

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] Toxic Tort/Greenhouse Gases: Fifth Circuit Revives Katrina GHG Lawsuit

The Fifth Circuit Court of Appeals has revived a mass tort action which alleges that the greenhouse gas (GHG) emissions of dozens of oil and chemical companies caused increased damage to plaintiffs' Mississippi coastal properties during Hurricane Katrina. *Comer v. Murphy Oil USA, No. 07-60756 (5th Cir. 10/16/09)*. The decision reverses a district court ruling that tort lawsuits against GHG emitters could not proceed in federal court because climate change is a political question that cannot be decided by the courts.

Defendants argued that plaintiffs lacked standing because they had not shown that the hurricane damage to their properties was traceable to the companies' emissions. Relying on *Massachusetts v. EPA*, 549 U.S. 497 (2007), the court ruled that private property owners have standing under state law to bring climate-related nuisance and trespass claims for both property and punitive damages, noting, "the Supreme Court accepted as plausible a link between man-made GHG emissions and global warming ... as well as the nexus of warmer climate and rising ocean temperatures with the strength of hurricanes."

As to justiciability, the appeals court determined that, until Congress enacts laws or federal agencies adopt regulations that comprehensively govern

GHG emissions and such laws or regulations preempt aspects of state common law tort claims, the "Mississippi common law tort rules questions posed by the present case are justiciable."

Other recent decisions have split on whether the courts are the proper forum for GHG-related claims. In *Connecticut v. American Electric Power Co.*, No. 05-5104 (2nd Cir. 09/21/09), the Second Circuit Court of Appeals ruled that the judiciary is a proper forum to adjudicate global warming disputes and alleged damages. On September 30, 2009, the U.S. District Court for the Northern District of California dismissed a global climate change lawsuit, ruling that the question of how to address global warming was a political issue and not appropriate for the courts to decide. *Native Vill. of Kivalina v. Exxon Mobil Corp.*, No. 08-1138 (N.D. Cal. 09/30/09). That district court is the Ninth Circuit.

[2] CERCLA: Second Circuit Rules Fire Department Responders Not Liable as Operators

The Second Circuit Court of Appeals has ruled that North Amityville, New York, fire fighters, responding to a fire in 2000 that destroyed a building and released hazardous substances stored there into the environment, were not liable as "operators" under CERCLA *AMW Materials Testing, Inc. v. Town of Babylon, No. 08-1731 (2nd Cir. 10/19/09)*. Plaintiff building owners sued the town and fire department under CERCLA and New York tort law to recover costs incurred responding to the release.



Plaintiffs argued that defendants were “operators” under CERCLA at the time of the release and were therefore liable for cleanup costs under section 107(a) of CERCLA; they also argued that emergency response actions under section 107(d)(2) of CERCLA cannot constitute an affirmative defense to section 107(a) liability. The district court entered judgment in favor of defendants after trial, and plaintiffs appealed.

Rejecting plaintiff’s arguments, the appeals court relied on the language of CERCLA and its definition of operator and *U.S. v. Best Foods*, 524 U.S. 51 (1998), which held that “an operator must manage, direct, or conduct operations specifically related to pollution, that is operations having to do with the leakage or disposal of hazardous [substances], or decisions about compliance with environmental regulation.”

According to the court, the circumstances of the instant case would not permit a conclusion as a matter of law that defendants had sufficient control over the hazardous substances to “manage, direct, or conduct operations specifically related to pollution.” The court then reviewed section 107(d)(2) of CERCLA, which commands that “[n]o state or local government shall be liable under this subchapter” if it is responding to the type of emergency defined in the provision, unless the alleged damages are the “result of gross negligence or intentional misconduct.” The court found no evidence of “gross negligence or intentional conduct” and that other sections of CERCLA did not alter the affirmative defense provision in section 107(d)(2). The court also ruled that plaintiffs’ tort claims lacked merit.

[3] **Envtl. Crime: Shipping Company Agrees to Pay \$1.25 Million to Settle Ocean Dumping Charges**

A Panamanian shipping company has reportedly agreed to pay \$1.25 million to settle federal felony charges of knowingly concealing pollution discharges into the sea, in violation of the Act to Prevent Pollution from Ships. *U.S. v. Styga Compania Naviera S.A.*, No. 09-00572 (S.D. Tex. plea agreement 10/21/09). According to court documents, senior engineers on the oil tanker M/T Georgios M failed to log into the record book the discharge of sludge and oily waste, which was discharged directly into the ocean using a “magic pipe” bypass that circumvented required pollution-control equipment.

The engineers then made false entries in the oil record book to conceal the fact that pollution-control equipment had not been used. The bypass pipe was used from December 2006 until February 2009, and it was concealed from U.S. Coast Guard inspectors when they boarded the vessel at the port of Texas City in February 2009. The fine includes a \$250,000 payment to the National Marine Sanctuary Foundation. The agreement is subject to public comment and court approval. *See DOJ Press Release* and *BNA Daily Environment Report*, October 26, 2009.

