

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

- [1] **Toxic Tort:** Tenth Circuit Affirms Dismissal of Aircraft De-icing Suit. 1
- [2] **Contract Law:** Dismissal of Lead Paint Lawsuit Upheld in Eighth Circuit for Failure to Obtain Written Consent to Sue 1
- [3] **CERCLA:** Federal Court Rules Cost Recovery Action May Proceed Despite NRC Licensed Cleanup 2
- [4] **CERCLA:** Federal Court Dismisses State Law Claim Against Majority Shareholder. 2
- [5] **Envtl. Crime:** Businessmen Sentenced for Bribing State Environmental Official. . . 3
- [6] **Greenhouse Gases:** Legislators, Companies Challenge GHG Endangerment Finding. 3

Legislation, Regulations and Guidance

- [7] **Air:** EPA Publishes NAAQS for NO₂ 3
- [8] **Nanotechnology:** EC Announces Projects to Determine Whether REACH Adequately Covers Nanomaterials 4
- [9] **Prop. 65:** California Proposes Adding BPA to Prop. 65 List 4
- [10] **Greenhouse Gases:** California's Bay Area Air Quality Management District Issues Nation's First Air Permit Limiting GHG Emissions 4

Scientific/Technical Items

- [11] **Nanotechnology:** EC Funded Consortium Launches Web Site to Track Nanomaterial Exposure 4
- [12] **Alternative Energy:** Study Claims Proposed Offshore Wind Farm in New England Would Cut Energy Costs 5
- [13] **Climate Change:** NOAA Announces Plan to Create Climate Service 5

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Litigation and Regulatory Enforcement

[1] Toxic Tort: Tenth Circuit Affirms Dismissal of Aircraft De-icing Suit

The Tenth Circuit Court of Appeals has affirmed the dismissal of a lawsuit seeking to bar airplane gate de-icing at the Denver International Airport under RCRA's "imminent and substantial endangerment" provision. 42 U.S.C. § 6972(a)(1)(B). [*Crandall v. City and County of Denver, No. 08-1197 \(10th Cir. 02/08/10\)*](#). Although the airport had stopped full-plane gate de-icing about the time the lawsuit was filed, plaintiffs argued that an injunction should be ordered anyway, because the airport could always reinstate full-plane de-icing again.

According to both the district and appellate courts, RCRA's imminent and substantial endangerment requirement has not been met where the practice alleged to be the violation is no longer occurring. The suit, said the court, "cannot be brought because someone may sometime begin disposing of solid waste in a manner that presents an endangerment." The lawsuit was brought by airport workers who alleged that the spraying of aircraft de-icing fluid, which degrades into hydrogen sulfide, created a health risk to humans present in Concourse B.

[2] Contract Law: Dismissal of Lead Paint Lawsuit Upheld in Eighth Circuit for Failure to Obtain Written Consent to Sue

The Eighth Circuit Court of Appeals has upheld the dismissal of a lawsuit by investors alleging breach of contract for failure to disclose payment deductions in connection with lead paint contamination at the site of a \$47.3 million redevelopment project. [*Dubinsky v. Mermart, LLC, No. 09-2072 \(8th Cir. 02/10/10\)*](#). According to the three-judge panel hearing the case, plaintiffs failed to state a claim because they did not comply with the requirements of the financing documents governing the deal.

The redevelopment project involved the Merchandise Mart Building in downtown St. Louis, Missouri, and converted the property into a mixed-use apartment and retail building. During the renovation, defendant retained a third-party contractor to remove lead-based paint found in the building. The state environmental agency issued a certificate of occupancy in 2003. In connection with a later refinancing, an environmental assessment revealed the continued presence of lead paint and recommended further remediation.

Beginning in 2007, defendant began to remediate individual units as they became available, characterizing the costs as "upgrade" expenses rather than capital expenses. This allowed defendant to deduct the costs from funds available for interest payments to its subordinate bondholders. Several bondholders sued,



alleging breach of contract, unjust enrichment, negligence, and fraudulent misrepresentation. The district court dismissed, and plaintiffs appealed.

Because the bondholders failed to obtain the written consent of the senior mortgagee before bringing the enforcement action as required by the subordination agreement, the appeals court concluded that the district court did not err in dismissing the breach of contract and accounting claims. Finding that the negligence, unjust enrichment and fraudulent misrepresentation claims were also enforcement actions under the subordination agreement, the court similarly found no error in their dismissal.

[3] CERCLA: Federal Court Rules Cost Recovery Action May Proceed Despite NRC Licensed Cleanup

A federal judge in Pennsylvania has ruled that a CERCLA cost recovery action may proceed despite the fact that the handling and release of a radioactive byproduct at the facility and the state initiated cleanup were accomplished under licenses issued by the Nuclear Regulatory Commission (NRC). *Pennsylvania Dep't of Env'tl. Prot. v. Lockheed Martin Corp., No. 09-821 (M.D. Pa. 02/01/10)*.

