

# Environmental & Chemical Update

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SUSTAINABILITY • TOXIC TORT • WASTE • WATER

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## Litigation and Regulatory Enforcement

### [1] CERCLA: Third Circuit Addresses Cost Recovery and Contribution Issues

The Third Circuit Court of Appeals has vacated a district court decision that allowed cost allocation claims of \$10.9 million in cleanup costs involving a Pennsylvania facility. *Agere Sys., Inc. v. Advanced Env'tl. Tech. Corp.*, No. 09-1814 (3d Cir. 04/12/10). So ruling, the court attempted to clarify the relationship between section 107 and 113 claims.

Several potentially responsible parties (PRPs) filed the lawsuit in 2002 against 23 other parties for cost recovery and contribution under CERCLA and state law to recover costs plaintiffs had paid to EPA under certain consent decrees or that they had provided as a consequence of hazardous substance cleanup at the site. All of the defendants except for Carpenter Technology Corp. either settled or were dismissed from the lawsuit. The district court entered judgment against Carpenter, finding it liable for 80 percent of both the past costs paid by plaintiffs and any future costs that may be incurred. Carpenter appealed the judgment.

The appellate court reversed and remanded, ruling that the lower court failed to make a finding that would help resolve whether the statute of limitations had expired and improperly relied on a stipulation involving how much waste the suing PRPs contributed to the waste site's contamination. The court also held (i) a party that obtains

contribution protection under a settlement with the government is limited to a contribution action under section 113(f) of CERCLA; and (ii) a party that pays money under a private settlement agreement into a group trust account may sue another PRP under section 107(a). The second issue was relevant because Agere Systems, Inc. had never been sued by anyone under CERCLA for costs at the site, but it had paid money into a group trust account for site cleanup, anticipating it would be sued at some point.

On remand, the appellate court ordered the district court to (i) make a clean finding as to when EPA completed its removal action; (ii) permit Agere to go forward with a section 107(a) action; (iii) proceed as to the other plaintiffs under section 113; and (iv) while proceeding under section 113, allocate liability among the parties.

### [2] OSHA: D.C. Circuit Rules Penalty May Be Imposed on Behalf of Each Affected Worker

The D.C. Circuit Court of Appeals has ruled that the Secretary of Labor has the authority to adopt rules imposing separate penalties for each employee affected by a safety violation under Occupational Safety and Health Administration (OSHA) regulations. *Nat'l Ass'n of Home Builders v. OSHA*, No. 09-1053 (D.C. Cir. 04/16/10).

The National Association of Home Builders, the U.S. Chambers of Commerce and the National Association of Manufacturers challenged rules the secretary amended in January 2009 to clarify that



employers could be held liable on a per-employee basis for failing to provide training and respirators for employees. The rule amended Title 29 of the Code of Federal Regulations. Petitioners argued that the authority to set penalties per employee lay exclusively with the Occupational Safety and Health Review Commission and not the Secretary of Labor.

Rejecting petitioner's argument, the court ruled that the responsibility for specifying whether per-person penalties are allowed is a legislative function and it is the "Secretary [who] stands in the shoes of the legislature." According to the court, the review commission performs a judicial and not a legislative function.

### **[3] Envtl. Crime: Federal Jury Acquits Chief Engineer of Ocean Dumping**

A federal jury in Houston, Texas, has reportedly acquitted a Greek maritime officer charged with engineering the dumping of an oil tanker's waste off the shore of Texas in 2009. *U.S. v. Mylonakis*, No. 09-492 (S.D. Tex. verdict 04/28/10). The jurors rejected DOJ prosecutors' claims that the chief engineer ordered his crew to use a "magic pipe" to bypass pollution-control equipment on the tanker M/T Georgios and discharge sludge and oily waste into the Gulf of Mexico. The court struck the testimony of a U.S. Coast Guard Marine Safety Lab expert, finding it confusing and irrelevant, after the expert was apparently unable to make a conclusive determination matching the oil of certain tanks on the vessel to oil in the discharge pipe. The tanker's operator, Styga Compania Havieria S.A., entered a plea agreement in October 2009, agreeing to pay \$1.25 million to the government to settle federal felony charges of deliberately concealing pollution discharges from the Coast Guard. *See BNA Daily Environment Report*, April 30, 2010.

### **[4] Clean Water Act: Environmental Groups Sue Mining Company Subsidiaries over Alleged Violations**

Several environmental groups have sued five Massey Energy Co. subsidiaries, alleging they have persistently violated their Clean Water Act permits at several coal mines in West Virginia. [\*Sierra Club v. Elk Run Coal Co., Inc., No. N/A \(S.D. W. Va. filed 04/27/10\)\*](#). The complaint asks the court to order immediate compliance with the companies' NPDES permits, require the companies to pay civil penalties of up to \$32,500 to \$37,500 for each day of violation, and order the companies to restore the environment to its prior uncontaminated condition. Specifically, the complaint alleges that the defendants exceeded their permits in discharges of aluminum, iron and suspended solids. The lawsuit was filed three weeks after an explosion at Massey's Upper Big Branch Coal mine killed 29 miners.

