

Environmental & Chemical Update

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Litigation and Regulatory Enforcement

[1] NEPA: Ninth Circuit Allows Drilling in Alaska's Chukchi and Beaufort Seas

The Ninth Circuit Court of Appeals has ruled that the Minerals Management Service (MMS) properly approved plans for exploratory drilling in Alaska's Chukchi and Beaufort Seas by Shell Offshore Inc. and Shell Gulf of Mexico Inc. [Native Vill. of Point Hope v. Salazar, No. 09-73942 \(9th Cir. 05/13/10\) \(unpublished\)](#). The petitioners sought to block the drilling on the ground that MMS failed to meet its obligations under NEPA and the Outer Continental Shelf Lands Act in approving the plans. Denying their petitions, the court found that MMS had met its obligations under the statutes and had taken a "hard look at the consequences of its actions" before it approved the plans.

[2] CERCLA: Federal Court Upholds Joint and Several Liability Ruling

A federal judge in California has ruled that *Burlington Northern & Santa Fe Railway Co. v. U.S.*, 129 S. Ct. 1870 (2009), did not change existing law regarding joint and several liability under CERCLA. [U.S. v. Iron Mountain Mines Inc., No. 91-768 \(E.D. Cal. 05/06/10\)](#). Arguing that *Burlington Northern* changed existing case law by requiring courts to consider apportioning CERCLA liability in cases involving multiple potentially responsible parties, defendant asked the court to reconsider

a 2002 summary judgment ruling imposing joint and several liability on defendant at the Iron Mines CERCLA Site near Redding, California. In that decision, the court ruled that the Iron Mountain Mines and its president were jointly and severally liable for the cleanup as the site's current operator and owner. EPA alleges that the cleanup has cost \$57 million.

Rejecting defendant's arguments, the court determined that the case simply reiterated established law, stating "*Burlington Northern* does not constitute a change in law as required for reconsideration." In fact, the U.S. Supreme Court cited as the "seminal opinion on the subject," *U.S. v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983), which held that "..., once a responsible party has been held to be liable to the United States under CERCLA, that party's liability is joint and several unless the defendant carries its burden of demonstrating that there are distinct harms, or that there is a reasonable basis for determining the contribution of each [party] to a single harm."

[3] Env'tl. Crime: California AG Charges 31 People with Sham Recycling

California Attorney General (AG) Jerry Brown (D) has announced the arrest of 31 individuals for allegedly trucking in millions of cans and bottles from Arizona and Nevada and collecting redemption fees at California recycling centers. Prosecutors filed felony complaints in Riverside, San Bernardino and San Diego counties charging defendants with conspiring to commit a crime, grand theft, unlawful recycling, and recycling fraud. According to the



complaints, defendants stole \$3.5 million worth of cans and bottles from the state by illegally trucking the cans and bottles into the state and collecting the redemption fees. Penalties vary according to the crime, but penalties for recycling fraud alone range from 16 months to three years in prison. California is among 11 states with bottle and can redemption programs designed to encourage recycling. Consumers pay the fees—5 cents or 10 cents per container depending on size—when purchasing beverages, which can be redeemed at recycling centers. For aluminum cans, the state's redemption value is equal to about \$1.57 a pound. See *Office of the Attorney General of California News Release*, May 5, 2010.

[4] Env'tl. Crime: Former Tugboat Company Manager Convicted of Dumping Dredged Material

A federal jury in San Francisco has reportedly convicted the former manager of Brusco Tug & Barge Co. of Longview, Washington, of illegally dumping tainted dredged materials into Sacramento-San Joaquin River near Pittsburg, California. *U.S. v. Guinn*, No. 09-414 (N.D. Cal. *verdict* 05/11/10). Defendant was found guilty on one count of conspiring to violate and one count of violating the Clean Water Act (CWA). Court records show that from 2003 through 2007 defendant discharged or ordered his employees to discharge large amounts of dredged materials into the waterways without the required permit. Defendant faces up to eight years in prison and \$500,000 in fines when he is sentenced August 26, 2010.

