

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] State Superfund: First Circuit Rules Bankruptcy Bars Contribution Claim

The First Circuit Court of Appeals has ruled that bankruptcy bars a contribution claim under the state superfund law for cleanup costs associated with a railroad's pre-bankruptcy oil spills. *Boston & Maine Corp v. Mass. Bay Transp. Auth., No. 09-1185 (1st Cir. 11/24/09)*. Plaintiff, the operator of buses, subways and light rail throughout eastern Massachusetts, sought to recover cleanup expenses attributable to oil and other hazardous substance spills at a railroad facility in Boston before 1983, despite the fact that claims against defendant, which once owned the facility, had been discharged in bankruptcy in 1983.

Plaintiff argued that its contribution claim should survive for pre-1983 spills because the state law regulating soil contamination from oil releases was enacted just a few months before defendant's bankruptcy discharge. The district court agreed, holding that because plaintiffs' claim was not "fairly contemplated" at the time of the 1983 bankruptcy, the claim was not discharged, and thus, the suit for contribution could proceed. Defendant appealed.

Reversing the district court, the appeals court found it undisputed that plaintiff, which purchased the facility from defendant in 1976, had actual knowledge before the bankruptcy discharge that many oil spills had occurred on the property.

Additionally, according to the court, because the state law was enacted about three months before the bankruptcy discharge, plaintiff knew that it was liable as the present owner in 1983 for all contamination at the facility.

[2] Toxic Tort: Fifth Circuit Finds Dredging Contractors Immune in Katrina Suit

The Fifth Circuit Court of Appeals has ruled that several contractors responsible for Mississippi River dredging, which plaintiffs claimed exacerbated damage from Hurricane Katrina, are immune from liability because they acted under authority granted by an act of Congress. *Ackerson v. Bean Dredging LLC, No. 07-30272 (5th Cir. 11/25/09)*. Plaintiffs filed a class action in 2006 against the United States and 32 dredging companies to recover damages from Hurricane Katrina; they also sought an injunction to prevent future dredging activities.

Plaintiffs alleged that defendant contractors caused environmental damage to protective wetlands in the Mississippi River Gulf Outlet (MRGO). According to the court, "The Plaintiffs also alleged that the MRGO project caused an amplification of the storm surge in the New Orleans region during Hurricane Katrina, undermining the levees and flood walls along the MRGO and the Industrial Canal that breached and flooded St. Bernard Parish and Orleans." Claims asserted included negligence, breach of implied warranty, concealment, and violation of several environmental statutes. The district court dismissed the complaint, ruling that the contractor-



defendant had government-contractor immunity under *Yearsly v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940). Plaintiffs appealed.

Affirming the district court, the Fifth Circuit held that government-contractor immunity protected the defendant-contractor because plaintiffs failed to allege or establish that the contractors acted outside the authority granted to them by the federal government or that the government granted that authority improperly.

[3] Air/Greenhouse Gases: Fifth Circuit Asked to Review Panel's Ruling in *Comer v. Murphy Oil Co.*

A large group of energy companies has asked the Fifth Circuit to review a panel decision allowing Mississippi property owners to sue energy companies for emitting greenhouse gases (GHGs), which allegedly contributed to Hurricane Katrina's ferocity. The energy companies contend that the panel erred in failing to uphold the district court's dismissal of the litigation on political question and standing grounds.

The panel rejected the companies' argument that regulating GHG emissions through the courts is contrary to the political question doctrine. Instead, the panel concluded that GHG regulation is not committed exclusively to any particular governmental branch, and, thus, until Congress enacts comprehensive GHG legislation, it is the court's duty to hear common law tort claims.

The energy defendants disagree with this characterization of the political question doctrine and argue that the panel's ruling impermissibly expands the judiciary's Article III power. The panel's decision, if upheld, would be "unprecedented and transformative" and lead to "staggering" results, they contend.

The energy defendants argue that this case presents several questions of "exceptional importance concerning the limits of federal judicial authority," including whether the court can hold a select number of GHG emitters liable for alleged global warming effects. They also state that this case presents a nonjusticiable political question because the proper level of emissions is a matter of national policy, not judicial fact finding.

