

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] Clean Water Act: U.S. Supreme Court Rules Corps Has Permitting Authority over Mining-Waste Discharges

The U.S. Supreme Court has ruled 6-3 that the Army Corps of Engineers (Corps), rather than EPA, has authority to issue permits for the discharge of mining wastes to navigable waters under the Clean Water Act (CWA). *Coeur Alaska v. Se. Alaska Conservation Council*, No. 07-984 (U.S. 6/22/09). So ruling, the Court reversed a Ninth Circuit Court of Appeals determination that section 402 of the CWA gives EPA the authority to regulate mining-waste discharges as pollutants under the NPDES permitting system. *Se. Alaska Conservation Council v. Corps*, 486 F.3d 638 (9th Cir. 2007).

According to the majority, EPA is authorized under section 402 to issue NPDES permits for all pollutants discharged into navigable waters except those over which the Corps has jurisdiction under section 404. Crushed rock and process water from mining operations are pollutants under the CWA, but a 2002 joint EPA/Corps regulation defines fill material as any material that has the effect of changing the bottom elevation of water including “slurry, or tailings, or similar mining-related materials.” 40 CFR § 232.2. Because mining discharges are defined as fill material under the regulation, they are regulated by section 404 and not 402.

The case involved a company’s plans to reopen a gold mine located 45 miles north of Juneau, and use a technique called froth flotation to chemically separate gold from crushed rock. The company will operate the flotation mill in Lower Slate Lake in the Tongrass National Forest, turning the entire lake into a tailings pond thereby killing all fish populating the lake. The Corps issued the company a dredge-and-fill permit after determining that the environmental consequences would be less severe than if the tailings were discharged into neighboring wetlands. EPA issued an NPDES permit setting strict standards for discharges from the lake into a downstream creek.

Three environmental groups challenged the dredge-and-fill permit. The Ninth Circuit held that section 306 of the CWA required dischargers to comply with the effluent limitations for new source standards of performance and did not contain any exception for regulation under section 404 as dredge-and-fill material. The three dissenting justices (Ruth Bader Ginsberg, John Paul Stevens and David Souter) agreed with the Ninth Circuit, arguing that new source standards of performance under section 306 of the CWA require an NPDES permit to discharge pollutants regulated by that section. The dissenters’ position was that such discharges do not qualify for dredge-and-fill permits under section 404.



[2] Constitutional Law: U.S. Supreme Court Rejects Port of Valdez, Alaska, Oil Tanker Tax

The U.S. Supreme Court has reversed an Alaska Supreme Court decision and struck down a Port of Valdez, Alaska, ordinance that imposed a personal property tax on certain boats and vessels that transport crude oil from the Port of Valdez to refineries in other states. *Polar Tankers, Inc. v. City of Valdez*, No. 08-310 (S. Ct. 6/15/09).

In a 7-2 decision, the Court's majority held that the tax violated Article I, section 10, clause 3 of the U.S. Constitution, which forbids a "state . . . without the Consent of Congress, [to] lay any Duty of Tonnage." According to the majority, the Tonnage Clause applies where vessels "are not taxed in the same manner as other property of the citizens." Here the tax applied almost exclusively to oil tankers, but to no other form of personal property. The dissenters argued that the tax did not apply to oil tankers only and that even if it did, the Tonnage Clause permits a state to levy a property tax on ships whether or not it taxes other property.

[3] Damages: Ninth Circuit Orders Exxon to Pay \$507.5 Million in Punitive Damages Plus Interest for Valdez Spill

The Ninth Circuit Court of Appeals has ruled that ExxonMobil Corp. must pay \$507.5 million in punitive damages, plus interest accruing since 1996, making the total interest approximately \$500 million, to victims of the Exxon Valdez oil spill. *In re: The Exxon Valdez*, No. 04-35182 (9th Cir. 6/15/09).

Following an 83-day jury trial in 1994, a district court in Alaska awarded \$5 billion in punitive damages in addition to compensatory damages. In 2001, the Ninth Circuit remanded the matter

after finding that the punitive damages award violated due process. *In re: Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001). In 2004, the district court reduced the punitive damages award to \$4.5 billion. *In re: Exxon Valdez*, 296 F. Supp. 2d 1071 (D. Alaska 2004). In 2006, the Ninth Circuit reduced the punitive damages award to \$2.5 billion. *In re: Exxon Valdez*, 472 F.3d 600 (9th Cir. 2006).

