

Environmental & Chemical Update

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Litigation

- [1] **CERCLA: Federal Court Rules Administrative Settlement Triggers Statute of Limitations** 1
- [2] **CERCLA/RCRA: Federal Court Dismisses Claims Against Manufacturer Based on Useful Product Defense** 1
- [3] **Wild and Scenic Rivers Act: Federal Court Vacates NPS Finding of No Adverse Impact.** 2
- [4] **Greenhouse Gases: States Seek to Intervene in Challenge to GHG Regulation.** . . 2
- [5] **Toxic Tort: Pet Owners Sue Flea and Tick Product Manufacturers in Putative Class Action** 2
- [6] **Clean Water: Group Sues City of Baton Rouge over Alleged Wastewater Discharges** 3

Legislation, Regulations and Guidance

- [7] **Renewable Fuels: EPA Issues Final Rule Setting Criteria for Determining Renewable Fuels.** 3
- [8] **Air: EPA Issues Amendments to Transportation Conformity Rule** 3
- [9] **Greenhouse Gases: EPA Proposal Would Require More Facilities to Report Emissions** 4
- [10] **Water: EPA Draft Guidance Targets Nonpoint Source Pollution in Chesapeake Bay Watershed** 4
- [11] **SDWA: EPA Announces Initiative to Overhaul Drinking Water Rules.** 4
- [12] **Canada: Hazardous Products Regulation on Lead in Kettle Solder Amended** 5
- [13] **Greenhouse Gases: Washington Governor Signs GHG Reporting Bill into Law.** . . . 5

Scientific/Technical Items

- [14] **Science Database: EPA Provides Scientific Studies Online** 5

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Litigation

[1] CERCLA: Federal Court Rules Administrative Settlement Triggers Statute of Limitations

A New York federal judge has dismissed a CERCLA contribution action as time-barred, ruling that an administrative settlement in 1998 triggered the three-year statute of limitations. *Cbitayat v. Vanderbilt Associates, No. 03-5314 (E.D. N.Y. 03/22/10)*. The lawsuit involved a property in Hauppauge Industrial Park purchased by the plaintiff in 1985 and found to be contaminated in 1989. In 1998, the plaintiff entered into an administrative settlement with the New York Department of Environmental Conservation under which he agreed to contribute up to \$125,000 annually to remediation efforts. In 2003, the plaintiff sued the previous owners of the site, seeking contribution and arguing that an out-of-court administrative settlement with a state agency would not trigger CERCLA's three-year statute of limitations.

In granting the defendant's motion for summary judgment, however, the court agreed that the suit was time-barred and concluded that the statute of limitations applied as long as the administrative settlement completely resolved the settling party's CERCLA liability. According to the court, "[s]uch a conclusion comports with the rule under federal common law that it is the discovery of the injury which triggers the statute of limitations."

[2] CERCLA/RCRA: Federal Court Dismisses Claims Against Manufacturer Based on Useful Product Defense

A federal judge in California has dismissed a contribution claim and other claims against the manufacturers of a dry cleaning machine that required the disposal of hazardous wastewater to operate properly. *Hinds Investments, LP v. Team Enterprises, Inc., No. 07-703 (E.D. Cal. 03/12/10)*. Plaintiffs sought remediation costs from manufacturers to clean up perchloroethylene (PCE) contamination at two properties where dry cleaning machines were in use, alleging that the product manual called for wastewater to be discharged into "an open drain."

The court ruled that plaintiffs failed to present a plausible claim and "offer[ed] nothing substantial to negate the useful product defense." According to the court, the complaint also failed to allege that the manufacturers intended to arrange for the improper disposal of PCE and consequently plaintiffs cannot go forward with claims that defendants face liability as "arrangers" under CERCLA or "contributors" under RCRA. The court also dismissed plaintiffs' nuisance and trespass claims as well as those under the California Hazardous Substance Account Act.



[3] **Wild and Scenic Rivers Act: Federal Court Vacates NPS Finding of No Adverse Impact**

A federal judge in Minnesota has vacated a finding by the National Park Service (NPS) that a proposed four-lane bridge over the Lower St. Croix River would not have an adverse effect on the river. [*Sierra Club North Star Chapter v. LaHood, No. 07-2593 \(D. Minn. 03/11/10\)*](#). The Federal Highway Administration (FHWA) first proposed the bridge in 1995, but NPS found, under the Wild and Scenic Rivers Act (WSRA), that the project would have a direct and adverse effect on the river's value. In 2006, NPS reversed this finding, allowing a new project proposal to proceed. The Sierra Club sued in 2007 to block the project on numerous grounds, including allegations under NEPA that NPS failed to consider the impact of the bridge on the environment and that the agency "inexplicably reversed" its position.

