

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

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Litigation and Regulatory Enforcement

[1] CERCLA: Ninth Circuit Upholds Dismissal of Challenge to EPA Unilateral Trichloroethylene Remediation Order

The Ninth Circuit Court of Appeals has upheld the dismissal of a challenge to an EPA CERCLA unilateral order concerning a 160-acre site in Rialto, California. [*City of Rialto v. West Coast Loading Corp., No. 08-55474 \(9th Cir. 8/14/09\).*](#)

In 2003, EPA issued a unilateral administrative order to Goodrich Corp., requiring the company to remediate trichloroethylene contamination at the site, which was added to the National Priorities List in 2008.

Goodrich challenged the order in federal court, alleging that EPA had information which exonerated Goodrich and that the agency has a pattern of issuing unilateral orders when no emergency exists and often refuses to certify completion of the work required under the order so the agency can delay judicial review. The district court granted EPA's motion for judgment on the pleadings under 42 U.S.C. section 9613(h), and Goodrich appealed.

The appeals court agreed with the district court that Goodrich lacked standing to challenge the order since the company has not completed the work it required. According to the appeals court, once EPA issues a unilateral order to a party, the party may challenge the order, but not until it has completed the work required by the order.

[2] NEPA: Federal Court Rejects Challenge to Army's Chemical Weapons Disposal Plan

A federal judge in the District of Columbia has rejected a legal challenge by an environmental group to U.S. Army plans to destroy chemical weapons at four U.S. sites. [*Chem. Weapons Working Group v. Dep't of Defense, No. 03-645 \(D.D.C. 8/19/09\).*](#) The Army's chemical weapons are currently stored at eight sites in the United States and at a prototype incineration facility in the Pacific known as Johnston Atoll Chemical Agent Disposal System.

The Army developed the disposal plan under a congressional mandate to destroy the nation's stockpile of chemical warfare agents following execution of the Chemical Weapons Convention in 1993. The challenged plans involve the incineration of chemical weapons at facilities in Anniston, Alabama; Pine Bluff, Arkansas; Tooele, Utah; and Umattilla, Oregon. Plaintiffs argued that the Army violated NEPA by failing to provide a supplemental analysis reflecting new alternative destruction technologies that could be used at the four sites. They also claimed that the Army's health risks analysis was not complete.

In 1988, the Army prepared an environmental impact statement (EIS) as part of the weapons destruction plan. Examining incineration technology and several alternative methods, including deep ocean disposal and nuclear detonation, the Army ultimately selected incineration after determining that the alternative technologies were "either immature or unreliable." The Army also prepared



site-specific studies which concluded that dioxin and furans incineration would pose no significant impact to the environment or to human health.

According to the court, plaintiffs failed to demonstrate that alternatives to incineration were readily available and capable of destroying the chemical warfare agents. The court also found that plaintiffs' arguments about incineration risks "were too speculative to qualify as irreparable harm."

[3] CERCLA: Federal Court Rules Site Owner's Cost Recovery Claim Is Not Consistent with NCP

A federal judge in New Jersey has rejected a site owner's CERCLA cost recovery claim against an adjoining landowner, ruling that plaintiff failed to demonstrate that it incurred costs that were consistent with the National Contingency Plan (NCP). *Champion Labs., Inc. v. Metex Corp.*, No. 02-5284 (D.N.J. 8/13/09). As a result, according to the court, plaintiff may not recover its costs "because none of those expenditures has furthered a cleanup of the ... site, or sought to contain or assuage the contamination allegedly migrating onto the site."

Plaintiff owned property in Edison, New Jersey, known as the Interlee Site, which had been used for industrial operations until 1985. Defendant owned an industrial property adjacent to and uphill from plaintiff's property. After plaintiff ceased operations, an investigation revealed the presence of contaminants including tetrachloroethylene, trichloroethylene and vinyl chloride. In 2002, plaintiff filed a CERCLA cost recovery action against defendant, alleging that defendant's property was the source of the contamination. Following a bench trial, the court ruled that plaintiffs' costs were incurred to persuade the New Jersey Department

of Environmental Protection that defendant was the source of the contamination on the Interlee Site and to obtain a "no further action" letter, but not to clean up the site.

