

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] Standing: D.C. Circuit Finds No Harm to North Carolina in Challenge to EPA Rule

The D.C. Circuit Court of Appeals has ruled that North Carolina lacks standing to challenge an EPA rule that withdrew another rule, the “NO_x SIP Call,” which would have subjected the northern part of Georgia to regulations controlling emissions that contribute to ozone formation. [*North Carolina v. EPA*, No. 08-1225 \(D.C. Cir. 11/26/09\)](#). In the challenged rule, EPA removed the northern portion of Georgia from a requirement to reduce emissions of nitrogen oxide (NO_x) as part of the NO_x state implementation plan (SIP). *73 Fed. Reg.* 21,528 (04/22/08). North Carolina filed a petition for review in June 2008, alleging that Georgia’s NO_x emissions contributed to North Carolina’s inability to attain the ozone national ambient air quality standards (NAAQS).

The Georgia Environmental Protection Agency submitted evidence which demonstrated that reinstating the NO_x SIP Call for the state would not assist North Carolina in achieving the ozone air quality standards. The court ruled that North Carolina could not demonstrate a harm that could be redressed and therefore lacked standing.

[2] NRC Licensing: Second Circuit Upholds NRC Decision in Nuclear Plant License Renewal

The Second Circuit Court of Appeals has upheld a U.S. Nuclear Regulatory Commission (NRC) decision rejecting petitions to waive certain rules and to intervene filed by local residents in the license-renewal adjudication of the Indian Point Energy nuclear power plant. [*Burton v. U.S.*, No. 09-0005 \(2d Cir. 11/23/09\) \(summary order\)](#). The residents filed a petition to waive the application of certain regulations to a license-renewal adjudication and then filed a petition to intervene to present evidence that would be barred by those regulations.

The power plant has two reactors that are licensed through 2013 and 2015, respectively. The petitioners alleged that the utility had not adequately considered the health risks of cumulative radiation exposure from accidental releases over a long period of time. Plant owners and the NRC opposed the petition to intervene on the ground that it was a challenge to global NRC regulations, with which the reactors must comply, and therefore was beyond the scope of license-renewal proceedings. The court held that the NRC’s action was not arbitrary and capricious under the Administrative Procedure Act and therefore upheld its denial of both petitions.



[3] CERCLA: Federal Court Finds Government Lacked Sufficient Control to Be Held Liable as Operator

A federal judge in California has ruled that the federal government is not liable under CERCLA as an operator of a manufacturing plant where rocket motors were once made for the military, because a private corporate owner conducted all of the plant's day-to-day operations and waste-disposal activities. *Steadfast Ins. Co. v. U.S.*, No. 06-4686 (C.D. Cal. 11/10/09).

Plaintiff argued that the government was liable as an operator for rocket fuel-related contamination found on the plant property because, under contracts between the military and the plant's prior owner, the company agreed to abide by a Department of Defense safety manual that required certain waste disposal. Plaintiff argued that, with the use of the safety manual and the on-site presence of military inspectors, enough government control was exerted over the plant's disposal of perchlorate to make the military a plant operator under *U.S. v. Bestfoods*, 524 U.S. 51 (1998).

Rejecting plaintiff's argument, the court held that the safety manual, the presence of inspectors and other activities carried out by the military at the site did not amount to the type of extensive control over waste disposal or pollution practices contemplated by *Best Foods*. According to the court, "[t]he undisputed facts reveal that [the] USA has neither managed, directed nor conducted operations specifically related to pollution" as required by the U.S. Supreme Court to impose operator liability.

[4] FTCA: Damages Awarded for Corps' Negligent Operation and Maintenance of MRGO Before Hurricane Katrina

A federal judge in Louisiana has ruled that the U.S. Army Corps of Engineers (Corps) negligently operated and maintained the Mississippi River-Gulf Outlet (MRGO) before Hurricane Katrina. *In re: Katrina Canal Beaches Consol. Litig.*, No. 05-4182 (E.D. La. 11/18/09). The court awarded plaintiffs \$720,000 in damages under the Federal Tort Claims Act (FTCA) after finding they had demonstrated that known defects in the MRGO and the Corps' subsequent failure to take action contributed significantly to the devastation Hurricane Katrina caused in New Orleans' Lower Ninth Ward and St. Bernard Parish. According to the Court:

[i]t is the Court's opinion that the negligence of the Corps, in this instance by failing to maintain the MRGO properly, was not policy, but insouciance, myopia and shortsightedness ... The Corps had an opportunity to take a myriad of actions to alleviate this deterioration or rehabilitate this deterioration and failed to do so. Clearly the expression "talk is cheap" applies here.