Ruling that NPS violated WWSA, the court said that while "[a] federal agency may reevaluate previous determinations and change its mind, ... the agency must explain its reasons for changing its position." In this case, according to the court, the NPS failed "to acknowledge its previous contrary position, let alone why, in its opinion, a change is justified, [...]."

[4] **Greenhouse Gases: States Seek to Intervene in Challenge to GHG Regulation**

Sixteen states have filed motions to intervene in a challenge to greenhouse gas (GHG) regulation. Florida, Hawaii, Indiana, Kentucky, Louisiana, Mississippi, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, and Utah filed a joint motion, while Alaska, Michigan, Minnesota, and Pennsylvania filed separate motions. [*Coalition For Responsible Regulation, Inc. v. EPA, No. 09-1322*](#)

[\(D.C. Cir. Filed 03/18/10\)](#). These states seek to join in a petition originally filed by Alabama, Texas and Virginia, which challenges an Environmental Protection Agency (EPA) final rule titled "Endangerment and Cause or Contribution Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act," published at *74 Fed. Reg. 66,496 (12/15/09)*. The rule is a condition precedent for the regulation of GHG emissions from motor vehicles under the Clean Air Act.

Petitioners have alleged that the rule is "arbitrary and capricious" and that EPA failed to properly exercise its judgment by relying almost exclusively on reports from the Intergovernmental Panel on Climate Change in attributing climate change to GHG emissions. Fifteen other states, including Arizona, California and New York, have intervened in the case in support of EPA.

[5] **Toxic Tort: Pet Owners Sue Flea and Tick Product Manufacturers in Putative Class Action**

Seven pet owners have filed a putative class action against manufacturers of flea and tick products, seeking damages and a recall of the allegedly dangerous products. [*Arlandson v. Hartz Mountain Corporation, No. 10-1050 \(D. N.J. filed 03/03/10\)*](#). The complaint alleges that plaintiffs purchased pyrethrin-containing flea- and tick-control products manufactured by defendants and that, as a result, their pets displayed symptoms of pyrethrin poisoning and some died. Claiming that defendants have known for many years that pyrethrin could substantially injure or kill significant numbers of dogs or cats, the complaint asserts counts of breach of implied warranty, strict liability, negligence, and violations of the New Jersey Consumer Fraud Act. Plaintiffs seek to represent a



class of “all persons who purchased flea-protection products from Defendants” that contained pyrethrin and pyrethrin derivations.

[6] **Clean Water: Group Sues City of Baton Rouge over Alleged Wastewater Discharges**

The Louisiana Environmental Action Network has sued Baton Rouge and the parish of East Baton Rouge for allegedly violating their Clean Water Act discharge permits at three sewage treatment plants. [*Louisiana Environmental Action Network v. City of Baton Rouge*, No. 10-187, \(M.D. La. filed 03/22/10\)](#). According to the complaint, these plants have failed to abide by the so-called “Eighty-five Percent Rule,” which requires permit holders to ensure that the 30-day average amount of biochemical oxygen demand and total suspended solids in discharged wastewater is at least 85 percent less than the amount found in sewage entering the plant. Plaintiffs allege that raw sewage and untreated wastewater were discharged into residential areas surrounding the plants, in violation of the permits. The complaint also contends that the plants have violated a 1988 consent decree with the Environmental Protection Agency that was amended in 2002. The complaint seeks declaratory and injunctive relief as well as fees and costs.

Legislation, Regulations and Guidance

[7] **Renewable Fuels: EPA Issues Final Rule Setting Criteria for Determining Renewable Fuels**

The Environmental Protection Agency (EPA) has issued a [final rule](#) that establishes criteria for determining what biofuels meet the renewable fuels standard of the Energy Independence and

Security Act (EISA). *75 Fed. Reg.* 14,669 (03/26/10). Under EISA, the nation’s fuel supply must include 36 billion gallons of ethanol or other renewable fuel by 2022, with 21 billion gallons derived from cellulosic sources of biomass, such as switch grass or crop residues. The rule makes four primary changes to the volumetric requirements of the existing renewable fuels program (RFP): (i) it substantially increases the required volumes and extends the time frame over which the volumes ramp up through at least 2022; (ii) it divides the total renewable fuel requirement into four separate categories, each with its own volume requirement, (iii) it requires, with certain exceptions applicable to existing facilities, that each of the mandated volumes achieve certain minimum thresholds of greenhouse gas (GHG) emission performance; and (iv) it requires that all renewable fuel be made from feedstocks that meet the definition of renewable biomass including certain land use descriptions. The rule is effective July 1, 2010.

[8] **Air: EPA Issues Amendments to Transportation Conformity Rule**

The Environmental Protection Agency (EPA) has issued a [final rule](#) amending its transportation conformity rule that sets out detailed procedures for states and local governments to ensure that transportation projects do not contribute to violations of revised air quality standards for particulate matter. *75 Fed. Reg.* 14,259 (03/24/10). The amendments also address a federal appeals court decision that ordered the agency to rewrite a 2006 transportation conformity rule for fine particulate matter. *Environmental Defense v. EPA*, No. 06-1164 (D.C. Cir. 12/11/07). The rule, which amends 40 C.F.R. Part 93, is effective April 23, 2010.