Defendant argued that the lawsuit should be dismissed for the following reasons: (i) as a matter of public policy, costs incurred by a state cleaning up a site under a license and decommissioning plan approved by the NRC are not recoverable under CERCLA; (ii) the disposal of the radioactive byproduct Sr-90 could not constitute "disposal" of a CERCLA "hazardous waste" because the statutory definition of such waste in 42 U.S.C. 6903(27), excludes radioactive "byproduct material" as defined by the Atomic Energy Act of 1954; (iii) no "release" of a hazardous substance could be found because of

two nuclear-materials-related exclusions in CERCLA—one involving "nuclear accident" releases and the other involving "federally permitted releases"; and (iv) any of the radioactive material left behind at the site was done so under the NRC-issued byproduct material license of the company's predecessor and, consequently, any release came under CERCLA's "federally permitted release" exemption.

The court rejected each of defendant's arguments, ruling (i) nothing in CERCLA, the Atomic Energy Act or the legislative history of either statute supports defendants' "public policy" argument; (ii) while the definition of "disposal" is ambiguous, EPA has listed Sr-90 as a designated "hazardous substance" under CERCLA Section 102, Appendix B, and its interpretation should be accorded deference, thus the disposal of Sr-90 can constitute a "disposal of any hazardous substance" for purposes of CERCLA liability; (iii) for the alleged exclusions to apply, defendant must meet a statutory requirement that it have "financial protection"—a requirement defendant could not establish factually; and (iv) the radioactive material releases at the site were extensive and beyond the bounds of the license cited by defendant.

[4] CERCLA: Federal Court Dismisses State Law Claim Against Majority Shareholder

A federal judge in Illinois has dismissed a state law claim of unjust enrichment against a company's majority shareholder by a potentially liable party (PRP) in a federal CERCLA lawsuit in which the company was a co-defendant. *U.S. v. Clark, No. 08-4158 (N.D. Ill. 02/03/10)*. The federal government filed a CERCLA cost recovery action involving the Green Plating Site in Chicago against several PRPs, including Thomas Cooper and Calumet Heat Treating Corp. (CHTC). Cooper then filed a third-party complaint against Robert Sierks,



CHTC's majority shareholder, seeking to hold Sierks liable for unjust enrichment under state law. Sierks moved to dismiss the unjust enrichment claim for lack of federal jurisdiction.

The court agreed with Sierks, ruling that for plaintiff to prevail, "acts linking state to federal claims must be operative," that is, they must be relevant to the resolution of the federal claim. For Cooper to prevail on the CERCLA claim, he must show that defendant had "direct responsibility and personal control" over disposal of hazardous substances at the site. According to the court, however, the unjust enrichment claim requires different evidence: at a minimum, that Sierks is a 50 percent shareholder of CHTC and that all of the expenditures he made relating to the CERCLA suit accrued to the benefit of CHTC and its shareholders. Finding the latter connection lacking, the court dismissed the third-party complaint.

[5] Envtl. Crime: Businessmen Sentenced for Bribing State Environmental Official

Two North Carolina businessmen, who formed a company to build an ethanol production facility in the eastern part of the state, have reportedly been sentenced to 30-month prison terms and fined \$60,000 and \$10,000, respectively, for bribing a state environmental official. *U.S. v. Brady*, No. 08-297 (E.D.N.C. 02/10/10). To speed environmental permitting for the project, defendants agreed to pay a high-level official with the North Carolina Department of Environment and Natural Resources approximately \$196,000 in return for influence to secure the needed permits. The plant, which was projected to cost \$220 million, was never built,

and the defendants paid the official \$5,000 only, according to reports. The state official was separately sentenced for his role in the scheme. *U.S. v. Hudson*, No. 08-95 (E.D.N.C. 08/06/08).

[6] Greenhouse Gases: Legislators, Companies Challenge GHG Endangerment Finding

The Southeastern Legal Foundation has filed a [petition for review](#) on behalf of 13 Republican lawmakers and 16 companies challenging EPA's decision titled "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act," published on December 15, 2009. *74 Fed. Reg.* 66,496. Several other stakeholders have also filed petitions challenging the endangerment finding. The decision found that elevated levels of six greenhouse gases (GHG) endanger public health and welfare and that motor vehicle emissions are a major contribution to GHG pollution and climate change. *See Greenwire*, February 12, 2010.