While the award is only a fraction of the potential damages, news reports speculate that the decision could expose the Corps to many other lawsuits and millions of dollars in potential liability. The MRGO is a 76-mile shipping channel that the Corps constructed in stages beginning in the 1950s. See *The Washington Post*, November 23, 2009.



[5] **CWA/NEPA: Corps Ordered to Comply with Public Notice Requirements in Mining Permit Process**

A federal judge in West Virginia has ruled that the U.S. Army Corps of Engineers (Corps), in issuing permits for coal mining operations in the state, violated the Clean Water Act (CWA) and NEPA by ignoring public notice requirements. *Obio Valley Envtl. Coal. v. Corps.*, No. 08-0979 (S.D. W. Va. 11/24/09). Environmental groups sued the Corps in 2008, alleging that the public notification and objection mechanism the Corps used in the permitting process was a sham because most of the applicant's environmental mitigation documents were submitted after the 30-day comment period had expired.

The court remanded the permits to the Corps for proceedings that would allow the public to comment on the environmental impact documents. The permits would allow the mining companies to fill in streams and rivers near their mining sites. Under the CWA, the companies must propose mitigating measures to the environmental degradation they may cause before they can acquire a permit.

[6] **Toxic Tort: Federal Court Dismisses Toxic Tort Lawsuit Under Discretionary Function Exemption**

A federal judge in South Carolina has dismissed a personal injury lawsuit against the federal government that accused the Department of Defense of causing releases of trichloroethylene (TCE) from a military base; the court ruled that the solvent was unregulated at the time and that the military has discretion over how it operates its bases. *Oxendine v. U.S.*, No. 08-4036 (D.S.C. 11/09/09). The federal court adopted a federal magistrate's report and recommendation that while the Federal Tort Claims Act (FTCA) waives sovereign immunity for some negli-

gence and other tort claims against the government, the discretionary function exception, which bars claims stemming from discretionary actions involving policy considerations, precludes the action in this case.

According to the report, plaintiff, who alleged multiple health ailments from long-term exposure to the TCE purportedly spilled or leaked at Shaw Air Force Base, could not pursue his FTCA claims because he could not identify any TCE statute or regulation that was effective in the 1940s and 1950s when the solvent was allegedly used at the base. The magistrate cited *Aragon v. U.S.*, 146 F.3d 819 (10th Cir. 1998), in support of his recommended decision.

[7] **Envtl. Crime: D.C. Metro Pleads Guilty to CWA Criminal Violations**

Washington D.C. Metro, the city's transit authority, has reportedly pleaded guilty to negligently discharging acidic water into the area's sewer system during rail-car washing operations in violation of the Clean Water Act (CWA). The Metro entered a guilty plea November 25, 2009, in the U.S. District Court for the District of Maryland.

According to court documents, the Metro retained a contractor in 1985 to clean or "restore" the exterior surface of rail cars because their automated washing had not sufficiently removed heavy soil and oxides that accumulated on the cars' aluminum surface during extended use. The contractor washed the cars' exterior with various chemicals, including hydrofluoric acid, a corrosive chemical known for its ability to dissolve metal oxides. Contractors using this process at two different rail yards experienced failures of the wastewater recycling system due to flow-pipe corrosion that allowed the wastewater to enter the Washington, D.C. sanitary sewer system without pretreatment.



The DOJ filed a complaint against the Metro on October 28, 2009. *U.S. v. Washington Metro. Transit Auth., No. 09-0557 (D. Md. 10/28/09)*. The court reportedly ordered the Metro to pay a \$200,000 fine, levied an 18-month probation and ordered the Metro to undergo regular inspections by EPA or the Suburban Sanitary Commission. See *Law360*, November 30, 2009.

[8] **Envtl. Crime: Import Company and President Plead Guilty to Smuggling Refrigerant into the United States**

A Miami, Florida, import company and its president have reportedly pleaded guilty to smuggling more than 1.4 million kilograms of hydrochlorofluorocarbon-22 (HCFC-22), a restricted refrigerant, into the United States. *U.S. v. Kroy Corp.*, No. 09-20913 (S.D. Fla. *plea agreement* 11/20/09). In separate plea agreements, the company and its president pleaded guilty to three counts of importing HCFC-22 in violation of the Clean Air Act. At a scheduled February 11, 2010, sentencing hearing, the company's president faces a maximum 20-year prison term on each count as well as a fine of \$250,000 per count. The company could be fined up to \$500,000 per count. See *BNA Daily Environment Report*, November 25, 2009.

Legislation, Regulations and Guidance

[9] **Water: EPA Issues Final Rule Imposing Limits on Storm Water Discharges from Construction Sites**

EPA has released a **final rule** that imposes national monitoring requirements and enforceable numeric limits on storm water discharges from construction sites. The rule requires all construction site owners and operators who disturb one or more acres to use erosion- and sediment-control best manage-

ment practices to ensure that soil disturbed during construction activity does not pollute nearby water bodies. It establishes technology-based effluent limitations guidelines and new source performance standards for the Clean Water Act's construction and development point-source category.