Defendant's former employer, Brusco Tug & Barge Co., reportedly paid a fine of \$1.5 million in July 2009 to resolve a single count of violating the CWA. See *BNA Daily Environment Report*, May 14, 2010.

[5] Legal Malpractice: Real Estate Developer Alleges Law Firm Failed to Conduct Environmental Due Diligence

A real estate developer has sued a Louisiana-based law firm alleging that the firm failed to perform an environmental assessment which would have revealed that land it purchased for development was part of a World War II-era bombing range. *Coves of the Highland Cmty. Dev. Dist. v. McGlinchey Stafford PLLC*, No. 09-7251 (E.D. La. *05/07/10*). The complaint alleges legal malpractice, securities fraud, negligence, negligent misrepresentation, and breach of fiduciary duty; the plaintiff seeks compensatory and punitive damages.

Plaintiff retained defendant in 2006 to assist in organizing a development district and securing \$7.7 million in bond financing to purchase a 324-acre property in eastern Louisiana to build a residential community. According to the complaint, defendant simply replaced names and numbers on documents it had used for previous projects and "did little to tailor the plan to the special circumstances of the planned development." In March 2009, the U.S. Army Corps of Engineers published a notice about its investigation of unexploded ordinance on the former bombing range, including the property purchased for development. In April 2009, development was halted until unexploded ordinance was cleaned up, and, as a result, plaintiff defaulted on its bonds.

[6] Air: Groups Challenge EPA Approval of San Joaquin Valley's Portion of California SIP

Environmental and public health groups have challenged EPA's approval of the San Joaquin Valley's portion of California's 2004 state implementation plan (SIP). *Sierra Club v. EPA*, No. 10-71457



(9th Cir. 05/06/10) and *Comm. for a Better Arvin v. EPA*, No. 10-71458 (9th Cir. 05/06/10). At issue is EPA's approval of a plan with emissions assumptions that were never changed even though California's Air Resources Board 2007 emissions inventory update showed that emissions were greater than those assumed for the 2004 plan.

Petitioners are pressing for more aggressive regulations to control air pollution in the valley, which is not in compliance with the one-hour ozone standard and is not expected to meet the November 15, 2010, attainment deadline. In a separate action, the Sierra Club sued EPA over its alleged late action on San Joaquin Valley's 2007 SIP, submitted for the eight-hour ozone standard. *Sierra Club v. Jackson*, No. 10-01954 (N.D. Cal. 05/06/10). See *BNA Daily Environment Report*, May 11, 2010.

[7] Water: Kansas City, Missouri, to Settle Sewer Overflow Issues

The city of Kansas City, Missouri, has agreed to settle alleged violations of the Clean Water Act resulting from unauthorized overflows of untreated sewage and stormwater. *U.S. v. City of Kansas City, Missouri*, No. N/A (W.D. Mo. lodged 05/18/10). Under the terms of the settlement, the city agrees to make extensive improvements to its sewer systems, at an estimated cost to exceed \$2.5 billion over 25 years and pay a \$600,000 civil penalty to the United States.

As part of the agreement, the city will spend \$1.6 million in supplemental environmental projects to implement a voluntary sewer connection and septic tank closure program for income-eligible residential property owners. Of the 420 square miles covered by the city's sewer system, 58 square miles, located mostly within the city's urban core, are currently served by combined sewers that carry both stormwater

and wastewater. Under the agreement, the city agrees to expedite certain projects that are expected to provide more immediate relief to residences and other properties served by combined sewers in the urban core. The agreement is subject to a 30-day public comment period and approval by the federal court.

