

# Environmental & Chemical Update

AIR • CLIMATE CHANGE • NANOTECHNOLOGY • RENEWABLE FUELS  
SUSTAINABILITY • TOXIC TORT • WASTE • WATER

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## Litigation and Regulatory Enforcement

### [1] CERCLA: Second Circuit Allows Plaintiff to Amend Complaint for Cleanup Costs as PRP

The Second Circuit Court of Appeals has reversed a district court decision that barred plaintiff from amending its complaint for cleanup costs under CERCLA in light of *U.S. v. Atlantic Research Corp.*, 551 U.S. 128 (2007). [\*N.Y. State Elec. & Gas Corp. v. FirstEnergy Corp.\*, No. 07-2581 \(2d Cir. 5/5/09\) \(summary order\)](#). Plaintiff filed its complaint in 2003, seeking to recover more than \$27 million in cleanup costs under section 113(f) of CERCLA. The district court dismissed the complaint, ruling that plaintiff, as the owner of the manufactured gas plant where the contamination occurred, was a potentially responsible party (PRP) and therefore not entitled to bring a cost recovery action under section 113.

Plaintiff immediately moved for reconsideration and sought to amend its complaint in light of *Atlantic Research* to assert a claim under CERCLA section 107(a)(4)(B). The district court denied the motion to amend because it found that the plaintiff “could have anticipated the availability to it of a claim under CERCLA § 107 (a)(4)(B),” and because the contemplated amendment “would be manifestly unfair and inherently prejudicial to the defendant.” The appellate court reversed, stating, “[i]n light of our conclusion that [plaintiff] reasonably believed it

had no claim under CERCLA § 107(a)(4)(B)..., its delay in seeking to amend the complaint is substantially shorter than the delay contemplated by the district court.” The court also said, “[w]e perceive no prejudice to [defendant] owing to this short delay.”

### [2] Endangered Species Act: Fish & Wildlife Service Plan Properly Balanced Threats to Two Endangered Bird Species

The Eleventh Circuit Court of Appeals has upheld a U.S. Fish & Wildlife Service (FWS) decision approving and implementing a plan to save the endangered Cape Sable seaside sparrow habitat in the Florida Everglades at the expense of the population of Everglade Snail Kite, an endangered hawk species. [\*Miccosukee Tribe of Indians of Fla. v. U.S.\*, No. 08-10799 \(11th Cir. 5/5/09\)](#). The complaint, filed in November 2005, accused the FWS of improperly approving the plan. The two bird species were both listed as endangered in 1967 and received critical habitat designation in 1977.

As part of a U.S. Army Corps of Engineers (Corps) flood-control project, the Corps and FWS implemented a series of trial-and-error tests, but in the 1990s were forced to modify their water releases in response to a dramatic decline in the sparrow population. As a result, water began backing up into the hawk’s critical habitat and onto Miccosukee Tribe land. In a 2006 biological opinion, the FWS found that the hawk would not be jeopardized by allowing an interim sparrow plan to continue.



The tribe filed a second amended complaint, claiming that the opinion violated the Endangered Species Act and that a consultation between the FWS and Corps was insufficient. The district court dismissed the complaint, and plaintiff appealed.

The appeals court rejected plaintiff's arguments that (i) the FWS failed to follow proper procedures in preparing its 2006 biological opinion; (ii) the agency reached conclusions that were contrary to scientific data; and (iii) an FWS incidental-take statement was deficient because it improperly quantified incidental take in terms of habitat markers. Still, the court ordered the FWS to recalculate the incidental-take statement for the species in terms of population numbers instead of water-level indicators, "unless it is impracticable to do so."

