Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] CERCLA: Costs of Complying with Consent Order Are Recoverable Under Section 107

The Second Circuit Court of Appeals has ruled that a CERCLA potentially responsible party (PRP) that cleans up a contaminated site pursuant to a consent order with a state "incurs" response costs under CERCLA and may seek to recover those costs under section 107(a). ***W.R. Grace & Co. v. Zotos Int'l Inc.*, No. 05-2798 (2nd Cir. 3/4/09)**.

So ruling, the court rejected an argument that money spent under a state consent order is not recoverable under section 107 of CERCLA because such costs are "compelled" and therefore not "incurred" as required by *U.S. v. Atl. Research Corp.*, 127 S. Ct. 2331 (2007). According to the court, "[u]nder the plain language of the statute, the fact that a party enters into a consent order before beginning remediation is of no legal significance with respect to whether or not the party has incurred response costs as required under section 107(a)."

[2] Endangered Species Act: Ninth Circuit Upholds NMFS Fisheries Policy Under ESA

The Ninth Circuit Court of Appeals has upheld a National Marine Fisheries Service (NMFS) policy that focuses its protection policy on wild salmon rather than hatchery salmon. ***Trout Unlimited v. Lohn*, No. 07-35623 (9th Cir. 3/16/09)**.

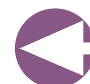
The issue involves a dispute over the listing of salmon and steelhead under the Endangered Species Act (ESA).

Environmental groups argue that the NMFS should list only wild fish under the ESA. Industry groups argue that a population should not be listed under the ESA as long as some fish—including hatchery fish—are thriving. The NMFS policy under attack was adopted in 2005. Known as the "Hatchery Listing Policy," it "emphasize[s] the importance of natural spawning to species' health and to clarify the contribution hatcheries can make to population health." Both the environmental and industry groups challenged the policy.

Upholding the NMFS policy, the court deferred to the agency and said neither the ESA nor its legislative history provided any instructions on how biological distinctions should affect the listing process. The court held that the policy, which listed a number of ways that hatchery fish can positively or negatively affect the status of an entire "evolutionary significant unit" and recognized the importance of long-term hatchery monitoring and evaluation, was consistent with the ESA's overall focus on preserving natural populations.

[3] Insurance: Duty to Defend Under CERCLA Exists Despite Changes in Ownership

The First Circuit Court of Appeals has ruled that Century Indemnity Co. must defend a company involved in a CERCLA site cleanup under the terms of a decades-old Excess Blanket Catastrophe Liability



Policy issued in the 1960s despite the fact that both the insurance company and the insured had undergone a sequence of mergers and acquisitions. ***Emhart Indus. v. Century Indem*. Co., No. 07-2806 (1st Cir. 3/13/09)**.

EPA cited plaintiff as a potentially responsible party (PRP) in 2000 at the Centredale Manor CERCLA Site in North Providence, Rhode Island, as the successor to Crown Chemical and Metro-Atlantic, former site operators, which had merged in 1968.

Plaintiff requested defense and cleanup costs from the six insurance companies that issued policies to the prior operators in the 1960s. In the district court litigation, three of the insurance companies were dismissed or settled before trial. Two others were found by the court not to be responsible for covering plaintiff's claims. The district court, although it found defendant not liable for the cleanup costs, ruled that it owed plaintiff defense costs.

Defendant appealed, arguing that the complicated sequence of mergers and acquisitions that occurred since the policy was issued meant that it was not liable to defend and that the district court had applied an incorrect test for determining the "policy period." The court disagreed, holding that the line of succession was clear and that the policy language was clear and unambiguous.

[4] Toxic Tort: Federal Court Remands Foreign Banana-Worker Toxic-Tort Lawsuit, Avoiding Federal Jurisdiction Under CAFA

A federal judge in California has remanded 30 lawsuits brought by nearly 2,500 banana farm workers to the Los Angeles County court where the actions were originally filed, thereby avoiding federal jurisdiction under the Class Action Fairness Act (CAFA). ***Vanegas v. Dole Food Co., Inc.*, No. 09-181 (C.D. Cal. 3/9/09)**.