The largest sites, those that disturb 20 or more acres, will be required to monitor discharges and comply with the numeric effluent limitation starting 18 months after the rule's effective date. The monitoring requirement and effluent limits will apply four years after the effective date to sites that disturb between 10 and 19 acres. The Ninth Circuit Court of Appeals required the EPA to promulgate the rule, *NRDC v. EPA*, No. 07-55183 (9th Cir. 09/22/08), which takes effect 60 days after its December 1, 2009, publication in the *Federal Register*.

[10] **Water: SPCC Rule Amended; Exemption and Exclusion Removed**

EPA has issued **amendments** to the Spill Prevention, Control and Countermeasure (SPCC) rule at 40 C.F.R. Part 112. *74 Fed. Reg.* 58,783 (11/13/09). The amendments revise regulations published in December 2008 "to address a number of issues raised by the regulated community."

The final rule, effective January 14, 2010, removes (i) "the exclusion of farms and oil production facilities from the loading/unloading rack requirements," (ii) "the exemption for produced water containers at an oil production facility" and (iii) "the alternative qualified facility eligibility criteria for an oil production facility." The SPCC regulations require owners and operators of facilities that use, store, transfer, or consume oil or oil-based products to develop and implement professional certified spill-prevention plans to avoid discharges of oil to U.S. waters.



[11] Air: EPA Proposes NAAQS for SO₂

EPA has **proposed** a new National Ambient Air Quality Standard (NAAQS) for sulfur dioxide (SO₂). The proposed rule would revise the primary SO₂ standard to a level of between 50 and 100 parts per billion (ppb) measured over one hour. The existing primary standards are 140 ppb measured over 24 hours and 30 ppb measured over an entire year. The agency is also taking comments on alternative levels for the one-hour standard up to 150 ppb. The public comment period will be open for 60 days following the proposed rule's publication in the *Federal Register*.

[12] Air: California Air Board Releases Draft Regulation for Cap-and-Trade Program

The California Air Resources Board (ARB) recently released a draft cap-and-trade **regulation** designed to advance implementation of California's climate change legislation (**A.B. 32**), which seeks to reduce greenhouse gas (GHG) emissions to 1990 levels by 2020. According to the draft, "the cap-and-trade program would establish a cap covering about 85 percent of the State's GHG emissions and allow trading to ensure cost-effective emissions reductions."

The regulation apparently aims to achieve the following objectives: (i) "Requiring sources of GHG emissions to manage their emissions under an aggregate declining emissions cap that supports achieving the 2020 emissions target mandated by AB 32"; (ii) "Starting the program in 2012 with about 600 of the state's largest GHG emitting stationary sources (primarily industrial sources and electricity generators), along with electricity imports"; (iii) "Including emissions from transportation fuel combustion (e.g., gasoline, diesel, ethanol), and from fuel combustion at stationary sources that fall below the threshold for direct inclusion in the program (e.g. residential and commercial natural gas

combustion) by covering the suppliers of fuel to these sources"; (iv) "Requiring a minimum number of allowances to be auctioned at program start"; (v) "Allowing limited use of high quality offsets outside of capped sectors to cover a portion of the overall emissions reductions"; and (vi) "Establishing clear rules for emissions trading, monitoring, and enforcement."

While the regulation requires the auctioning of a minimum number of allowances, noticeably absent is a process outlining the distribution of allowances and the allocation of auction proceeds. The regulation also calls for a 4 percent limit on the use of offsets to comply with emissions caps. ARB is accepting draft comments through January 11, 2010. See *ARB Press Release*, November 24, 2009.

Scientific/Technical Items

[13] Chemical Exposure: EPA Study Finds High Mercury Levels in U.S. Lakes

EPA recently released **The National Study of Chemical Residues in Lake Fish Tissue**, which found that mercury concentrations in game fish exceed recommended levels in 49 percent of lakes and reservoirs. The four-year study also found that concentrations of polychlorinated biphenyls (PCBs) were at or above the 12-part-per-billion level of concern in 17 percent of lakes and reservoirs. EPA collected samples from 486 predator species, such as bass and trout, and 395 bottom-dweller species, such as catfish and carp, at 500 sampling locations in 48 states.

The fish were tested for 268 persistent, bioaccumulative and toxic chemicals. Researchers found mercury and PCBs in all of the fish samples from all sampling locations. The study also found concentrations of dioxins and furans in 81 percent of the predator samples and 99 percent of the bottom-dweller species.



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

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