

Environmental & Chemical Update

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SUSTAINABILITY • TOXIC TORT • WASTE • WATER

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Litigation and Regulatory Enforcement

[1] Toxic Tort: Fifth Circuit Rules Contamination from Plugged Wells Is Not Continuing Trespass

The Fifth Circuit Court of Appeals has ruled that under Louisiana law, an oil company's failure to clean up contamination from a well it plugged decades earlier is not a continuing trespass and therefore, the lawsuit seeking damages for contamination caused by the oil is time-barred. *Kling Realty Co. v. Chevron USA, No. 08-30043 (5th Cir. 07/10/09)*. Plaintiffs entered into an oil and gas lease with a predecessor of defendant pursuant to which one production well was drilled on the property. The well was plugged and abandoned in 1971. In the early 1970s, plaintiffs entered into a release of claims related to the well with defendant and defendant's lease terminated in 1974. In June 2006, plaintiffs sued defendant seeking compensatory and punitive damages for contamination on their property, alleging contamination was a "continuing trespass or nuisance." The court disagreed, holding that "a continuing tort is occasioned by unlawful acts, not the continuation of the ill effects of an original, wrongful act."

[2] Toxic Tort: Federal Court Rules MTBE Liability Must Be Apportioned

A federal judge in New York has ruled that liability for contamination from methyl tertiary-butyl ether (MTBE) in New York City groundwater is not joint and several, but must be apportioned. *In re MTBE Products Liability Litigation, No. 04-3417 (S.D. N.Y. 07/14/09)*. The city sued several corporations in 2003 over their use and alleged mishandling of MTBE from 1979 to 2003. The city alleged the contamination has prevented construction of a groundwater treatment facility in Queens. ExxonMobil Corp. is the lone remaining defendant in the case, and the city argued that the court should hold that the company was jointly and severally liable for the contamination. Exxon argued that because the contamination is the result of a "co-mingled product," joint and several liability was not appropriate and the burden of apportionment should reside with the city.

In an earlier decision the court agreed with Exxon on the first argument, but did not decide which party bore that burden. *In re MTBE, 2009 WL1649668 (S.D. N.Y. 06/09/09)*. In this decision, the court ruled that Exxon must determine its share of the potential harm. According to the court, the burden of proof is ordinarily placed on the culpable party, especially where the defendant is in a better position to know its own share of the market. The court set the burden of proof low, saying the company need only show a reasonable basis for its proposed share.



[3] **Env'tl Crime: Ship Pilot Sentenced to Prison for Oil Spill**

A California harbor pilot of a container ship that discharged 53,000 gallons of oil into San Francisco Bay after running into a bridge has reportedly been sentenced to 10 months in prison. *U.S. v. Cota, No. 08-0160 (N.D. Cal. 07/17/09)*. In March 2009, the defendant pleaded guilty to negligently causing the spill in violation of the Clean Water Act and the Migratory Bird Treaty Act. The spill occurred in November 2007 during a heavy fog that limited visibility to less than half a mile. In a plea agreement, defendant admitted to key errors in piloting the ship and failing to disclose to the Coast Guard during physical examinations in 2006 and 2007 that he took various prescription drugs to treat sleep disorders, depression and anxiety. According to reports, this is the first case in which a ship pilot has been sent to prison for an accident. See *BNA Daily Environment Report* and *DOJ Press Release*, July 20, 2009.

[4] **E-Waste: Electronics Recycler Charged with Dumping Electronic Waste in South Africa**

A company that conducted a free electronics recycling program for the Western Pennsylvania Humane Society and other area charitable organizations has reportedly been charged by EPA with dumping electronic waste in South Africa. The charges were recently added to previous allegations against EarthCycle for dumping e-waste in Hong Kong. According to the complaint, the company exported two sea-going shipping containers holding 2,061 computer monitors from Baltimore to South Africa on May 1, 2009. EPA has ordered the company to arrange for the return of the illegal waste to the United States and to submit a plan for its disposal. The agency also seeks

\$37,500 per day of violation for illegal disposal of hazardous waste and RCRA. See *Pittsburgh Post-Gazette*, July 15, 2009.

[5] **Waste: UK to Take Back Toxic Waste Illegally Shipped to Brazil**

According to press reports, the United Kingdom (UK) is working with Brazilian authorities to return more than 1,400 tons of syringes, condoms and bags of blood to the UK. The UK Environment Agency says British companies Worldwide Biorecyclables and UK Multiples Recycling will face prosecution in Britain under the 1992 Basel Convention on the Movement of Hazardous Waste. See *BBC News*, July 20, 2009.

Legislation, Regulation and Guidance

[6] **Air: EPA Proposes Rule Requiring States to Monitor Rural Ozone**

Under a **proposed rule** released by EPA on July 14, 2009, states would be required to monitor rural ozone concentrations for the first time, as well as expand existing monitoring systems in cities. The proposed rule would amend 40 C.F.R. Part 58, by harmonizing minimum ozone-monitoring requirements with the new national ambient air quality standards (NAAQs) for ozone.

Under the proposed rule, new monitors would be required to be operational by the 2012 ozone season. It would mandate that states maintain at least three rural ozone monitors: (i) in a wilderness area with natural vegetation or ozone-sensitive ecosystem; (ii) in a town whose urban cluster numbers 10,000 to 50,000 people and is expected to have ozone design values that are at least 85 percent of the current standard; and (iii) in an area



expected to have a maximum ozone concentration. The proposal would also lengthen the ozone monitoring season in some states and reduce it by one month in Minnesota. EPA estimates the proposed rule would require an additional 270 ozone monitors in urban areas and is accepting comments until 60 days after its publication in the *Federal Register*.

