

# Environmental & Chemical Update

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SUSTAINABILITY • TOXIC TORT • WASTE • WATER

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## Litigation and Regulatory Enforcement

### [1] Toxic Torts: Ninth Circuit Finds No Foreign Government Conduct, Remands Philippine Pollution Lawsuit to State Court

The Ninth Circuit Court of Appeals has returned a case to a Nevada state court after ruling that allegations of direct involvement in pollution by the Philippine government were too vague to establish a federal question. *Provincial Gov't of Marinduque v. Placer Dome, Inc., No. 07-16306, (9th Cir. 9/29/09)*. The Provincial Government of Marinduque filed this action in 2005 in a Nevada state court, alleging environmental degradation and economic damages as well as adverse impacts on public health near a copper mine formerly operated by a Placer Dome, Inc. subsidiary. The jurisdiction was chosen because Placer Dome, a Canadian company, had significant business connections in Nevada.

According to the complaint, Placer Dome severely polluted the lands and waters of Marinduque for some 30 years, caused two cataclysmic environmental disasters and poisoned the islanders by contaminating their food and water sources—all in violation of Philippine law. Placer Dome thereafter removed the action to federal court on the basis of federal-question jurisdiction. Specifically, Placer Dome contended that the case raised questions of “international law and foreign relations.” The Province filed a motion for remand to state court,

and the district court denied the motion, ruling that federal-question jurisdiction existed under the federal common law “act of state” doctrine. The district court then dismissed the lawsuit on *forum non conveniens* grounds, and plaintiff appealed.

The appeals court ruled that removing a case from state court on the basis of federal-question jurisdiction requires a plainly stated federal question with factual and legal allegations spelled out. A “general invocation of international law” is insufficient to demonstrate that “an act of state” is an essential element of a claim, according to the court. The court also noted that the Philippine government now openly condemns the conduct of former President Ferdinand Marcos, who had an ownership interest in the mine, so the matter can no longer be classified as “an act of state.”

### [2] RCRA: Federal Court Upholds EPA Definition of “Spent Material”

A federal judge in the District of Columbia has upheld EPA’s definition of “spent material,” rejecting an argument that a \$309,000 penalty imposed for RCRA shipping violations should be dismissed because EPA’s interpretation of what constitutes “spent material” is unreasonable and too broad. *Howmet Corp. v. EPA, No. 07-1036 (D.D.C. 9/23/09)*. In a 2003 enforcement action against Howmet Corp., EPA alleged that the company shipped used cleaner solutions from plants in New Jersey and Texas to a fertilizer company without following RCRA shipping require-



ments. The cleaners, which consisted of liquid potassium hydroxide (KOH), were used to clean metal casings until they became too contaminated. They were then shipped to a fertilizer maker for use in its fertilizers.

At issue was EPA's interpretation of "spent material," defined by RCRA as "any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing." Under RCRA, a "spent material" is hazardous waste and must be treated as such. The company argued that it did not have to follow RCRA regulations when it transported the cleaners because KOH is also manufactured for use as a fertilizer ingredient. Because KOH's use in fertilizer was a "purpose for which it was produced," it could not be a "spent material" under RCRA, according to the company.

An administrative law judge and the district court rejected the company's argument. While acknowledging that the definition of "spent material" was ambiguous, they deferred to the agency's interpretation of its own regulations. The court noted that EPA has consistently interpreted and applied the spent material definition in association with a material's "intended or original use."

### **[3] NEPA: Challenge to Presidential Pipeline Permit Dismissed**

A federal judge in the District of Columbia has dismissed a lawsuit brought by environmental groups challenging the State Department's issuance of a presidential permit allowing the construction of a 2,148-mile oil pipeline from western Canada into the central United States. *NRDC v. Dept. of State*, No. 08-1363 (D.D.C. 9/29/09). The project, known as the Keystone Pipeline, will transport heavy crude oil from Canadian tar sands to termi-

nals and refineries in the United States. It will have an initial capacity of 435,000 barrels per day in late 2009 and will be expanded to a capacity of 590,000 barrels per day in late 2010. Plaintiffs argued that the project would lead to "an environmental catastrophe" and should be halted. They claimed that the State Department's final environmental impact statement (EIS) did not comply with NEPA and its implementing regulations.