Transportation conformity is a Clean Air Act requirement under which state and local transportation agencies must ensure that federally supported highway and transit projects are consistent with, or conform to, state implementation plans (SIPs). The projects cannot cause or contribute to new air quality violations, worsen existing violations or delay attainment of air quality standards for transportation-related air pollutants, such as ozone, particulate matter, carbon monoxide, or nitrogen dioxide.

[9] Greenhouse Gases: EPA Proposal Would Require More Facilities to Report Emissions

The Environmental Protection Agency (EPA) has issued a [proposed rule](#) that would require greenhouse gas (GHG) reporting at oil and gas wells, carbon sequestration facilities and facilities that produce and use fluorinated gases, such as chlorofluorocarbons (CFCs). Such facilities were not included under the industry-wide mandatory reporting rule for GHG emissions issued by EPA in October 2009.

The oil and gas system proposal would require oil and gas wells and associated equipment that emit more than the equivalent of 25,000 metric tons per year of carbon dioxide to report emissions. It would also apply to offshore oil and gas wells, storage tanks and equipment that transfers the oil and gas onshore. In addition, the proposal would apply to carbon dioxide sequestration and underground injection for enhanced oil and gas recovery. It would not apply to above-ground or temporary underground carbon dioxide storage or to processes that use carbon dioxide.

Electronics production, fluorinated gas production, imports and exports of pre-charged equipment or closed-cell foams containing fluorinated GHGs, and the use or manufacture of electric transmission and

distribution equipment would be subject to fluorinated gas emissions reporting requirements. EPA will accept comments on the proposal for 60 days after its publication in the *Federal Register*.

[10] Water: EPA Draft Guidance Targets Nonpoint Source Pollution in Chesapeake Bay Watershed

The Environmental Protection Agency (EPA) has released [draft guidance](#) on ways of reducing nonpoint source pollution from farms, lawns, septic systems, and other sources across the Chesapeake Bay watershed. The guidance provides detailed recommendations and cost estimates for bay-protection activities that would reduce the risk of pollution from agriculture, urban and suburban development and septic tanks, and protect forestry, riverbanks and stream banks. The guidance urges that development and redevelopment projects maintain the land's hydrology to the "maximum extent technically feasible" and presents background information and examples that demonstrate how to implement low-impact development and other green infrastructure techniques.

[11] SDWA: EPA Announces Initiative to Overhaul Drinking Water Rules

The Environmental Protection Agency (EPA) has announced development of new strategies to address drinking water contaminants. The agency also plans to revise existing drinking water standards for the carcinogenic compounds tetrachloroethylene, trichloroethylene, acrylamide, and epichlorohydrin.

As part of its new initiative on drinking water, EPA will (i) address contaminants as a group rather than individually to achieve cost-effective enhancement of drinking water protection, (ii) foster development of new drinking water treatment technologies



to address health risks posed by a broad array of contaminants, (iii) use the authority of multiple statutes to help protect drinking water, and (iv) partner with states to share more complete data from monitoring at public water systems. *See EPA Press Release and New York Times*, March 22, 2010.

[12] Canada: Hazardous Products Regulation on Lead in Kettle Solder Amended

Health Canada has [amended](#) its Hazardous Products Regulations to reduce the maximum allowable lead levels leached from solder joints inside kettles from 0.05 parts per million to 0.01 parts per million. The amendments came after testing determined that the use of lead solder in some kettles produced lead levels in boiled water exceeding the 0.05 ppm standard for drinking water. Affected products include stove-top and electric kettles, coffee percolators, samovars, and espresso machines. *See Canada Gazette*, March 17, 2010.

[13] Greenhouse Gases: Washington Governor Signs GHG Reporting Bill into Law

Washington Governor Christine Gregoire (D) has signed a bill ([S.B. 6373](#)) that will align the state's greenhouse gas (GHG) reporting requirements with the Environmental Protection Agency's (EPA's) reporting rules, although the state law is somewhat more stringent than federal rules. For example, EPA requires annual reporting for fuel suppliers and facilities that emit 25,000 metric tons of GHGs per year, whereas the Washington law requires reporting by facilities that emit 10,000 metric tons.

Scientific/Technical Items

[14] Science Database: EPA Provides Scientific Studies Online

The Environmental Protection Agency's (EPA's) new Health and Environmental Research Online ([HERO](#)) database provides access to scientific studies used by the agency to make regulatory decisions. The database includes peer-reviewed literature used to develop Integrated Science Assessments (ISAs) as well as references and data from the Integral Risk Information System (IRIS). *See EPA Press Release*, March 24, 2010.



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