district court "apply the proper degree of deference" to standards the Corps employed in its permitting decision. *Sierra Club v. Van Antwerp*, 526 F.3d 1353 (11th Cir. 2008).

In this decision, the court ruled that the Corps erred when it issued dredge-and-fill permits, concluding that the limestone excavation operations were "water dependent" under section 404 of the CWA in that they required access or proximity to or within a special aquatic site to fulfill their basic purpose. The court also said, "[n]othing in the administrative record indicates that the basic purpose of this project, limestone excavation, requires siting within wetlands." In addition, the court held that a Corps EIS "failed to meet NEPA requirements because the Corps adopted challenged data and conclusions submitted by the companies without independent evaluation." The court ordered the permits vacated.



[6] Air: State Court Invalidates Rule Limiting Mercury Emissions from Coal-Fired Power Plants

A Pennsylvania state court has ruled that a state **regulation** limiting mercury emissions from coal-fired power plants is “unlawful, invalid, and unenforceable.” *PPL Generation LLC v. Pa. Dept. of Env'tl. Protection*, No. 446 (Pa. Commw. Ct. 1/30/09). The regulation required state power plants to cut mercury emissions 80 percent by 2010 and 90 percent by 2015. It also barred interstate or systemwide trading of mercury allowances to achieve compliance. It was adopted by the state Environmental Quality Board and published in the *Pennsylvania Bulletin* February 17, 2007.

In 2005, EPA removed coal-fired power plants from the CAA section 112 list and adopted the Clean Air Mercury Rule, which allowed states to adopt more stringent requirements to regulate power plant mercury emissions. But in February 2008, the D.C. Circuit Court of Appeals invalidated the “delisting” and vacated the federal Clean Air Mercury Rule, holding that EPA must set strict limits on mercury emissions from coal-fired power plants. *New Jersey v. EPA*, 65 ERC 1993 (D.C. Cir. 2008).

According to the court, when the federal appellate court ruled that “electric generating units remain listed under Section 112,” there was no period during which Pennsylvania had the authority to regulate mercury emissions from power plants. The state Department of Environmental Protection has appealed the ruling to the Pennsylvania Supreme Court.

[7] Air: Texas Court Rejects Challenge to Pulverized Coal Power Plant

A Texas state appeals court panel has upheld the Texas Commission on Environmental Quality's (TCEQ) issuance of a permit to operate a coal-fired power plant in McLennan County. *Blue Skies Alliance v. TCEQ*, No. 07-0366 (Tex. App., 7th Dist. 1/29/09).

Sandy Creek Energy Associates filed an application with TCEQ for a permit to operate an 800-megawatt pulverized coal power plant near Waco in rural McLennan County. Because the county meets the NAAQS for ozone, the company was required to perform a prevention of significant deterioration (PSD) analysis. Following a hearing before a TCEQ administrative law judge, TCEQ issued the permit. After environmentalists challenged the permit in state court, the trial court upheld TCEQ, and the environmental groups appealed.

The appeals court rejected their argument that TCEQ should have required the integrated gasification combined cycle coal conversion process as part of its best available control technology (BACT) analysis. It also rejected an argument that plant emissions would increase ozone levels in the nearby Dallas and Fort Worth areas, which are classified as non-attainment for ozone. Specifically, the court ruled that BACT must be a technology that can be installed at the plant without requiring a plant redesign, and that the plant would have no significant impact on compliance with federal air quality standards in the Dallas-Fort Worth area to the north.



[8] Air: Groups Sue EPA over Failure to Update Emission Standards for Nitric Acid Plants

Environmental groups have sued EPA, alleging that it has failed to update emission standards for nitric acid plants. *Envtl. Integrity Project v. EPA, No. N/A (D.D.C. filed 2/4/09)*. The complaint seeks an order requiring EPA reviews of new source performance standards for the plants' nitrous oxide emissions. Plaintiffs allege that the agency has not reviewed the standards since 1984 and that, by failing to review the standards, EPA has been in continuous violation of the Clean Air Act. New source performance standards are technology-based requirements for new and modified sources and must be updated every eight years.

[9] Air: Kentucky Coal-Fired Electric Utility to Pay \$1.4 Million Civil Penalty for Air Violations

Kentucky Utilities Co. has reportedly agreed to pay a \$1.4 million civil penalty and invest \$135 million in pollution controls at its E.W. Brown Generating Station in Mercer County, Kentucky. *U.S. v. Kentucky Utils. Co.*, No. 07-0075 (E.D. Ky. *consent decree proposed 2/3/09*). As part of the proposed consent decree, the company will also invest approximately \$3 million in projects to benefit the government, including a \$1.8 million project to test storing carbon dioxide emissions in deep-injection wells, retrofitting school buses to reduce particulate matter emissions and donating \$200,000 to the National Park Service.

In an enforcement action filed in March 2007, EPA alleged that the company modified the largest coal-fired electrical generating unit at the generating

station without complying with new source review. According to the lawsuit, modifications made in 1997 allowed the plant to increase the amount of coal it burned and to increase the amount and rate of sulfur dioxide, nitrogen oxide and particulate matter it emitted. The proposed settlement is subject to a 30-day comment period before it can be approved by the court. *See EPA Press Release*, February 3, 2009.

