

# Environmental & Chemical Update

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SUSTAINABILITY • TOXIC TORT • WASTE • WATER

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## Litigation and Regulatory Enforcement

### [1] Air: U.S. Supreme Court Denies Review of EPA Emissions Exemption Case

The U.S. Supreme Court recently denied review of a D.C. Circuit Court of Appeals decision that invalidated an EPA final rule exempting major sources of hazardous air pollutants from normal emission standards during periods of startups, shutdowns and malfunctions (SSM). *Am. Chemistry Council v. Sierra Club*, No. 09-495 (3/8/10). The appeals court held that the Clean Air Act did not grant EPA the authority to create the SSM exemption. *Am. Chemistry Council v. Sierra Club*, 468 F.3d 810 (D.C. Cir. 2006). Several industry groups, supported by a U.S. Chamber of Commerce *amicus* brief, sought to appeal the decision. See *Greenwire*, March 8, 2010.

### [2] Env'tl. Crime: Ninth Circuit Upholds Conviction of Corporate Officer for Knowledge Plus Participation

The Ninth Circuit Court of Appeals has ruled that a corporate officer may be prosecuted for illegal hazardous waste storage if the officer knew of the illegal storage and directly participated in the conduct that violated RCRA. [\*U.S. v. Reis\*, No. 09-30177 \(9th Cir. 02/04/10\) \(unpublished\)](#). Appealing his conviction, defendant argued that the government could charge and convict either him or the corporation, but not both.

Rejecting his contention, the court observed that the government did not rely on the “responsible corporate officer doctrine” or any other derivative liability theory to establish defendant’s guilt. The U.S. Supreme Court developed the doctrine in *United States v. Dotterweich*, 320 U.S. 277 (1943), to hold corporate officers in responsible positions of authority personally (and, in that case, criminally) liable for violating strict liability statutes protecting the public welfare.

The court ruled that the government chose to prove each element of the crime with respect to the defendant individually. According to the court, the government proved that the defendant participated in the facility’s day-to-day management, he had been warned that the material was hazardous waste for which the company used a permit, and he had the power and control to prevent or remedy the violation. The court found “no evidence that the jury found [defendant] guilty merely because he held a position of authority in the company.”

### [3] CERCLA: Second Circuit Rules Contribution Action Does Not Require EPA Approval of Settlement

According to the Second Circuit Court of Appeals, a CERCLA consent decree does not require EPA approval for the settling party to seek response and cleanup costs under section 113 based on the settlement. [\*Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.\*, 08-3843 \(2d Cir. 02/24/10\)](#). The district court had dismissed the contribution



claims because EPA had never given the New York Department of Environmental Conservation (NYDEC) the express authority to approve a CERCLA settlement agreement with the company.

Reversing the district court and reinstating the section 113 contribution action, the appeals court ruled that the 2003 consent decree between the company and NYDEC “qualifies as an administrative settlement of liability for purposes of CERCLA pursuant to the plain text of Section 113(f)(3)(B).” The court relied in part on a U.S. Department of Justice brief arguing, “[i]t is important that PRPs ... that agree to engage in response activities in settlements with states have appropriate CERCLA claims for contribution against other PRPs. Otherwise, PRPs will decline to enter into administrative settlements and instead wait for the filing of civil actions to ensure they can sue for contribution under Section 113(f)(1).”

Plaintiff had also asserted a section 107 cost recovery action against defendants as an alternative in the event the court agreed with the district court that no section 113 cause of action was available. Citing *U.S. v. Atlantic Research Corp.*, 551 U.S. 128 (2007), the court held, “only § 113 (f)(3)(B) provides the proper procedural mechanism for [plaintiff’s] claims.”

#### **[4] Whistleblower Suit: Eleventh Circuit Finds EPA Not Liable in Whistleblower Lawsuit**

The Eleventh Circuit Court of Appeals has ruled that EPA is not liable in a whistleblower lawsuit brought by an agency research microbiologist who wrote an article claiming a link between the land application of sewage sludge and public health risks. [\*Lewis v. Dep’t of Labor\*, No. 08-12114 \(11th Cir. 02/24/10\) \(unpublished\)](#). *The Lancet* rejected the article for publication at about the same time that an EPA peer review process involving

another EPA scientist concluded that the article was “of poor quality” and “alarmist.” The criticism and additional actions taken by the other EPA scientist involving the microbiologist’s purported lack of expertise in this field led to the filing of a complaint with the Department of Labor’s Administrative Review Board (ARB) alleging harassment and retaliation by EPA. Finding no evidence of harassment by the agency, the Department of Labor rejected the claim, and the microbiologist filed an appeal to the Eleventh Circuit.