[4] Toxic Tort: Federal Court Dismisses Lawsuit Alleging Injuries from Exposure for Lack of Expert Testimony

A federal judge in Nebraska has dismissed an industrial worker's toxic exposure lawsuit against a chemical manufacturer, ruling that plaintiff presented insufficient expert evidence linking his alleged brain injury to hydrogen sulfide exposure. *Barrett v. Rhodia, Inc.*, No. 07-5014 (D. Neb. 8/11/09).

Plaintiff sued the company in 2007, alleging that, in June 2003, he was exposed to a high level of hydrogen sulfide that came from an open drum containing phosphorous pentasulfide (P255). He alleged that the gas came from a defectively manufactured or designed drum and that the exposure caused his toxic encephalopathy, a brain injury associated with certain toxic substances. Plaintiff also alleged that the drum of P255 lacked adequate warnings about its ability to produce hydrogen sulfide when exposed to moisture.

In support of his failure-to-warn claim, plaintiff offered evidence that the material safety data sheet that accompanied the drum had been changed from an earlier sheet so that a warning about the risk inherent in exposing P255 to air was no longer included. He also offered expert testimony, but the court limited it to the fact that plaintiff's symptoms were consistent with hydrogen sulfide exposure. Defendant offered expert testimony to the effect that plaintiff was too far away from the gas release to have been exposed to enough hydrogen sulfide to cause his alleged injuries.



Granting defendant's summary judgment motion, the court held that "plaintiff offered no evidence, expert or otherwise, to suggest any quantity of hydrogen sulfide found in the drum could disperse to workers in the vicinity" of plaintiff. The court also held that "in contrast to plaintiff's position, the undisputed evidence presented by the defendant indicates hydrogen sulfide would be unable to cause injuries consistent with those sustained by plaintiff."

[5] Env'tl. Crime: Tanker Operator to Pay \$10 Million Criminal Fine for San Francisco Bay Spill

The operator of the tanker, Cosco Busan, has agreed to pay a \$10 million criminal fine to resolve charges arising out of a 2007 oil spill in San Francisco Bay after the ship struck a section of the San Francisco-Oakland Bay Bridge. *U.S. v. Fleet Mgmt. Ltd.*, No. 08-0160 (N.D. Cal. filed 8/13/09). The company pleaded guilty to a criminal violation of the Oil Pollution Act of 1990, felony obstruction of justice and false statement charges for creating false and forged documents. In July 2009, the federal court sentenced the ship's harbor pilot to 10 months in prison and 200 hours of community service for his role in the spill. *U.S. v. Cota*, No. 08-0160 (N.D. Cal. 7/17/09).

According to court documents, the company admitted that the ship's crew (i) was not adequately familiar with certain navigational equipment on the ship, (ii) failed to participate in the passage planning process or prepare written passage plans, (iii) did not conduct an adequate Master-Pilot exchange of information, (iv) failed to fully use or operate the ship's radar and electronic chart system, and (v) did not take fixes during the voyage. See *DOJ Press Release* and *The Los Angeles Times*, August 13, 2009.

[6] CWA/CERCLA: Pipeline Firms to Pay \$3.65 Billion to Settle Ammonia Spill Violations

An Oklahoma pipeline company and two of its former operating companies have agreed to pay a civil penalty of \$3.65 million to settle charges that they violated the Clean Water Act in connection with anhydrous ammonia spills in Nebraska and Kansas. *U.S. v. Magellan Ammonia Pipeline, L.P., No. 09-02425 (D. Kan. 8/14/09)*. EPA charged the companies with liability for two anhydrous ammonia spills that occurred in 2004.