Second, the defendants argue that plaintiffs do not have standing to seek damages from these particular defendants because they cannot allege facts showing that the injuries can be fairly traced to the defendants' emissions. Defendants also argue that, to one extent or another, everyone potentially contributes to global warming, and thus, the injuries alleged could not be traced to the individual defendants. The panel disagreed with this argument and stated that, while proximate causation may be a hurdle later in the case, the plaintiffs had standing to sue the defendants at this stage of the proceedings.

Ultimately, the defendants argue that the political question doctrine prohibits the judiciary from resolving far-reaching socioeconomic issues and that the courts lack judicially manageable standards to handle these types of cases. A similar rehearing request has been filed in *AEP v. Connecticut* in the Second Circuit, and an appeal of the *Village of Kivalina* from the Northern District of California has been filed in the Ninth Circuit. All three cases deal with similar allegations brought against GHG emitters.



[4] **Envtl. Crime: Poultry Processing Plant and Manager Indicted for CWA Criminal Violations**

A federal grand jury in Greensboro, North Carolina, has reportedly returned an indictment charging a poultry processor and a plant manager with multiple violations of the Clean Water Act for illegally discharging waste water from a facility in Raeford, North Carolina, between January 2005 and August 2006. According to Department of Justice documents, the plant manager allowed employees to bypass the facility's pretreatment system and discharge untreated wastewater to the Raeford Publicly Owned Treatment Works 14 times without notifying city officials. Many of the bypasses took place while the plant's owner was subject to a consent order with the city that specifically required the elimination of all bypasses from the facility.

The plant processes more than 30,000 turkeys daily, and its operations generate approximately one million gallons of wastewater per day. If convicted, the company faces a maximum fine of \$500,000 or twice the gain resulting from the offense, whichever is greater, per count. The plant manager faces a maximum penalty of five years in prison and a \$250,000 fine on each count. *See DOJ Press Release*, November 30, 2009.

[5] **Air/Greenhouse Gases: EPA Issues GHG Endangerment Finding**

On December 7, 2009, EPA Administrator Lisa Jackson signed the agency's **endangerment finding**, concluding that (i) the current and projected concentrations of the six key greenhouse gases (GHG)—carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulfur hexafluoride (SF₆)—in the atmosphere threaten

the public health and welfare of current and future generations; and (ii) the combined emissions of these well-mixed GHGs from new motor vehicles and new motor vehicle engines contribute to the GHG pollution that threatens public health and welfare. According to the agency, the endangerment finding is a prerequisite to finalizing EPA's proposed GHG emission standards for light-duty vehicles, which were proposed September 15, 2009, by EPA and the Department of Transportation.

EPA's findings follow the U.S. Supreme Court's ruling in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that GHGs are air pollutants covered by the Clean Air Act. The findings alone do not impose any emission-reduction requirements but rather allow EPA to finalize the proposed rule issued in September. According to press reports, the findings may also lead to additional regulations that impose other restrictions on GHG emissions. *See Greenwire*, December 7, 2009.

Legislation, Regulations and Guidance

[6] **RCRA: EPA to Propose Withdrawal of Emissions-Comparable Fuels Rule**

EPA has **proposed** withdrawing the emissions-comparable fuels rule that took effect on January 20, 2009, and allows industries to burn certain hazardous waste as fuel by exempting the materials, such as sludge and manufacturing byproducts, from RCRA regulations.

EPA said it is proposing to withdraw the rule "due to the difficulty of ensuring that emissions from burning emissions-comparable fuels are comparable to emissions from burning fuel oil, and the limited savings of burning emissions-comparable fuels." According to the agency, it will need to



ensure that the material does not pose greater risks, and it will need to create a complicated set of conditions for the fuels' storage and combustion. Under current rules, fuel-burner operators are not subject to review by EPA. The proposed rule was published in the December 8, 2009, *Federal Register*, and comments will be accepted until January 22, 2010.

[7] Air: EPA Issues NESHAPs for Small Asphalt Processing and Roofing Manufacturing

EPA has issued national emission standards for hazardous air pollutants (NESHAPs) for small asphalt refiners and roofing manufacturers. *74 Fed. Reg. 63,235* (12/2/09). The rule amends 40 C.F.R. part 63, and establishes generally available control technology standards for area sources—those that emit less than 10 tons annually of a single air toxic or less than 25 tons per year of any combination of hazardous pollutants. The facilities will be required to control emissions of polycyclic aromatic hydrocarbons, substances known to cause or suspected of causing cancer and other serious health and environmental problems. The final rule was effective upon publication.

