Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] Water/NEPA: Fourth Circuit Upholds Corps Permits Allowing Mountaintop Coal Mining 1

[2] Air: D.C. Circuit Upholds EPA Extension Deadline on Standards for Large Marine Engines 1

[3] CERCLA: Federal Court Rules Non-Settling PRPs Liable for Proportionate Share . . 2

[4] Toxic Tort: Army Found Immune from Chemical Exposure Claims 2

[5] Water: Federal Court Rules CWA Notice Letter Need Not Identify Exact Location of Alleged Violations 3

[6] Envtl. Crime: Two Asbestos Abatement Company Operators to Serve Prison Terms 3

[7] Toxic Tort: Suits Filed over Allegedly Contaminated Chinese Drywall 4

Legislation, Regulations and Guidance

[8] Air: EPA Revises Source Category List and Proposes CAA Emission Standards for Aluminum, Copper and other Nonferrous Foundries 4

[9] Air: EPA Delays Effective Date of NSR Aggregation Rule 5

[10] Alternative Energy: DOI to Reverse Prior Offshore Drilling Policy 5

Scientific/Technical Items

[11] Nanotechnology: Study Claims Iron-Containing Nanomaterials Can Cause Skin Damage 5

[12] Air: Inspector General Criticizes EPA Risk Management Program 6

[13] Chemical Contamination: Study Finds Road Salt Retained in Watershed 6

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Litigation and Regulatory Enforcement

[1] Water/NEPA: Fourth Circuit Upholds Corps Permits Allowing Mountaintop Coal Mining

The Fourth Circuit Court of Appeals has reversed two district court orders blocking mountaintop coal mining at locations in West Virginia. ***Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, No. 07-1355 (4th Cir. 2/13/09)**.

The district court had found that the U.S. Army Corps of Engineers (Corps) violated the Clean Water Act and NEPA when it issued permits allowing the creation of 23 loosely filled valleys and 23 sediment ponds affecting 13 miles of streams. In issuing the permits, the Corps prepared an environmental assessment which concluded that, given planned mitigation measures, no significant environmental impacts would result from the mining.

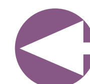
The appeals court ruled that an internal EPA guidance document supported the CWA section 404 permits and that the Corps did not act arbitrarily and capriciously in determining the scope of the NEPA analysis. The court also ruled that the district court had improperly classified downstream sediment ponds as waters of the United States instead of unitary waste treatment systems. A dissenting judge argued that mitigation measures were inadequate.

[2] Air: D.C. Circuit Upholds EPA Extension Deadline on Standards for Large Marine Engines

The D.C. Circuit Court of Appeals has upheld an EPA decision postponing from April 27, 2007, to December 17, 2009, the development of emissions standards for Category 3 marine diesel engines, which are large compression-ignition engines with a displacement at or above 30 liters per cylinder. ***S. Coast Air Quality Mgmt. Dist. v. EPA*, No. 08-1030 (D.C. Cir. 2/6/09)**.

California's South Coast Air Quality Management District (SCAQMD), Santa Barbara County Air Pollution Control District and Friends of the Earth challenged EPA's December 5, 2007, final rule extending the deadline, arguing that the agency violated section 213 of the Clean Air Act. In the Los Angeles area, marine vessel engines are a major source of nitrogen oxides and diesel soot. The SCAQMD has pushed EPA to move forward with federal regulations to allow the region to meet national air quality standards.

Denying the petition for review, the court held that EPA's administrative record supported the agency's claim that it needed additional time to develop the standards. According to the court, "[e]xtending the deadline in order to complete the tasks necessary to devising an informed Tier 2 regulation does not violate section 213," and "…, the record demonstrates



the EPA reasonably needs more time to develop a cost-effective implementation program and compliance program for the advanced technologies."