### **[5] Air: Wildlife Watchdog Claims EPA Failed to Perform Mandatory Duties**

An environmental group has sued EPA alleging that the agency violated the Clean Air Act by missing statutory deadlines to make PM-10 attainment designations, failing to take final action on state implementation plans, failing to promulgate federal implementation plans, and failing to impose sanctions required in noncompliant areas. [\*Ctr. for Biological Diversity v. Jackson, No. 10-1846 \(N.D. Cal. filed 04/29/10\)\*](#). The lawsuit involves 14 areas in Alaska, Arizona, Idaho, Montana, and Nevada that had been classified as in "moderate" nonattainment for coarse particles, or PM-10, in the early 1990s. According to the complaint, EPA is more than 10 years late in determining whether PM-10 has been reduced to healthy levels in some areas and has failed to approve emission-control



plans for areas in Arizona and Montana. It seeks a declaration that EPA is in violation of the CAA and an order requiring the agency to perform mandatory duties listed in the complaint.

#### **[6] Europe: EC Study Targets Disparities in REACH Enforcement Penalties**

A [study](#) released by the European Commission on April 27, 2010, discusses disparities in REACH enforcement penalties among European Union (EU) member states. Prepared by the Belgian consulting firm Milieu, the study says that countries differ “significantly” in the type of enforcement regime chosen, the level of sanctions and the level of deterrence in penalties. According to the study, the disparities could create EU market distortions and “reduce the level of protection of human health and the environment in those countries with less severe systems of penalties.” It also suggests that these disparities could lead companies to avoid locating in countries with more stringent compliance systems. The study found that some countries apply administrative penalties for REACH violations, for example, while others use criminal law to enforce the same types of violations.

## **Legislation, Regulations and Guidance**

#### **[7] RCRA/Air: EPA Proposes Rule on Non-Hazardous Secondary Materials Considered Solid Waste**

EPA has issued a [proposed rule](#) that is intended to clarify which non-hazardous secondary materials are solid wastes when burned in combustion units. Under the proposed rule, non-hazardous secondary materials considered solid wastes under RCRA would be subject to section 129 of the Clean Air

Act, while non-hazardous secondary materials not considered wastes under RCRA would be subject to section 112 of the CAA.

The proposed rule would classify the following as non-solid wastes: (i) material used as fuel that remains within the control of the generator and meets legitimacy criteria; (ii) materials used as an ingredient in a manufacturing process that meets legitimacy criteria; and (iii) material that has been determined through a case-by-case petition process to not have been discarded and to be indistinguishable in all relevant aspects from a fuel product. EPA will accept comments on the proposed rule for 45 days after it is published in the *Federal Register*.

The proposed rule was issued in conjunction with three CAA proposals: Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration (CISWI) Units; NESHAPS for Area Sources: Industrial, Commercial, and Institutional Boilers; and NESHAPS for Industrial, Commercial, and Industrial Boilers and Process Heaters. Each of these proposals may be downloaded from the EPA Website.

#### **[8] Science Policy: President Issues Executive Order Establishing Science and Technology Advisory Council**

President Barack Obama (D) issued [Executive Order 13539](#) on April 21, 2010, establishing the President’s Council of Advisors on Science and Technology. *75 Fed. Reg.* 21,973 (04/27/10). The council will advise the president directly and through a science advisor on matters involving science, technology and innovative policy. It will also (i) respond to the president’s requests for information, analysis, evaluation, and advice; (ii) solicit information and ideas from a broad range of stake holders; (iii) serve as the advisory



committee identified in subsections 101(b) and 103(b) of the High Performance Computing Act of 1991, as amended; and (iv) serve as the advisory panel identified in section 4 of the 21<sup>st</sup> Century Nanotechnology Research and Development Act. The council will be composed of not more than 21 members, one of whom will be the assistant to the president for science and technology and 20 of whom will include distinguished members from outside the federal government.

#### **[9] Chemical Exposure: California DTSC Proposes Regulatory Framework to Reduce Toxics in Consumer Products**

The California Department of Toxic Substances Control (DTSC) has proposed a [regulatory framework](#) designed to reduce toxic chemicals in consumer products as part of the agency's "green chemistry" initiative. Legislation (A.B. 1879) enacted in 2008 requires the agency to adopt the regulations by January 1, 2011. A companion bill (S.B. 509) requires the agency to establish a Toxics Information Clearinghouse.