[8] Water Resources: CEQ Proposes New Guidelines for Water Project Studies

The White House Council on Environmental Quality (CEQ) proposed guidelines on December 3, 2009, for all federal agencies to follow in studies for water resource projects. The guidelines would apply to activities of the U.S. Army Corps of Engineers, Bureau of Reclamation, Tennessee Valley Authority, and National Resources Conservation Service; they would also cover other agencies to the extent that they engage in site-specific implementation studies for projects and project modification.

The proposed guidelines were released for public comment and sent to the National Academy of Sciences for review. Some of the guidelines' elements include requirements to (i) take into account non-monetary as well as monetary costs and benefits; (ii) minimize floodplain development and (iii) account for "ecosystem services," climate change, future development, and "environmental justice." CEQ will accept comments on the proposed guidelines for 90 days.

[9] HazMat: DOT Issues Final Pipeline Control Room Safety Rule

The U.S. Department of Transportation's (DOT's) Pipeline and Hazardous Materials Safety Administration has issued a final rule requiring certain pipeline operators to define the roles and responsibilities of controllers and provide them with information, training and processes necessary to fulfill these responsibilities. *74 Fed. Reg. 63,310* (12/3/09). The rule also requires operators to (i) implement methods to prevent controller fatigue, (ii) establish "human factors" management plans and (iii) account for National Transportation Safety Board recommendations for supervisory control and data acquisition system displays. The rule revises 49 C.F.R. parts 192 and 195 and takes effect February 1, 2010.

[10] HazMat: Final Rule on Distribution Integrity Management Published

The U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration has issued a final distribution integrity management rule, which revises 49 C.F.R. part 192 and includes a requirement for gas distribution pipeline systems operators to adopt integrity management programs similar to those required for larger transmission pipelines. *74 Fed. Reg. 63,905* (12/4/09).



In addition to requiring gas distribution system operators to process, collect, integrate, analyze, and apply information about possible threats, the rule requires them to install excess flow valves in new and replaced services for single-family residences where conditions are suitable for their use. The rule is effective February 2, 2010.

[11] EU/Nanotechnology: EU Adopts Revised Cosmetics Regulation Requiring Labeling of Nanoscale Ingredients

The European Parliament and the Council of the European Union have approved a [cosmetic regulation](#) that requires manufacturers of new cosmetic products to disclose the presence of nanomaterials on product labeling, notify the European Commission and provide certain information six months before the product is placed on the European market. Manufacturers of existing products containing nanoscale ingredients would have to notify the Commission and submit safety data.

The regulation will be published in the *Official Journal of the European Union*. Once published, manufacturers will have approximately 3.5 years to comply with the regulation.

Scientific/Technical Items

[12] Chemical Exposure: Report Claims BPA Among 21 Chemicals Found in Umbilical Cords of North American Babies

According to a new Environmental Working Group (EWG) [study](#) titled "Pollution in People: Cord Blood Contaminants in Minority Newborns," Bisphenol A (BPA) and 20 other chemicals have been found for the first time in the umbilical cords of babies born in North America. The 21 new chemicals are among a total of 232 contaminants detected in the two-year study. Other chemicals detected for

the first time included tetrabromo-bisphenol A, galaxolide, tonalide, perfluorobutanic acid, and eight polychlorinated biphenyls (PCBs).

Five research laboratories in Canada, the Netherlands and the United States found the chemicals in the umbilical cord blood of 10 American minority newborns. According to EWG, the study focused on minority newborns because no previous studies have "examined the chemical body burden in the womb for minority children." See *Greenwire*, December 2, 2009.

[13] Chemical Exposure: Consumer Guide Finds Chemicals in Children's Products

According to the third annual *Consumer Guide to Toxic Chemicals in Toys*, published by a nonprofit environmental organization and released December 2, 2009, about one-third of some 737 toys and other children's products tested contained one or more chemicals of concern. Lead was reportedly found in 18 percent of the products tested, and other chemicals detected included arsenic, cadmium, mercury, and chlorine.

The guide recommends phasing out chemicals in toys and other children's products, holding industry responsible for the products they manufacture and distribute, and using the best science to ensure that toys and children's products are not dangerous. See *BNA Daily Environment Report*, December 2, 2009.



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

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