

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] Radioactive Waste: Federal Circuit Rules “Unavoidable Delay” Defense Not Available to DOE

The Federal Circuit Court of Appeals, in an 11-1 decision, has reversed the Court of Federal Claims to rule that the Department of Energy (DOE) could not use the defense of “unavoidable delay” in breach of contract cases involving a delay in taking custody of radioactive waste from commercial power plants. *Neb. Pub. Power Dist. v. U.S.*, No. 07-5083 (Fed. Cir. 01/12/10). The lawsuit involves a claim by Nebraska power company officials that DOE failed to accept spent nuclear fuel, as required by the Nuclear Waste Policy Act (NWPA) and a contract between the utility and DOE.

Under the NWPA, DOE was to have taken custody of spent nuclear fuel from power plants by 1998 for permanent disposal. Efforts to build a repository at Yucca Mountain in Nevada have been stalled for years, however, and the government recently announced that the repository was no longer viable. DOE argued that the delay in taking control of the waste was “unavoidable,” and that contrary rulings by the D.C. Circuit Court of Appeals in related litigation did not have res judicata effect because they were barred by the doctrine of sovereign immunity. The Court of Federal Claims agreed, but the appeals court reversed, holding that the D.C. Circuit Court of Appeals had the authority to construe DOE’s

obligations under the NWPA and, thus, that DOE could not successfully use the argument as a defense in this contract action. According to the majority, the government’s failure to have the repository ready by 1998 could not be excused as unavoidable delay.

[2] Air: Federal Court Rules Ohio Exemption for Small Polluters Violates CAA

A federal magistrate in Ohio has held that a 2008 Ohio Environmental Protection Agency (Ohio EPA) rule violates the Clean Air Act (CAA); the rule exempts all sources that produce less than 10 tons per year of any National Ambient Air Quality Standards (NAAQS) pollutant or pre-cursor from Ohio’s State Implementation Plan (SIP) requirement that all sources of air contaminants employ the best available technology to reduce air emissions. *Sierra Club v. Korleski*, No. 08-865 (S.D. Ohio 02/02/10). The complaint alleges that (i) the rule is less stringent and therefore in violation of the SIP; (ii) the exemption violated the CAA’s anti-backsliding provisions; and (iii) the state’s failure to request a modification of the SIP also violated the CAA. Although the state had applied to EPA for an SIP revision, the agency refused to process the proposed revision because it was incomplete.

The court agreed with plaintiffs that Ohio EPA is improperly granting the exemption without EPA’s permission. The exemption was applied to small pollution emitters, including dry cleaners, auto body shops and small production facilities,



as well as power and manufacturing plants that were operating individual smokestacks on small-source permits. The court ordered Ohio EPA to stop using the exemption.

[3] Toxic Tort: General Allegation of Improper Disposal Is Insufficient to Support Claims of Emotional Distress

A federal judge in California has ruled that several allegations of improper hazardous waste disposal are not specific enough to support claims of intentional infliction of emotional distress. *Whitlock v. Pepsi Americas, No. 08-2742 (N.D. Cal. 01/26/10)*. The complaint, filed by 12 individuals who are either residents or former residents of Willits, California, or workers at the Remco site, a former machine shop and chrome-plating facility, alleged numerous toxic tort-based claims, including negligence, negligence per se, intentional infliction of emotional distress, loss of consortium, nuisance, and toxic trespass, against several companies that owned or operated the facility before 1993. Defendants filed a motion for summary judgment on the intentional infliction of emotional distress claim.

Granting defendants' motion, the court held that, without showing defendant's knowledge of these particular plaintiffs, an intentional infliction of emotional distress claim fails under state law even if the companies' conduct was "extreme and outrageous," and even if the plaintiffs did in fact suffer severe distress and anxiety as a result of defendants' conduct. According to the court, plaintiffs offered no proof that defendants intended those particular individuals to be harmed.

