

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] Biogenetics: Ninth Circuit Upholds Ban on GM Alfalfa

In a 2-1 ruling, the Ninth Circuit Court of Appeals has denied a petition to rehear its decision upholding a ban on genetically modified (GM) alfalfa until a full environmental impact statement (EIS) under NEPA is completed. [Geertson Seed Farms v. Jobanns, No. 07-16458 \(9th Cir. 6/24/09\)](#). Denying Monsanto Co.'s petition to rehear the matter or to rehear the matter en banc, the court affirmed the district court's decision and its earlier ruling.

Monsanto argued that its Roundup Ready® alfalfa posed virtually no risk of contamination to conventional crops. The Center for Food Safety argued that using GM crops such as the alfalfa, which is herbicide-resistant, can have serious environmental and economic impacts. The group claimed that GM alfalfa would contaminate conventional alfalfa crops, create new weeds tolerant to herbicides and limit export markets hostile to GM products. The dissenting judge argued that the district court's failure to conduct an evidentiary hearing before issuing a permanent injunction was reversible error.

[2] Toxic Tort: Eighth Circuit Reverses Summary Judgment in Farm Contamination Lawsuit

The Eighth Circuit Court of Appeals has reversed and remanded a grant of summary judgment against a grain farm in a soil-and-groundwater contamination lawsuit that was dismissed by the district court on statute of limitations grounds. [Harry Stephens Farms, Inc. v. Wormald Americas, Inc., No. 07-3547 \(8th Cir. 6/19/09\)](#).

Plaintiff sued in July 2006, alleging that a chemical plant near his farm leaked ethylene dichloride and other chemicals from three waste ponds.

The complaint alleged negligence, property damage and trespass and sought a judgment of liability, remediation costs and damages. In October 2007, the district court issued a one-page dismissal order, granting a motion for summary judgment that contended the claims were barred by a three-year statute of limitations. The district court decision was based on testimony which purportedly showed that plaintiff knew of the contamination well before the suit was filed. Plaintiff appealed, arguing that he did not learn of the contamination until just before he filed suit.

Reversing the district court, the appeals court ruled that a genuine issue remains as to when plaintiff learned of the contamination. The court found that the conflicting testimony of plaintiff and defense witnesses on this issue meant that summary judgment was not warranted.



[3] RCRA: First Circuit Vacates Injunction in Service Station Case

The First Circuit Court of Appeals has vacated part of a preliminary injunction against an oil company that supplied gasoline to a service station in Puerto Rico, ruling that the district court erred by ordering the company to remediate the spill-related contamination without a full trial on the merits. *Sánchez v. Esso Standard Oil Co., No. 09-1211 (1st Cir. 6/19/09)*. According to the appeals court, the company had a right to a full trial on the merits for alleged violations of RCRA and state law.

In October 2008, the service station owner filed a RCRA citizen suit against defendant alleging that the company's underground storage tanks leaked and that its failure to comply with environmental regulations as to the handling of hazardous substances and waste created a serious public health hazard. After a two-day hearing in December 2008, the district court held that the property was contaminated and granted an injunction against the company after finding that it committed numerous RCRA violations. The court ordered defendant to pay for a comprehensive cleanup study and, based on study results, to remediate the property. Defendant appealed.

The appellate court upheld that part of the injunction requiring a cleanup assessment, but vacated that part of the injunction requiring defendant to remediate the contamination. The court ordered that plaintiff and defendant be allowed to proceed with discovery on plaintiff's claims that defendant should be liable for the cleanup under RCRA and state law.

[4] CERCLA: Federal Court Rules Indian Tribes Cannot Be Sued as "Persons"

A federal judge in Washington has dismissed counterclaims filed against several Native American tribes in northern Washington, ruling that the tribes do not constitute "persons" under CERCLA. *Pakootas v. Teck Cominco Metals, Ltd., No. 04-256 (E.D. Wash. 6/19/09)*. The tribes filed suit in 2004, claiming that defendant mining company had dumped slag—including arsenic, mercury and lead—into the Columbia River. The complaint sought to enforce a unilateral order for remedial investigation that EPA issued to defendant, a Canadian company, in 2003. Defendant filed counterclaims, claiming that the tribes had caused and contributed to the pollution and were therefore potentially responsible parties (PRPs) under CERCLA. The tribes countered that they could not be liable under CERCLA because they did not fall under its definition of "persons."

The court agreed with the tribes, ruling that under section 9601(21), "Person" is defined as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political sub-division of a State, or any interstate body." The court also observed that "Indian Tribe" is defined separately in section 9601(36).

[5] Toxic Tort: Federal Court Remands Agent Orange Disposal Lawsuit

A federal judge in West Virginia has remanded an Agent Orange disposal lawsuit to state court, holding that the case was improperly removed to federal court. *Carter v. Monsanto Co., No. 08-01359 (S.D. W.Va. 6/19/09)*. The plaintiff



accused Monsanto Co. of dumping byproducts that were created while making the active ingredients for Agent Orange into a nearby creek. Monsanto argued on removal that the federal court had jurisdiction because the federal government played a role in directing the company's operations during the Vietnam War when it manufactured Agent Orange chemical ingredients.