The appeals court agreed with the ARB, ruling that EPA was not liable for the peer-reviewing scientist’s alleged harassment because he had no supervisory authority over the microbiologist. The court therefore upheld the ARB’s dismissal of plaintiff’s hostile work environment claim against EPA, holding that any “harassment” that may have occurred was not imputable to EPA.

#### **[5] Europe/Greenhouse Gases: EU General Court Upholds Emissions Trading Rules**

The General Court of the European Union (EU) has reportedly dismissed a challenge brought by Arcelor, the world’s largest steel producer, to the EU’s Emissions Trading Directive. The company sought both an annulment of certain articles of the directive as well as damages for harm allegedly resulting from its adoption. The company argued that the directive violated several community law principles, including the right of property, the freedom to pursue economic activity, equal treatment, freedom of establishment, and legal certainty.

The court rejected the claim that the directive led to unequal treatment of operators, noting that it applies to all covered operators. Regarding Arcelor’s claim for damages, the court held that the company had failed to prove the breach of any principles alleged.



Under the EU emissions trading scheme, member states set thresholds on the quantity of emissions produced each year and allocate allowances to national producers. The scheme was adjusted in 2003 to encourage operators to reduce their greenhouse gas (GHG) emissions, by allowing them to sell their surplus allowances to other operators. Arcelor may appeal the decision to the Court of Justice. *See General Court of the European Union Press Release*, March 2, 2010.

#### **[6] Clean Water Act: Groups Sue Chicken Producers over Effluent Discharges**

Two environmental groups have sued two chicken producers over alleged effluent from a large chicken farm that discharges into a Chesapeake Bay tributary. *Assateague Coastkeeper v. Hudson, No. N/A (D. Md. filed 03/01/10)*. The complaint alleges that the effluent comes from uncovered manure piles at the 80,000-bird chicken farm in Berlin, Maryland. According to the plaintiffs, the runoff includes phosphorus and nitrogen, as well as fecal *coliform* and *E. coli* in concentrations far exceeding limits set by the Maryland Department of the Environment for recreational waters. The complaint seeks injunctive relief, a civil penalty and costs.

#### **[7] Prop. 65: Lawsuit Targets Fish Oil Supplements Containing PCBs**

Environmental and public health groups have sued eight manufacturers and retailers of fish oil supplements sold in California under the state Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65) alleging that the fish oil supplements contain high levels of polychlorinated biphenyls (PCB) and require warning labels. *Mantbey v. CVS Pharmacy, Inc., No. 10-497334 (Cal. Super. Ct. filed 03/02/10)*. In addition to CVS Pharmacy,

defendants include General Nutrition, Inc.; Omega Protein, Inc.; Rite Aid Corp.; Now Health Group, Inc.; Pharmaxite LLC; Solgar, Inc.; and Turnlab Corp. Prop. 65, a voter initiative, requires that businesses provide clear and reasonable warnings on products the state has identified as a carcinogen or reproductive toxicant. California listed PCBs as a carcinogen in the late 1980s and as a reproductive toxicant in 1994.

#### **[8] Clean Water Act/CERCLA: Rail Company Settles Chlorine Spill Violations of \$4 Million**

The Norfolk Southern Railway Co. has reportedly agreed to pay a \$4 million civil penalty to resolve alleged violations of the Clean Water Act and CERCLA for a 2005 chlorine spill in Graniteville, South Carolina. The alleged CWA violations include the discharge of tons of chlorine, a hazardous substance, from a derailed train tank car and thousands of gallons of diesel fuel from ruptured locomotive engine fuel tanks. The settlement also resolves an alleged CERCLA violation for failure to immediately notify the National Response Center about the chlorine release. The consent decree was filed in the U.S. District Court for the District of South Carolina on March 8, 2010, and is subject to a 30-day public comment period and approval by the court. *See DOJ Press Release*, March 8, 2010.

