

# Environmental & Chemical Update

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

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## Litigation and Regulatory Enforcement

### [1] Toxic Tort: Personal Injury and Medical Monitoring Claims in Radiation Exposure Case Dismissed

The Tenth Circuit Court of Appeals has affirmed an order dismissing claims by Uravan, Colorado, residents who alleged radiation injuries from mining and milling operations. [\*June v. Union Carbide Corp.\*, No. 07-1532 \(10th Cir. 8/21/09\)](#). Twenty-seven plaintiffs asserted personal injury claims, and 152 asymptomatic plaintiffs sought medical monitoring. The district court dismissed the personal injury claims for lack of specific causation evidence tying the alleged injuries to defendant. The claims of asymptomatic plaintiffs were dismissed for lack of the “bodily injury” evidence that is needed to meet the requirements set forth in federal radiation claims legislation. Of the 27 injured plaintiffs, 11 had non-thyroid cancer and 16 had thyroid cancer.

The town of Uravan was built for mining and milling workers by Union Carbide and Umets Minerals Corp. The companies began milling vanadium and uranium in 1936. Operations ceased in 1984, the town was placed on CERCLA’s National Priorities List in 1986, and the residents were evacuated. The town has been cleaned up since then.

Refusing to adopt plaintiffs’ substantial-factor standard of causation, the appeals court held that plaintiffs failed to prove their injuries were due to defendants’ activities and that many plaintiffs failed

to establish injury at all. According to the majority, despite the testimony of five experts, radiation exposure from the detonation of atomic weapons at the Nevada Test Site between 1959 and 1970 made proving that radiation exposure from mining caused plaintiffs’ injuries difficult under Colorado’s “but-for” causation standard. As to the asymptomatic plaintiffs, the court held that the medical monitoring claims did not amount to a bodily or physical injury under the Price-Anderson Act. The dissenting judge argued that the appellate court should have reversed the district court as to the 27 plaintiffs with thyroid disease so their claims could be tried.

### [2] RCRA: Seventh Circuit Rules Cleanup Not Discharged in Bankruptcy

The Seventh Circuit Court of Appeals has ruled that a 2008 district court order requiring Apex Oil Inc. to remediate soil and groundwater contamination under RCRA is not discharged in bankruptcy. [\*U.S. v. Apex Oil Co., Inc.\*, No. 05-242 \(7th Cir. 8/25/09\)](#). Apex argued that (i) it has no in-house ability to conduct the cleanup at the company’s former refinery, (ii) the cleanup would cost the company \$150 million to hire an outside party to do the work, and (iii) the expense constituted a “right to payment” that was discharged in the company’s bankruptcy in the 1980s.

Writing for the appeals court panel, Judge Richard Posner stated, “In a 178-page opinion following a 17-day bench trial, the district judge made findings that millions of gallons of oil, composing a ‘hydrocarbon plume’ trapped not



far underground, are contaminating groundwater and emitting fumes that rise to the surface and enter houses in Hartford and in both respects are creating hazards to health and the environment.” The court deemed it the company’s responsibility to abate the nuisance because the plume came from an oil refinery owned by the company’s corporate predecessor.

Considering the company’s argument that its obligation was discharged in bankruptcy, the appellate court said that, in obtaining the injunction, EPA was not seeking a money payment and that the injunction obtained under RCRA did not entitle the agency to payment. According to the court, discharges in bankruptcy must be limited to cases in which the claim gives rise to a right of payment—otherwise, because all enforcement actions impose some cost on the violator, no agency could effectively enforce its laws.

### **[3] NEPA: OCS Oil & Gas Lease Decision Affirmed in Ninth Circuit**

The Ninth Circuit Court of Appeals has affirmed a district court ruling upholding a Minerals Management Service (MMS) decision not to prepare a supplemental environmental impact statement for a proposed oil and gas lease sale on a tract of outer-continental shelf (OCS) in the Beaufort Sea in Alaska. *N. Slope Borough v. MMS, No. 07-00045 (9th Cir. 8/27/09)*.

The three-judge panel ruled that plaintiffs failed to demonstrate that MMS acted arbitrarily and capriciously in scrutinizing the environmental, economic and social impact of leasing approximately 8.7 million offshore acres to energy exploration and production firms. Plaintiffs had argued that conditions in the region were changing rapidly due to global warming and increased oil

and gas exploration activities were making previous assessments inadequate. The appellate court held that plaintiffs “failed to identify any specific new information which shows that [the leases] may have a significant impact on Arctic wildlife.”