[3] CERCLA: Federal Court Rules Non-Settling PRPs Liable for Proportionate Share

Rejecting a settlement agreement between a property owner and the former operators of a dry cleaning business, a federal judge in California has ruled that a CERCLA non-settling potentially responsible party (PRP) remains liable only for its proportionate share where the settling party settled for less than its equitable share of cleanup costs. *Adobe Lumber, Inc. v. Hellman*, No. 05-1510 (E.D. Cal. 2/3/09). According to the court, the agreement would have been unfair to non-settling defendants sued by the property owner because it would have required them to assume the burden of the settling party's lower settlement amount.

The proposed settlement relied on a "pro tanto" method to determine settlement credit, which method calls for a site's total expected cleanup costs to be reduced by the actual amount to be paid by the settling party. Refusing to approve the settlement, the court held that because CERCLA's contribution provisions call for a site's cleanup costs to be allocated equitably among PRPs, it could not approve a settlement credit based on the "pro tanto" method. The court said "the proportionate share approach makes it more likely that pre-trial settlements and the overall litigation will achieve an equitable allocation of liability among all responsible parties."

[4] Toxic Tort: Army Found Immune from Chemical Exposure Claims

A federal judge in California has dismissed a family's lawsuit against the U.S. Army over purported harm allegedly caused by exposure to carbon tetrachloride while living at Fort Ord. *Welsh v. U.S. Army*, No. 08-3599 (N.D. Cal. 2/3/09). According to the court, the lawsuit was barred by the discretionary function exception to the Federal Tort Claims Act (FTCA).

The lawsuit involved contamination at Fort Ord, in Marina, California, where the family lived from 1998 until 2007. EPA placed Fort Ord on the CERCLA National Priorities List (NPL) in 1990, and, in 1991, it was selected by the Department of Defense (DOD) for closure. In 1997, DOD prepared a Base Reuse and Implementation Manual to provide guidance on how to reuse former military property. It was decided that part of the former base would be retained for military use, while the rest would be transferred to other government agencies. Plaintiffs moved into a house on the former base after local redevelopment authorities leased part of the property from DOD.

In 2008, plaintiffs sued the government, alleging that their house had been located "on top of an old clean up area where solvents containing carbon tetrachloride were used and dumped extensively" causing the family to experience "dizzy spells, vomiting, headaches and skin and breathing problems." They also alleged that long-term exposure caused "central nervous system damage…severe cognition, mental and physical problems," and they

sought more than $12 million in damages. The government claimed immunity from liability under FTCA's discretionary function exception, which bars claims based on a government employee's exercise or performance of, or the failure to exercise or perform, a discretionary function or duty.

The court agreed with the government, ruling that it met the two-pronged test of *Berkovitz v. U.S.,* 486 U.S. 531 (1998). First, the court said the Army "conducted all actions concerning the [carbon tetrachloride] plume" pursuant to its guidance manual which did not mandate a specific course of conduct. Second, the court found that the Army's investigation, remediation and reuse decisions were the kinds of judgments that "implicate policy choices and decisions of the type that Congress intended to protect from judicial second guessing and therefore satisfy the second prong of *Berkovitz.*"

[5] Water: Federal Court Rules CWA Notice Letter Need Not Identify Exact Location of Alleged Violations

A federal judge in Mississippi has ruled that a Clean Water Act citizen-suit notice letter is not deficient because it fails to identify the exact location of alleged violations. ***Gulf Restoration Network v. Hancock County Dev., LLC*, No. 08-186 (S.D. Miss. 2/3/09)**. The notice letter claimed that the defendant developer began clearing, dredging and filling wetlands and conducting other excavation without a CWA permit on approximately 700 acres of wetlands property it owned near Bay St. Louis, Mississippi. The defendant moved to dismiss the lawsuit arguing that it lacked specificity about the location of the alleged violations, the date range of violations in the notice letter was too broad, and the list of CWA sections alleged to be violated was incomplete.