### **[3] Administrative Procedures Act: Ninth Circuit Allows Forest Service to Avoid Mandatory Limits on Suction-Dredge Mining**

The Ninth Circuit Court of Appeals has upheld a U.S. Forest Service (USFS) interpretation of Mineral Management Standard and Guideline MM-1 to prevent a conflict with existing regulations and thus allow suction-dredge mining in the Siskiyou National Forest without a mandatory plan of operations. *Siskiyou Reg'l Educ. Project v. USFS*, No. 06-35332 (9th Cir. 5/7/09).

According to the USFS Northwest Forest Plan, any standard or guideline contrary to existing law or regulations does not apply. In February 2002, the USFS decided that its MM-1 guideline, which required a plan of operations for suction-dredge mining, would be interpreted to impose the same threshold standard for a plan of operations as an existing U.S. Department of Interior regulation that did not require such plans unless a district ranger determined that proposed operations would cause

a significant disturbance. 36 C.F.R. § 228.4(a) (2002). Plaintiff sued, alleging that the USFS violated its duty to comply with the MM-1 standards, thereby violating the Administrative Procedures Act. The district court dismissed the complaint, and plaintiffs appealed.

Agreeing with the lower court, the appeals court determined that the USFS MM-1 interpretation was a reasonable attempt to reconcile the conflict between the guidance and existing regulations. According to the court, "to adopt [plaintiff's] interpretation would require a plan of operations for every mining operation involving riparian reserves, and would be contrary to § 228.4(a)'s specification that a plan of operations is required only after the district ranger so determines."

### **[4] Toxic Tort/RCRA: Federal Court Finds Conspiracy to Circumvent RCRA Allegation Insufficient to Invoke Federal Jurisdiction**

A federal judge in Illinois has ruled that an allegation in a state toxic-tort lawsuit that two companies engaged in a conspiracy under state law to circumvent RCRA is insufficient to give a federal court jurisdiction. *Giles v. Chicago Drum, Inc.*, No. 08-5654 (N.D. Ill. 4/22/09). Filed by individuals who either lived or worked near a drum-reconditioning facility in Chicago, the complaint alleged that the company and one of its customers conspired to avoid RCRA regulations when the facility accepted the customer's used drums, which once purportedly contained hazardous waste. The lawsuit also alleged state-based personal injury, wrongful death and other claims.

The company allegedly cleaned the drums at a facility without a license to accept hazardous waste and also accepted the drums without proper documentation and without charging the customer for processing hazardous waste. According to the plaintiffs, the waste included arsenic, benzene and



other toxic substances. The case was removed to federal court in August 2008 on the basis of federal-question jurisdiction. Plaintiffs argued that their state-law conspiracy claims were so intertwined with RCRA that they implicated “significant federal issues,” which should be decided in federal court.

Rejecting plaintiff’s argument, the court held that “courts have uniformly held that a reference to federal environmental statutes, including RCRA, in plaintiff’s negligence claims is insufficient to confer federal question jurisdiction.” To support its decision, the court cited *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006), and distinguished *Gable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), which plaintiffs relied on to support their argument.

**[5] Toxic Tort: Federal Court Remands Putative Class Action Alleging Exposures from Old Zinc Smelter**

A federal judge in Oklahoma has ruled that it lacked jurisdiction over a putative class action filed by Blackwell, Oklahoma, residents who alleged injuries from exposure to contamination at an old zinc smelter. *Coffey v. Freeport-McMoRan Copper & Gold, Inc., No. 08-640 (W.D. Ok. 4/27/09)*. Defendants argued that the federal court had jurisdiction over the proposed class action—which seeks a more thorough cleanup of a town contaminated with hazardous substances—because the suit challenges a federal CERCLA cleanup. According to the court, the action is not a federal cleanup, but a cleanup conducted by the state under its laws; it remanded the case to state court.

The lawsuit, brought by up to 7,000 people living on or owning property in Blackwell, alleges that Freeport-McMoRan Copper & Gold, Inc. and several other companies that owned or operated a zinc mine between 1916 and 1974, failed to adequately clean up their town. According to the complaint, the smelter left behind millions of pounds of toxic substances including zinc, cadmium, arsenic, and lead. Those substances have allegedly contaminated soil and groundwater in the town, lowering property values and endangering residents’ health.

