

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] CERCLA/Indemnity: Third Circuit Rules Indemnity Agreement Covers Pre- and Post-Agreement Contamination

The Third Circuit Court of Appeals has ruled that a broadly drafted indemnity provision in a 1994 purchase-and-sale agreement requires the current industrial property owner to compensate a former owner for CERCLA cleanup costs from pre-sale as well as post-sale contamination. *Pharmacia Corp. v. Motor Carrier Servs. Corp.*, No. 07-3204 (3d Cir. 2/10/09). Under the purchase-and-sale agreement, the seller agreed to complete at the site some prior cleanup actions that were initiated by New Jersey regulators. Except for those actions, the agreement said that the purchaser was responsible for:

- (i) any and all costs and expenses (including attorney's fees) of Clean-up [required under federal or state law] ...
- (ii) and any voluntarily incurred costs and expenses (including attorney's fees) to investigate, remediate, remove, treat, clean up or prevent the escape, in each case of any Substances present at or which migrate from the ... Site, the Plant or the Property at any time after the Effective Time.

In January 1995, EPA notified the seller that it was investigating contamination in the Passaic River in Newark, and, in April 1996, EPA notified the seller that it was a potentially responsible party (PRP) for river contamination. In 2004, the seller and several other PRPs entered into a settlement with EPA to address the contamination, and, in June 2007, the seller sued the purchaser for indemnification under the 1994 agreement. The district court held that the purchaser owed indemnity duties to the seller under the agreement. The purchaser appealed, arguing that it was responsible for the costs of cleanup activities only if the pollutants at issue migrated from the site after the property was sold.

The appeals court rejected the purchaser's argument, ruling that "... the Agreement is not ambiguous," and it requires the [purchaser] ..., to reimburse [seller] ..., "for governmental-mandated cleanup costs that arise from environmental harms caused by the property's former use as a chemical manufacturing site, whether the contamination occurred before or after the agreement's effective date. The court not only found that the purchaser owed indemnification under the agreement for cleanup costs but also for natural resource damages caused by the contamination.



[2] Water/Sewer Overflows: Seventh Circuit Affirms Dismissal of CWA Citizen Suit over Sewer Overflows

The Seventh Circuit Court of Appeals has affirmed the dismissal of a Clean Water Act citizen suit brought by environmental groups against the Milwaukee Metropolitan Sewerage District (MMSD) over sanitary sewer overflows into Lake Michigan. *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist., No. 08-1103 (7th Cir. 2/13/09)*. Plaintiffs filed their lawsuit in 2002, based on sanitary sewer overflows between 1995 and 2001, alleging that the state was not doing enough to reduce MMSD's overflows into the lake. On the same day, the state also filed a lawsuit against MMSD.

Within a few months, the state and MMSD reached a settlement (the 2002 Stipulation) that provided for expenditures by MMSD of more than \$900 million on various projects. In 2002, the district court dismissed the citizen suit on the ground that the state had diligently prosecuted MMSD, and, on appeal, the Seventh Circuit remanded for a determination as to whether the 2002 Stipulation would adequately address the systemic inadequacies of MMSD's facilities. The district court dismissed the lawsuit again on remand, finding the 2002 Stipulation would do so and constituted a diligent prosecution for privity purposes; plaintiffs again appealed.

Plaintiffs argued that the district court failed to give full weight to CWA violations that occurred after the 2002 Stipulation and that the court did not fully consider that the stipulation was intended to bring the district into compliance. They further argued that if the court had looked at all of the

facts—including major sewer overflows in 2004 and 2006—it would have concluded that the state's conduct did not amount to “diligent prosecution,” which was required for the subsequent citizen suit to be dismissed on *res judicata* grounds.

Affirming the district court, the appellate court reasoned, “diligence does not require a state agency to have perfect foresight,” and the state is not required to succeed but only to try diligently to enforce the law. “When the evidence . . . demonstrates that a citizen's representative acted in good faith and obtained relief adequate to address all known problems in the system and to prevent all foreseeable violations, that constitutes diligent prosecution, no matter what happens later.” The court also noted that a massive May 2004 storm and consequent sewer overflows were not “conclusive proof of a lack of diligence.”