[10] Water: Coal Company to Settle CWA Violations for \$6.5 Million

One of the largest U.S. coal companies has reportedly agreed to pay a \$6.5 million civil penalty to settle Clean Water Act violations. In a complaint lodged with the consent decree in the U.S. District Court for the Southern District of West Virginia, EPA and the state alleged that Patriot Coal Co. violated its CWA permits more than 1,400 times—representing more than 22,000 days of violations between January 2003 and December 2007—at mining sites in West Virginia. Specifically, the complaint alleged that Patriot and its subsidiaries discharged excess amounts of metals, sediment and other pollutants into dozens of state rivers and streams.

In addition to the civil penalty, Patriot agreed to implement measures to prevent future violations and to perform environmental projects costing a total of \$6 million. The consent decree is subject to a 30-day public comment period and federal court approval. *See DOJ Press Release*, February 5, 2009.

[11] FIFRA: Dental Equipment Company Fined for Selling Unregistered Pesticide

A dental equipment manufacturer in Newberg, Oregon, has reportedly reached a \$325,700 settlement with EPA for selling a pesticide product before it



was registered under FIFRA. According to the settlement, the company developed a dental waterline cleaner to control bacterial contamination and applied for registration in 2006. The company began selling the product the same year, although it was not registered until 2008. In 2007, the Oregon Department of Agriculture investigated the matter based on a tip and found 116 FIFRA violations. The settlement is reportedly the largest pesticide settlement in EPA's Region 10, based in Seattle. See *BNA Daily Environment Report*, February 5, 2009.

Legislation, Regulations and Guidance

[12] Air: EPA to Issue Mercury Rules for Power Plants

EPA has reportedly announced that it intends to develop technology-based standards to control mercury emissions from power plants. The agency also moved to dismiss its petition before the U.S. Supreme Court that sought to reinstate an emissions trading system established in 2005 by the Clean Air Mercury Rule. *EPA v. New Jersey*, No. 08-512 (U.S. motion to dismiss filed 2/6/09). The rule allowed power plants to install emission controls or purchase allowances from other plants able to reduce emissions. A three-judge panel of the D.C. Circuit Court of Appeals unanimously overturned the regulation in 2008, ruling that EPA ignored the "plain text" of the Clean Air Act and must set strict limits on mercury emissions from all coal-fired power plants under section 112. *New Jersey v. EPA*, 65 ERC 1993 (D.C. Cir. 2008). See *BNA Daily Environment Report*, February 9, 2009.

[13] NEPA: DOI Secretary Cancels Oil and Gas Leases on Public Land in Utah

U.S. Department of Interior Secretary Ken Salazar has reportedly directed the Bureau of Land Management (BLM) not to accept bids for oil and gas leases on 77 parcels of public land in Utah. Salazar also ordered the return of approximately \$6 million bid by producers at BLM's quarterly oil and gas lease sale held December 19, 2008.

A federal judge in Washington, D.C. had delayed the issuance of the leases until he ruled on the merits of a lawsuit brought by several environmental groups against BLM. *S. Utah Wilderness Alliance v. Allred*, No. 08-2187 (D.D.C. 1/17/09). The court ruled that the groups were likely to succeed on the merits of their claims, which alleged that BLM violated APA, NEPA, the National Historic Preservation Act, and the Federal Land Policy and Management Act. The court also found that BLM failed to conduct sufficient analysis of the environmental impacts of the drilling. See *The Washington Post* and *The Salt Lake Tribune*, February 4, 2009.

[14] Air/Greenhouse Gases: EPA to Hold Hearing on California GHG Emissions Waiver

EPA has reportedly announced a March 5, 2009, public hearing to consider the possible reversal of its 2007 decision denying California a waiver to implement the state's greenhouse gas (GHG) emissions limits on vehicles. Thirteen other states and Washington, D.C. have adopted the California standards. EPA will announce its decision to formally reconsider the waiver denial in the *Federal Register* and will accept written comments until April 6. See *BNA Daily Environment Report*, February 9, 2009.



Scientific/Technical Items

[15] Chemical Exposure: Article Claims Link Between Environmental Exposures and Breast Cancer

A recent article claims that a growing body of evidence suggests exposure to industrial chemicals, pesticides and other toxic substances increases breast cancer risk. Janet Nudelman, et al, "Policy and Research Recommendations Emerging from the Scientific Evidence Connecting Environmental Factors to Breast Cancer," *International Journal of Occupational and Environmental Health* (2009). The authors reviewed more than 400 studies and concluded that common chemicals and radiation, alone and in combination, are contributing to increases in breast cancer incidence observed over the past several decades.

The article recommends (i) reform of TSCA to establish the necessary authority to regulate all chemicals being used commercially; (ii) bans of individual chemicals like phthalates and bisphenol A; (iii) strengthening pre-market health and safety testing and regulation of pesticides; (iv) federal standards to achieve consistency in radiation-emitting medical and dental equipment; (v) improved state quality assurance standards for radiation-emitting equipment; and (vi) strengthened oversight and regulation of the cosmetics industry.



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