Rejecting defendant's motion to dismiss, the court held that the CWA statutory notice requirement "does not mandate the exact location of the violations," but "requires only sufficient information which would permit the recipient to identify, among other things, the location of the alleged violations." The court also ruled that the date in the notice letter was sufficient when it said, "at some point prior to May 7, 2007," certain construction began, and that citing sections 402 and 404 of the CWA sufficiently designated the standard violated, even though the more general section, 301(a), was not mentioned in the notice letter.

[6] Envtl. Crime: Two Asbestos Abatement Company Operators to Serve Prison Terms

A federal judge in New York has reportedly sentenced two operators of asbestos abatement companies to prison for environmental crimes related to the illegal removal and disposal of asbestos. The two operators were sentenced to four years and two years in prison, respectively, after pleading guilty to conspiring to violate the Clean Air Act and the mail fraud statute. One of the operators was also sentenced to pay $854,166 in restitution to victims, and the other was ordered to pay $114,902. Court documents show that defendants directed employees to perform "rip and run" asbestos removals that, rather than removing all asbestos, dispersed and left substantial quantities behind, contaminating numerous businesses and homes. The operators were sentenced in the U.S. District Court for the Northern District of New York, February 6, 2009. *See DOJ Press Release,* February 11, 2009.

[7] Toxic Tort: Suits Filed over Allegedly Contaminated Chinese Drywall

A putative class of Florida homeowners reportedly filed a lawsuit against a company that manufactured drywall in China. *Allen v. Knauf Plasterboard Tianjin,* No. 09-54 (M.D. Fla. *filed* 1/30/09). The complaint alleges that defendant manufactured drywall which contained fly ash from Chinese coal-fired power plants, causing the product to emit sulfur compounds—including sulfur dioxide and hydrogen sulfide—that create odor and corrode copper in air conditioning and electrical wiring. According to the complaint, the emissions have also caused concerns over respiratory and other health problems and have diminished the value of plaintiffs' homes. The lawsuit seeks certification of a plaintiff class of all Florida homeowners whose homes have defendant's drywall.

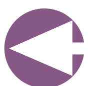
In a related lawsuit, Lennar Homes LLC alleged that the gypsum wallboard manufactured by the same defendant and another company damaged heating and air conditioning coils in homes it built. *Lennar Homes LLC v. Knauf GIPs KG,* No. 09-07901 (Fla. Cir. Ct. *filed* 1/30/09). The complaint alleges that defendants failed to establish proper quality controls and failed to warn customers their products were defective. It seeks unspecified damages for harm to plaintiff's reputation as well as damages for the costs to investigate the problem, replace defective drywall and provide alternative housing to homeowners during repairs. *See BNA Daily Environment Report,* February 11, 2009.

Legislation, Regulations and Guidance

[8] Air: EPA Revises Source Category List and Proposes CAA Emission Standards for Aluminum, Copper and other Nonferrous Foundries

EPA has proposed a rule revising the area source category list and amending workplace practices and emissions limits for aluminum, copper and other nonferrous foundries that are area sources. 74 *Fed. Reg.* 6,509 (2/9/09). The proposed rule renames the "Secondary Aluminum Production" and "Nonferrous Foundries, not elsewhere classified" categories to "Aluminum Foundries" and "Other Nonferrous Foundries." It would also require facilities that melt 600 tons of metal per year to cover or enclose melting furnaces during the melting process to the extent practicable, purchase and use only scrap metal that has been depleted of hazardous pollutants and develop and maintain management plans to demonstrate how management practices are being observed.

Foundries that melt at least 6,000 tons of metal per year would be required to comply with emissions limits, using particulate matter as a surrogate for hazardous pollutants such as beryllium, cadmium, chromium, lead, manganese, and nickel. Existing foundries would be required to control 95 percent of particulate matter emissions or meet an outlet concentration of at most 0.015 grain per dry standard cubic feet (gr/dscf). New facilities would be required to control 99 percent of particulate matter emissions or meet an outlet concentration of at most 0.010 gr/dscf. EPA will accept comments on the proposed rule until March 26, 2009.



