

# Environmental & Chemical Update

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SUSTAINABILITY • TOXIC TORT • WASTE • WATER

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## Litigation and Regulatory Enforcement

### [1] CERCLA: Federal Court Finds Owner of Leased Equipment Liable as “Owner”

A federal judge in Illinois has ruled that the owner of equipment leased to a company which used it in activities that produced contamination is liable as an “owner” under CERCLA. [\*U.S. v. Saporito, No. 07-3169 \(N.D. Ill. 02/09/10\)\*](#). The equipment was leased to a company called Crescent Plating and used in a Chicago electroplating facility to coat steel and brass objects with various metals, including zinc, chromium and copper.

Following an inspection in 2003, EPA concluded that the facility posed an imminent and substantial endangerment and began a removal action. After conducting a cleanup, EPA named defendant as a potentially responsible party (PRP) in a cost recovery action. Defendant argued that a party leasing equipment to a company that uses it to cause contamination cannot be liable as an owner under CERCLA.

The court disagreed, citing *Elf Atochem North American, Inc. v. U.S.*, 868 F. Supp. 707 (E.D. Pa. 1994), in which the federal government conceded liability based on its ownership of equipment necessary for the operation of a DDT plant. According to the court, “[t]he plating line is no less a facility than the land on which it operated. . . . Thus, an owner of equipment necessary to the operation of the plating line is no less an ‘owner’ than a part-owner of land.”

### [2] APA: Federal Court Dismisses Lawsuit Challenging Restrictions on Logging in Tongass National Forest

A federal judge in the District of Columbia has dismissed a lawsuit by several Alaskan cities and associations alleging that the Tongass National Forest Land and Resources Management Plan placed excessive restrictions on logging. [\*Se. Conference v. Vilsack, No. 081598 \(D.D.C. 02/17/20\)\*](#).

Filed under the Administrative Procedure Act (APA), the lawsuit alleged that 1.22 million acres designated by the Forest Service as “old growth reserves” constituted an executive withdrawal of land from multiple use possibilities in violation of the Alaska National Interest Lands Conservation Act. The Forest Service had designated 2.3 million acres of the 16.8 million acres in the Tongass National Forest for timber production.

The court held that the designation of the old growth reserves was not an illegal withdrawal, but an exercise of the Forest Services’ multiple use planning responsibilities. According to the court, plaintiffs had not provided sufficient evidence to overcome “the extreme degree of deference given to an agency’s evaluation of scientific data within its technical expertise.”

### [3] Federal Hazardous Substances Act: Cement Labeling Lawsuit Allowed to Proceed

A federal judge in New York has refused to dismiss a lawsuit alleging that plaintiff’s injuries, sustained when he knelt in caustic Portland cement,



were due to defendant's failure to comply with federal labeling requirements. *Leibstein v. Lafarge N. Am. Inc.*, No. 066460 (E.D.N.Y. 02/12/20). In his lawsuit, filed in 2006, plaintiff claimed he had to undergo skin grafting and other medical procedures after he burned his knees while using the cement to install a radiant-heat floor in his basement. Defendants argued that the bags of cement met the labeling requirements of the Federal Hazardous Substances Act (FHSA), with the exception of one technical error—omission of the word "DANGER." According to the court, a jury should decide whether the warning labels on the cement bags lived up to the federal liability law and, if not, whether those FHSA violations injured the plaintiff.

#### **[4] Clean Water Act: New York Court of Appeals Upholds State Authority over Hydroelectric Dams**

New York's highest court has ruled that the New York Department of Environmental Conservation (NYDEC) acted within its authority in taking an enforcement action against a hydroelectric dam operator for violations of the state's water quality laws. *Chasm Hydro, Inc. v. NYDEC*, No. 10 (N.Y. 02/16/10). Chasm Hydro filed a petition in the nature of prohibition against NYDEC after the agency filed an administrative complaint against the company alleging six violations of water quality requirements set forth in the state Environmental Conservation Law. The petition contended that NYDEC was preempted by federal law because the dam that petitioner operated was regulated by the Federal Energy Regulatory Commission (FERC). The state supreme court dismissed, finding the issue "not ripe for review," the appellate division affirmed, and the court of appeals granted leave to appeal.

According to the court, while FERC has general regulatory authority over hydroelectric dams, the Clean Water Act grants states authority to certify that dam activities do not violate water quality standards. The court concluded that petitioner had not clearly established that NYDEC's "enforcement action was in excess of its jurisdiction."