[4] **Air: Port Announces Proposed Settlement of Clean-Trucks Program Lawsuit**

The Port of Long Beach, California, announced October 19, 2009, a proposed settlement of the trucking industry’s challenge to the port’s Clean-Trucks Program. *Am. Trucking Ass’n, Inc. v. City of Los Angeles*, No. 08-4920 (C.D. Cal. proposed settlement announced 10/19/09). In April 2009, the court blocked the port from enforcing portions of the



program after finding that federal laws preempted it. The proposed settlement addresses the preemption issue by establishing a new motor carrier registration process. The companies also agree to comply with the port's "environmental, safety and security requirements." The trucking association's lawsuit challenging a similar program at the Port of Los Angeles is still pending. *See BNA Daily Environment Report*, October 22, 2009.

[5] Air: EPA Agrees to Propose Technology-Based Power Plants Emissions Standards

As part of a proposed consent decree in a 2008 lawsuit brought by environmental groups, EPA has agreed to propose technology-based standards to control emissions of mercury and other air toxins from fossil fuel-fired power plants by March 2011. *Am. Nurses Ass'n v. Jackson*, No. 08-2198 (D.D.C. consent decree proposed 10/22/09). The proposed agreement requires EPA to issue final maximum achievable control technology (MACT) standards for hazardous pollutant emissions from power plants by November 16, 2011. The proposed consent decree is subject to public comment and judicial approval. *See DOJ Press Release* and *BNA Daily Environment Report*, October 26, 2009.

[6] CERCLA: San Diego Sues Navy and Shipbuilders over Bay Pollution

The City of San Diego, California, has reportedly sued the U.S. Navy, a number of shipbuilders and a utility over pollution in San Diego Bay. *San Diego v. Nat'l Steel & Shipbuilding Co.*, No. 09-2275 (S.D. Cal. filed 10/14/09). The complaint seeks a court declaration of responsibility and liability for an ocean floor parcel known as "Shipyard Sediment Site."

Filed under CERCLA, the complaint seeks the recovery of costs the city expended to investigate, clean up, remove contaminated sediments and soils, and monitor and remediate the site. It also seeks contribution under the state's Hazardous Substance Account Act. The complaint names National Steel & Shipbuilding Co., National Iron Works, Martinolich Ship Building Co., BAE Systems, San Diego Marine and Construction Co., and San Diego Gas & Electric as defendants in addition to the U.S. Navy. *See BNA Daily Environment Report*, October 22, 2009.

[7] FIFRA: Computer Manufacturer Agrees to Fine for Antimicrobial Keyboard Claims

Computer manufacturer Samsung has reportedly agreed to pay a \$205,000 civil penalty under FIFRA and stop making claims that its "antimicrobial" keyboards inhibit germs and bacteria. According to EPA, the company's labels and promotional material claims make the products pesticides, which require registration under FIFRA. The company, using silver nanotechnology to produce the purported antimicrobial effects, failed to register its products and thereby violated FIFRA. In addition to paying the fine, the company agreed to provide certification to EPA that it has removed all pesticidal claims from its products and to notify retailers and distributors to remove the pesticidal claims from labels, promotional brochures and Internet or Web-based content for the products. *See EPA Press Release* and *Law 360*, October 21, 2009.



Legislation, Regulations and Guidance

[8] Air: EPA Finalizes NESHAPs for Chemical Manufacturing Sources

EPA released a [final rule](#), October 20, 2009, that will establish work practices and set emission limits on some equipment at nine categories of small chemical manufacturing operations to reduce emissions of hazardous pollutants. The rule will amend 40 C.F.R. Part 63.

It will establish hazardous air pollutant standards for (i) agricultural chemicals and pesticide manufacturing, (ii) cyclic crude and intermediate production, (iii) industrial inorganic chemical manufacturing, (iv) industrial organic chemical manufacturing, (v) inorganic pigments manufacturing, (vi) miscellaneous organic chemical manufacturing, (vii) plastic materials and resins manufacturing, (viii) pharmaceutical production, and (iv) synthetic rubber manufacturing. The rule will establish work practices and emissions controls as the generally available control technology standard for area source chemical manufacturers—those that emit less than 10 tons annually of a single air toxin or less than 25 tons per year of any combination of hazardous air pollutants. The rule will be effective when it is published in the *Federal Register*.

[9] Climate Change: Boxer Releases Chairman's Mark, EPA Cost Analysis of Senate Climate Change Bill

U.S. Senator Barbara Boxer (D-Calif.) recently released the [chairman's mark](#) of the Clean Energy Jobs and American Power Act ([S.B. 1733](#)) along with EPA's [cost analysis](#) of the bill. The markup

primarily mirrors the legislation passed by the House, but also specifies which entities stand to receive a share of free allowances.