[4] Agriculture: Idaho Supreme Court Rules Counties Can Regulate Feedlots

The Idaho Supreme Court has upheld a lower court decision allowing counties to regulate concentrated animal feeding operations (CAFOs). *Idaho Dairymen's Ass'n v. Gooding County No. 35980 (Idaho 02/01/10)*. At issue was a Gooding County ordinance that imposes a density limit on cattle in feedlots, prohibits new CAFOs located within one mile of the rim of two Idaho canyons and bars CAFOs within a half-mile of certain floodplains.

The Idaho Dairymen's Association and Idaho Cattle Association, Inc. sued in 2007 seeking to have the ordinance overturned. The complaint argued that state law, which regulates some aspects of CAFOs, impliedly preempted the ordinance. It also argued that the state Beef Cattle Act, which provides that state authorities "shall have authority to administer all laws to protect the quality of water within the confines of a beef cattle animal feeding operation," conflicts with and therefore preempts the ordinance.

The lower court and the supreme court disagreed, citing other elements of state law, such as a clause that provides county commissioners with authority to regulate the siting of "large confined animal feeding operations and facilities," and ruled that the state legislature did not intend to comprehensively regulate water quality at CAFOs. Accordingly, the court held that state regulations do not preempt the local ordinance.



[5] NEPA: NRDC Sues Corps over Alleged Failure to Produce Full EIS at RR Intermodal Facility

NRDC has sued the Army Corps of Engineers (Corps) alleging that the agency violated NEPA by failing to produce a full environmental impact statement (EIS) before authorizing the construction and operation of a large railyard and distribution and warehousing center in the Kansas City area. [*NRDC v. Corps, No. 10-2068 \(D. Kan. Filed 02/01/10\)*](#). The complaint alleges that the Corps failed to adequately probe the environmental impacts of the facility despite evidence that it will generate substantial localized air pollution and exacerbate existing area pollution problems. Plaintiffs seek declaratory and injunctive relief, including a court order staying the authorization until the Corps completes a full EIS.

The Corps issued a permit to Burlington Northern Santa Fe Railway Co. in 2009, allowing the railroad to construct and operate a 500-acre intermodal facility near Gardner, Kansas, south of Kansas City. Following its own investigation of the air quality impact on the region, the Corps determined that a full EIS was unnecessary and prepared an abridged EIS. A pending lawsuit filed in January 2010 alleges water quality issues if the project moves forward.

[6] Prop. 65: Los Angeles School District Sues over Alleged Exposure Caused by Artificial Turf

The Los Angeles Unified School District has reportedly sued the installer of artificial turf systems and playing fields at 13 schools under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65), alleging that the systems contain lead and carbon black and that the known carcinogens would be in direct contact with children.

The complaint alleges violation of Prop. 65, breach of contract, product liability, and negligence and seeks civil penalties, compensation and costs. According to California, lead and carbon black are known to cause cancer, reproductive harm, neurological harm, and developmental toxicity. See *Courthouse News Service*, January 29, 2010.

Legislation, Regulations and Guidance

[7] Renewable Fuels: EPA Issues Final Renewable Fuels Rule

EPA has issued a [rule](#) implementing provisions of the Energy Independence and Security Act (EISA) of 2007, which requires the nation's fuel supply to include 36 billion gallons of ethanol or other renewable fuel by 2022, including 21 billion gallons from cellulosic sources or biomass, such as switchgrass or crop residues. The rule says that corn-based ethanol produced in modern plants powered by natural gas qualifies as a renewable fuel. Under the EISA, to qualify as a renewable fuel, a fuel must reduce life-cycle greenhouse gas emissions by at least 20 percent compared to gasoline. The law also requires EPA to analyze indirect emissions arising from land-use changes that result from using corn and other food grains for energy. The final rule will be published in the *Federal Register* and effective July 1, 2010.

[8] TSCA: EPA Issues SNURs for 15 Chemical Substances

EPA has issued [significant new use rules](#) (SNURs) for 15 chemical substances that will require manufacturers and importers of those substances to notify EPA of any uses that differ from those outlined in premanufacture notices already filed with the agency. *75 Fed. Reg.* 4,983 (02/01/10).