Legislation, Regulations and Guidance

[7] Air: EPA Publishes NAAQS for NO₂

EPA has published its final primary national ambient air quality [standard](#) (NAAQS) for oxides of nitrogen as measured by nitrogen dioxide (NO₂). *75 Fed. Reg.* 647 (02/09/10). In the rule, EPA establishes the first one-hour primary air quality standard for NO₂ at 0.053 ppm; it requires additional air monitoring near roadways and in urban centers. EPA is expected to designate nonattainment areas for NO₂ by January 2012.



[8] **Nanotechnology: EC Announces Projects to Determine Whether REACH Adequately Covers Nanomaterials**

The European Commission (EC) reportedly announced February 2, 2010, three projects designed to determine whether new guidance is needed to ensure that the European Union's registration, evaluation and authorization of chemicals (REACH) regulation provides adequate coverage of nanomaterials. The three projects deal with chemical identification, information requirements and assessing the safety of nanoscale chemicals.

The chemical identification project will be led by the Institute for Health and Consumer Protection, which will assemble a group of experts from member states, industry and non-governmental organizations. A consortium of research and industry groups led by the United Kingdom's Institute for Occupational Medicine will coordinate the projects on information requirements and chemical safety assessment. The projects were started in January 2010 and are scheduled to continue for 12-15 months. *See European Commission Joint Research Centre Press Release*, February 2, 2010.

[9] **Prop. 65: California Proposes Adding BPA to Prop. 65 List**

California EPA's Office of Environmental Health Hazard Assessment (OEHHA) has announced that "sufficient evidence" indicates the plastics additive bisphenol A (BPA) should be added to the state list of substances that may cause cancer or reproductive harm under Proposition 65 (Prop. 65). OEHHA stated that its conclusions are based on a 2008 National Toxicology Program report expressing concern about BPA's possible effect on the development of the prostate and brain and on the behavior of

infants and children. The state will accept comments on its proposal until April 13, 2010. *See OEHHA Press Release*, February 11, 2010.

[10] **Greenhouse Gases: California's Bay Area Air Quality Management District Issues Nation's First Air Permit Limiting GHG Emissions**

In a landmark move, the Bay Area Air Quality Management District (BAAQMD) recently [approved](#) a federal permit for a proposed Hayward, California, power plant that includes limits on greenhouse gas (GHG) emissions. The power plant is the first in the country to accept enforceable limits on GHGs.

BAAQMD issued the Prevention of Significant Deterioration Permit on behalf of U.S. EPA. The most stringent ever issued by the district, the permit includes requirements that the power plant be equipped with state-of-the-art air pollution control equipment, including selective catalytic reduction and oxidation catalysts. The plant will also use 100 percent reclaimed water that will be converted to steam for electricity production. *See BAAQMD Press Release*, February 4, 2010.

Scientific/Technical Items

[11] **Nanotechnology: EC Funded Consortium Launches Web Site to Track Nanomaterial Exposure**

A consortium funded by the European Commission (EC) has launched a [Web site](#) to track information on occupational and consumer exposures and environmental releases of nanomaterials. The online resource will focus on carbon nanotubes, mass-produced nanomaterials, such as titanium dioxide, and specialized nanomaterials, such as nanosilver. Consortium members include



11 research and industry organizations that will examine information from peer-reviewed studies as well as government academic information that has not been published in scientific journals.

[12] Alternative Energy: Study Claims Proposed Offshore Wind Farm in New England Would Cut Energy Costs

A recent **study** commissioned by Cape Wind Associates LLC claims that a proposed offshore wind farm in Nantucket Sound would reduce wholesale electricity prices for the region by an average of \$185 million annually over a 25-year period. The study claims that the proposed wind farm would place downward pressure on the wholesale clearing price of electricity by reducing operations of power plants with higher operating costs and greater emissions. The facility would consist of 130 wind turbines capable of generating 468 megawatts of electricity. The project is currently undergoing public comment and must be approved by the U.S. Department of Interior before it can move forward. See *BNA Daily Environment Report*, February 12, 2010.

[13] Climate Change: NOAA Announces Plan to Create Climate Service

The National Oceanic and Atmospheric Administration (NOAA), an arm of the Department of Commerce, recently announced its plan to create a **Climate Service** within NOAA. Climate Service will bring together many of the agency's existing climate assets including research labs, climate observing systems, modeling facilities, integrated monitoring systems, and extensive on-the-ground service delivery infrastructure. The service will aim to provide a single, reliable and authoritative source for climate data, information and decision-support services to help individuals, businesses, communities, and governments make smart choices in anticipation of a climate-changed future.

While NOAA asserts that the National Climate Program Act provides the agency adequate authority to establish the new office, it intends to work with Congress for approval as soon as possible. The office will be created as a result of restructuring within the NOAA and will not require new funding. NOAA's new Climate Service Web site is accessible at <http://www.climate.gov>.



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

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