[7] CERCLA: EPA Signs PNA Regarding Financial Assurance Requirements

EPA recently signed a [priority notice of action \(PNA\)](#) identifying the hardrock mining industry as the agency's priority for developing financial assurance requirements under CERCLA Section 108(b). That section addresses the promulgation of regulations that require classes of facilities to establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, storage, or disposal of hazardous substances. It also requires EPA to publish a notice of the classes for which financial responsibility requirements will be developed first.

EPA identified the hardrock mining industry as the first industry class for which financial responsibility requirements will be developed as the result of a recent court decision that ordered the agency to do so. *Sierra Club v. Johnson, No. 08-1409 (N.D. Cal. 02/25/09)*. Hardrock mining facilities include those that extract, beneficiate and process metals (e.g., copper, gold, iron, lead, magnesium, molybdenum, silver, uranium, zinc) and non-metallic, non-fuel minerals (e.g., asbestos, gypsum, phosphate rock, sulfur). EPA will evidently propose a formal rule for the hardrock mining industry by spring 2011. It will also examine other industries that may warrant the development of financial responsibility

requirements by the end of 2009. The PNA has been submitted to the *Federal Register* for publication. See *EPA Press Release*, July 13, 2009.

[8] Energy Conservation: DOE Sets Efficiency Standards for Fluorescent Lighting

The U.S. Department of Energy (DOE) has set efficiency [standards](#) for fluorescent lamps and other types of household and commercial lighting. *74 Fed. Reg. 34,079 (07/14/09)*. According to DOE, the standards will reduce the amount of electricity consumed by general service fluorescent lamps by 15 percent and cut the amount of electricity used by incandescent reflector lamps by 25 percent. The standards apply to general service fluorescent lamps, commonly used in residential and commercial buildings, and incandescent reflector lamps, used in recessed and track lighting.

The Energy Policy and Conservation Act, as amended, prescribes energy conservation standards for various consumer products and commercial and industrial equipment. DOE claims the new standards will result in cumulative greenhouse gas (GHG) emissions reductions of 175 to 488 million tons of carbon dioxide for general service fluorescent lamps and 44 to 106 million tons of carbon dioxide for incandescent reflector lamps over the next 30 years.

[9] Air: Canada Adopts Regulations Setting VOC Limits in Consumer and Commercial Products

Canada has adopted [regulations](#) setting concentration limits for volatile organic compounds (VOCs) in consumer and commercial products included in automotive paints, varnishes, adhesives, and cleaners. The new regulations prohibit the



manufacture, import and sale or offer for sale of products that do not meet the specified VOC concentration limits. They reduce allowable VOC concentration limits for 14 categories of coatings and surface cleaners used for refinishing or repairing painted surface of automobiles, trucks and other mobile equipment. According to Environment Canada, the regulations will reduce VOC emissions by 71,100 metric tons over a 25-year period.

[10] Water: GAO Report Cites Funding Gaps for Wastewater System Infrastructure Upgrades

A recent U.S. Government Accountability Office (GAO) [report](#) cites a significant funding gap for clean water infrastructure upgrades and concludes that sufficient cash is not available to deal with the issues. According to EPA, much of the U.S. wastewater infrastructure is more than 50 years old; the agency estimates that a potential funding gap between future needs and current budgets ranges from \$150 billion to \$400 billion over the next decade. The GAO report examines potential options for dealing with the funding gap, including the establishment of a clean water trust fund through a partnership between EPA and the states.

[11] Chemical Policy: Report Says State Policies Focus Increasingly on Product Ingredients

A recent [report](#) from the Lowell Center at the University of Massachusetts asserts that the focus of state chemical policies is increasingly changing from “end-of-pipe” waste concerns to product ingredient concerns. The report analyzes state and local legislation and executive branch policies enacted since 1990. It examines state actions on chemicals in several policy areas, including: (i) restrictions on

single chemicals; (ii) data collection requirements; (iii) assessments of alternative chemicals; and (iv) environmentally preferable purchasing. The report identifies 10 states that have endorsed or are discussing the concept of an interstate clearinghouse for chemical information to promote safer chemicals in consumer products.

[12] EU/REACH: Baseline Study Issued

The European Union (EU) has published a [baseline study](#) designed to provide a “system of indicators” that will answer questions on how risks may change after implementation of the EU’s Registration, Evaluation, and Authorization of Chemicals (REACH) directive. Among other things, the indicator system will allow the EU to monitor the (i) increased knowledge of the uses and related exposures of existing substances; (ii) improvement of data in extended safety data sheets; (iii) direct communication of uses not supported by the manufacturer/importer; (iv) increased involvement of downstream users in the communication and assessment of safe uses; (v) cessation of production of substances if no standard set of data is available; and (vi) cessation of the use of substances of high concern.

Scientific/Technical Items

[13] Nanotechnology: Nanoengineered Materials Could Cut Cleanup Costs at Sites with Large-Scale Contamination

A recent study by researchers from EPA and the Woodrow Wilson International Center for Scholars claims that using nanoengineered materials to remediate certain contaminated sites could potentially save billions of dollars. Barbara Karn, et al., “Nanotechnology and In Situ Remediation: A Review of the Benefits and Potential Risks”, *Environmental Health Perspectives*, June 24, 2009. The study



examines the case of a New Jersey manufacturing facility where it was estimated that using a traditional pump-and-treat method to remediate groundwater and soil contamination at the site would have cost \$4.16 billion, whereas the use of zero-valent iron nanoparticles would have cost approximately \$450,000. In another analysis involving a TCE cleanup, researchers found the use of iron nanoparticles reduced 99 percent of the TCE in groundwater in a matter of days. Nanoremediation methods use the application of reactive nanomaterials for transformation and detoxification of pollutants. According to the study, they work best on non-aqueous phase liquids such as TCE.



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

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