#### **[5] Envtl. Crime: Ship Management Company to Pay \$10 Million over San Francisco Bay Oil Spill**

Fleet Management Ltd, a Hong Kong based ship management company, pleaded guilty to a criminal violation of the Oil Pollution Act of 1990 as well as felony obstruction of justice and false statement charges, in conjunction with its role in causing the *Cosco Busan* oil discharge and subsequent cover up after the ship struck the San Francisco Bay Bridge in November 2007. The company was ordered to pay \$10 million and implement a comprehensive compliance plan that would include heightened training and voyage planning for ships engaged in trade in U.S. waters. A fifth of the monetary assessment must be devoted to marine environmental projects in San Francisco Bay.

In pleading guilty on August 13, 2009, the company admitted that after the ship hit the Bay Bridge, it concealed ship records and documents and created materially false, fictitious and forged documents with an intent to influence the Coast Guard's investigation of the incident. The *Cosco Busan's* pilot pleaded guilty on March 6, 2009, and was later sentenced to 10 months in prison. See *DOJ Press Release*, February 19, 2010.



## Legislation, Regulations and Guidance

### [6] Air: EPA Proposes to Repeal PM10 Surrogate Policy

EPA has issued a [proposed rule](#) that would remove a “grandfathering” provision in the federal prevention-of-significant-deterioration (PSD) program that allows facilities with PSD permit applications on file before July 15, 2008, to use coarse particles as surrogates for fine particles. *75 Fed. Reg 6,827 (2/11/10)*. EPA is also proposing to end early the PM10 surrogate policy applicable in states that have an approved PSD program in their State Implementation Plan. The policy allows facilities in those states to use coarse particles as surrogates during a period in which all sources are expected to make a transition to direct compliance with requirements for fine particles.

The primary basis for the surrogate policy was, according to EPA, that it was difficult to monitor and calculate fine particle emissions when the policy was adopted more than 10 years ago. The Sierra Club and Natural Resources Defense Council petitioned EPA to end the policy in 2008 and again in 2009, arguing that fine particle emissions monitoring had improved, making the policy unnecessary. EPA is seeking comments by March 15, 2010, on what kind of transition process, if any, should be allowed should the agency decide to issue a final rule ending the surrogate policy.

### [7] CERCLA: IG Criticizes EPA’s Use of Independent Cost Estimates

The EPA Inspector General (IG) has issued a [report](#) critical of EPA’s use of independent cost estimates in evaluating whether the agency receives the best value

for money spent on CERCLA contracts. EPA uses such estimates to plan costs for new contracts as well as modifications, new work assignments and task or delivery orders under existing contracts. According to the report, EPA staff sometimes accept contractor estimates without evaluating why they may differ from the independent estimate. Specifically, the report says that, in 30 of 42 cases the IG reviewed, EPA did not sufficiently document information in its estimates. In nine of 42 cases, the agency failed to update the independent cost estimates when significant cost changes occurred, and, in eight of the 42 cases, EPA program staff accepted the contractor’s estimate without evaluating why it differed from the independent cost estimate.

The report recommends that EPA place a greater emphasis on independent cost estimates through training and tools for creating them. It also recommends that these cost estimates be prepared for all contract actions expected to exceed \$100,000, as required by the Federal Acquisition Regulation and that agency guidance and independent cost estimates be updated.

### [8] NEPA/Climate Change: CEQ Issues Draft Guidance on NEPA and Climate Change

The White House Council on Environmental Quality (CEQ) issued [draft guidance](#) on February 18, 2010, that would direct federal agencies to analyze the impact of greenhouse gas (GHG) emissions from federal actions that increase emissions by 25,000 tons per year or more of carbon dioxide. According to the draft, agencies should consider emissions above this level as “an indicator that a quantitative and qualitative assessment may be meaningful to decision makers and the public.” CEQ also recommends that, for actions that cause emissions to increase less than 25,000 tons per year, federal agencies consider whether the action’s longterm emissions should receive similar analysis.



CEQ oversees federal agency compliance with NEPA, which requires federal agencies to analyze the environmental impact of their actions. The draft says that agencies can use the NEPA process “to reduce vulnerability to climate change impacts, adapt to changes in the environment and mitigate impacts of federal agency actions that are exacerbated by climate change.” The draft for the first time proposes the NEPA process for GHG emissions.

CEQ also released draft guidance clarifying that the environmental impacts of a proposed action may be mitigated during the NEPA process and separate draft guidance clarifying the use of categorical exclusions. See *CEQ Press Release*, February 18, 2010.

#### **[9] Mine Regulation: GAO Report Critical of Mountaintop Removal Cleanup Process**

A recent Government Accountability Office (GAO) [report](#) claims that damage from mountaintop removal mining continues long after sites have been deemed sufficiently reclaimed and that federal and state regulators often fail to prevent damage or ensure that mine operators are held financially responsible for remediating sites once the mining is completed.