The U.S. Supreme Court cut the punitive damages to an amount equal to the compensatory damages in 2008 and remanded the case to the Ninth Circuit with instructions to use a one-to-one ratio of punitive damages to compensatory damages. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008). Exxon has already reportedly paid \$507 million in compensatory damages. The Ninth Circuit also ruled that each side should bear its own costs of appeal. According to press reports, about 20 percent of the 32,677 plaintiffs involved in the litigation have died since the complaint was filed.

The Exxon Valdez ran aground in Alaska's Prince William Sound in March 1989, spilling 11 million gallons of oil that fouled 1,200 miles of coastline. Cleanup of the spill reportedly cost more than \$2.5 billion. Plaintiffs included fisherman, Alaska natives, business owners, and other allegedly injured parties. See *Los Angeles Times* and *BNA Daily Environment Report*, June 16, 2009.

[4] Air/Attorney's Fees: Basis of Attorney Fee Award Upheld in Successful Challenge to Cement Plant NSPS

The Ninth Circuit Court of Appeals has upheld an award of attorney's fees to the Sierra Club after its successful challenge to EPA's new source performance standards (NSPS) for new and modified Portland cement plants. *Sierra Club v. EPA*, No. 08-15264 (9th Cir. 6/15/09) (unpublished).



The petition for fees stemmed from a lawsuit filed in 2006. The complaint alleged a failure by EPA to perform a nondiscretionary duty to review NSPS for new and modified Portland cement plants under the Clean Air Act. 42 U.S.C. § 7411(b)(1)(B). EPA ultimately settled that litigation in a consent decree that the district court approved in May 2007. *Sierra Club v. EPA*, 66 ERC 1421 (N.D. Cal. 2007).

In that settlement, the parties agreed, and the court ordered, that on or before May 31, 2009, EPA would publish a final rule containing revisions to NSPS Subpart F “and/or” a final determination not to revise NSPS Subpart F. The district court awarded the Sierra Club, as the prevailing party, \$35,275 in attorney’s fees and calculated the award using a San Francisco hourly rate. EPA appealed, contending that the hourly rate was erroneous because one of two attorneys for the Sierra Club performed substantial work in Laramie, Wyoming, where the hourly rate is lower.

According to the appellate court, the accepted rule is that the “relevant legal community” is the “forum district” in which the district court sits, in this case San Francisco. The court also said it would not depart from the established rule without good reason and that here “EPA failed to introduce any evidence of reasonable rates for environmental attorneys practicing in Laramie.”

[5] Indemnity Agreement: Federal Court Rules Agreement to Defend and Indemnify Does Not Create Successor Liability

A federal judge in Pennsylvania has ruled that an agreement to defend and indemnify does not create successor liability nor is it the same as an assumption of liability. *U.S. v. Sunoco, Inc., No. 05-6336 (E.D. Pa. 6/15/09)*. Under an agreement entered into by

Sunoco and Atlantic Richfield (ARCO) after Sunoco acquired certain property from ARCO, ARCO paid Sunoco \$72 million in return for a promise to handle any off-site recovery or remediation of contamination related to the property and to indemnify ARCO. The federal government, which owns property next to the Sunoco facility, sued Sunoco alleging that the facility is the source of contamination on the government property and that the agreement created successor liability for Sunoco.

The court disagreed with the government, ruling that the “agreement to defend and indemnify implies that Sunoco’s duty to ARCO only arises if a third party brings suit against ARCO.” The court also said that Sunoco’s promise to remediate any contamination required by law, would apply only if an order, judgment or settlement agreement was addressed to ARCO. The court pointed out that, if addressed to Sunoco as ARCO’s legal successor, Sunoco’s promise to cover the cost of remediation for ARCO “would be completely unnecessary.”

[6] RCRA: California AG Sues Retailer over Alleged Hazardous Waste Disposal Violations

California Attorney General (AG) Jerry Brown (D), 20 California counties and the City of Los Angeles have reportedly sued retail giant Target Corp. for allegedly illegally disposing of bleach, paints, oven cleaners, and other hazardous wastes into state landfills. The complaint, which was filed in Alameda County Superior Court, claims that more than 200 Target retail stores and seven distribution centers in the state have been engaged in the illegal disposal of hazardous wastes for more than eight years. The lawsuit seeks \$25,000 per violation and an order requiring Target to comply with



California's hazardous waste codes. See *The San Jose Mercury News*, June 15, 2009; *The San Francisco Chronicle*, June 16, 2009.