According to the court, "the President has complete, unfettered discretion over the permitting process. No statute curtails the President's authority to direct whether the State Department, or any other department for that matter, issues a presidential permit." The court said that to expose these types of permitting decisions to judicial review would run afoul of the separation of powers.

### **[4] CERCLA: Federal Court Finds Attorneys' Fees Not Recoverable Where Costs Not Related to Cleanup**

A federal judge in New Jersey has ruled that attorneys' fees may not be recovered in a CERCLA cost recovery action unless they are directly related to the cleanup of contamination. *Bonnieview Homeowners Ass'n, L.L.C. v. Woodmont Builders, L.L.C.*, No. 03-4317 (D.N.J. 9/22/09).

In 1997, defendant was retained to develop a property for the construction of single-family homes. Defendant failed to test soil on the property for hazardous substances and, in 2002, the town of Montville discovered that part of the property was contaminated with arsenic and insecticides. Retesting identified the presence of arsenic, dieldrin, lead, and DDT.

A homeowners association and its members then sued under CERCLA seeking, among other costs, fees paid to their attorneys for participating



in meetings and conferences with the New Jersey Department of Environmental Protection “about the investigation and remedial options.” They argued that the meetings were “wholly separate from the conduct of the litigation” and that the attorneys’ work was “tied to the actual cleanup [and] may constitute a necessary cost of response in itself under” CERCLA.

The court disagreed, saying plaintiffs “offer no explanation . . . how this work was closely tied to the actual cleanup” as required by *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), or how it was “necessary to the containment and cleanup of hazardous releases,” as required by *Redland Soccer Club, Inc. v. Department of the Army*, 55 F.3d 827 (3d Cir. 1995). According to the court, there was no evidence that the actions of plaintiffs’ attorneys “furthered the cleanup of the residential lots.”

#### **[5] Env'tl. Crime: Company Fined \$18 Million for Illegally Storing Mercury**

A federal judge in Rhode Island has assessed the Southern Union Co. an \$18 million fine for illegally storing mercury at a company-owned site in Pawtucket. The sentence includes a \$6 million criminal fine and \$12 million in payments to community initiatives including the Rhode Island Foundation, Rhode Island Department of Environmental Protection Emergency Response Fund and Hasbro’s Children’s Hospital. In October 2008, a federal jury found the company guilty of illegally storing mercury for several years at a site near the Seekonk River.

According to court documents, the company began removing customers’ home gas regulators containing mercury in 2001. The regulators were stored in a shed at the company’s facility along with loose liquid mercury. In September 2004, the shed

was broken into, and several containers of mercury were stolen. The thieves broke some of them, spilling mercury around the facility, and took some to a nearby apartment complex. After the mercury was discovered, the apartment complex’s occupants were evacuated, and its 150 tenants were displaced for two months while the mercury was cleaned up. *See DOJ Press Release*, October 2, 2009.

#### **[6] Env'tl. Crime: Greek Shipping Company Pleads Guilty to Criminal Violations of Ocean Dumping and Other Laws**

A Greek shipping company has reportedly pleaded guilty to violations of federal anti-pollution laws, shipping safety laws and making false statements to the Coast Guard, and has agreed to pay a \$2.7 million criminal fine. *U.S. v. Polembros Shipping Ltd.*, No. 09-00252 (E.D. La. 9/30/09). According to the plea agreement, the company will also make a \$100,000 community service payment to the Smithsonian Environmental Research Center. The payment will be used to research and mitigate the effects of marine invasive species suspected of being transported by ocean-going vessels in ballast waters.

The company pleaded guilty to two counts of violating the Act to Prevent Pollution from Ships, one count of failing to maintain an accurate oil record book on one of its ships and violations of the Non-indigenous Aquatic Nuisance Prevention and Control Act (NANPCA) and the Ports of Waterways Safety Act. The case is the first criminal prosecution under the NANPCA, which requires ships to maintain accurate ballast water records. The master and highest ranking officer aboard the ship also pleaded guilty to violations of environmental and ship safety laws as well as to obstruction of justice; they will be sentenced in November. *See DOJ Press Release*, September 30, 2009.



