

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] RCRA/CERCLA: Federal Court Rules RCRA Suit Barred by CERCLA

A federal judge in California has ruled that the city of Fresno may not pursue a RCRA claim against the federal government for cleanup of a former military installation. [City of Fresno v. U.S., No. 06-1559 \(E.D. Cal. 04/22/10\)](#). The city argued that because the cleanup was conducted in part under the Defense Environmental Restoration Program, it should be considered a cleanup under section 120 of CERCLA, pertaining to federal agencies and facilities, which does not trigger the jurisdictional bar of section 113(h) of CERCLA. Rejecting that argument, the court ruled that the cleanup is being conducted under section 104 of CERCLA because the site is privately owned by the city and, thus, the court lacked jurisdiction to review any challenge to the cleanup.

The city leased the facility to the Army during World War II. At the end of the war, the property reverted to the city and later became the Fresno-Yosemite International Airport. In the 1990s, the city and the federal government entered a cooperative agreement to clean up trichloroethane and tetrachloroethene contamination at the facility under the oversight of the California Department of Toxic Substances Control (DTSC). In 2004, DTSC approved a final remediation plan for the site. The cleanup continued until 2006, when several parties disagreed over its funding. In November 2006, the city filed a RCRA complaint against the

federal government seeking monetary and injunctive relief. The government moved for summary judgment, arguing that the city's claim is precluded by the CERCLA section 113(h) ban on pre-enforcement review, and the court agreed.

[2] Endangered Species Act: EPA's Approval of Proposed State Water Quality Standards Set Aside

A federal judge has set aside EPA's 2008 approval of Washington's water quality standards. [Wild Fish Conservancy v. EPA, No. 08-0156 \(W.D. Wash. 04/28/10\)](#). Granting plaintiff's motion for summary judgment, the court criticized EPA's decision to exempt Puget Sound salmon farms from certain water-quality standards and ordered the agency to reconsider whether a formal review is required to approve the standards—taking into consideration the “best available science,” as called for in the Endangered Species Act.

In 1995, the state's water quality standards were amended to exempt salmon farms from some regulations that restricted the chemical composition of marine sediments. EPA, which had approved the original standards in 1991, neither approved nor rejected the amended standards until plaintiffs threatened a lawsuit unless it acted. EPA and the Fisheries Service then approved the amended standards without undertaking a lengthy formal review. According to the court, by failing to use research generated by the Fisheries Service in deciding that formal consultation was unnecessary, the agencies “ran afoul of the Endangered Species Act.”



[3] **Envtl. Crime: Chief Engineer Pleads Guilty to Ocean Dumping**

The chief engineer of an ocean-going ship that transported cargo between various ports in Asia and the United States has reportedly pleaded guilty in federal court to violating an international treaty and the federal Act to Prevent Pollution from Ships. *U.S. v. Sikbaruidze*, No. 10-32 (E.D.N.C. *plea entered* 05/30/10). According to the [criminal information](#), defendant allegedly ordered the illegal discharge of oil-contaminated waste and failed to maintain accurate records in March 2010. An estimated 13,200 gallons of this waste were allegedly discharged using a pipe that bypassed the vessel's oil and water separator. The defendant also allegedly made false entries in the required record book and failed to record the improper discharge. According to a news source, defendant faces up to six years in prison and a maximum \$250,000 fine. See *BNA Daily Environment Report*, May 4, 2010.

[4] **Envtl. Crime: Hong Kong-Based Shipping Company Indicted**

A federal grand jury in Texas has reportedly returned an indictment against a Hong Kong-based shipping company in connection with the illegal dumping of oil wastewater, obstruction of agency proceedings, making false statements, and failing to maintain accurate pollution-control records. The charges resulted from an investigation by the U.S. Coast Guard after a crew member on the MV Lowlands Sumida told inspectors that the ship had been rigged to dump its waste oil and conceal evidence. The ship's crew allegedly used a "dummy" sounding tube that would fool inspectors into thinking the waste oil tank was empty and a fake logbook to corroborate the falsehood.

Under the Act to Prevent Pollution from ships, the ship's owner faces a potential \$3 million fine. See *Law360*, April 30, 2010.