[9] Air: EPA Delays Effective Date of NSR Aggregation Rule

EPA has reportedly announced that it will reconsider air pollution revisions to the CAA New Source Review (NSR) program's "aggregation" policy. Those revisions outline when emissions from multiple related projects should be evaluated together to determine whether pollution-control upgrades are required. EPA published the aggregation rule on January 15, 2009, and announced on February 10 that it would reconsider objections raised in a January 30 petition that NRDC filed. EPA is staying the effective date of the rule for 90 days. *See EPA Press Release,* February 10, 2009.

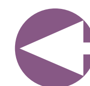
[10] Alternative Energy: DOI to Reverse Prior Offshore Drilling Policy

U.S. Secretary of Interior Ken Salazar (D) reportedly announced plans February 10, 2009, to extend by 180 days the public comment period on a proposed five-year plan for oil and gas development on the U.S. Outer Continental Shelf (OCS). During that period, he will assemble a detailed report from Department of Interior (DOI) agencies on conventional and renewable offshore energy resources, hold four regional conferences to review these findings and expedite renewable energy rulemaking for the OCS. DOI will also use the extra time to give states, stakeholders and affected communities the opportunity to provide input on the future of offshore areas. *See DOI Press Release,* February 10, 2009.

Scientific/Technical Items

[11] Nanotechnology: Study Claims Iron-Containing Nanomaterials Can Cause Skin Damage

A recent study claims that iron-containing nanomaterials can cause inflammation and other cell damage if it touches the skin. A.R. Murray, *et al.,* "Oxidative Stress and Inflammatory Response in Dermal Toxicity of Single-Walled Nanotubes," *J. Toxicology,* 2008. In the study, researchers compared the toxic effects of two formulations of single-walled carbon nanotubes: one batch was partially purified so that it had a very low iron content, while the other batch was unpurified and contained 30 percent iron. Using human skin cells grown in a laboratory, the study compared the effects of exposure on molecular markers that indicate inflammation and oxidative stress in cells. The researchers found that both formulations caused free-radical formation and oxidative stress in skin cells, though the nanotubes with high iron content were more toxic. The researchers also tested the unpurified form on engineered human skin grown in a laboratory and on the skin of mice. Direct topical exposure of these nanomaterials increased the skin thickness and caused skin inflammation.

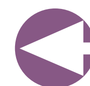


[12] Air: Inspector General Criticizes EPA Risk Management Program

According to a recent **report** by EPA's Office of Inspector General (IG), the agency does not have national procedures in place to ensure that all facilities covered by the Clean Air Act Risk Management Program have submitted plans to control chemical releases. The report found that one-third of the 1,516 facilities EPA had identified as past due for submitting risk management plans in 2005 still had not submitted them as of March 2008. EPA also failed to audit 296 of the 493 high-risk facilities identified by the agency's Office of Emergency Management. The Risk Management Program requires stationary sources with more than the threshold quantity of regulated substances on site to submit risk management plans to EPA detailing steps to minimize the risk of an airborne chemical release. CAA § 112(r). The plans must be updated every five years or when the affected facility makes operational changes. The report recommends that EPA develop inspection requirements to target higher-priority facilities to ensure that risk management plans are properly maintained and updated.

[13] Chemical Contamination: Study Finds Road Salt Retained in Watershed

A recent study by University of Minnesota researchers found that 70 percent of the road salt applied in the Twin Cities metropolitan area is being retained in the area's watershed, thereby affecting aquatic life and drinking water. Heinz Stefan, *et al.*, "Environmental Effects of Road Salt Runoff," *Lake & River Water Quality Dynamics,* February 2009. According to the study, which examined 39 lakes, three major rivers and 10 tributaries, chloride concentrations exceed 250 milligrams in several instances, especially in small streams. Given that nearly 350,000 tons of sodium chloride are applied each year to the area's roads, the results were not unexpected.



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Jim Neet (**jneet@shb.com**; 816-474-6550).
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