[7] ESA/Climate Change: Environmental Interests Sue BLM over Alleged Failure to Consider Climate-Change Impacts of Oil-Shale Development

Thirteen environmental groups have reportedly sued the Bureau of Land Management (BLM) alleging that the agency failed to adequately consider the potential climate-change implications of designating two million acres of public land for possible oil shale development in Colorado, Utah and Wyoming. The complaint alleges that BLM failed to properly consider air quality impacts and failed to consult with the U.S. Fish and Wildlife Service, as required by the Endangered Species Act (ESA). It also contends that BLM provided general information on the climate impacts of oil shale and tar sands development, but failed to attempt to quantify anticipated greenhouse gas emissions or climate impacts. Plaintiffs say the lands in question are home to more than a dozen species protected, threatened or endangered under the ESA. See *Grand Junction Colorado Sentinel*, June 16, 2009.

[8] Toxic Tort: Chinese Drywall Lawsuits Consolidated in New Orleans Federal Court

The Judicial Panel on Multidistrict Litigation has transferred 10 lawsuits from Florida, Louisiana and Ohio against manufacturers and distributors of drywall from China to a federal court in New Orleans for pretrial proceedings. *In re: Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047 (JPML 6/15/09). The lawsuits allege similar problems with the drywall, which allegedly emits sulfurous compounds that cause air conditioners

and other appliances to deteriorate. Some plaintiffs also allege that it causes nosebleeds and other health issues. An additional suit filed in federal court in Virginia could also be moved to New Orleans, according to reports. See *The Times-Picayune*, June 15, 2009.

Legislation, Regulations and Guidance

[9] Air: EPA Reissues Rule to Continue Sulfur Dioxide Emissions Trading Program

EPA has issued a [final rule](#) indicating that the agency will continue to operate the acid rain emissions program that had been part of the Clean Air Interstate Rule (CAIR). 74 *Fed. Reg.* 27,940 (6/12/09). The CAIR had been remanded to EPA for correction by a federal appeals court. *North Carolina v. EPA*, D.C. Cir. 67 ERC 1151 (12/24/08). The rule reaffirms the promulgation of certain revisions to the Acid Rain Program Rules that have been in effect since mid-2006 and EPA believes were not addressed by the court's decision. EPA made the revisions to coordinate the interstate emissions trading program for sulfur dioxide and nitrogen oxides in 28 eastern states and the District of Columbia (70 *Fed. Reg.* 25,162; 71 *Fed. Reg.* 49,253) with the CAIR. This rule reissues those revisions.

[10] SPCC: EPA Extends Deadline Again for Rule Compliance

EPA has issued a [final rule](#) extending the compliance deadline for the Spill Prevention, Control, and Countermeasure (SPCC) rule until November 10, 2010. 74 *Fed. Reg.* 29,136 (6/19/09). EPA has extended the compliance date several times. First promulgated in 1973, the SPCC rule, codified at 40 C.F.R. Part 112, requires owners and



operators that use, store, transfer, or consume oil or oil-based products to develop and implement professionally certified spill-prevention plans to avoid discharges of oil into navigable U.S. waters or adjoining shorelines. An earlier revision allowed a number of exemptions to the rule, including exemptions for hot-mix asphalt equipment and containers, pesticide application equipment and related containers, and heating oil containers at single-family residences.

[11] Air: EPA Proposes Amendments to Stationary Source Audit Program

EPA has published proposed [amendments](#) to the Stationary Source Audit Program that would allow accredited providers to supply stationary source audit samples and would require sources to obtain and use these samples from the providers rather than from EPA, as is the current practice. *74 Fed. Reg.* 28,451 (6/16/09).

In addition, requirements pertaining to the audit samples have been moved to the General Provisions of Parts 51, 60, 61, and 63 of 40 C.F.R. EPA will accept comments on the proposed amendments until July 16, 2009.