The report focuses on Kentucky, Tennessee, Virginia, and West Virginia because those states accounted for nearly 83 percent of the surface coal production in Appalachia in 2008 and more than 98 percent of recently approved valley fills across the United States. It addresses the mine-permitting system in which companies post reclamation bonds to ensure that mine sites are cleaned up. Regulators are not supposed to release those bonds until the sites are fully reclaimed, but the report contends that damage often continues after bonds are released. According to the report, federal and state rules do not require mining regulators to monitor mining sites after bonds are released.

The report makes no specific recommendations but discusses possible actions the federal government may take under the Surface Mining Control and Reclamation Act, the Clean Water Act, CERCLA, and RCRA to address issues identified in the report.

#### **[10] Restoration: Federal Government Issues Great Lakes Restoration Plan**

The White House, EPA and 15 other federal agencies have issued a five-year [action plan](#) that would guide efforts to restore the Great Lakes. The plan focuses on five priority areas: (i) remediating the most polluted areas in the lakes; (ii) combating invasive species; (iii) protecting high-priority watersheds and reducing runoff from urban, suburban and agricultural sources; (iv) restoring wetlands, other habitats and important species; and (v) implementing accountability measures, learning initiatives, outreach, and strategic partnerships.

The fiscal year (FY) 2010 budget includes \$475 million for the plan and anticipates that \$300 million will be appropriated in FY 2011 and \$475 million per year through 2014. See *EPA Press Release*, February 22, 2010.

#### **[11] Chemical Exposure: Wisconsin Assembly Votes to Ban BPA in Baby Bottles**

The Wisconsin Assembly has reportedly approved [Senate Bill 271](#) that would prohibit the sale and manufacture of baby bottles and sippy cups containing bisphenol A (BPA). According to news reports, Governor Jim Doyle (D) has indicated he will sign the bill, which dictates that manufacturers and wholesalers must ensure that baby bottles and sippy cups sold in the state are clearly labeled as not containing BPA.

According to the bill, the state Department of Agriculture, Trade and Consumer Protection can order a manufacturer or wholesaler that



violates provisions of the bill to recall or repair the container. Violations could result in a fine of up to \$5,000, imprisonment of one year, or both, plus forfeitures ranging from \$100 to \$10,000 for each violation. *See BNA Daily Environment Report*, February 18, 2010.

## Scientific/Technical Items

### [12] Climate Change: Report Claims Companies in Water-Intensive Industries Fail to Manage and Disclose Water-Related Investor Risks

A recent [report](#) prepared for the Investor Network on Climate Risk claims that companies in water intensive industries fail to manage and disclose water-related risks to investors despite growing scarcity challenges. The report includes analyses and rankings of water-disclosure practices of 100 leading companies in eight key sectors exposed to water-related risks: beverage, chemicals, electric power, food, home building, mining, oil and gas, and semiconductors.

According to the report, most companies disclosed some exposure to water risks in their annual reports but used vague, boilerplate language. Only six companies reported any water-accounting data within their financial filings, only 21 disclosed targets for reducing water use and only 15 had goals to reduce wastewater discharge.

The report, which is based on corporate-disclosure guidance related to climate change recently approved by the Securities and Exchange Commission, recommends that companies (i) include material water-risk factors and performance data in their financial filings; (ii) provide water-performance data broken down to the facility level for operations in waterstressed regions; (iii) outline actions and policies for assessing and managing water risks, including quantified targets

for reducing water use and wastewater; (iv) disclose how they collaborate with stakeholders and suppliers on water risks, including how they set performance goals for key chains; and (v) outline specific strategies for developing water related products with strong market potential.

### [13] Chemical Exposure: EC-Sponsored Report Addresses Impacts of Chemical Mixtures

A recent European Commission (EC)sponsored [report](#) prepared by the University of London addresses the impacts of chemical mixtures on health and the environment and concludes that the current European Union (EU) approach of evaluating chemical substances in isolation is not adequate. According to the study, the risks that chemicals pose to human health and the environment may be underestimated because not enough attention has been paid to assessing substances' "cocktail effect."

According to the report, the scientific community consensus is that "combination effects [of substances] are larger than the effects of each mixture component applied singly" and that consequently there is "a need for dedicated regulatory considerations of the problem of chemical mixtures in the environment."

The report consists of five sections: (i) an executive summary, (ii) an appraisal of published scientific literature on mixture toxicology, (iii) a description of current EU regulatory provisions that take into account hazards and risks arising from mixture toxicity, (iv) a survey of approaches EU member states take in assessing the mixture toxicity of complex environmental samples, and (v) an overview of approaches to hazard and risk assessment of chemical mixtures in the United States, Japan and international bodies. The EC will use the report as a basis for discussions with experts and EU member states.



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