

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] Remediation Costs: Fourth Circuit Affirms Summary Judgment Ruling; Purchase Agreement's Indemnification Provision Clear

Based on the language of a 1987 purchase agreement, the Fourth Circuit Court of Appeals has affirmed the grant of plaintiff's summary judgment motion in a lawsuit seeking remediation costs for mercury contamination. *Olin Corp. v. P.H. Glatfelter Co., No. 08-2252 (4th Cir. 3/5/10) (unpublished)*. In 1949, Olin purchased the Ecusta Paper Mill in Pisgah Forest, North Carolina, and through its manufacturing process released mercury on-site into wastewater that contaminated the facility and nearby properties. In 1987, Olin sold the property to defendant in a stock purchase agreement under which defendant agreed to indemnify Olin for specified cleanup costs.

After the North Carolina Department of Environment and Natural Resources notified both companies that it was taking an enforcement action with respect to the property, Olin sued defendant for declaratory relief. Defendant counter-claimed, alleging fraud. The district court granted Olin's motion for summary judgment, ruling that the purchase agreement was clear that defendant was obligated to indemnify Olin for costs of cleanup

described in the agreement. The district court also dismissed defendant's state fraud claim as time-barred, and defendant appealed.

The appeals court held that defendant "unambiguously agreed to assume Olin's liabilities" regarding contaminants at the site. The court also found "no improper conduct by Olin" and upheld the dismissal of the state fraud claim.

[2] NEPA/Water Resources: Federal Court Upholds Injunction in Water Supply Project Lawsuit

A federal judge in the District of Columbia has upheld an injunction preventing the completion of the Northwest Area Water Supply Project until the U.S. Department of Interior's Bureau of Reclamation (Bureau) completes an adequate environmental impact statement (EIS) that takes a "hard look" at the cumulative impact of water withdrawal and invasive species issues. *Manitoba v. Salazar, No. 02-2057 (D.D.C. 3/5/10)*.

The \$218 million project would draw 3.6 billion gallons of Missouri River water annually from Lake Sakakawea and pump it north to local communities and rural water systems in northwest North Dakota. The Canadian province of Manitoba filed the lawsuit in 2002 alleging that the Bureau violated NEPA by failing to fully study the risk of transferring invasive species from one basin to another in its environmental assessment (EA). A federal judge agreed in 2005 and ordered the Bureau to beef up its analysis. Instead of revising its EA, the Bureau issued a more



detailed EIS. Manitoba and Missouri, which had joined the suit, remained unsatisfied and sought to have the injunction continued.

Upholding the injunction, the court held that the Bureau failed to consider the cumulative impacts of the project in conjunction with other Missouri River water withdrawal projects. The court also found that the Bureau failed to properly look at the consequences of biota transfer from the Missouri River basin to the Hudson Bay basin, an ecologically distinct watershed.

[3] Toxic Tort: Federal Court Denies Class Certification in Cancer Cluster Lawsuit

A federal judge in Pennsylvania has refused to certify a class in a lawsuit against Rohm and Haas Co. alleging that vinyl chloride contamination in McCollum Lake Village, Illinois, caused an increase in brain cancer rates among local residents.

[Gates v. Robm and Haas Co., No. 06-1743 \(E.D. Pa. 3/5/10\).](#)

The complaint alleged that vinyl chloride released from defendant's specialty chemicals manufacturing facility contaminated the village's groundwater and air. Specifically, plaintiffs claimed that vinyl chloride levels in village air were higher than the background level of 0.042 micrograms per cubic meter and created a significantly increased risk for residents to develop brain cancer. They sought class certification for the following claims: (i) medical monitoring, (ii) public and private nuisance, (iii) negligent and intentional trespass, (iv) strict liability, (v) negligence and negligence *per se*, and (vi) conspiracy.

The court ruled that plaintiffs had failed to establish that all of the proposed class members had the same vinyl chloride exposure levels and therefore denied the medical monitoring claim, saying,

"plaintiffs must demonstrate that they can use common proof to demonstrate that each individual was exposed to a level above background levels." The court also denied certification of a separate class of property owners who claimed that vinyl chloride leached out of a facility owned by defendant, lowering the values of village homes and requiring significant cleanup costs. The court held that common issues do not predominate as to plaintiffs' property damage claims. According to the court, class certification was not warranted "on the record presented to the court."

[4] Enforcement: Federal Jury Finds Pennsylvania DEP Employees Liable for Unfair Enforcement Actions

A federal jury in Pennsylvania has reportedly awarded MFS, Inc. of Bethlehem, a now-defunct manufacturer of industrial insulation and ceiling tiles, \$6.5 million after finding that four Pennsylvania Department of Environmental Protection (DEP) employees retaliated against the company in a series of enforcement actions. The company charged that the employees took the enforcement actions after the company complained to state lawmakers about alleged unfair treatment. The employees, who were sued as individuals, included the director of DEP's northeast regional office, a former air-quality program manager, the current air-quality program manager, and an agency lawyer.