## [7] Water: HRSD Agrees to Settle Sanitary Sewer Violations

The Hampton Roads, Virginia Sanitation District (HRSD) has reportedly agreed to pay a \$900,000 civil penalty and spend millions of dollars for infrastructure improvements over the next eight years to settle alleged Clean Water Act violations. *U.S. v. Hampton Roads Sanitation Dist.*, No. N/A (E.D. Va. *proposed consent decree filed 9/29/09*). EPA and DOJ had charged the district with repeated violations of the CWA by failing to keep untreated and undertreated sewage from flowing into the Chesapeake Bay and the Atlantic Ocean.

Under a proposed consent decree filed in federal court, the district would have to collect data, conduct computer modeling and develop a regional plan to ensure that its sewer system has adequate capacity to handle flows from heavy rains and prevent sewage overflows. The proposed settlement would also require the district to modernize its sewer system infrastructure at an estimated cost of at least \$140 million. *See BNA Daily Environment Report*, October 1, 2009.

## Legislation, Regulations and Guidance

### [8] Air/Greenhouse Gases: Proposed EPA Rule Regulates GHGs Under the CAA, Permit Requirements Limited to Large Sources

EPA acted to address greenhouse gas (GHG) emissions under the Clean Air Act (CAA) by releasing a [proposed rule](#) that would amend major source applicability thresholds under the CAA's Prevention of Significant Deterioration (PSD) and title V programs.

Both programs regulate pollutant emissions by requiring permits for new and existing sources when emissions reach a certain level, but the programs have yet to regulate GHG emissions.

The rule calls for GHG regulation and increases the threshold requirement for permits under both programs to 25,000 tons of CO<sub>2</sub> or CO<sub>2</sub>-equivalent GHGs a year, a substantial increase from the current thresholds for other harmful pollutants. The rule also requires those subject to the requirements to demonstrate the use of best available control technologies to minimize GHG emissions. The increase will, in effect, exempt many small businesses and farms from permit requirements, while retaining the requirements for the largest emitters.

EPA Administrator Lisa Jackson promotes the rule as a common-sense use of the CAA. The rule may also serve to strengthen President Barack Obama's negotiating power at the December 2009 United Nations' talks in Copenhagen. Opponents argue that EPA lacks the legal authority to regulate GHGs or reduce threshold requirements under the CAA.

According to EPA, the change is necessary to accommodate a GHG emissions-control rule on light-duty motor vehicles that the agency plans to promulgate in 2010. Since the motor vehicle rule will trigger PSD and title V applicability requirements for stationary sources, EPA expects that the current threshold requirements would bring millions of additional sources into the permitting programs, an increase that is administratively infeasible. As a result, EPA found the blanket threshold increase legally justified under the judicial doctrines of "absurd results" and "administrative necessity."

The rule proposes a two-phase system. The phase-one threshold will remain in effect until EPA conducts a full assessment, which it has committed



to do within five years, of the actual resources required to administer the programs. At that point, phase-two thresholds will be established based on the study's results. The proposed rule will be open for public comment for 60 days after it is published in the Federal Register. See *EPA Fact Sheet*, September 30, 2009.

### [9] Nanotechnology: Nanomaterials Research Strategy Announced

EPA has released a new **strategy** to guide its research into how nanomaterials used in a number of consumer products might be harming human health and the environment. Nanomaterials, particles between about 1 nanometer and 100 nanometers in size, are used in hundreds of consumer products, including sunscreen, cosmetics and sports equipment.

According to EPA, the strategy focuses on identifying sources, fate, transport, and exposure to nanomaterials; understanding the human health and ecological effects of nanomaterials to inform risk assessments and test methods; developing risk assessment approaches; and preventing and mitigating risks.

The strategy is intended to help decision-makers answer these questions: (i) What nanomaterials, and in what form, are most likely to result in environmental exposure?; (ii) What particular nanomaterial properties may raise toxicity concerns?; (iii) Are nanomaterials with these properties likely to be present in environmental media or biological systems at concentrations of concern, and what does this mean for risk?; and (iv) If the answer to previous question is yes, can the material's properties be changed or can exposure be mitigated?

### [10] Air: EPA Amends NSPS for Coal Preparation and Processing Plants

EPA is issuing a **final rule** that amends the Clean Air Act's new source performance standards (NSPS) for coal preparation and processing plants for particulate matter, sulfur dioxide, nitrogen oxides, and carbon monoxide.