[5] **Breach of Contract: Lawsuit Alleges Failure to Remediate Contamination at Service Stations**

Seeking \$29 million in damages, three energy companies recently filed a lawsuit alleging that defendant breached contracts to remediate contamination at dozens of service stations in upstate New York. [Blount Energy, Inc. v. Env'tl. Risk Solutions, LLC, No. N/A \(N.D.N.Y. filed 05/03/10\)](#). The complaint alleges that defendant failed to properly oversee a subcontractor who was supposed to remediate petroleum contamination at nearly 50 properties under a contract that assigned the defendant all environmental liabilities for any pre-existing contamination at the properties, which plaintiffs purchased from major oil companies. The seller of the properties placed more than \$20 million into an escrow account to cover the remediation.

According to the complaint, defendant "failed to perform or otherwise supervise the remediation of the pre-existing contamination associated with the properties in compliance with the contracts, with environmental law, and with the standards of care and diligence normally practiced by nationally recognized firms performing services of a similar nature." Plaintiffs allege breach of contract, negligence, breach of duty of care, and breach of fiduciary duty. They seek \$7.5 million in compensatory damages and \$21.9 million in consequential damages.



[6] **Water: Puerto Rico Sewer Authority to Settle CWA Violations**

The Puerto Rico Aqueduct & Sewer Authority has entered a [proposed consent decree](#), in which it agreed to spend \$195 million on improvements to 126 drinking water plants across the island over the next 15 years to resolve alleged violations of the Clean Water Act (CWA). It will also upgrade three other drinking water plants to resolve alleged violations of the Safe Drinking Water Act and pay a \$1.02 million civil penalty. The authority also agreed to spend \$2.5 million to improve the water quality of Lake Toa Vaca, or both that lake and Lake Cidra. The authority agreed to construct 34 treatment systems at facilities that are discharging untreated sludge into waterways and install flow meters and other sensors at all of its facilities. The proposed consent decree, lodged in the U.S. District Court for the District of Puerto Rico, is subject to a 30-day public comment period and approval by the federal court.

[7] **Water: Beef-Processing Plant to Settle CWA Violations**

A Washington state beef-processing plant has reportedly agreed to settle alleged Clean Water Act (CWA) violations for a \$750,000 civil penalty and the installation of \$3 million in new wastewater treatment equipment. *U.S. v. Washington Beef LLC*, No. N/A (E.D. Wash. [proposed consent decree lodged 05/04/10](#)). According to the complaint, defendant violated the CWA on numerous occasions from 2003 to 2009 by discharging partially treated slaughterhouse wastes into nearby waterways without a permit for an extended period and also exceeded the level of pollutants allowed by its permit when it did obtain one. Under the terms of the settlement, the company will pay the civil penalty and install five new pieces of equipment

including a new sequential batch reactor, a large concrete basin equipped with aerators in which bacteria break down the slaughterhouse's organic pollutants. The proposed consent decree is subject to a 30-day public comment period and approval by the federal court. *See DOJ Press Release*, May 4, 2010.

Legislation, Regulations and Guidance

[8] **Greenhouse Gases: EPA Issues Final GHG Tailoring Rule**

The U.S. Environmental Protection Agency (EPA) has issued a final rule setting thresholds for greenhouse gas (GHG) emissions that defines when permits under the Clean Air Act are required for new and existing industrial facilities. The rule's phase-in approach exempts all but the nation's largest GHG emitters and reflects an increase in the threshold laid out in EPA's 2009 proposal. Starting in January 2011, facilities already subject to the Prevention of Significant Deterioration (PSD) permitting program or the Title V operating permit program for other pollutants will be required to include GHGs in their permits if they increase their GHG emissions by at least 75,000 tons per year.

In July 2011, the requirements will expand to all new facilities with GHG emissions of at least 100,000 tons per year and existing facility modifications that would increase GHG emissions by at least 75,000 tons per year. The rule also requires that regulated emitters use the best available control technologies to minimize GHG emissions. EPA estimates that about 550 sources will need to obtain title V permits for the first time due to their GHG emissions, and that the rule will trigger approximately 900 additional PSD permitting actions each year. The final rule and other resources are available [here](#).