Remanding the matter, the court ruled that plaintiff's claims involved defendant's alleged disposal of the chemicals only and not their production. According to the court, Monsanto could not show that a "causal nexus" existed between the production and distribution of the chemicals under government control and the company's disposal of the byproduct. The lawsuit, a putative class action, is one of 55 suits filed in the state seeking damages for exposure to the chemicals manufactured at a Monsanto plant and their byproducts.

[6] NEPA/ESA: Federal Court Vacates USDA Forest Planning Rule

A federal judge in California has vacated and remanded a federal forest planning rule issued in 2008 by the U.S. Department of Agriculture (USDA). *Citizens for Better Forestry v. USDA, No. 08-1927 (N.D. Cal. 6/30/09)*. The rule, which took effect April 21, 2008, governs plans for about 193 million acres of land managed by the U.S. Forest Service (USFS). The USFS claimed that the rule was programmatic in nature and therefore immune to challenge. Plaintiffs argued that the agency could not avoid conducting a detailed analysis of the rule's environmental impacts and that the agency violated NEPA and the Endangered Species Act (ESA) in failing to do so. The court agreed with plaintiffs, ruling that the USFS violated NEPA by not

performing an environmental impact statement and the ESA by failing to obtain the written concurrence of the Fish and Wildlife Service.

[7] Env'tl. Crime: Former Water Treatment Plant Superintendent Pleads Guilty to Falsifying Records

The former superintendent of the Rochester, Indiana, Wastewater Treatment Plant reportedly pleaded guilty in federal court to falsifying monthly discharge monitoring reports concealing Clean Water Act violations at the plant. He admitted that from September 2004 through May 2007, he submitted at least five reports to the Indiana Department of Environmental Management containing false data for treated water that was discharged from the plant into Mill Creek, a tributary of the Tippecanoe River. The reports indicated that levels of *E. coli*, ammonia, NH 3-N, and CBOD-5 were in compliance with permit concentration limits, when the defendant knew they were not. The defendant could be sentenced to up to two years in prison and fined up to \$250,000 on each of five felony counts. *See DOJ Press Release, June 30, 2009.*

Legislation, Regulations and Guidance

[8] Air: EPA Issues Final Rule Amending the Aerosol Coatings Reactivity Rule

EPA has issued a [final rule](#) amending the National Volatile Organic Compound Emissions Standard for Aerosol Coatings (Aerosol Coatings Reactivity Rule). *74 Fed. Reg. 29,595 (6/23/09)*.

The rule expands to 171 chemicals the 40 C.F.R. Part 59, Subpart E list of volatile organic compounds (VOCs) used in aerosol coatings that must be controlled to reduce ground-level ozone. Among the newly added chemicals are



(i) formaldehyde, (ii) ethanol, (iii) benzene, (iv) propane, (v) vinyl chloride, and (vi) styrene.

The rule also amends the VOCs definition at 40 C.F.R. 51.100(s) to clarify that chemicals such as ethane, methane and methyl chloride, which have minimal reactive potential and have previously been excluded from the VOCs definition, must be counted when aerosol paint manufacturers determine compliance with the rule's reactivity limit. The rule also details recordkeeping requirements for coatings manufacturers, importers and distributors. VOCs react with nitrogen oxides in the presence of sunlight to form ozone, which has allegedly been linked to increased asthma attacks and other respiratory ailments. The rule was effective upon publication.

[9] TSCA/Nanotechnology: EPA Imposes Notification Requirement on Carbon Nanotube Manufacture

EPA has issued a **final rule** under TSCA on carbon nanotubes, subjecting them to a "new-use" regulation that requires makers of carbon nanotubes, as well as those of 21 other chemicals, to notify EPA at least 90 days before starting manufacturing. *74 Fed. Reg.* 29,982 (6/24/09). Section 5(a)(2) of TSCA authorizes EPA to determine that a use of a chemical substance is a "significant new use." Once that determination is made, section 5(a)(1)(B) requires persons to submit a significant new use notice (SNUN) to EPA at least 90 days before they manufacture, import or process the chemical substance for that use. After receipt of an SNUN, EPA will assess the risks that may be presented by the intended uses and, if appropriate, regulate the proposed use before it occurs.

The final rule lists both "[m]ulti-walled carbon nanotubes (generic)" and "[s]ingle-walled carbon nanotubes (generic)" as new substances that are subject to the rule. The rule is effective August

24, 2009, unless EPA receives adverse or critical comments by July 24, 2009. If such comments are received, EPA will withdraw relevant sections of the rule and issue a proposed significant new use rule for those chemical substances.

[10] Air: EPA Proposes Rule Setting Exhaust Emission Standards for Oceangoing Vessels

EPA has proposed new exhaust emission **standards** for Category 3 marine diesel engines used for propulsion on oceangoing vessels.

The proposal would add two tiers of standards to limit nitrogen oxide (NOx) emissions and tighten the agency's existing diesel-fuel program for large ships. The proposed NOx standards would take effect in 2011 and require new marine diesel engines to use more efficient engine technologies, resulting in a 15 percent to 25 percent reduction in NOx emissions.