According to court documents, the dispute started in 2001, when DEP issued a violation notice to MFS for odors allegedly emitted from its plant. A year later, the agency issued a field-enforcement order on a Friday, requiring a response by the following Monday. MFS responded by complaining to state lawmakers, at least one of whom wrote to DEP expressing concern. Shortly thereafter, DEP



issued 13 citations to MFS over a two-week period. The company alleged that continued DEP harassment forced the company to shut down in 2008. *See The Philadelphia Inquirer*, March 11, 2010.

[5] Clean Water Act: EPA to Address Ocean Acidification

As part of a [settlement agreement](#) announced March 11, 2010, EPA has agreed to consider issuing nationwide guidance under the Clean Water Act (CWA) to assist states in dealing with ocean acidification. *Ctr. for Biological Diversity v. EPA*, No. 09-00670 (W.D. Wash. settlement announced 03/11/10). Under the agreement, EPA will seek comments on whether guidance should be issued about the listing of waters as threatened or impaired due to ocean acidification and what such guidance might entail.

Filed in May 2009, the lawsuit alleged that, while EPA had information indicating that Washington state's marine waters were not in attainment with water quality standards due to acidification, the agency arbitrarily and unlawfully approved the state's deficient list of impaired waters. In a forthcoming *Federal Register* notice, EPA will seek recommendations for developing a total maximum daily load for waters impaired by ocean acidification. *See BNA Daily Environment Report*, March, 12, 2010.

Legislation, Regulations and Guidance

[6] Air: EPA Draft Report Says Existing PM2.5 Standards Fail to Protect Health

A recently issued EPA [draft report](#) indicates that existing air standards for fine particles (PM2.5) are insufficient to protect public health and reduce the pollutant's impact and visibility. According to the draft, recent research into the health effects of fine particles

“calls into question the adequacy of the current suite” of air standards for the pollutants. It recommends that the agency consider setting a separate secondary standard for PM2.5 to protect visibility.

The draft report proposes two scenarios for EPA to consider when revising the standards: (i) either revise the current annual standard (15 micrograms per cubic meter) to between 12 and 13 micrograms, while retaining the existing 24-hour standard of 35 micrograms, or revise it to between 30 and 35 micrograms; or (ii) set the annual standard in a range between 10 and 11 micrograms and revise the 24-hour standard to between 25 and 30 micrograms.

The draft report recommends revising the standards because, according to EPA, research linking fine particle exposure to health effects such as increased risk of heart attack, respiratory effects and even death is “stronger in comparison” to the agency's 2004 review. The draft report goes on to say that “[t]he science is unquestionable that we need significantly more stringent fine particle standards.”

[7] Greenhouse Gases: EPA Seeks Comments on Draft Annual GHG Inventory Report

EPA is seeking public comments on its annual “Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2008” [draft report](#), which shows that in 2008 overall greenhouse gas (GHG) emissions have decreased by 2.9 percent. Total emissions for GHGs were about 6,946.1 million metric tons of carbon dioxide (CO₂) equivalent. Overall, emissions have grown by 13.6 percent since 1990.

The inventory tracks annual GHG emissions from 1990 to 2008 at the national level. The gases included in the inventory are CO₂, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. The inventory also



calculates CO₂ emissions that are removed from the atmosphere by “sinks,” e.g., through the uptake of carbon by forests, vegetation and soils. The report will be available for public comment for 30 days after it is published in the *Federal Register*. See *EPA Press Release*, March 9, 2010.

[8] Enforcement: IG Report Faults EPA Tracking of Fines and Reporting

The EPA Inspector General (IG) has issued a report criticizing the agency for failing to do a better job of tracking and recording fines and penalties and reporting that information transparently. The report found that, as a result of record keeping delays, the agency did not record as receivable two disputed stipulated penalties totaling more than \$2.8 million and also failed to monitor the collection of a \$300,000 receivable.

The report also found that the EPA Office of Compliance and Enforcement Assurance’s database contained errors totaling \$139,242 in penalty assessment amounts. The IG report recommends that (i) the agency’s chief financial officer (CFO) work with program offices to implement performance measures to track the timelines of forwarding information to the finance center; (ii) performance reports be issued to the agency program offices and regions; (iii) the CFO analyze and document the current process of forwarding accounts-receivable source documents to the office in Cincinnati that records and tracks the billing and collection of fines and penalties; and (iv) the CFO develop a policy on fines and penalties to clarify when a stipulated penalty becomes an account receivable.

