

# Environmental & Chemical Update

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

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## Litigation and Regulatory Enforcement

### [1] Climate Change: Fifth Circuit Grants Rehearing in *Comer v. Murphy Oil USA*

The Fifth Circuit Court of Appeals has granted petitions for rehearing en banc in a putative class action filed by Mississippi coastal residents against energy and chemical companies, alleging that the companies' greenhouse gas emissions made Hurricane Katrina more severe and intensified the damages the plaintiffs sustained. *Comer v. Murphy Oil USA*, No. 07-60756 (5th Cir. 02/26/10). A three-judge appeals court panel ruled in October 2009 that the plaintiffs had standing and their nuisance lawsuit could proceed. The defendants reportedly hope that the court's latest action is an indication that the lawsuit will be dismissed as it was in 2007, when a district court determined that "global warming nuisance suits raised political questions" not suitable for judicial review. See *Business Insurance*, March 2, 2010.

### [2] Toxic Torts: First Circuit Reinstates Putative Class Action over Oil Spills

The First Circuit Court of Appeals has reinstated a putative class action alleging negligence relating to a 2003 oil spill in Buzzards Bay, Massachusetts, in which a vessel owned by defendant veered off course, struck a reef and spilled approximately

88,000 barrels of fuel oil. *Gintis v. Bouchard Transp. Co.*, No. 09-1717 (1st Cir. 02/23/10).

The spill contaminated 1,200 properties, and the putative class would include owners of those properties as well as 1,000 other individuals with deeded rights to the land.

Plaintiffs sued in April 2006 seeking damages under two state statutes relating to strict liability and double damages for negligent vessel owners, as well as a third claim of common law nuisance. The district court denied class certification, holding that *Church v. General Electric Co.*, 138 F. Supp. 2d 169 (D. Mass 2001), established that "recovery for contamination of land downstream from a point of toxic discharge . . . would require parcel-by-parcel determinations." Plaintiffs appealed.

The appeals court reversed, in a decision by retired U.S. Supreme Court Justice David Souter, sitting by designation, ruling that the district court decision was based on a simplistic analysis and failed to consider conflicting case law. The court said that the district court's "fact-finding was too sparse to provide a prudent basis for us to say that a class should have been certified," but held that "plaintiffs presented substantial evidence of predominating common issues." The court remanded the matter to the district court, with directions to base its reconsideration on plaintiffs' claim that "common evidence will suffice to prove injury, causation and compensatory damages."



### [3] **Endangered Species Act: Federal Circuit Finds Forest Service Not Liable for Timber Contract Breach**

The Federal Circuit Court of Appeals has ruled that the U.S. Forest Service (Service) is not liable for suspending the contract of a timber harvesting company in Arizona. *Precision Pine & Timber, Inc. v. U.S., No. 08-5092 (Fed. Cir. 02/19/10)*. Plaintiff sued the service in 1998, alleging that language in contracts with the Service implied that it had already determined whether any special protective measures needed to be put in place to protect endangered species. The Service suspended the contracts in 1995 to comply with a court order to delay timber harvesting until government agencies determined whether it would threaten the endangered spotted owl.

The federal claims court agreed with plaintiff, finding that several of the contracts were entered into before the owl endangerment listing, thus its placement on the endangered species list would not have resulted in a suspension of work had the Service consulted with the U.S. Fish and Wildlife Service to make sure measures were in place to protect the natural habitat, as required by the Endangered Species Act. The claims court remanded the matter to the trial court to determine damages. In 2007, the trial court awarded plaintiffs \$3.34 million in damages, and the Service appealed.

The appeals court reversed, ruling that the contracts' plain language authorizes the Service to suspend or delay work "to comply with a court order." The court found no express warranty in the contracts barring the government from suspending the contracts.

### [4] **CERCLA: Federal Court Refuses to Extend "Operator" Liability to Companies That Loaded, Inspected Railcar**

A federal judge in West Virginia has ruled that neither a company that loaded coal tar distillates into a railcar nor another that inspected the railcar is liable as an "operator" under CERCLA for a spill that later occurred. *Veolia Es Special Servs. v. Hilltop Invs., No. 07-0153 (S.D. W.Va. 02/18/10)*. According to the complaint, approximately 22,000 gallons of coal tar light oil spilled from the car in October 2004 at a West Virginia transloading site. The facility's owner retained plaintiff to remediate the spill. When the owner of the oil was unable to pay for the cleanup, plaintiff filed a CERCLA Section 107 cost recovery action arguing, in part, that the company that loaded the oil onto the railcar and the company that inspected the railcar were both liable as "operators" under CERCLA.