[3] Air: Federal Court Declines to Dismiss Lawsuit Against Ohio EPA Director for Alleged CAA Violations

A federal judge in Ohio has denied a motion to dismiss a lawsuit brought by the Sierra Club against the director of the Ohio EPA, alleging violations of the Clean Air Act. *Sierra Club v. Korleski, No. 08-865 (S.D. Ohio 2/18/09)*. The complaint, filed in September 2008, claimed that (i) revised CAA rules the state adopted in November 2006 were less stringent than federal regulations and therefore violated the state's implementation plan (SIP), (ii) the revisions violated the CAA's anti-backsliding provisions, and (iii) the state's failure to require a modification to its SIP to reflect the revisions in a timely way also violated the CAA.



The revised rules exempted all sources, producing less than 10 tons per year of any National Ambient Air Quality Standard pollutant or precursor, from the SIP requirement that all air-contaminant sources employ the best available technology to reduce air emissions. The Ohio EPA began enforcing the exemption as of December 1, 2006, but failed to submit a revised SIP to U.S. EPA within 60 days, as required by the CAA. The agency argued in its defense that a revised regulation in a pending change to Ohio's SIP does not constitute a violation enforceable by a citizen suit.

The court disagreed, ruling that the standard in Ohio's currently approved plan is still valid until EPA adopts Ohio's SIP revision proposal and that Ohio EPA has a duty not to enforce or adopt any emission standard or limitation that is less stringent than an air emission standard or limitation in effect under an approved SIP. According to the court, if the state were allowed to ignore the current SIP because revisions were pending, it would counter CAA's intent.

[4] Water/CERCLA/Toxic Tort: Federal Court Upholds Sanctions Against State for Discovery Violations in Poultry Waste Case

A federal judge in Oklahoma has upheld sanctions against the state for failing to comply with discovery requests in a suit the state filed against poultry companies over the environmental effects of poultry waste in the Illinois River Watershed. [*State v. Tyson Foods, Inc., No. 05-329 \(N.D. Okla. 2/18/09\)*](#). The court upheld sanctions that a magistrate judge imposed earlier against the state for failing to produce information about water sampling results in a timely manner, both before and after defendants moved to compel.

The state initiated the lawsuit in 2005, when the state attorney general sued several out-of-state chicken producers for allegedly contaminating the watershed with poultry waste. The complaint also alleged violations of CERCLA for disposing of hazardous substances in the river basin, and violations of state and federal nuisance laws, trespassing laws and state waste disposal statutes. According to the court, the state failed to show that the magistrate's opinion was "clearly erroneous and contrary to law." The magistrate awarded attorney's fees and costs incurred in connection with the filing of defendant's motion to compel.

Defendants have also moved to dismiss the CERCLA counts, arguing that poultry waste does not qualify as a hazardous substance under the statute.

[5] EU/Biotechnology: EU Court of Justice Rules Member States May Not Conceal Location of GM Crops

The European Court of Justice has ruled that member states may not refuse to release information concerning the location of field trials for genetically modified (GM) crops. [*Commune de Sausheim v. Azelvandre, No. 552/07 \(Eur. Ct. Just. 2/17/09\)*](#).

The case involved a man in Alsace, France, who requested that the Mayor of Sausheim disclose to him the location of open field tests of GM organisms in the area. When he failed to obtain the information he sought, he challenged the refusal first before the French administrative court and then upon referral to the court of justice. The only GM crop approved by the European Union is a strain of corn developed by Monsanto, but research trials of other crops are legal with strict controls. GM crops are controversial in Europe with some scientists pushing for Europe to end its resistance to them, consumers and others



worrying about their safety, and biotechnology companies pursuing farmers whom they suspect of saving and replanting their seeds and others who may accidentally be growing biotech crops in their fields.

[6] Chemical Exposure: Groups Sue Manufacturers of Household Cleaning Products over Alleged Failure to Report Ingredients under New York Law

Several environmental groups have sued four leading manufacturers of household cleaning products, alleging that the companies failed to comply with provisions of a New York law that require certain information to be reported to the state semi-annually. [Women's Voices for Earth v. Procter & Gamble Co., No. 09-102035 \(N.Y. Sup. Ct. filed 2/13/09\)](#). The 1976 law requires household and commercial-cleaner manufacturers to file semi-annual reports with the state listing chemical ingredients and company research on their products' health effects. The lawsuit seeks a court order requiring the companies to comply with the law within 30 days. Companies named as defendants include Procter & Gamble Co., Colgate-Palmolive Co., Church and Dwight Co., Inc., and Reckitt-Benckiser Group PLC.