[8] Stormwater: EPA to Settle Chesapeake Bay Restoration Litigation

EPA announced May 11, 2010, that it will settle a Chesapeake Bay Foundation lawsuit, filed in January 2010, over the agency's alleged failure to use its regulatory powers to restore Chesapeake Bay. *Fowler v. EPA*, No. 09-5 (D.D.C. settlement announced 05/11/10). The settlement requires EPA to take actions to reduce stormwater runoff into the bay, including (i) reviewing all proposed construction general permits drafted by bay states to ensure that they meet current federal stormwater standards; (ii) issuing guidance by July 31 for municipal stormwater permits in the Chesapeake Bay watershed; (iii) issuing final regulations for stormwater discharges in the watershed by November 19; (iv) proposing new regulations to control stormwater runoff from agriculture in 2012; and (v) finalizing those regulations in 2014.

The settlement also allows the foundation to intervene if EPA fails to ensure that the states (i) provide "reasonable assurances" that proposed pollution reduction activities specified in their watershed improvement plans (WIPs) will work; (ii) face significant consequences for failing to develop or implement WIPs, including potential denial of all EPA permits sought for new sewage treatment plants or major new developments; and (iii) offset all new nitrogen, phosphorus and sediment levels and reflect that in their WIPs.



The agreement requires EPA to establish total maximum daily loads (TMDLs) for the bay and its tributaries in the 64,000-square-mile watershed that includes six states and Washington, D.C. The settlement is subject to public comment and court approval. *See EPA Press Release*, May 11, 2010.

[9] Air: Vehicle and Engine Importer Agrees to Settle Alleged CAA Violations

Pep Boys has reportedly agreed to pay a \$5 million civil penalty and take corrective measures to settle allegations that it violated the Clean Air Act (CAA) by importing and selling Chinese-manufactured motorcycles, recreational vehicles and generators that do not comply with U.S. environmental requirements. The agreement requires the company to export or destroy more than 1,300 non-compliant vehicles and engines and to mitigate adverse environmental effects of equipment already sold to consumers, estimated at 620 tons of excess hydrocarbon and nitrogen oxide emissions and more than 6,520 tons of excess carbon monoxide emissions.

The government alleged that at least 45 vehicle and generator models imported and sold by Pep Boys and another company were not certified to meet federal standards. The complaint also alleged that Pep Boys failed to provide purchasers with the full emission-system warranty required by the CAA and imported and sold vehicles and engines without the proper emission-control information labels. The agreement was lodged in the U.S. District Court for the District of Columbia on May 10, 2010. It is subject to a 30-day public comment period and federal-court approval. *See DOJ Press Release*, May 10, 2010.

Legislation, Regulations and Guidance

[10] Air/Greenhouse Gases: EPA/NHTSA Issue GHG Emission Standards for Light-Duty Vehicles

EPA and the National Highway Traffic Safety Administration (NHTSA) have issued a [final rule](#) designed to reduce greenhouse gas (GHG) emissions and improve the fuel economy of light-duty vehicles. *75 Fed. Reg.* 25,323 (05/07/10). The new standards apply to passenger cars, light-duty trucks and medium-duty passenger vehicles covering model years 2010 through 2016. According to the agencies, these vehicle categories are responsible for almost 60 percent of all U.S. transportation-related GHG emissions.

The standards will require the more widespread use of technologies that include “improvements to engines, transmissions, and tires; increased use of start-stop technology; improvements in air conditioning systems; increased use of hybrid and other advanced technologies; and the initial commercialization of electric vehicles and plug-in hybrids.” The final rule is effective on July 6, 2010. Industry groups filed a challenge to the standards the day they were published. *Coal. for Responsible Regulation, Inc. v. EPA*, No. 10-1092 (D.C. Cir. petition for review filed 05/07/10).

[11] Air: EPA Proposes Amendments to NSPS for Medical Waste Incinerators

EPA has [proposed](#) amendments to the new source performance standards (NSPS) for hospital/medical/infectious waste incinerators. *75 Fed. Reg.*



27,249 (05/14/10). The amendments would correct inadvertent drafting errors in the emissions limits for nitrogen oxides and sulfur dioxide promulgated in 2009 and correct erroneous cross-references in the reporting and recordkeeping requirements. EPA will accept comments on the proposed amendments until June 28, 2010.