The court disagreed, ruling that neither company can be liable as an "operator" under CERCLA where neither party had control over the tank car at the time of the spill. The court also said that its decision not to broaden CERCLA liability to anyone who had a causal role in a spill was supported by legislative history, as well as the recent U.S. Supreme Court ruling in *Burlington Northern & Santa Fe Railway Co. v. U.S.*, 129 S. Ct. 1870 (2009).

### [5] **Endangered Species Act: Federal Court Sets Aside Biological Opinion of Two Federal Agencies**

A federal judge in Washington has set aside the biological opinions of the NOAA Fisheries Service and the U.S. Fish and Wildlife Service for failing to consider a gravel mine's track record on land-reclamation obligations related to past mining activity.



**Friends of the East Fork, Inc. v. NOAA, No. 05-0189 (W.D. Wash. 02/11/10)**. The two agencies had granted the mining company the right to take endangered and potentially endangered species from the East Fork River as part of its expanded gravel mining. The court remanded the case to the two agencies to ascertain the proper environmental baseline for deciding whether to issue permits to the company.

The company had been mining gravel in the area for 20 years but had failed to meet a two-year state deadline for land reclamation. The court held that its failure to meet pre-existing obligations to reclaim land was a factor that should have been considered by the agencies before issuing incidental take rights to the company. The permits issued to the company would have authorized incidental takes of nine species including bull trout, steelhead trout, chum salmon, and Chinook salmon. Such permits allow landowners to take endangered species if such conduct is incidental to and not the purpose of carrying out otherwise lawful activity.

**[6] CERCLA: Federal Court Rules Circumstantial Evidence Insufficient for Liability**

A federal judge in Indiana has ruled that circumstantial evidence of property contamination was insufficient to hold defendant, who operated as an auto salvage yard from 1980-1991, liable under CERCLA. **City of Gary v. Paul's Auto Yard, No. 07-056 (N.D. Ind. 02/10/10)**. In 1998, plaintiff city took ownership of the property and later obtained a Brownfields grant from EPA for a property assessment and entered into the EPA voluntary remediation program. After incurring assessment costs, the city filed a CERCLA cost recovery action against defendant, alleging that the auto yard was liable for disposing of hazardous substances,

including lead from auto batteries. Defendants counterclaimed, arguing that the city was responsible for the contamination emanating from a municipal landfill adjacent to the auto yard.

Finding insufficient evidence of any releases of lead from car batteries at the site, the court held, “[t]here is no direct evidence that Paul’s Auto Yard caused or allowed any leakage from any vehicle batteries onto or into the soil at the Site.” Ruling on the counterclaim, the court held that defendant had proven by a preponderance of evidence that the city committed a disposal or release of a hazardous substance by “allowing, over a time period of several decades, soil sediment, leachate and water run-off, all containing lead contamination, to frequently run off from the Gary landfill and wash over onto Paul’s Auto Yard. . . .”

**[7] Toxic Torts: Federal Court Allows Personal Injury Suit over Camp Lejeune Drinking Water to Proceed**

A federal judge in North Carolina has ruled that a personal injury lawsuit against the federal government stemming from exposure to drinking water contamination at Camp Lejeune may proceed.

**Jones v. U.S., No. 09-106 (E.D.N.C. 02/23/10)**.

The court rejected the government’s motion to dismiss based on the statute of limitations and sovereign immunity. According to the court, the government failed to provide notice to individuals potentially exposed to the contamination, so the statute of limitations did not apply. The court also held that sovereign immunity did not apply because the government was aware of the presence and toxicity of the chemicals at issue and its conduct regarding that contamination “was not the subject of discretion susceptible to policy analysis.”

According to court records, in 1982, the Marine Corp. detected volatile organic compound (VOC) contamination in the drinking water provided by



two of eight treatment plants at Camp Lejeune. Among the chemicals found in the water were trichloroethylene, tetrachloroethylene, benzene, toluene, and xylene. Individuals residing or working at the base were potentially exposed to VOCs from the 1950s through the mid-1980s, according to studies by the Agency for Toxic Substances and Disease Registry (ATSDR). The wife of a marine stationed at the base filed the lawsuit after she was diagnosed with non-Hodgkin's lymphoma. She alleged that her illness was caused by exposure to VOCs at Camp Lejeune. Filed under the Federal Tort Claims Act, the suit seeks damages for personal injury.

#### [8] Enforcement: EPA Lists Priorities on OECA Web Site

EPA has identified six national enforcement priorities for the years 2011-2013 and listed them on the agency's Office of Enforcement and Compliance Assurance [Web site](#). The list includes (i) keeping sewage and untreated storm water out of waterways; (ii) preventing animal waste from large farm operations from contaminating groundwater; (iii) protecting communities from toxic air pollution; (iv) investigating new source review violations at power plants, cement kilns and glass and acid manufacturers; (v) targeting pollution emissions from mining and mineral processing operations; and (vi) ensuring natural gas, coal mining and petroleum operations comply with environmental laws. EPA evaluates national priorities every three years and had considered 15 potential areas in identifying the six listed.