[7] Envtl. Crime: Federal Grand Jury Indicts Company, Chief and Second Engineer for Ocean Dumping Criminal Violations

A federal grand jury in Newark, New Jersey, has reportedly returned an eight-count indictment charging a Liberian bulk carrier vessel operator and the ship's chief engineer and second engineer for covering up discharges of oil-contaminated waste at sea. Dalnave Navigation Inc. and the two ship's engineers were charged with conspiracy and violating the Act to Prevent Pollution from Ships by failing to maintain an accurate ship record concerning

disposal of oil-contaminated waste. They were also charged with making false statements to U.S. Coast Guard authorities about pumping oil-contaminated waste overboard and five counts of obstruction of justice. If convicted, the company faces a possible fine of \$500,000 on each of eight counts. The two engineers face up to 11 years each in prison and fines of \$500,000 each per count.

The indictment alleges that between 2004 and September 2008, the company and two senior engineers directed subordinate crew on the M/V Myron N, Stamatakis and Papadakis, to use a metal pipe to bypass the ship's oil water separator and instead discharge the oil-contaminated waste directly overboard. It further alleges that on September 8, 2008, defendants presented a fabricated oil record book that failed to disclose prior discharges to the Coast Guard and stated falsely that they had never ordered the pumping of oil-contaminated waste into the ocean.

Legislation, Regulations and Guidance

[8] TSCA/Nanotechnology: EPA Announces TSCA Premanufacture Enforcement Initiative for Carbon Nanotubes

EPA reportedly announced that beginning March 1, 2009, it will begin enforcing a requirement that subjects many carbon nanotubes to review before they may be manufactured because they are considered "new chemicals" under TSCA. EPA issued a notice October 31, 2008, in which the agency said it considers most carbon nanotubes to be "chemical substances distinct from graphite or other allotropes of carbon listed on the Toxic Substances Control Act Inventory." 73 *Fed. Reg.* 64,946. The notice also said that many carbon nanotubes may be new chemicals



as defined by section 5 of TSCA and that any chemical not listed on the TSCA inventory of chemicals that have been made in or imported into the United States are considered new chemicals under TSCA.

The notice advised manufacturers and importers of carbon nanotubes that are not on the TSCA Inventory to submit either a premanufacture notice (PMN) or an applicable exemption that would explain why a PMN was not needed under exemptions allowed by section 5 of TSCA. Section 5 exemptions apply in situations where the chemicals are to be made in very low volumes or when EPA concludes that the likelihood of exposure is minimal. *See BNA Daily Environment Report*, February 20, 2009.

[9] Air/Greenhouse Gases: Appeals Board Remands Michigan PSD Permit for Failure to Consider CO₂ and Other GHGs

EPA's Environmental Appeals Board (EAB) has remanded to the Michigan Department of Environmental Quality (DEQ) a federal prevention of significant deterioration (PSD) permit for a new boiler at a Northern Michigan University (NMU) heating plant. *In re: N. Mich. U. Ripley Heating Plant, No. 08-02 (EAB 2/18/09)*.

The PSD permit would have allowed NMU to build a new circulating fluidized bed boiler at a heating plant on the Marquette, Michigan, campus that would provide electrical power and heat to the university's buildings by burning wood, coal and natural gas. An environmental group challenged the permit's best available control technology (BACT) requirements as to the boiler's emissions of sulfur dioxide, carbon dioxide (CO₂), nitrous oxide, and fine particulate matter.

Remanding the permit to MDEQ, the EAB ordered the agency to reconsider the BACT limitations for sulfur dioxide and questioned a number of elements of the state agency's BACT analysis. The EAB also criticized the agency for failing to follow EPA's New Source Review Workshop Manual "or any method consistently faithful to statutory and regulatory guidelines." The EAB also ordered MDEQ to consider whether a BACT analysis should require limited CO₂ and nitrous oxide emissions for the boiler. The agency must also re-evaluate and clarify the way it analyzed the PSD increments the new boiler and other boilers at the plant use and release.