[12] Envtl. Management System: MMS Proposes Rule Requiring SEMS to Address Oil, Gas Operations in the OCS

The Department of Interior's Minerals Management Service (MMS) has proposed a [rule](#) that would require offshore operators to develop and implement a Safety and Environmental Management System (SEMS) to address oil and gas operations on the Outer Continental Shelf (OCS). *74 Fed. Reg.* 28,639 (6/17/09). The SEMS would consist of four elements: Hazards Analysis, Management of Change, Operating Procedures,

and Mechanical Integrity. According to MMS, the agency analyzed accident panel investigation reports, incident reports and noncompliance incidents in determining that the root cause of most safety and environmental accidents and incidents is one or more of those four elements. MMS will accept comments on the proposed rule until September 15, 2009.

[13] Prop. 65: Cal/EPA Seeks Comments on Proposed Listing of Chemicals

Cal/EPA's Office of Environmental Health Hazard Assessment (OEHHA) has [proposed](#) adding 30 chemicals to the state's Proposition 65 (Prop. 65) list. Prop. 65, the Safe Drinking Water and Toxics Enforcement Act of 1986, requires the state to update annually a list of substances known to cause cancer, birth defects and reproductive harm. It bans the discharge of listed chemicals into sources of drinking water and requires warnings on products that contain the listed chemicals.

In a recent decision, an Alameda County Superior Court concluded that the state must list any chemical that worker-safety laws deem carcinogens and reproductive toxicants. *Sierra Club v. Schwarzenegger*, No.07-356881 (Cal. Super. Ct., Alameda County, 4/24/09). Business groups in the state had challenged listings made through the so-called labor code mechanism, which allows OEHHA to administratively list substances that state and federal labor codes have identified as cancer-causing or reproductive toxicants.

[14] Pharma Disposal: Chicago Initiates Pharmaceutical Disposal Option

Chicago Mayor Richard Daley (D), the Chicago Department of Environment and the Chicago Police Department recently announced a new program



that addresses the disposal of expired or unused prescription drugs by offering permanent prescription drop box locations at five Chicago Police Department Area Centers. Pharmaceuticals dropped in the boxes will be periodically removed and taken to the Household Chemicals and Computer Recycling Facility at Goose Island. The Illinois Environmental Protection Agency will then transport the packaged pharmaceuticals to a disposal facility for incineration. U.S. EPA is funding the program. See *City of Chicago Press Release*, June 17, 2009.

Scientific/Technical Items

[15] Nanotechnology: Study Claims Aluminum Nanoparticles Bind After Release into Soil

A recent study claims that aluminum nanoparticles bind together after their release into soil. Thomas K. Darlington, et al., “Nanoparticle Characteristics Affecting Environmental Fate and Transport Through Soil,” *Environmental Toxicology and Chemistry*, Vol. 28, No. 6, (2009). The study’s objective was to understand the fate of nanoparticles that may be deposited in soil and focused on aluminum because it is currently used at the nanoscale in a number of applications, including energetics, alloys, coatings, incendiary devices, and sensors.

The study found that the aluminum particles quickly clustered and stuck together. It also determined that the surface charge of the particles affected their movement through soil in that binding events of positively-charged aluminum nanoparticles were greater than those for negatively-charged nanoparticles. The researchers recommended the development of predictive models for nanoparticle transport in soils and further research into the fate of nanoparticles in multiple soil types.

[16] Chemical Exposure: Study Claims Pesticides Linger in Homes

A new study claims that pesticides, some banned for decades in the United States, continue to persist in homes. D.M. Stout, et al., “American Healthy Homes Survey: A National Study of Residential Pesticides Measured From Floor Wipes,” *Environmental Science & Technology*, 43 (2009). Researchers wiped hard-surface floors with alcohol wipes in 500 homes across the United States to collect dust samples that could be analyzed for insecticide residues.

The swipes were analyzed for 24 current- and past-use residential insecticides in the organochlorine, organophosphate, pyrethroid, and phenylpyrazole classes and the insecticide synergist piperonyl butoxide. Analysis found all 24 insecticides samples in some of the homes. Fipronil and permethrin, both currently used, were found in 40 and 89 percent of the homes, respectively. DDT and chlordane—which have been banned for decades—were found in 42 and 74 percent of homes, respectively. DDE, the breakdown product of DDT, was found in 33 percent of the homes. Chlorpyrifos and diazinon, both banned for residential use for several years, were detected in 78 and 35 percent of homes, respectively.

The study concludes that “[t]he persistence of now-banned pesticides, and emerging health concerns for current-use pesticides, such as permethrins and fipronil, highlight the need to further assess the dangers of the pesticides Americans are currently using.”



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