The SNURs' effective date is April 2, 2010, unless EPA receives adverse or critical comments. If such comments are received, EPA will withdraw the relevant sections and reissue them as proposed SNURs.

Among the 15 SNURs identified are (i) an automobile air-conditioning systems refrigerant that EPA has said poses no risk of depleting the ozone layer and has a relatively low potential for contributing to global warming, (ii) an industrial solvent, (iii) a chemical intermediate for making dye, (iv) a substance used as a raw material in the manufacture of photosensitive material, and (v) a chemical used in oil-drilling operations. The SNURs are issued under section 5(a)(2) of TSCA.

[9] TSCA/Nanotechnology: EPA Proposes SNURs for Certain Multi-Walled Carbon Nanotubes

EPA has [proposed](#) a significant new use rule (SNUR) for certain multi-walled carbon nanotubes for which the agency has received a premanufacture notice under TSCA. *75 Fed. Reg.* 5,546 (02/03/10). The proposed rule identifies the multi-walled carbon nanotubes by the number of their premanufacture notice, P-08-199. According to the agency, the proposed rule applies to those nanotubes only.

The nanotubes will be used as an additive/filler for polymer composites and support media for industrial catalysts. For other uses, a manufacturer or importer would need to file a SNUR notice at least 90 days before the new use. EPA is accepting comments on the proposed rule through March 5, 2010.

[10] FIFRA: EPA Seeks Comments on Draft Product Performance Guidelines for Antimicrobial Products

EPA has issued a [notice](#) announcing the availability of four draft guidelines for product performance of public health uses of antimicrobial

agents. *75 Fed. Reg.* 4,380 (01/27/10). The draft guidelines, which are nonbinding, address efficacy testing for antimicrobial agents intended to be used on hard, inanimate and environmental surfaces that bear label claims as sterilants, disinfectants and/or sanitizers. They include sections incorporated from FIFRA Scientific Advisory Panel recommendations in 1997 and 2007, new guidelines and clarifications from other guidance documents and comments from the regulated industry. EPA will accept public comments on the draft guidelines until March 29, 2010.

[11] HAZMAT: DOT Revises Packaging Regulations

The Department of Transportation (DOT) Pipeline and Hazardous Materials Safety Administration has issued a revised hazardous materials (HAZMAT) transport [rule](#) that amends packing-related regulations and incorporates changes into the HAZMAT regulations based on an agency initiative and petitions for rulemaking submitted by stakeholders. *75 Fed. Reg.* 5,375 (02/02/10). The rule makes a number of changes to clarify and explain portions of the prior rule.

Changes include (i) revising the definitions of "bulk packaging" and "large packaging" to allow intermediate forms of containment, (ii) adding a definition for "strong outer packaging," (iii) authorizing the use of "large packaging" for certain explosives, (iv) clarifying shippers' responsibilities regarding package closure instructions, (v) authorizing the transportation of bromine residue in cargo tanks, and (vi) permitting stenciling of the UN symbol on packaging by allowing small gaps in the circle. The rule is effective October 1, 2010.



[12] Europe: EC-Funded Report Recommends Establishment of EU Waste Agency

A recent report funded by the European Commission (EC) calls for the establishment of a European Union (EU) dedicated waste agency that would carry out several enforcement functions in member states and direct training of member state waste officials. According to the report, implementation of EU waste legislation has fallen significantly short of legal obligations because (i) many member states lack sufficient capacity for inspections, controls and other actions to enforce waste legislation properly; (ii) EU waste legislation is considered a low priority in many member states, resulting in insufficient allocation of resources; (iii) poor coordination among various national bodies responsible for inspections and controls hinders enforcement; (iv) lack of technical capacity for the preparation of waste management plans and programs is widespread; and (v) member states have different interpretations of EU waste requirements.



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If you have questions about this issue or would like to receive supporting documentation,
please contact Dave Erickson (derickson@shb.com; 816-474-6550) or

Jim Neet (jneet@shb.com; 816-474-6550).

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