**[6] Env’tl. Crime: Jury Acquits W.R. Grace and Three Executives in Criminal Asbestos Trial**

A federal jury in Montana has reportedly acquitted W.R. Grace & Co. and three former executives of all criminal charges related to the contamination of Libby, Montana, with asbestos from a nearby mine operated by the company. *U.S. v. W.R. Grace & Co., No. 05-7 (D. Mont. 5/8/09)*. The defendants were charged in an eight-count indictment with conspiracy, obstruction of justice, knowing endangerment, and criminal violations of the Clean Air Act. Prosecutors sought to prove that the defendants knowingly and willfully caused Libby residents to be exposed to the mineral tremolite, a component of vermiculite ore that the company mined from 1963 to 1990, and did not tell government regulators or the public of the danger. During trial, defense attorneys reportedly claimed that the prosecutors withheld evidence. *See BNA Daily Environment Report*, May 11, 2009.



## Legislation, Regulations and Guidance

### [7] Renewable Fuels: EPA Issues Proposed Rule Revising Renewable Fuel Standard

EPA issued a proposed rule on May 5, 2009, designed to curtail greenhouse gas (GHG) emissions and ensure that alternative fuels, such as ethanol and biodiesel, do not have indirect effects, such as deforestation in other countries, that could inadvertently increase GHG levels in the atmosphere. Under the Clean Air Act, as amended by the Energy Independence and Security Act of 2007 (Energy Act), EPA is required to promulgate regulations implementing changes to the Renewable Fuel Standard program.

The Energy Act specifies the volumes of cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel that must be used in transportation fuel each year, with the volumes increasing over time. It also includes new definitions and criteria for both renewable fuels and the feedstock used to produce them, including new GHG emission thresholds for renewable fuels. To qualify as renewable under the Energy Act, a fuel must reduce GHG emissions by 20 percent relative to gasoline over its life cycle, from growing in the field to combustion in a motor vehicle.

The proposed rule would exempt from GHG emissions reduction targets about 15 billion gallons of production capacity that was in place or under construction when Congress revised the renewable fuels standard as part of the Energy Act. Under the proposed rule, EPA would consider indirect emissions that arise from ethanol production from corn. According to EPA, the diversion of the crop to fuel production leads to the destruction of

tropical rainforest for food production and results in increased carbon dioxide emissions. EPA will accept comments on the proposed rule for 30 days after it is published in the *Federal Register* and will hold a June 9 public hearing on the proposal in Washington D.C.

### [8] RCRA: EPA to Withdraw Emissions-Comparable Fuels Rule

EPA reportedly intends to withdraw the emissions-comparable fuels rule that the agency promulgated during the Bush administration in December 2008. The rule allowed industries to burn certain hazardous wastes as fuel by exempting the materials, such as sludges and manufacturing byproducts, from RCRA regulation. The rule, which took effect January 20, 2009, expanded the Comparable Fuels Exclusion Rule at 40 C.F.R. Part 261.38, which excludes from the definition of solid waste certain secondary material fuels whose hazardous constituents and physical properties are comparable to those in fossil fuels.

According to EPA, the rule has been criticized because it allows hazardous waste to evade the hazardous waste regulatory scheme and is difficult to administer. Given that the rule has been finalized, EPA cannot simply withdraw it, but must publish a proposed rule in the *Federal Register* and request comments from the public on its withdrawal proposal. See *BNA Daily Environment Report*, May 6, 2009.

### [9] RCRA: EPA Seeks Comments on Whether to Revise Solid Waste Definition

According to news reports, EPA announced May 5, 2009, that it is seeking comments on whether it should consider revising an October 2008 final rule that removed 1.5 million tons of hazardous secondary materials from regulation under RCRA.