[9] Climate Change: Senate Version of Energy Bill Unveiled

U.S. Senators John Kerry (D-Mass.) and Joseph Lieberman (I-Conn.) have released the latest version of their energy bill. Called the American Power Act, the proposal, like the Waxman-Markey Bill (H.R. 2454) passed by the U.S. House of Representatives in June 2009, seeks to cap the greenhouse gas (GHG) emissions of electric utilities, manufacturers, and producers and importers of refined transportation fuels at 17 percent of 2005 levels by 2020 and 83 percent by 2050. It would preempt state and regional cap-and-trade programs, but would not affect other state emissions standards (e.g., mobile source standards for automobiles). It would also place certain limits on EPA's ability to regulate greenhouse gases under the Clean Air Act, while allowing the agency to proceed with New Source Performance Standards for power plants

The preemption aspects of this bill are particularly significant in light of EPA's issuance of a Final GHG Permit Tailoring Rule on Thursday, May 13, 2010, and the anticipated rollout of California's climate change program on January 1, 2011.

The American Power Act includes provisions that allow off-shore drilling, incentives for nuclear power and natural gas, an investment tax credit to promote plant construction, \$54 billion in loan guarantees, incentives for carbon capture and storage, and a manufacturing tax credit for domestic production of nuclear parts. The Act would also (i) set the price for carbon credits between \$12 and \$25 per ton; (ii) effectively eliminate a federal cap-and-trade program, but establish a limited cap-and-trade program for electric utilities; (iii) grant electric utilities free allowances for 75 percent of their 2005 emissions; (iv) allow emitters to offset up to 2 billion tons of carbon

dioxide per year; and (v) allow both domestic and international emitters to purchase domestic and foreign carbon offsets.

[10] RCRA: EPA Proposes to Regulate Coal Ash from Coal-Fired Power Plants

EPA issued a **proposed rule**, May 3, 2010, that would regulate coal combustion residuals from coal-fired power plants under RCRA, as either hazardous waste or non-hazardous waste. Under the hazardous waste option, which would regulate the ash under RCRA Subtitle C, EPA would list the ash under a new category of "special wastes." As special wastes, the ash would generally be subject to the same Subtitle C and CERCLA requirements as hazardous wastes, including permitting of treatment, storage and disposal facilities and cradle-to-grave management. The special waste designation would allow the ash to be reused for beneficial purposes such as road fill and construction. The ash would be treated as hazardous waste only if it is destined for disposal in landfills and surface impoundments.

Under the non-hazardous option, coal ash would continue to be regulated under Subtitle D of RCRA. The use of surface impoundments could continue, but EPA would outline new criteria for impoundments and landfills and put in place new criteria for composite liners. EPA is also proposing groundwater monitoring and corrective action criteria for releases from a unit; closure and post-closure care criteria; and measures to address the stability of surface impoundments. The actual planning and implementation of solid waste programs under Subtitle D would remain a state and local function. EPA will accept comments on both options for 90 days after the proposal is published in the *Federal Register*.



[11] Lead Paint: EPA Proposes Revisions to Lead Rule

EPA has [proposed revisions](#) to the 2008 Lead Renovation, Repair, and Painting Rule. *75 Fed. Reg.* 25,037 (05/06/10). As part of the proposal, EPA would eliminate the opt-out provision that currently exempts a renovation firm from the rule's requirements when an owner of a residence built before 1978 certifies that no child younger than age 6 or pregnant woman resides in the home. A second proposal would add requirements designed to ensure that lead-based paint hazards generated by renovation work are adequately cleaned before the areas that were renovated are reoccupied. A third proposal, issued as an advance notice of proposed rulemaking covers lead-safe work practices and other requirements for renovations on the exteriors of public and commercial buildings. EPA will accept comments on the proposed revisions until July 6, 2010.