The EAB based its decision in part, on an earlier decision, *In re: Deseret Power Electric Cooperative*, No. 07-03 (EAB 11/13/08), in which the EAB said it had discretion to regulate CO₂ from coal-fired power plants and ordered EPA's Region 8 office in Denver to reconsider its decision against requiring CO₂ controls on the planned expansion of a Utah power plant. The EAB made its decision on the same day that EPA announced it would reconsider a memorandum issued in late 2008 that said EPA would not regulate CO₂ emissions from coal-fired power plants. *See E & E News PM*, February 20, 2009.

[10] Air/Greenhouse Gases: EPA to Reconsider Regulation of CO₂

EPA has reportedly announced that it will reconsider the question whether it will regulate carbon dioxide (CO₂) emissions from coal-fired power plants and other large pollution sources. The agency granted a petition filed by NRDC, the Sierra Club and the Environmental Defense Fund asking EPA to review a December 2008 memorandum by former EPA Administrator Stephen Johnson. The memorandum reversed the agency's Environmental Appeals Board (EAB) opinion



requiring EPA's Region 8 office in Denver to consider including CO₂ emissions regulation as part of a permit for the proposed expansion of a coal-fired power plant in Utah. See *LAW360* and *The Wall Street Journal*, February 17, 2009.

Scientific/Technical Items

[11] Climate Change: Report Claims Western Climate Plan Could Prolong Economic Recession

A recent Western Business Roundtable (WBRT) [report](#) claims that the Western Climate Initiative (WCI) greenhouse gas (GHG) cap-and-trade plan could "chase away tens of billions of dollars in high technology investment from the West to other regions" and would "further stress the West's already strained electricity grid, increasing the threat of potentially catastrophic power outages." The WCI's regional proposed cap-and-trade plan was announced in September 2008 by the governors of Arizona, California, Montana, New Mexico, Oregon, Utah, and Washington.

The plan proposes that western states and several Canadian provinces change the way they produce and consume energy to achieve an aggregate 15 percent reduction of GHG emissions below 2005 levels by 2020. The plan recommends a broad cap-and-trade program as part of a comprehensive regional effort to reduce GHG emissions and the 2020 regional goal. The GHGs covered are carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. It covers emissions from electricity generation; combustion at industrial and commercial facilities; industrial process emission sources, including oil and gas process emissions; residential, commercial and industrial fuel

combustion at facilities with emissions below the WCI thresholds; and transportation fuel combustion from gasoline and diesel.

The report criticizes the WCI plan and predicts that it would disadvantage the West by limiting energy resources and discouraging the deployment of new technologies. It also claims that the plan would (i) increase energy costs and disproportionately harm low-income and minority families, particularly minority families most vulnerable to price shocks; (ii) require the establishment of a large and powerful new government bureaucracy; and (iii) give WCI climate officials authority even over private companies' organization and reorganization functions. The report is also critical of some of the models used by the plan to project future benefits and proposes specific federal action that would replace or supplement regional initiatives.

[12] Climate Change: Paper Addresses Market Design Options for Carbon Markets

A recent [working paper](#) by researchers at the Nicholas Institute for Environmental Policy Solutions Climate Change Policy Partnership at Duke University addresses market design options that should be considered in developing carbon markets in the United States. Jonas Monast, *et al.*, "U.S. Carbon Market Design: Regulating Emission Allowances as Financial Instruments, *Nicholas Institute*, February 2009.

The paper initially sets out three basic principles policymakers should consider when reviewing options: (i) the price of carbon should accurately reflect the expected marginal costs of abatement; (ii) the market should provide enough information to market participants and observers to minimize



trading costs and uncertainty about market activity; and (iii) the market should be fair to market participants and the consumers and businesses affected by it. It also suggests four federal agencies—CFTC, SEC, FERC, and EPA—as potentially viable agencies that could be selected to oversee the U.S. carbon market.

The paper proposes that two primary categories of carbon instruments would be traded in the marketplace: (i) carbon allowances and verified offset credits—each representing the equivalent of one ton of CO₂, and (ii) allowance derivatives. The paper discusses factors that will influence how and where carbon instruments trade and options for ensuring the transparency and oversight of the U.S. carbon market.



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