Plaintiffs filed their lawsuits in state court against Dole Food Co. and others over their alleged exposure to the pesticide dibromochlorpropane (DBCP) in Central America both before and after 1977, the year DBCP was banned in the United States. Alleging that their exposures caused sterility and other adverse health effects, the workers sought punitive damages in addition to compensatory damages because defendants allegedly continued to use DBCP at the farms after they learned of the pesticide's dangers.

The defendants removed the lawsuits to federal court under CAFA, arguing that the 30 lawsuits should be considered one lawsuit because they were divided up, each with no more than 100 plaintiffs, solely to avoid CAFA jurisdiction. The plaintiffs moved to remand the lawsuits to state court, arguing that they do not meet CAFA's amount-in-controversy requirement ($5 million in the aggregate, or $75,000 for any individual plaintiff) and do not meet CAFA's definition of a "mass action" because each complaint contains fewer than 100 plaintiffs.

The court agreed with plaintiffs, ruling that defendants failed to establish CAFA's minimum amount-in-controversy requirements and that the suits did not meet CAFA's "mass action" definition. The court said "[N]othing in CAFA suggests that plaintiffs, as masters of their complaint, may not file multiple actions, each with fewer than 100 plaintiffs, to work within the confines of CAFA to keep their state-law claims in state court."

[5] Wetlands: Federal Court Refuses to Dismiss Katrina Lawsuit Against Corps

A federal judge in Louisiana has refused to dismiss a lawsuit against the U.S. Army Corps of Engineers (Corps) brought by landowners in New Orleans seeking damages allegedly suffered as a result of flooding during Hurricane Katrina. ***In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182 (E.D. La. 3/20/09)**.

The lawsuit, which was filed in September 2005, alleged negligence related to the Corps' destruction of protective wetlands when building and expanding the Mississippi River Gulf Outlet (MRGO), a 76-mile long, 36-foot deep, 500-foot bottom width man-made body of water that connects navigation facilities in central New Orleans to the Gulf of Mexico, thereby allowing Hurricane Katrina to strike Lake Pontchartrain and other bodies of water directly. The Corps argued in a motion to dismiss that it was entitled to a "due care exemption" as well as a "functionary exemption discretion," which would have barred any lawsuits over its actions leading up to the storm.

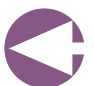
Although the court ruled that those exemptions applied to the initial construction of the MRGO, it also found that significant questions remained regarding the MRGO's maintenance and operation that could only be resolved at trial. According to the court, "[w]hether the Corps exercised due care lies at the heart of the case, and plaintiffs have presented voluminous evidence attempting to demonstrate that in a myriad of ways due care was not exercised."

The court also refused to grant summary judgment to plaintiffs on a separate issue—whether the Corps had violated the Fish and Wildlife Coordination Act (FWCA) and NEPA. Plaintiffs had argued that the Corps violated the FWCA by not coordinating with federal and state environmental agencies and not reporting its concerns about the destruction of protective marshes to Congress and NEPA by dredging the area in question without performing appropriate environmental impact statements. The court held that the Corps could assert its functionary-exemption discretion as to both arguments, but only at trial.

[6] Prop. 65: California Appellate Court Rules Mercury Warnings Not Required on Canned Tuna

A California appellate court has ruled that Proposition 65 (Prop. 65) does not require canned tuna companies to place mercury warnings on their products because the contaminant occurs naturally in fish and Prop. 65 does not require warnings for naturally occurring carcinogens or reproductive toxicants. ***People v. Tri-Union Seafoods, LLC*, No. 01-402975 (Cal. Ct. App. 3/11/09)**. The lawsuit was filed in 2006 by then California Attorney General Bill Lockyer (D) against Tri-Union Seafoods LLC, Del Monte Corp. and Bumble Bee Seafoods LLC, following the state's successful efforts to force sellers of certain species of fresh fish to post warnings alerting consumers about potential mercury exposure.