[9] Energy: California Public Utilities Commission Approves Tradable Renewable Energy Credit Scheme

California’s Public Utilities Commission has authorized the procurement and use of tradable renewable energy credits (TREC) for compliance with the California renewables portfolio standard (RPS) program, which will allow electric utilities to buy and sell credits to meet the state’s renewable energy goals.

The March 11, 2010, decision also delineates the structure and rules for a TREC market, which will keep megawatt-hours with credit sellers, but removes the seller’s right to claim that energy to meet statewide targets.

Under a temporary limit imposed by the decision, the three largest California utilities may use TREC to meet no more than 25 percent of their annual RPS procurement obligations. The decision also imposes a transitional price cap of \$50 per credit in renewable energy credit-only contracts used for RPS compliance by all investor-owned utilities.

[10] Enforcement: NYC Increases Penalties for Dumping Waste Materials in N.Y. Harbor

The New York City Council has reportedly increased potential fines for dumping waste materials into New York Harbor from a maximum of \$250 to as much as \$20,000 for each violation. The council voted unanimously to amend the anti-dumping law by adding civil penalties ranging between \$1,500 and \$10,000 for first offenses and \$5,000 to \$20,000 for subsequent offenses. The council retained the old law’s criminal provisions, which classify dumping in the harbor as a misdemeanor and carry a jail sentence of up to six months.



Under the amended law, violators could face both criminal and civil prosecution. Under the law, it is illegal to discharge “offal, lumber, timber, driftwood, ashes, cinders, mud, sand, dredging materials, sludge, acid, dirt, gravel, clay, loam, rocks, rubble, sawdust, manure or any other refuse” into the city’s port areas. *See Environmental Law 360*, March 8, 2010.

[11] Lead: EPA Lead Certification Rule Effective April 22, 2010

An EPA [rule](#) issued in 2008 and effective April 22, 2010, requires contractors performing renovation, repair and painting projects that disturb paint in homes, child-care facilities and schools built before 1978 to be trained and certified by an EPA- accredited provider. *73 Fed. Reg. 21,691 (04/22/08)*. Landlords, property managers and their employees are responsible for ensuring compliance with the rule. EPA-accredited training providers can be located on EPA’s “Get Lead Safe” Web site. *See EPA Press Release*, March 11, 2010.

[12] Europe: ECHA Issues Guidance on Appeals Process

The European Chemical Agency (ECHA) has published a [guidance document](#) that sets out the procedures manufacturers or importers of chemical substances should follow when appealing an ECHA decision. Under the European Union’s regulation on the registration, evaluation and authorization of chemicals (REACH), ECHA issues decisions that exempt certain substances from registration, reject registration dossiers if judged deficient and require substance tests. The guidance provides information on how information should be provided to ECHA during the appeals process, time limits and the confidentiality rights of appealing parties. It also addresses open- or closed-hearing requests.

Scientific/Technical Items

[13] Chemical Exposure: Study Claims Link Between BPA Exposure and Lifelong Fertility Defects

A recent study by Yale School of Medicine researchers claims a link between exposure to bisphenol A (BPA) during pregnancy and permanent abnormalities in the uterus of offspring and the reprogramming of genes. Jason Bromer, et al., “Bisphenol-A exposure *in utero* leads to epigenetic alterations in the developmental programming of uterine estrogen response,” *Journal of the Federation of American Societies for Experimental Biology*, Vol. 24, Issue 3, March 2010. The researchers exposed a group of mice to BPA during fetal development and examined both gene expression and the amount of DNA modification in the uterus. A second group of mice was exposed to a placebo. The researchers found that the mice exposed to BPA demonstrated an “exaggerated response to estrogen as adults, long after the exposure to BPA.”

[14] Europe/Electronic Waste: Report Claims Germany Exports 155,000-Plus Tons of Electronic Waste Annually

According to a recent [report](#) by the German Institute for Environmental Strategies in Hamburg, Germany exports more than 155,000 metric tons of used electrical and electronic equipment to Africa and Asia each year. Titled “Transboundary shipment of waste electrical/electronic equipment/electronic scrap: Optimization of material flows and control,” the report was commissioned by the German Federal Environmental Agency.



Legislation in effect since 2004 requires European Union countries to collect and recycle waste electrical and electronic equipment (WEEE), but the WEEE directive (2002/96/EC) has been considered difficult to implement and enforce. Most of the equipment shipped from Germany is believed to be WEEE.

According to the report, even defective appliances are often reclassified as “functional,” then shipped to other countries where they are rarely recycled in an environmentally sound fashion. The equipment, including television and computer monitors, often contains hazardous materials. The European Parliament is set to begin debate in April 2010 on revising waste electronics directives.



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

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