### **[4] Water: Federal Court Rules State DEP Violated CWA**

A federal judge in West Virginia has ruled that the West Virginia Department of Environmental Protection (DEP) violated the Clean Water Act (CWA) for allowing acid drainage from abandoned mine sites without a discharge permit. *West Virginia Highlands Conservancy v. Huffman, No. 07-00410 (S.D. W. Va. 8/24/09)*. The case involved bond forfeiture sites in southern West Virginia formerly operated by three now-defunct companies. Under the Surface Mining Control and Reclamation Act, the state agency is charged with reclamation of bond forfeiture mining sites. The state agency claimed that the state DEP did not “stand in the shoes” of the former owners and that EPA does not treat bond forfeiture sites which discharge acidic mine drainage as point sources.

The court rejected DEP’s arguments, ruling that the agency controls the discharge of acidic mining drainage at the sites and operates the sites’ water-discharge treatment system. According to the court, “[t]he text of the CWA clearly provides that, as a ‘person’ under the Act, a state shall not discharge a pollutant without a permit.” The court specifically rejected the agency’s argument that EPA does not treat bond forfeiture sites as point sources, saying EPA had never taken that position.



**[5] Toxic Tort: Inability to Develop Property Due to Contamination May Result in Recoverable Damages**

A federal judge in California has ruled that the inability to develop a property due to contamination is a cognizable injury under California law. *West Coast Home Builders v. Aventis Cropscience USA, Inc.*, No. 04-2225 (N.D. Cal. 8/21/09).

Plaintiff alleged that its development plan was thwarted when it discovered that the groundwater under the land had been contaminated by chlorinated solvents and other contaminants that had leaked from a nearby, now-shuttered landfill.

Plaintiff sought \$13 million in damages based on what the developer estimated it could have received if it had been able to build and sell houses and other structures on property it purchased for development. The complaint alleged that the contamination constituted a continuing nuisance and asserted trespass claims as well as imminent and substantial endangerment under RCRA. Defendant argued that plaintiff's claims were too speculative. The court allowed plaintiff's nuisance and trespass claims but agreed with defendant that the RCRA claim was too speculative. As to the former claims, the court allowed the matter to proceed on the theory that groundwater contamination from the landfill has prevented plaintiff from building and selling real estate.

**[6] Water: Industrial Launderer to Pay \$525,000 to Settle CWA Violations**

An industrial launderer with a facility in Hartford, Connecticut, will reportedly pay a \$525,000 penalty for alleged violations of federal and state clean water laws and a state-issued discharge permit. A civil complaint and proposed consent decree were filed on August 24, 2009, in federal court in

New Haven. According to court documents, from July 2001 through March 2008, the company's wastewater discharge repeatedly violated the National Pretreatment Standard prohibiting the discharge of wastewaters with a pH lower than 5.0 in violation of the CWA. The company's wastewater discharges also frequently violated industrial discharge limitations for pH, oil and grease, and total zinc, total lead and total copper. The violations purportedly continued until March 2008, when the company—AmeriPride Service, Inc.—completed the installation of a new industrial wastewater system. The proposed consent decree is subject to public comment and judicial approval. *See EPA Press Release*, August 25, 2009.

## Legislation, Regulations and Guidance

**[7] Air: EPA Proposes Rule Limiting Nitrogen Oxide Emissions From Ships**

EPA has proposed a rule that would require large oceangoing vessels to significantly reduce emissions of nitrogen oxides and other pollutants. *74 Fed. Reg.* 44,441 (8/28/09). The rule would require near-term and long-term reductions in emissions from new Category 3 marine compression ignition engines for all ships flagged or registered in the United States. Such engines are primarily used for propulsion power on large oceangoing vessels such as container ships, tankers, bulk carriers, and cruise ships.

The proposal would codify recent amendments to Annex VI of the 1973 International Convention for the Prevention of Pollution from ships (MARPOL), which established two new tiers of nitrogen oxides emissions-control requirements for large marine engines. EPA's proposal would adopt the Tier



2 and Tier 3 requirements for emissions reductions—the Tier 1 standards took effect in 2004. EPA will accept comments on the proposed rule until September 30, 2009.

**[8] Safe Drinking Water Act: Public Comments Sought on New Information Related to Geologic Sequestration of Carbon Dioxide**

EPA has announced it will seek public comments on new information regarding planned regulations for underground storage of carbon dioxide. EPA's request for comments will be published in the *Federal Register*. The agency initially proposed regulations to govern geologic sequestration of carbon dioxide on July 25, 2008. The proposal used the regulatory framework already in place for the Underground Injection Storage program under the Safe Drinking Water Act. To minimize potential risk to drinking water, the proposal included a requirement that any geologic layer used to store carbon dioxide lie below the lowest underground sources of drinking water in that area.

