

# Environmental & Chemical Update

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

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## Litigation and Regulatory Enforcement

### [1] CERCLA: Second Circuit Finds Successor Liable for Contamination Based on Control of Subsidiary

The Second Circuit Court of Appeals has ruled that an electric utility may be liable under CERCLA for contamination from two old manufactured gas plant sites in New York because its corporate predecessor once controlled a subsidiary that operated the plants. *Rochester Gas & Elec. Corp. v. GPU, Inc., No. 09-0482 (2d Cir. 12/10/09)* (summary order). The appeals court ruling upholds a January 6, 2009, district court determination that FirstEnergy Corp. was liable to Rochester Gas & Electric Corp. for \$600,000 in past costs associated with remediation of two sites that were located near Rochester, New York. The court held that Associated Gas & Electric Co. (AGECO) controlled several subsidiaries of Rochester Gas & Electric in the 1930s and earlier and that this control warranted veil piercing under New York law. The court found a direct nexus between AGECO's control over the subsidiaries and the sites' contamination.

### [2] Env'tl. Crime: Cast Iron Manufacturer and Plant Manager Plead Guilty to CWA Violations

One of the largest cast iron manufacturers in the United States and its Birmingham, Alabama, plant manager have pleaded guilty in federal court to

numerous Clean Water Act (CWA) criminal violations. McWane, Inc. pleaded guilty to nine felony counts of knowingly violating the CWA, and the plant manager pleaded guilty to eight counts of negligently violating the CWA. Under the plea agreement, the company agreed to pay a criminal fine of \$4 million and serve a five-year term of probation. It must also perform a "community project known as the Greenwood Environmental Project." The plant manager agreed to pay an \$8,000 fine and serve 36 months of probation.

Court documents show that the company operates iron foundries that produce cast iron pipe, fittings, valves, and hydrants in several areas of the county. Wastewater generated as a result of the manufacturing process contains several foundry contaminants, including oil, grease and zinc. The company was subject to an NPDES permit to treat its wastewater before discharging it to Avondale Creek that flows into another creek and then to the Black Warrior River. EPA charged the company with violating its NPDES permit repeatedly over an 18-month period from 1999 to 2001. The company has been previously convicted of CWA, RCRA, CAA, and OSHA violations. *See DOJ Press Release*, December 18, 2009.

### [3] Toxic Tort: Federal Jury Awards \$100 Million for Inhalation Exposure to Carbon Disulfide at Texas Refinery

A federal jury in Galveston, Texas, has reportedly awarded more than \$100 million in damages to 10 workers at the BP Products North America Refinery



in Texas City. The workers claimed they were injured from inhalation exposure to carbon disulfide during four separate incidents in March and April 2007.

*Garner v. BP Prods. N. Am.*, No. 07-221 (S.D. Tex. 12/18/09). Jurors awarded each plaintiff \$10 million in punitive damages in addition to compensatory damages ranging from \$5,900 to \$244,000 each. The damages were awarded to the first 10 of 143 refinery workers represented by a Houston law firm which is apparently continuing to prepare the remaining lawsuits for trial. According to a news source, the company called the verdict “utterly unjustified, improper and unsupportable.”

It intends to file an appeal. *See Houston Chronicle*, December 19, 2009; *BNA Daily Environment Report*, December 21, 2009.

#### [4] TSCA: Companies Agree to Phase Out Flame Retardant

Three companies have [agreed](#) to voluntarily phase out production of the flame retardant decabromodiphenyl ether (decaBDE) over the next three years. Following discussions with EPA staff, Albemarle Corp., Chemtura Corp. and ICL Industrial Products, Inc. issued letters confirming their commitment to end the “production, importation and sales of decaBDE for most uses in the United States by December 31, 2012, and to end all uses by the end of 2013.” While the companies reaffirmed their “belief in the safety of decaBDE,” EPA contends that the chemical “persists in the environment, potentially causes cancer and may impact brain function,” and it “can degrade to more toxic chemicals that are frequently found in the environment and are hazardous to wildlife.” *See BNA Daily Environment Report*, December 18, 2009.

#### [5] Enforcement: EPA Enforcement to Focus on Wetlands, Clean Energy, Air, and Water

According to Cynthia Giles, EPA’s assistant administrator for Enforcement and Compliance Assurance, EPA is in the process of evaluating its list of national priority enforcement areas for 2011 through 2013. During an ABA teleconference on December 18, 2009, Giles reportedly said the agency is considering adding wetlands and clean energy extraction to the list, which already includes the Clean Air Act and wet weather discharges under the Clean Water Act.

EPA reviews its national enforcement priorities every three years. Current priorities include emissions of air toxins and new source review under the Clean Air Act; mineral processor compliance with RCRA; sewage, animal waste and storm water under the CWA; financial responsibility of regulated entities under RCRA and CGRCLA; and environmental issues arising on tribal lands. The agency is also attempting to improve transparency in all areas and focusing on environmental justice and criminal enforcement. *See BNA Daily Environment Report*, December 21, 2009.

## Legislation, Regulations and Guidance

#### [6] Air: EPA Issues Emissions Rule for New Marine Diesel Engines

EPA has issued a [final rule](#) that sets new engine and fuel standards for ships with Category 3 diesel engines—those with cylinder displacement of 30 liters or greater. Such engines are primarily used to power large ocean-going vessels such as container ships, tankers, bulk carriers, and cruise ships.