The framework proposes guidelines for scientific and systematic prioritization of chemicals and products of concern, certification of alternatives assessments and development of the agency's regulatory responses, such as banning substances or products and end-of-life management issues. According to the agency, "the regulations will be designed to encourage manufacturers to look for safer alternatives early on."

#### **[10] Greenhouse Gases: Arizona Enacts Law Prohibiting GHG Regulation**

Arizona Governor Janice Brewer (R) signed [legislation](#) (H.B. 2442) on April 26, 2010, that prohibits state agencies from regulating greenhouse

gas (GHG) emissions without legislative approval. The new law removes from the state Department of Environmental Quality greenhouse gas emissions authority delegated by former Governor Janet Napolitano (D) in a 2006 executive order.

#### **[11] Nanotechnology: UCSF Report Recommends State Regulation of Nanomaterials**

A recent University of California, San Francisco (UCSF) [report](#) recommends that the state Office of Environmental Health Hazard Assessment (OEHHA) explore health risks posed by nanomaterials and how to address those risks within the state's regulatory structure. Authored by scientists at UCSF's Program of Reproductive Health and the Environment, the report includes policy recommendations designed specifically for OEHHA to address the potential health risks identified.

The report stresses the importance of requiring manufacturers to provide sufficient data to determine whether their products pose a significant health risk, and it suggests that existing state laws could be employed to identify and define particles and "priority" properties, develop a list of characteristics for nanomaterials and create a framework for making regulatory decisions based on use of nanomaterials and their exposure potential. The report also suggests that existing laws could be employed to assess potential exposure risks using existing hazard traits from other chemicals and toxicological and environmental-health-related endpoints, evaluate risk assessment guidelines to determine if they can sufficiently cover nanomaterials and require labels to specify that a product contains nanomaterials.

Other recommendations include (i) developing definitions that describe the difference between nanomaterials or nanoparticles and other



small-molecule chemicals; (ii) identifying the existing sources of nanomaterials; (iii) collecting information on the fate and transport of the materials; and (iv) requiring that a consumer product, already on the market and made with nanomaterials, be tested for exposure potential.

## Scientific/Technical Items

### [12] Climate Change: EPA Issues Climate Change Indicators Report

EPA has issued a [report](#) titled “Climate Change Indicators in the United States.” According to EPA, the 24 indicators listed in the report will assist in interpreting and understanding climate change. EPA will use the indicators to collect data and generate analyses to (i) monitor the effects/impacts of U.S. climate change, (ii) assist decision-makers on how to best use policymaking and program resources to respond to climate change and (iii) assist EPA and its constituents in evaluating the success of their climate change efforts.

The indicators are grouped into five chapters: greenhouse gases (U.S. emissions, global emissions, atmospheric concentrations, and climate forcing); weather and climate (U.S. and global temperature, heat waves, drought, heavy precipitation, and tropical cyclone intensity); oceans (ocean heat, sea surface temperature, sea level, and ocean acidity); snow and ice (Arctic Sea ice, glaciers, lake ice, snow cover, and snowpack); and society and ecosystems (heat-related deaths, length of growing season, plant hardiness zones, leaf and bloom dates, and bird wintering ranges). As new and more complete indicator data become available, EPA plans to update the report and provide additional indicators as they are identified.

### [13] OSHA: Data on Worker Exposure to Toxic Chemicals Released

The U.S. Department of Labor’s Occupational Safety and Health Administration (OSHA) has released 15 years of data that provide details on workplace exposure to toxic chemicals. The data comprise measurements taken by OSHA compliance officers during the course of workplace inspections. They include exposure levels to hazardous chemicals, such as asbestos, benzene, beryllium, cadmium, lead, nickel, and silica. OSHA plans to release an online search tool soon that will allow public access to this information. More information can be found on OSHA’s [Website](#). See *OSHA Press Release*, April 28, 2010.

## Upcoming Conferences and Seminars

### [14] Greenhouse Gases: Casto to Discuss Carbon Trading Systems at ABA Teleconference

Shook, Hardy & Bacon Climate Change & Sustainability Practice Partner [Keith Casto](#) will serve as a panelist for an American Bar Association [teleconference](#) titled “The Current State of Carbon Trading” on June 7, 2010, from 12:00 p.m. to 1:30 p.m. (EST). Co-hosted by Shook, Hardy & Bacon’s San Francisco office, the conference will feature expert views from three countries on the types of transactions occurring, where the market is headed and current challenges.

Casto will specifically address the potential impact of carbon credits on California, including “whether credits from California will be recognized internationally, what the future for carbon trading in California looks like in the absence of federal legislation, and the more robust cap and trade system expected to be in place by January 2011.”



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

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