The second tier standard would apply in 2016 and would cut NOx emissions by 80 percent below current levels using more efficient control technology, according to EPA. The agency is also proposing limits on hydrocarbons and carbon monoxide and suggests changing the diesel-fuel program to ban the production and sale of fuel oil with sulfur concentrations higher than 1,000 parts per million along U.S. coasts and inland waterways. EPA will accept comments on the proposed rules until September 5, 2009. The proposed rule has been submitted to the *Federal Register* for publication.

[11] Air: New Nitrogen Dioxide Air Quality Standard and Monitoring Network Expansion Proposed

EPA has issued a **proposed rule** that would set a new one-hour air quality standard for nitrogen dioxide and expand its monitoring network but



retain the pollutant's existing annual standard. The proposed rule would create a new primary one-hour national ambient air quality standard (NAAQS) for nitrogen dioxide at a level between 0.080 parts per million (ppm) and 0.10 ppm. EPA would retain the current annual primary standard of 0.053 ppm and the secondary standard, which is also at 0.053 ppm. The proposed rule would also require nitrogen dioxide monitoring along major roads in cities with at least 350,000 residents and continued monitoring in cities with more than 1 million people.

Nitrogen dioxide forms from vehicle emissions, and exposure has been linked to airway inflammation, increased response to allergens and other respiratory impairments. According to EPA, all areas of the country currently meet the existing primary annual air quality standard. EPA will accept public comment on the proposed rule for 60 days after it is published in the *Federal Register*.

[12] Air/Greenhouse Gases: EPA Grants California's GHG Waiver Request

EPA **announced** on June 30, 2009, that it is granting California's waiver request that will allow the state to enforce its own greenhouse gas (GHG) emissions standards for new motor vehicles. *74 Fed. Reg.* 32,743 (07/08/09).

Under the Clean Air Act, EPA has authority to allow California to adopt its own emission standards because of the state's serious air pollution challenges. Thirteen other states and the District of Columbia have petitioned EPA to adopt the California standards.

The auto industry unsuccessfully mounted a federal court challenge to California's attempt to regulate tailpipe emissions, arguing that a

"regulatory patchwork" would be created and result in depressed overall sales and put some dealers at a competitive disadvantage. EPA had previously denied California's request for a waiver. *See EPA Press Release*, June 30, 2009.

[13] HAZMAT: DOT Proposes Revisions to Pipeline Safety Regulations

The Department of Transportation's (DOT) Pipeline and Hazardous Materials Safety Administration has proposed **revisions** to the Pipeline Safety Regulations to improve reporting and information gathering by pipeline operators. *74 Fed. Reg.* 31,675 (7/2/09). The proposed rule would amend 49 C.F.R. Parts 191, 192, 193, and 195. It would require that (i) operators report and file data electronically whenever possible, (ii) liquefied natural gas facilities submit incident and annual reports, (iii) operators use a standard form when electronically submitting reports, and (iv) operators of hazardous liquid pipelines submit pipeline information by state on their annual reports.

The proposed rule would also change the definition of an "incident" to establish a new reporting category called "an explosion or fire not intentionally set by the operator," and would establish a volumetric basis for reporting an incident of 3 million standard cubic feet of gas lost. The agency will accept comments on the proposed revisions until August 31, 2009.

[14] REACH: EU Issues Guidance on REACH

The European Chemicals Agency (ECHA) has issued **guidance** titled "Requirements for Substances in Articles," to help companies producing or importing goods into the European



Union (EU) comply with the EU's Registration, Evaluation, and Authorization of Chemicals (REACH) legislation.

ECHA has published the "Candidate List of Substances of Very High Concern for Authorization," which includes substances that are of particular concern because they may have serious effects on human health and the environment. If a listed substance is contained in an article (e.g., furniture, clothes, vehicles, books, toys, and electrical equipment) additional obligations may be triggered for companies producing, importing or supplying these articles. The guidance discusses who may have obligations for substances in articles under REACH, the obligations for these substances, practical guidance to identify the requirements for the substances, how to comply with requirements for communicating information on the substances, and where to find further guidance.

Scientific/Technical Items

[15] Chemical Exposure: EPA Air Toxics Study Concludes Americans at Risk

EPA's recently released "2002 National-Scale Air Toxics Assessment" concludes that most Americans have an elevated risk for cancer from exposure to air toxics. The assessment, which evaluated the risk of developing cancer from exposure to individual air toxics over a 70-year lifetime, looked at 181 air toxics from 2002 inventory data that included benzene, methylene chloride and acrolein.

According to the study, the majority of Americans live in areas where the lifetime risk of cancer from airborne toxics exposure is greater than 10 additional cases of cancer in 1 million exposed persons. Elevated exposure risks between 25 and 75 per 1 million were found along much of the

West Coast as well as throughout urban centers in Mid-Atlantic states and much of Florida. Pockets of elevated risk were also found in industrial centers of the Midwest, particularly throughout the Ohio River Valley. The greatest pockets of cancer risk, those greater than 100 in 1 million, were found in portions of West Virginia, Kentucky and Mississippi. See *EPA Press Release*, June 24, 2009.



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