The new emissions-control requirements for nitrogen oxides will apply to all ships flagged or registered in the United States and make U.S. requirements consistent with changes made in 2008 to Annex VI of the 1973 International Convention for the Preservation of Pollution from Ships (MARPOL Convention).

The final rule also includes new provisions excluding steamships on the Great Lakes from the low-sulfur fuel requirement and directing EPA to develop a process for granting other Great Lake ships a waiver of the requirements if they can demonstrate that compliance would cause economic hardship. Congress directed EPA to include these provisions in an EPA appropriations bill passed in October 2009. The final rule also includes standards for emission of hydrocarbons and carbon monoxide from new Category 3 engines and requirements for measuring and reporting particulate matter emissions. The final rule amends 40 C.F.R. Parts 80, 85, 86, 94, 1027, 1033, 1042, 1043, 1045, 1048, 1051, 1054, 1060, 1065, and 1068. The final rule is effective 60 days after publication in the *Federal Register*.

#### **[7] Air: EPA Bans Sale or Distribution of Pre-Charged Appliances**

EPA has issued a **final rule** banning the sale or distribution of air-conditioning and refrigeration appliances containing HCFC-22, HCFC-142b or blends containing one or both of these substances, beginning January 1, 2010. *74 Fed. Reg.* 66,449 (12/15/09). The rule also bans air-conditioning and refrigeration components containing the same substances. The rule does not restrict or prohibit the sale of appliances containing HCFC-22 or HCFC-142b as blowing agents in closed cell insulation foam, and it does not affect the servicing of air-conditioning

or refrigeration appliances manufactured before January 1, 2010. The rule will be codified in new subpart I to 40 C.F.R. Part 82.

#### **[8] Air: EPA Proposes Rule Expanding Air Monitoring for Lead**

EPA has proposed a **rule** that would require monitors near sources that emit a half-ton of lead or more annually. *74 Fed. Reg.* 69,050 (12/30/09). Current EPA rules require air monitoring in areas where industry annually emits at least one ton of lead into the air and in 101 urban areas with populations of 500,000 or more. The proposed rule would add 160 facilities to those already monitored. The proposal is EPA's response to a petition from environmental groups seeking additional air-monitoring requirements. EPA will accept comments on the proposed rule for 45 days after it is published in the *Federal Register*.

#### **[9] FIFRA: EPA Announces Plan to Disclose Inert Pesticide Ingredients to the Public**

EPA has announced that it plans to require pesticide manufacturers to publicly disclose the inert ingredients in their products. The December 22, 2009, announcement was made after the agency responded to petitions from the Northwest Coalition for Alternatives to Pesticides and several state attorneys general requesting that EPA designate more than 350 inert pesticide ingredients as hazardous.

Pesticide manufacturers usually disclose their inert ingredients only to EPA, which evaluates the safety of all ingredients when determining whether to register the pesticide. EPA will accept comments for 60 days after its advance notice of proposed rulemaking is published in the *Federal Register*. See *EPA Press Release*, December 22, 2009.



### [10] Water: Illinois Prohibits Pharmaceutical Disposal into Public Water Supply

Illinois's [Safe Pharmaceutical Disposal Act](#), effective January 1, 2010, will prohibit health care institutions from flushing unused medication into the public water supply. The new legislation applies to a wide range of health care providers including hospitals, nursing homes, long-term care and home health care facilities, and hospice programs. The law does not apply to retail entities such as pharmacies, and applies only to medicine in solid form.

## Scientific/Technical Items

### [11] Climate Change: USDA Report Claims Climate Change Rate Not Reversible

A recent U.S. Department of Agriculture (USDA) [report](#) claims that the rate of climate change in the 21st century will likely outpace the change occurring over the previous 10,000 years even if more stringent emissions controls are adopted. The report, which is based on a review of more than 1,000 published studies, concludes that climate change is inevitable because of greenhouse gases (GHGs) already present in the atmosphere.

According to the report, impacts of GHGs on U.S. agriculture, land and water systems and biodiversity are already apparent and likely to worsen because the lifespan of most GHGs ranges from a decade to a century. The report recommends enhanced monitoring of high-latitude areas, high-elevation ecosystems and coastal wetlands as an early warning system for major impacts.

### [12] Water Quality: EPA Releases Draft Baseline Study of U.S. Lakes

EPA has released a draft baseline [study](#) of U.S. lakes, rating the condition of 56 percent of the lakes as good and the remainder fair or poor. Based on random sampling of 1,028 lakes by states, tribes and the EPA in 2007, the study provides estimates on the condition of natural and man-made freshwater lakes, ponds and reservoirs greater than 10 acres and at least 1 meter deep. Field crews collected samples using the same methods at all lakes to ensure that results could be compared across the country.

Researchers processed and analyzed 680,000 measurements, including (i) indicators of water quality such as nutrients, dissolved oxygen and algal density; (ii) biological indicators such as phytoplankton and zooplankton (algal and microscopic animals); (iii) recreational indicators such as algal toxins and pathogens; and (iv) physical habitat indicators such as lakeshore and shallow water habitat cover. By inference, the study found 49,546 lakes to be in good condition, 29,308 to be in fair condition and 20,238 to be in poor condition. When compared to a similar sample taken in 1970, the study suggests that the nation's investment in wastewater treatment and other pollution improvement activities has improved water quality despite increased population pressures across the United States.



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