At trial, the industry argued that canned tuna was safe and that federal warnings urging pregnant women and children to curb their consumption of fish known to contain mercury provided sufficient protection. The court did not, however, address the preemption argument, but instead focused on expert testimony that "methylmercury is naturally occurring, thereby removing the Tuna Companies from the reach of Proposition 65." Prop. 65, also known as the Safe Drinking Water and Toxic Enforcement Act of 1986, requires manufacturers



and importers to provide warnings before intentionally exposing the public to chemicals that can cause cancer, birth defects or reproductive harm. The state has identified mercury as either a carcinogen or reproductive toxicant.

[7] Envtl. Crime: Portuguese Shipping Company Fined $1 Million for Environmental Crimes

A federal judge in Texas has reportedly sentenced General Maritime Management (Portugal) LDA, the operator of a fleet of tanker vessels, and two crewmembers of the tanker *German Defiance* for making false statements to the U.S. Coast Guard and failing to maintain an accurate oil record book as required by federal and international law. The court sentenced the company, which had been found guilty by a jury on November 25, 2008, to pay a $1 million fine. The company was also sentenced to serve 5 years of probation. The two crew members were sentenced to three and six months of confinement, respectively, a $500 fine each and five years of probation.

The criminal convictions stemmed from a voyage in November 2007, during which the crew was ordered to hook up a flexible hose between the ship's bilge pump and the overboard discharge valve, thus bypassing the vessel's oil-water separator and allowing direct pumping of the bilge-tank contents into the ocean. The crew was also ordered to assist in connecting a hose from the vessel's fresh water supply to the oil-content meter on the ship's oil-water separator. The connection allowed the crew to "trick" the oil-content meter and prevent it from shutting a valve that would re-circulate oily water to the bilge tank where it would be treated through the oil-water separator before being discharged into the sea. *See DOJ Press Release,* March 16, 2009.

[8] Air: Group to Sue EPA over Interstate Air Pollution

An environmental group has reportedly notified EPA of its intent to sue the agency over its alleged failure to address the interstate transport of air pollution in seven Western states. The notice accuses EPA of failing to promulgate a federal implementation plan within two years of finding that California, Colorado, Idaho, New Mexico, North Dakota, Oklahoma, and Oregon failed to submit state plans addressing transportation of ozone and fine particulate matter, as required by the Clean Air Act. EPA issued a formal finding in 2005 that all 50 states had failed to adopt required plans to protect neighboring downwind states from air pollution. According to the notice, EPA should have established a federal plan to compel the non-complying states to act by 2007, but has not yet done so. The notice asserts that EPA's inaction constitutes a failure to safeguard public health. *See FoxNews.com,* March 17, 2009, and *Law360,* March 18, 2009.

[9] RCRA: EPA's Emission-Comparable Fuel Exemption Rule Challenged

Environmental groups have reportedly challenged EPA's emission-comparable fuel exemption rule that allows industries to burn some hazardous wastes as fuel. *Louisiana Envtl. Action Network v. Jackson,* No. N/A (D.C. Cir. *filed* 3/18/09). The rule, issued in December 2008, exempts from RCRA hazardous wastes "emission-comparable fuel," such as sludges and manufacturing byproducts, that can be burned in industrial boilers if the emissions are comparable to those from burning fuel oil. According to petitioners, the rule could exempt more than 100,000 tons of additional materials a year from RCRA's disposal requirements, causing new health risks for those living near industrial boilers. *See The New York Times* and *E & E News PM,* March 18, 2009.