In its latest announcement, EPA said it is providing additional information on an alternative for addressing injection depth. The new information summarizes research from three carbon dioxide sequestration projects and Lawrence Berkeley National Laboratory studies on the possible consequences of pumping large amounts of carbon dioxide into geologic formations. EPA will accept comments on the proposal and new information for 45 days after publication in the *Federal Register*. See *EPA Press Release*, August 26, 2009.

**[9] Water: IG Report Recommends that EPA Set Numeric Nutrient Water Quality Standards**

A recent EPA Inspector General [report](#) recommends that the agency set numeric nutrient water quality standards for waters such as the Gulf of Mexico that have been significantly affected by excess nutrients. The report focuses on EPA activities from 1998 to 2008 in five states—Florida, Illinois, Iowa, Kansas, and Missouri. According to the report, EPA's reliance on states to develop water quality standards for nutrients is not working, in part because the agency has failed to require meaningful monitoring or secure firm commitments from the states. The report says EPA's nutrient criteria strategy lacks management control and an adequate system of accountability for itself or the states. As a result, few states have made progress in adopting numeric standards. The report recommends that EPA prioritize waters that need numeric nutrient standards and establish effective monitoring and measures to ensure that progress is accurately reported.

**[10] Water: Coast Guard Proposes Ballast Water Rule**

The U.S. Coast Guard has [proposed](#) amending its regulations on ballast water management by establishing standards for the allowable concentration of living organisms in ships' ballast water discharged in U.S. waters. *74 Fed. Reg.* 44,631 (08/28/09). On July 28, 2004, the Coast Guard published a final rule that required all vessels equipped with ballast water tanks and bound for U.S. ports to conduct a mid-ocean ballast water



exchange, retain their ballast water onboard or use an alternatively sound method approved by the Coast Guard. 69 *Fed. Reg.* 44,952. In the prior month, the Coast Guard had also published a final rule establishing penalties for failure to comply with reporting and record-keeping requirements in 33 C.F.R. Part 151.

The new proposed rule would establish a limit on the number of invasive organisms that can be released with a vessel's ballast water while a ship is in port. The limit would initially follow a formula used by the International Maritime Organization (IMO) in 2004, but would also set a second-phase goal by 2016 of a standard potentially 1,000 times more stringent than the IMO standard. The Coast Guard will accept comments on the proposed rule until November 27, 2009.

### [11] Lead Exposure: CPSC Rule Lists Exemptions from Lead-Testing in Children's Products

The Consumer Product Safety Commission (CPSC) has published a [final rule](#) outlining exemptions of certain materials from lead-content testing for children's products. 74 *Fed. Reg.* 43,031 (08/26/09). The rule exempts most precious and semiprecious gemstones, pearls, wood, natural fibers, many plant- and animal-based materials, and some textiles. It also exempts paper, most inks and adhesives in new books.

Section 101 of the Consumer Product Safety Improvement Act of 2008 limited lead in children's products to 300 parts per million. If technologically feasible, the limit may be reduced to 100 ppm by August 14, 2011. CPSC noted in the rule that some products or materials "inherently do not contain lead or contain lead at levels that do not exceed the lead content limits under Section 101."

### [12] EU/REACH: EC Issues REACH Chemical Test Methods

The European Commission (EC) has issued [regulations](#) detailing the test methods that chemical manufacturers must use to comply with the Registration, Evaluation, and Authorization of Chemicals (REACH) regulation.

Methods addressed include tests measuring physicochemical properties of chemicals and fibers, skin irritation and ecotoxicity. The new regulation, which is a technical amendment to REACH, includes the types of equipment to be used in testing and ways data should be analyzed and reported. The new regulations were published in the July 23, 2009, issue of the *Official Journal of the European Union*.

## Scientific/Technical Items

### [13] Water: NRDC Report Criticizes EPA Regulation of Atrazine in Drinking Water

A recent NRDC [report](#) criticizes EPA's regulation of atrazine in drinking water and urges a ban on the herbicide. Atrazine is used as a weed killer on lawns and fields planted with crops such as corn and sorghum. In the report, NRDC claims that spikes in atrazine contamination recorded in an EPA monitoring program allowed too much of the chemical to reach the public and created human health and wildlife risks. The report also faults EPA for failing to design and implement a monitoring program that would detect contaminant peaks and for not monitoring the 1,172 watersheds in the United States that have the highest risk of atrazine contamination. According to press reports, EPA responded to the report by saying that the agency "will take a hard look at atrazine and other substances." See *BNA Daily Environment Report*, August 26, 2009.



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