[12] Air: NESHAPs Rule for Commercial and Industrial Boilers Proposed

EPA has issued a [proposed rule](#) setting national emissions standards for hazardous air pollutants (NESHAPs) for small and large industrial, commercial and institutional boilers that would require operators to install controls to reduce mercury, dioxins and hydrogen chloride emissions. The proposed rule would also require controls for carbon monoxide, which is used as a surrogate for organic air toxins, and for particulate matter, which is used as a surrogate for toxic metals. The proposed rule would amend 40 C.F.R. Part 63. EPA will schedule a public hearing on the proposed rule 15 days after it is published in the *Federal Register* and will accept public comments for 45 days after publication.

[13] OSHA: Severe Violator Program Announced for Employers Who Endanger Workers

The Occupational Safety and Health Administration (OSHA) has [issued](#) a "Severe Violator Enforcement Program Directive," under which the agency will concentrate additional enforcement resources against "recalcitrant employers who endanger workers by demonstrating indifference to their responsibilities under the law." According to the April 22, 2010, directive, employers who meet certain criteria demonstrating their indifference to the OSH Act would be subject to enhanced enforcement, including "mandatory follow-up inspections, increased company/corporate awareness of OSHA enforcement, company-wide agreements, where appropriate, enhanced settlement provisions, and federal court enforcement."

OSHA will consider an employer a "severe violator" if an inspection reveals "one or more willful or repeated citations or failure-to-abate notices based on a serious violation related to a death of an employee or three or more hospitalizations." Other criteria for severe-violator classification are set out in the directive.

[14] Recycling: Vermont Law Requires Manufacturer-Financed Program for Electronic Products Recycling

Vermont Governor Jim Douglas (R) has signed into law legislation ([S. 77/Act 79](#)) that establishes a manufacturer-financed program for recycling electronic products. Under law, effective on April 19, 2010, manufacturers of electronic products sold in the state will be required to pay a fee of \$1,250 if they sell between 20 and 100 units, and \$5,000 if they sell more than 100 units. In the



second year of the program, manufacturers will be assessed a fee based on their market share of sales in the state. Products covered under the law include computers, computer monitors, televisions, printers, and devices containing cathode ray tubes.

The law makes it unlawful for retailers to sell products from manufacturers that have not registered in the state and for consumers to dispose of electronic waste in landfills. Beginning in 2011, state officials must develop a plan for collecting and recycling electronic waste that will require at least one recycling center in each county and each city with a population of more than 10,000. The law establishes a statewide goal of recycling 5.5 pounds of waste for each person in the state in the year beginning July 1, 2011, and 6 pounds per person the following year. The new law makes Vermont the 21st state with an electronics recycling law.

[15] Chemical Exposure: Maryland Law to Phase out Products Containing Deca-BDE

Maryland Governor Martin O'Malley (D) has signed legislation ([S.B. 556](#)) that phases out the manufacture, lease, sale, or distribution of certain products containing the flame retardant decabrominated diphenyl ether (deca-BDE). Under the law, effective on October 1, 2010, the phase-out of products containing deca-BDE will begin December 31 for mattresses, upholstered furniture designed for residential use and electrical equipment, with exceptions for certain replacement service parts manufactured before January 1, 2011. On December 31, 2012, the ban will extend to all products except for certain transportation equipment and military equipment and its components, which will be banned effective December 31, 2013.

Scientific/Technical Items

[16] Chemical Exposure: President's Cancer Panel Issues 2008-2009 Annual Report

According to a [report](#) prepared by President Barack Obama's (D) Cancer Panel, Americans are continuously exposed to largely unregulated cancer-causing chemicals and other carcinogenic substances that are having a "grossly underestimated" effect on cancer incidence and mortality. The report calls for a "precautionary prevention-oriented approach" to regulate chemicals that would "shift the burden of proving safety to manufacturers prior to new chemical approval, in mandatory post-market studies for new and existing agents, and in renewal applications for chemical approval."

It concludes that chemical laws are weak, funding for research and enforcement is inadequate, and regulatory responsibilities are split among too many agencies. The report says children are particularly vulnerable because they are smaller and develop more quickly than adults. The American Cancer Society has reportedly criticized the report for "overstating" its case. According to news sources, critics argue that the report presents an "unproven theory" that environmentally-caused cases are grossly underestimated. See *The New York Times*, May 6, 2010.



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