#### [9] Envtl. Crime: Sales Representative for Subcontractor Sentenced to Prison in Bid-Rigging Case

A former sales representative for a New Jersey subcontractor was reportedly sentenced February 23, 2010, in federal court to 33 months in prison for his role in an alleged kickback and fraud conspiracy

at a New Jersey CERCLA site. *U.S. v. McDonald*, No. 09-656 (D.N.J. 02/23/10). The defendant was also ordered to pay a \$30,000 criminal fine and \$53,049 in restitution to EPA. Defendant admitted paying kickbacks to former employees of a prime contractor at the Federal Creosote CERCLA site in Manville, New Jersey, between June 2002 and September 2004 in exchange for the award of a subcontract to supply backfill. He also admitted inflating bid prices for the subcontract to include the amount of the kickbacks paid to co-conspirators and then charging EPA for the inflated costs. Charges against the subcontractor's former chief executive and a former project manager are pending. See *BNA Daily Environment Report*, February 24, 2010.

## Legislation, Regulations and Guidance

#### [10] TSCA: EPA Proposes Rule Requiring Testing of High-Production Volume Chemicals

EPA has proposed a [rule](#) that would require testing of 29 high-production volume chemicals. *75 Fed. Reg. 8,575 (02/25/10)*. The proposed rule would require companies that manufacture, import or process any of the chemicals to provide basic environmental fate, ecotoxicity, acute toxicity, genetic toxicity, repeated dose toxicity, and developmental and reproductive toxicity to EPA. High-production volume chemicals are manufactured or imported into the United States in volumes of 1 million pounds or more annually. The testing is authorized by TSCA, Section 4, according to EPA.

The proposed rule would establish two tiers of companies that could be required to provide the test data. Tier 1 consists of manufacturers that would initially be required to comply with the mandated testing. Tier 2 consists of companies not initially required to comply but that could be



required to do so if data are not provided by Tier 1 companies. Tier 2 companies would include those that make, process or use the chemicals as byproducts or impurities from other manufacturing. Comments on the proposed rule must be submitted to EPA by May 26, 2010.

**[11] Air/Greenhouse Gases: California ARB Approves Rule to Limit Sulfur Hexafluoride Emission from Utilities**

California's Air Resources Board (ARB) reportedly approved a [rule](#) on February 25, 2010, that would require electric utilities and other facilities to limit and monitor emissions of sulfur hexafluoride, a greenhouse gas (GHG) used to insulate high-voltage equipment. The rule requires the regulated facilities to limit their emissions initially to no more than 10 percent of their capacity to emit, taking into account all of the gas contained in the facilities' equipment. After 2012, the facilities must cut their emissions by 1 percent per year. The rule applies to both investor-owned and publically owned utilities, co-generating facilities and gas insulated switch gear at military installations, universities and state-owned facilities. See *BNA Daily Environment Report*, March 1, 2010.

## Scientific/Technical Items

**[12] Mine Safety: NIOSH Publication Provides Historical Overview of Mine Safety and Health Research**

A recent National Institute for Occupational Safety and Health (NIOSH) [publication](#) provides "an historical overview of research undertaken by the U.S. federal government over the past 100 years" on mine safety and health. John Breslin, "One Hundred Years of Federal Mining Safety and Health Research," February 2010. In addition to focusing on research, the publication traces the key

organizational changes made within the Bureau of Mines and other federal agencies that affected mine safety and health research. The publication also contains 42 illustrations, many of historical interest.

**[13] CERCLA: EPA Issues Annual Superfund Report**

EPA's Office of Inspector General (IG) recently issued its "Annual Superfund Report to Congress for Fiscal Year 2009." According to the [report](#), as of May 2008, EPA had more than \$1.1 billion in more than 800 Superfund special accounts, with more than \$88 million in reserve. The report criticizes EPA for failing to spend the money held in reserve on priority Superfund sites, including sites where human exposure is not under control.

The report also says EPA's ability to recover the government costs from potentially responsible parties (PRPs) could be improved by better controls to monitor and document searches for PRPs, by ensuring EPA database quality and by identifying all government costs related to CERCLA accounts for possible recovery. Other improvements include (i) correcting minor misstatements in agency financial statements, (ii) better managing controls for Superfund special accounts, (iii) better controlling the identification of PRPs, (iv) correcting the lack of an agencywide policy on monitoring obligations under Superfund cooperative agreements, and (v) correcting the lack of data to support EPA decisions on site remediations.



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