73 *Fed. Reg.* 64,668 (10/8/08). The rule revised 40 C.F.R. Parts 260 and 261 and included spent materials, listed sludges and listed byproducts that are generated, legitimately reclaimed and handled in non-land-based units such as tanks, containers and containment buildings. In response to a Sierra Club petition which argues that the rule “substantially increases threats to public health and the environment, without producing compensatory benefits,” EPA said it will hold a public meeting June 30, 2009, in Arlington, Virginia, to consider the petition. Filed on January 29, the petition calls for EPA to reconsider and repeal the rule. See *BNA Daily Environment Report*, May 6, 2009.

#### **[10] FIFRA: EPA Issues Final Rule Prohibiting Carbofuran Residue in Fruits and Vegetables**

EPA has signed a **final rule** that will prohibit carbofuran residue in fruits and vegetables. The agency is also canceling all existing carbofuran registrations. Effective January 1, 2010, the rule will apply to both domestic and imported produce. According to the agency, “carbofuran products pose an unreasonable risk to man and the environment which outweighs the benefits of continued use, and therefore all uses must be canceled.” EPA has been investigating the insecticide, sold under the brand name Furadan, for several years. Its granular form was banned in the mid-1990s because it was blamed for killing millions of migratory birds. The rule has been forwarded to the *Federal Register* for publication.

#### **[11] EU/Chemical Ban: EU Bans Product Imports Containing Biocide DMF**

The European Commission recently **decided** to ban the import of products containing the biocide dimethylfumarate (DMF). The decision, which took effect May 1, 2009, also requires that products with DMF already in European Union (EU) markets be withdrawn from sale. The ban would last until March 15, 2010, when it will likely be controlled through the EU’s Registration, Evaluation, and Authorization of Chemicals (REACH) law. DMF is used to inhibit the growth of mold on furniture and footwear, and reports indicated that the substance purportedly caused skin irritations and breathing difficulties in those exposed to it. See *BNA Daily Environment Report*, May 6, 2009.

#### **[12] Chemical Exposure: Minnesota Bans BPA from Baby Bottles**

Governor Timothy Pawlenty (R-Minn.) signed legislation (**H.B. 326**) May 7, 2009, that would ban the plastic additive bisphenol A (BPA) from baby bottles and “sippy” cups beginning in 2011. Minnesota thus becomes the first state to ban the chemical additive. Several other states, including California, Connecticut, Michigan, and New York, are considering similar bans. New York’s Suffolk county recently became the first local government to ban BPA, while Canada announced such a ban in 2008. BPA is an industrial chemical used to make polycarbonate plastics and epoxy linings for food containers. It reportedly mimics estrogen and may cause developmental problems in those exposed to it. See *Greenwire*, May 8, 2009.



## Scientific/Technical Items

### [13] Air: Study Claims Six HAPs Regularly Exceed EPA Standards

A recent study comparing hazardous air pollutant (HAP) data from 2003 through 2005 with chronic health benchmarks set by EPA claims that six HAPs regularly exceed EPA health standards at most U.S. monitoring stations. Michael McCarthy, et al., "Characterization of the Chronic Risk and Hazard of Hazardous Air Pollutants in the United States Using Ambient Monitoring Data," *Environmental Health Perspectives*, Vol. 117, No. 5 ( May 2009).

The study reports that concentrations of benzene, 1,3-butadiene, carbon tetrachloride, acetaldehyde, arsenic, and acrolein regularly exceed EPA's health criteria at a majority of the nation's air quality monitoring stations. Ambient concentrations of acrolein in particular were reported to exceed the one-in-a-million cancer risk at 77 percent of the studied monitoring locations. The researchers, from a California air quality and meteorological research firm, said they were less able to quantify the health risks of other HAPs, such as ethylene oxide, acrylonitrile, naphthalene, and nickel because of inadequate emissions monitors nationwide.



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