Under Boxer's proposal (i) state-regulated and local electric distribution companies would receive 30 percent of the allowances; (ii) local natural gas distribution companies would receive 9 percent; (iii) energy intensive industries such as steel and chemical would initially receive 4 percent, increasing to 15 percent in 2014 and 2015; (iv) merchant coal generators would receive 3.5 percent; (v) companies with long-term power purchase agreements would receive 1.5 percent; and (vi) the automobile industry would receive 3 percent in 2017, decreasing to 1 percent in 2018. According to EPA, both bills would cost the average U.S. household approximately \$100 per year.

Boxer's draft would also distribute free allowances to support many other entities and programs, including domestic energy production and clean coal technology. To stimulate the development of carbon capture and sequestration technologies, the legislation would create a bonus allowance program for early actors with a requirement that the funded projects achieve at least a 50 percent reduction in greenhouse gas (GHG) emissions. Other new allocation programs include funding for transportation projects that reduce GHG emissions, an enhanced agriculture and forestry provision and a provision giving small business refiners additional time to comply with emission requirements under the bill.

The biggest difference between the House and Senate versions is the number of free allowances given to reduce the deficit. Boxer's measure would initially send 10 percent of the allowances to the Treasury Department, increasing to 22 percent in 2040. The House bill would send 13 percent initially



with a 1 percent increase in 2014, but calls for no allowances after 2023. See *Law360.com*, October 23, 2009.

[10] HazMat: DOT Seeks Comments on Proposed Revisions to HazMat Regulations

The Department of Transportation's Pipeline and Hazardous Materials Administration is **seeking** comments on proposed amendments to hazardous materials (HazMat) regulations by incorporating various amendments to international standards and model regulations. *74 Fed. Reg.* 53,982 (10/21/09). Possible amendments include changes to proper shipping names, hazard classes, packing groups, special provisions, and packaging authorizations.

The proposed amendments would harmonize the regulations with revised editions of the United Nations' Recommendations on the Transport of Dangerous Goods Model Regulations, the International Maritime Organization's Dangerous Goods Code, the International Civil Aviation Organization's Technical Instructions for Safe Transport of Dangerous Goods by Air, and Transport Canada's Transport of Dangerous Goods Regulations. The agency may also propose rule changes about the transport of limited quantities of certain hazardous materials. Comments are due to the agency by January 19, 2010.

[11] Chemical Exposure: CPSC Issues Guidance on Testing and Certification of Lead Content in Children's Products

The Consumer Product Safety Commission (CPSC) has issued **guidance** on the testing and certification of lead content in children's products. Lead content limits are established by the Consumer

Product Safety Improvement Act (CPSIA). Under CPSIA, products intended for use by children cannot contain more than 300 parts per million of lead. The guidance attempts to answer questions prompted by a final rule issued in August 2009 outlining the agency's determination that some materials used in children's products do not inherently contain lead.

The guidance also discusses CPSC's plan to issue a "testing rule" to address component-part testing and establish standards. According to the agency, this rule would answer questions related to lead content in children's products that are made of numerous materials and component parts, some of which may or may not contain lead. CPSC has issued a stay of testing enforcement and certification requirements to the 300 ppm content limit until February 2010.

[12] Air: Michigan DEQ Issues Rules Requiring Power Plants to Limit Mercury Emissions

The Michigan Department of Environmental Quality (Michigan DEQ) has issued **final rules** that require coal-fired power plants to reduce mercury emissions by as much as 90 percent. The rules provide regulated companies with three options: (i) an "input-output" strategy of reducing emissions by 90 percent from 1990 input levels or by a 12-month rolling average basis, or by cutting the amount of mercury in coal before it leaves the smokestack; (ii) a "multi-pollutant" compliance demonstration project that reduces mercury emissions by 75 percent, along with reductions in nitrogen oxides and sulfur dioxide emissions; or (iii) an alternative compliance demonstration project for plants that use no more than nine pounds of mercury per year.



The new rules were effective immediately when filed with the secretary of state, except for a few that were effective seven days after filing.

Scientific/Technical Items

[13] Chemical Exposure: Study Alleges Link Between Early Childhood Lead Exposure and Academic Issues

A recent study by researchers with the Children's Environmental Health Board of the North Carolina Department of Environment and Natural Resources claims to have found a link between early childhood lead exposure and poor academic performance. Marie Lynn Miranda, et al., "Environmental Contributors to the Achievement Gap," *Neurotoxicology* (2009).

The researchers examined data on blood levels from the North Carolina Lead Poisoning Prevention Program's surveillance registry and fourth-grade reading scores. The study claims that early childhood lead exposure accounted for up to 16 percent of test-score declines, while the family's poverty level accounted for up to 28 percent of the decline. The study recommends that the Centers for Disease Control and Prevention lower its blood lead action level, which is currently set at 10 milligrams per deciliter.



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

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