## **Legislation, Regulations and Guidance**

#### **[9] Air: EPA Issues NESHAPs for Reciprocating Internal Combustion Engines**

EPA has issued national emission standards for hazardous air pollutants (NESHAPs) for reciprocating internal combustion engines. 75 *Fed. Reg.* 9,647 (03/03/10). The standards apply to engines, used to



generate electricity and power equipment at factories and other facilities, that “either are located at area sources of hazardous air pollutant emissions or that have a site rating of less than or equal to 500 brake horsepower and are located at major sources of hazardous air pollutant emissions.” The rule requires facility operators to reduce emissions of carbon monoxide, used as a surrogate for air toxics, by as much as 70 percent and to take steps to limit emissions of metallic toxics by 2013. The rule is effective immediately.

#### **[10] Canada/Toxics: Benzyl Chloride Added to Toxic List**

Environment Canada and Health Canada have published a [draft order](#) that would identify benzyl chloride as toxic under section 64 of the Canadian Environmental Protection Act. The draft order would classify the substance, which is used in the production of benzalkonium chloride, as a Category 1 carcinogen.

Benzalkonium chloride is a chemical intermediate in the production of other compounds used in hand surface sanitizers, corrosion inhibitors, industrial and institutional cleaners, skin antiseptics, food packaging, and personal care products. Benzyl chloride has been classified as a Category 2 carcinogen by the European Union and a Group B<sub>2</sub> carcinogen by the U.S. EPA. The draft order was published in the *Canada Gazette*, Part I, on February 27, 2010, and is open to public comment for 60 days. Once the draft order becomes final, the government must propose regulations or some other control measure no later than November 28, 2011, and issue final measures by May 28, 2013.

#### **[11] Canada/Lead: Lead Restrictions Proposed in Surface Coatings**

Health Canada has [proposed](#) to restrict the use of lead in surface coating materials for children’s toys, furniture and other children’s items to align Canada’s restrictions on lead use with those in the United States. Proposed revisions to Canada’s Surface Coatings Materials Regulations would lower the total lead limit in surface coating materials from the current 600 milligrams per kilogram (mg/kg) to 90 mg/kg, the amount of lead allowed in paint and other surface coatings in U.S. children’s products. Revisions to the Hazardous Products Act would apply the same total lead limit to surface coating materials applied to furniture and other articles for children, including toys, equipment, pencils, and artist’s brushes. The proposed revisions are open to public comment for 75 days following the February 27, 2010, publication date in the *Canada Gazette*.

### **Scientific/Technical Items**

#### **[12] Chemical Exposure: Chinese Study Claims Benzene Exposure Link to Sperm Abnormalities**

A recent study by Chinese researchers claims that men exposed to benzene at levels close to the permissible exposure limit in the United States are more likely to have an abnormal number of chromosomes in their sperm. Xing C, et al., “Benzene Exposure Near the US Permissible Limit Is Associated With Sperm Aneuploidy,” *Environmental Health Perspectives*, 10-1289, 2010. The researchers studied 66 male factory workers in Tianjin, China. Thirty-three of the men worked in factories that used benzene-containing adhesives to produce shoes, paper bags and sandpaper. Thirty-three worked in



a meat-packing plant and an ice cream factory and were not exposed to benzene. To confirm benzene exposure, the men wore personal air monitors to measure benzene levels. Levels of benzene and benzene metabolites were also measured in the men's urine.

The researchers found that as the men's benzene exposure became higher, the number of sperm they produce with an extra chromosome also increased. Compared to men with no benzene exposure, those with low exposure were twice as likely to have sperm with two X chromosomes and men with high exposure to benzene were almost three times as likely. According to the researchers, the study raises questions as to whether the U.S. permissible limit for occupational benzene exposure is sufficient to provide protection from reproductive harm.

## **Seminars/Meetings**

### **[13] SHB Partner to Discuss Copenhagen Accord at San Francisco Event**

SHB San Francisco Partner [Keith Casto](#) will speak during the Bay Area Council's Energy and Climate Change Committee Meeting to be held March 23, 2010, in San Francisco, California. Casto will provide an update on energy and climate change policy at the state, federal and international level following the December 2009 Copenhagen Accord. To read more about the committee, please click [here](#).



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

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