The September 2004 spill in Blair, Nebraska, killed 1,000 fish in a creek and a golf course pond and resulted in the hospitalization of one person and the evacuation of homes within one mile of the creek. The second spill occurred near Kingman, Kansas, in October 2004. It killed more than 20,000 fish in a 12.5 mile section of a local creek, resulted in a 40-foot-high vapor cloud that stretched one-mile long and led to an evacuation of nearby residents. EPA also charged the companies with CERCLA violations for failing to immediately notify the National Response Center about the spills.

The settlement, which was filed August 14, 2009, requires the companies to spend an additional \$550,000 to improve selected segments of their pipeline system to prevent and minimize future spills and to establish a program to prevent third-party damage to the system. It also requires the pipeline company to improve employee training, leak-response procedures and protocols for detecting and responding to leaks. The proposed consent decree is subject to a 30-day public comment period and approval by the court.



[7] **Water: New Hampshire City Settles EPA Enforcement Action over Sewage Violations**

Portsmouth, New Hampshire, has agreed to settle an EPA enforcement action that alleged violations of the Clean Water Act for issues related to wastewater treatment and sewage systems. *U.S. v. City of Portsmouth*, No. N/A (D.N.H. filed 8/18/09).

Under the terms of a proposed consent decree, the city agreed to complete all of the terms set out in its 2005 long-term control plan by October 2013, as well as to submit a schedule to EPA by September 1, 2010, for all upgrades to the treatment facility and collection systems. The agreement also seeks improvements to the city's combined sewer system, which, during heavy rains, overflows and discharges untreated wastewater. Although the agreement does not require the city to pay an upfront penalty, stipulated penalties of at least \$27,500 per day may be imposed if the city fails to adhere to the consent decree's schedule. The proposed agreement is subject to public comment and court approval.

[8] **Prop. 65: Settlement to Reduce Lead in Synthetic Turf Products**

A major manufacturer of synthetic turf products has reportedly reached a settlement under California's Safe Drinking Water and Toxic Enforcement Act (Prop. 65) with the state attorney general's office, agreeing to eliminate most lead from its products. *California v. Beaulieu Group, LLC*, No. 08-407310 (Cal. Super. Ct. 8/14/09). California Attorney General Jerry Brown (D) announced the settlement, which immediately limits lead levels in AstroTurf® to 100 parts per million. By June 2010, the lead limit drops to 50 parts per million.

The company must also replace some synthetic playing fields, playgrounds and lawns at daycare facilities, schools and public parks if tests show lead levels above 0.1 microgram per square centimeter. As part of the settlement, the company agreed to pay \$170,000 in civil penalties, research grants, costs, and attorney fees. *See BNA Daily Environment Report*, August 19, 2009.

Legislation, Regulations and Guidance

[9] **Water: Effluent Standards for Airport De-icing Operation Discharges Proposed**

EPA plans to propose technology-based effluent standards for discharges from airport de-icing operations. The proposed rule "generally would apply to wastewater associated with the deicing of aircraft and airfield pavement at primary commercial airports." The proposed rule would require these airports to recover at least a specified portion of available de-icing or anti-icing fluid after it is sprayed on aircraft, meet a specified effluent limit for wastewater collected and discharged, and certify that they use pavement de-icers that do not contain urea.

Airports with more than 1,000 annual jet departures and more than 10,000 annual departures of all aircraft would have to use the best-available technology to capture 60 percent of the available fluid if they discharge more than 460,000 gallons. Airports with less than 460,000 gallons of discharge would be required to capture 20 percent. The proposed rule would amend 40 C.F.R. Part 449. EPA will accept comments on the proposed rule for 120 days after it is published in the *Federal Register*.