The revised standards will apply to coal processing facilities at coal mines, power plants, cement plants, coke manufacturing facilities, and other industrial sites that process more than 200 tons of coal per day.

As part of a consent decree, EPA had until September 26, 2009, to finalize the new NSPS for coal processing plants. *Kentuckians for the Commw. v. Johnson*, No. 06-0184 (D.D.C. 12/01/06). The final rule revises regulations at 40 C.F.R. Part 60, subpart Y. The rule will be effective when published in the *Federal Register*.

### [11] OSHA: OSHA Proposes Revisions to HCS to Conform to UN System

The Occupational Safety and Health Administration (OSHA) has **proposed** revisions to its Hazardous Communication Standard (HCS) to conform to provisions of the United Nations' Globally Harmonized System of Classification and Labeling Chemicals. *74 Fed. Reg.* 50,279 (9/30/09).

The current HCS requires chemical manufacturers and importers to evaluate the hazards they produce or import and provide information to subsequent users. The standard requires all employers to have hazard communication programs, which include container labeling and other forms of warning, material safety data sheets and employee training.



Among the proposed revisions are (i) “revised criteria for classification of chemical hazards”; (ii) “revised labeling provisions that include requirements for use of standardized signal words, pictograms, hazard statements, and precautionary statements”; (iii) “a specified format for safety data sheets”; and (iv) “related revisions to definitions of terms used in the standard, requirements for employee training on labels and safety data sheets.”

The agency has also proposed modifying provisions for a number of other standards, including those for flammable and combustible liquids, process safety management, and most substance-specific health standards, to ensure consistency with the modified HCS requirements. Comments on the proposal must be submitted by December 29, 2009.

#### **[12] RCRA: GAO Report Critical of DOE’s Estimated Cleanup Costs for Hanford**

The Government Accountability Office (GAO) has issued a [report](#) criticizing the Department of Energy’s (DOE) estimate for the cleanup costs of radioactive and hazardous waste stored in underground tanks at the Hanford Nuclear Reservation in Washington state.

At the Hanford site, DOE is responsible for the treatment and disposal of 56 million gallons of waste stored in 177 underground tanks. According to the report, DOE has not systematically evaluated whether its tank-waste cleanup strategy is commensurate with risks the wastes pose.

DOE’s current estimate of \$77 billion could easily be exceeded, with outside estimates running from \$88 billion to more than \$100 billion. GAO recommends that DOE (i) establish and provide Congress with credible and complete life-cycle costs and

schedule estimates, (ii) develop a risk assessment framework for the cleanup, (iii) work with state and federal regulators on a risk-based strategy for tank closure, and (iv) consider whether some waste could be left in the tanks without jeopardizing human health or the environment.

## **Scientific/Technical Items**

### **[13] Wetlands: MMS Study Links Wetlands Loss to OCS Oil and Gas Pipelines**

A recent Department of the Interior’s Minerals Management Service (MMS) [study](#) concludes that pipeline construction related to oil and gas production in the Outer Continental Shelf (OCS) of the Gulf of Mexico “can cause locally intense habitat changes, thereby contributing to the loss of critically important land and wetland areas.” The researchers used computer models to interpret satellite and other data, gauging the impacts of pipelines and navigation channels on coastal areas in Alabama, Louisiana, Mississippi, and Texas.

The largest impacts on wetlands were found in the coastal areas of Texas and Louisiana. The study found direct impacts from dredging and indirect impacts from canal and spoil bank construction. They included altered flooding patterns for adjacent wetlands caused by the spoil banks or saltwater intrusion from the Gulf through the canals. In Louisiana, OCS pipelines covered 480 square miles of wetlands, and land and navigation channels covered 137 square miles or about 11 percent of the Louisiana coast. The greatest land loss from navigation canals occurred in Texas, with slightly lower losses in Louisiana and the lowest in Alabama.



The study recommends (i) the use of mitigation measures to minimize habitat impacts; (ii) routine maintenance of mitigation measures to maintain construction elevation and hydraulic conditions to counter long-term processes like soil subsidence; (iii) the use of the least-damaging construction method when options are available, and (iv) finding alternatives to flotation canal dredging, such as installing pipes using a push-pull method in ditches that are backfilled or by directional drilling to put the pipes underground.



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