Legislation, Regulations and Guidance

[10] Air: EPA Proposes to Delay Clean Air Act NSR Rule on Aggregation

EPA has proposed delaying the effective date of an agency **rule** that would limit application of Clean Air Act New Source Review (CAA NSR) air pollution-control requirements for industrial facilities. 74 *Fed. Reg.* 11,509 (3/18/09). The rule, published January 15, 2009, offered a new interpretation of NSR and Prevention of Significant Deterioration (PSD) programs. It allowed emissions sources to treat several modifications at a single facility as separate projects. 74 *Fed. Reg.* 2,376. The rule had been scheduled to take effect February 17, 2009, but in January, it was delayed until May 18. Now EPA is proposing to delay the effective date of the rule until November 18. EPA will accept comments on its proposal to delay the effective date until April 17.

[11] EPCRA: EPA Makes Available a Toxics Release Inventory for 2007

EPA has established a **Web page** that provides an overview of and instructions on how to obtain the 2007 Toxics Release Inventory (TRI).

TRI is a national database that contains detailed information on nearly 650 chemicals and chemical categories that some 22,000 industries manage through disposal, recycling, energy recovery, or treatment. The data are collected from industries such as manufacturing, metal and coal mining, electric utilities, and commercial hazardous waste treatment.

The Emergency Planning and Community Right to Know Act (EPCRA) of 1986 was enacted to facilitate emergency planning, minimize the effects of potential toxic chemical accidents and provide people with information on releases of toxic chemicals in their communities. The Pollution Prevention Act of 1990 (PPA) requires collection of data on toxic chemicals that are treated on-site, recycled and combusted for energy recovery. Together, these statutes require facilities in certain industries that manufacture, process or use toxic chemicals above specified amounts to report annually on the disposal and other waste-management activities related to these chemicals. EPA manages this information in TRI.

[12] EU/Pesticides: EC Establishes Database of Active Substances in Pesticides

The European Commission (EC) has published an **online database** of active substances used in pesticides. The review that led to the database took 16 years and involved 1,000 substances on the market before 1993, as well as substances manufactured since then. The review was initiated by a 1991 directive on the placing of plant-protection products on the market. The pesticide database includes 334 entries for authorized substances and 763 entries for non-authorized substances.

The database also includes information on 66 substances that have a review pending and lists 42 substances not considered plant-protection products. Substances were assessed as to their impact on groundwater and on species not targeted by the pesticides, such as bees, birds, earthworms, and mammals.

[13] Climate Change: NAIC Approves Mandatory Reporting of Climate Risks

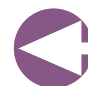
The National Association of Insurance Commissioners (NAIC) has reportedly voted to require insurance companies with annual premiums greater than $500 million to report their financial exposure from climate change to state regulators. Beginning in 2010, eligible insurance companies

must complete an annual climate risk disclosure, describe their risk-management and catastrophe-risk modeling in response to global warming, and detail their efforts to educate both policymakers and policyholders on climate change risks.

NAIC issued the rule after concluding that climate change affects insurers by (i) increasing the risk of extreme weather events such as floods and wildfires, and (ii) prompting governments to cap industrial carbon emissions that contribute to global warming, thereby threatening the profits of companies such as coal-fired utilities in which insurers commonly invest. *See The Wall Street Journal,* March 18, 2009.

[14] FOIA: DOJ Issues FOIA Guidelines Based upon Openness

U.S. Attorney General Eric Holder (D) reportedly issued a March 19, 2009, memorandum to all federal agencies, directing them to apply a presumption of openness when responding to federal Freedom of Information Act (FOIA) requests. Holder explicitly rescinded former U.S. Attorney General John Ashcroft's (R) October 12, 2001, memorandum stating that the Department of Justice (DOJ) would defend decisions to withhold records unless the agencies "lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records." Under the new policy, "DOJ will defend a denial of a FOIA request only if (i) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions; or (ii) the disclosure is prohibited by law." *See BNA Daily Environment Report* and *FindLaw,* March 20, 2009.



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