[10] Nanotechnology: EPA Withdraws Carbon Nanotube Rule After Receiving Notice of Adverse Comments

EPA has withdrawn a rule that would have required manufacturers of some carbon nanotubes and 21 other chemicals to notify EPA at least 90 days before commencing manufacturing under TSCA's "new use" regulation. *74 Fed. Reg. 42,177 (8/21/09)*. EPA published the rule as a "direct final rule" in the June 24, 2009, *Federal Register* (*74 Fed. Reg. 29,982*). Under the procedure EPA uses to issue direct final rules, the agency must withdraw the rule and propose it again under standard rulemaking procedures if EPA is notified that someone plans to file, or has already filed, adverse comments. The standard procedure includes an opportunity for public comments.

According to press reports, a Washington, D.C., attorney notified EPA that he would file adverse comments on the rule on behalf of his clients who apparently claim the rule as published was ambiguous about the kind of nanotubes it covered. The rule as to the 21 other chemicals was not affected by this withdrawal. *See E&E News PM*, August 20, 2009.

[11] Air: Comments Sought on Options for Reducing Power Plant Emissions in Four Corners Region

EPA will publish an Advance Notice of Proposed Rulemaking (ANPR) that seeks public comments on options for reducing power plant emissions in the Southwest's Four Corners region. With the ANPR, EPA seeks to collect additional information for anticipated visibility improvements and the cost effectiveness of different levels of air pollution controls as Best Available Retrofit Technology (BART) for the Four Corners Power Plant and the

Navajo Generating Station, located on the Navajo Nation in New Mexico and Arizona, respectively. EPA will accept comments on the ANPR for 30 days following its publication in the *Federal Register* on factors such as the facilities' remaining useful life, their existing controls, and energy and non-air-quality environmental impacts.

Scientific/Technical Items

[12] CERCLA: GAO Report Critical of EPA CERCLA Cost Data

A recent Government Accountability Office (GAO) report claims that EPA needs to better assess and improve the CERCLA cleanup data it collects. The report specifically cites the need for better information relating to the status and cost of CERCLA cleanups, the extent to which sites have viable responsible parties and the financial impacts of EPA's inability to identify such parties. GAO also calls for the agency to aggregate and provide such data to Congress. The report noted that, as of fiscal year 2007, "EPA or responsible parties completed construction of remedial actions at about 70 percent of nonfederal NPL [National Priority List] sites, with program appropriations averaging about \$1.2 billion annually. However, GAO identified [CERCLA] program trends that make it difficult to predict future program costs." These trends include (i) "the number of sites added to the NPL each year has declined;" (ii) the types of sites have changed, with mining sites, among the most expensive to clean up, added to the NPL in greater numbers; (iii) EPA data limitations make unclear "the extent to which NPL sites do not have viable parties to assist with cleanups"; (iv) data limitations make quantification of the amount of work remaining difficult; (v) "NPL sites that have not yet been cleaned up



may be more complex and expensive”; and (vi) program appropriations are in decline while EPA’s costs for individual sites increase.

The report recommends that EPA provide data to Congress on the status and cost of cleanups at individual sites, particularly complex and expensive sites; the extent to which there are viable responsible parties at NPL sites; and the potential financial impacts from EPA’s inability to obtain reimbursement for agency cleanup costs from nonviable responsible parties.

[13] Water: USGS Report Documents Mercury in U.S. Freshwater

A recent U.S. Geological Survey (USGS) [report](#) claims that mercury contamination in 25 percent of U.S. rivers and streams exists at levels above the safe standard for human consumption, which is 0.3 parts per million wet weight.

Barbara C. Scudder, et al., “Mercury in Fish, Bed Sediment, and Water From Streams Across the United States, 1998-2005” (2009). USGS examined mercury in fish, sediment and water drawn from 291 rivers and streams between 1998 and 2005. The researchers attributed much of the contamination to atmospheric deposition, but also noted that wetlands, forests and organic soils can enhance the conversion of mercury to highly toxic methylmercury, which accumulates in the food chain and may cause serious public health problems.

Some of the highest levels of mercury in fish were found in “blackwater” streams in North and South Carolina, Georgia, Florida, and Louisiana, all of which have large and undeveloped forested watersheds. The report attributes the high levels found in the western United States to mining.



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