Medical waste incinerator operators have challenged EPA's performance standards as too stringent. *Med. Waste Inst. v. EPA*, No. 09-1297 (D.C. Cir. filed 04/16/10). According to the incinerator operators, EPA calculated the emissions standards for each pollutant separately without considering the incinerator's emissions as a whole, resulting in standards that no single facility will be able to achieve.

[12] Reorganization: MMS to Establish Separate Enforcement Office

U.S. Secretary of the Interior Ken Salazar has announced that the department's Minerals Management Service (MMS), which currently oversees offshore oil and gas drilling and collects an average of \$13 billion a year in royalties, will be split into two separate offices. The new entity, to be known as the Office of Safety and Environmental Enforcement, will operate independently from the agency's leasing, revenue and permitting functions. According to press reports, the motive for the reorganization is to help ensure "there is no conflict—real or perceived." See *Department of Interior Press Release*, May 11, 2010; and *BNA Daily Environment Report*, May 12, 2010.

[13] Risk Assessment: SAB Panel Agrees That TCE Is Human Carcinogen

The Trichloroethylene (TCE) Review Panel established under EPA's Science Advisory Board (SAB) has reviewed the agency's voluminous draft risk assessment and reportedly agreed with EPA's preliminary conclusions that TCE is carcinogenic to humans by all routes of exposure. The panel reviewed EPA's most recent Toxicological Review of Trichloroethylene (CAS. No. 79-01-6) completed in 2009. The document was prepared under the agency's Integrated Risk Information System (IRIS) program.

The draft assessment found that TCE could cause harm to the central nervous and other bodily systems, such as the kidneys, liver, immune system, male reproductive system, and a developing fetus. EPA will finalize the draft in accordance with the SAB's final peer review and intends to issue the final IRIS assessment in 2011.

TCE is a hazardous air pollutant and a common ground water and drinking water contaminant that can be found at more than 1,500 CERCLA sites. EPA has not issued a risk assessment update for TCE since 1985. See *EPA Press Release* and *BNA Daily Environment Report*, May 13, 2010.

[14] Water: State Agency Proposes General Permit to Regulate Chemicals Used to Control Invasive Species

The Washington State Department of Ecology has proposed a **general permit** for the management of aquatic invasive species and marine algae in state waters. The proposed permit would allow the use



of algacides, herbicides, insecticides, molluscicides, piscicides, and other chemicals in state waters for the purpose of managing non-native invasive aquatic animals and marine algae. It would allow short-term toxicity to aquatic organisms to protect waters in the state from these invasive species.

Permit coverage would be obtained by filing notice with the state no later than 60 days before application of the chemical and publishing notices in local newspapers. The notifications would be followed by a 30-day comment period. The agency will hold a public meeting on the proposed permit on June 7, 2010, and accept public comments until June 11.

Scientific/Technical Items

[15] Chemical Exposure: Report Claims Cosmetics Contain Hazardous Chemicals

An Environmental Working Group [report](#) has claimed that popular brands of perfume and cologne contain numerous hazardous chemicals, many of which are not listed on labels. Heather Sarantis, et al., "Not So Sexy: The Health Risks of Secret Chemicals in Fragrance," May 12, 2010. The authors commissioned an independent laboratory to test 17 fragrance products and compared the results to the product labels. The data analysis revealed that the products contained, on average, 14 chemicals not listed on the labels; 10 sensitizing chemicals associated with allergic reactions, such as asthma, wheezing, headaches, and contact dermatitis; and four hormone-disrupting chemicals linked to a range of health effects, including sperm damage, thyroid disruption and cancer.

The authors also found among undisclosed ingredients chemicals with troubling hazardous properties or with the propensity to accumulate in

human tissues. These include diethyl phthalate, a chemical linked to sperm damage in human epidemiological studies, and musk ketone, a synthetic fragrance ingredient that concentrates in human fat tissue and breast milk. The report recommends that consumers select products with no added fragrance, minimize the use of fragrance, support laws that require the identification of chemicals in personal-care products, and support manufacturers that disclose ingredients in their personal-care products.



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