

# Environmental & Chemical Update

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SUSTAINABILITY • TOXIC TORT • WASTE • WATER

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## Litigation and Regulatory Enforcement

### [1] CERCLA: Ninth Circuit Defines “Owner” for Cleanup Cost Liability

In a question of first impression, the Ninth Circuit Court of Appeals has determined that “owner and operator” status under CERCLA is ascertained as of the time cleanup costs are incurred and not when a recovery suit seeking reimbursement is filed.

[California v. Hearthside Residential Corp., No. 09-55389 \(9th Cir. 07/22/10\).](#)

Defendant purchased property in Huntington Beach, California, in 1999, knowing it was contaminated with polychlorinated biphenyls (PCBs). In 2002, defendant entered into a consent order with the state Department of Toxic Substances Control agreeing to remediate contamination on the property. The state agency certified that the property cleanup was complete in December 2005, and defendant thereafter sold the property to the state land commission. After the state environmental agency found contamination on adjoining property, it sued the defendant alleging that the contamination had leached from the property it formerly owned. Defendant argued that “owner” status is determined as of the time the lawsuit was filed, not when cleanup costs were incurred; thus, he was not liable as an owner because he sold the property before suit was filed.

The district court and the appellate court disagreed, ruling that “owner” status under CERCLA is determined at the time a response-recovery claim accrues, not when a lawsuit is initiated. Because defendant owned the property at all times relevant to the remediation, defendant was a current owner under section 107(a)(1) of CERCLA, the court held.

### [2] Water: First Circuit Rejects Challenge to Wastewater Permit on Procedural Grounds

The First Circuit Court of Appeals has rejected a challenge to a revised wastewater permit by the city of Pittsfield, Massachusetts, upholding a decision by EPA’s Environmental Appeals Board (EAB) that declined to hear the permit appeal on procedural grounds. [City of Pittsfield v. EPA, No. 09-1879 \(1st Cir. 07/16/10\).](#) The revised permit tightened previous standards on phosphorous, aluminum, copper, and *E. coli* levels in wastewater that the city’s treatment plant discharges to the Housatonic River.

The city challenged the revised permit before the EAB, arguing that the new standards were “unachievable” and would increase costs. The EAB declined to hear the appeal on the ground that the appeal failed to state what specific aspects of the revised permit it was appealing or explain how the revised limits were unachievable. The city appealed the EAB decision to the First Circuit.



The court of appeals upheld the EAB decision, holding that "... it is not the obligation of the federal courts to 'ferret out and articulate the record evidence considered material to each legal theory advanced on appeal.'" The EAB has interpreted its procedural rules to mean that merely reiterating issues raised during the public comment period is not adequate when appealing a permit, and the court refused to substitute its reading of the rules for the EPA's own reading.

### **[3] Air: Federal Court Rules EPA Not Required to Block Power Plants**

A federal judge in the District of Columbia has ruled that the Clean Air Act (CAA) does not require EPA to stop the construction of three power plants in Kentucky. *Sierra Club v. EPA, No 09-2089 (D.D.C. 07/20/10)*. Plaintiff sued under the citizen suit provision of the CAA arguing that the three power plants would be major emitters and that EPA had a nondiscretionary duty under section 167 of the CAA to prevent the plants' construction. EPA argued that it had no mandatory duty to act and moved to dismiss for lack of subject matter jurisdiction.

The court agreed with EPA, ruling that section 167 of the CAA gives discretionary enforcement authority to the agency. Because the authority is discretionary, the court found no meaningful standard that would allow it to review EPA's lack of action. Accordingly, the court granted the agency's motion to dismiss.

### **[4] NEPA/Water: Mining Group Sues EPA over Valley Fill Permit Guidance**

A national mining group has sued EPA over its April 1, 2010, guidance, which focused on coal operations that involve mountaintop removal and the deposit of waste rock in stream valleys.

### *Nat'l Mining Ass'n v. Jackson, No. 10-1220*

(D.D.C. filed 07/20/10). The lawsuit challenges the guidance and an "enhanced coordination process" established in a June 4, 2009, memorandum of understanding (MOU) among EPA, the U.S. Army Corps of Engineers (Corps) and the Department of Interior's Office of Surface Mining Reclamation and Enforcement.

The complaint alleges that the guidance and the MOU violate NEPA and the Clean Water Act (CWA) by avoiding public notice and comment. It also alleges usurpation of state authority to issue water quality standards under section 303(c) of the CWA and the authority of the Corps to issue dredge-and-fill permits under section 404 of the CWA. The complaint asks the court to enjoin implementation of and vacate the guidance and the process established by the MOU as an illegal attempt to circumvent the rulemaking process.

### **[5] Nuisance: Five States Sue to Protect Great Lakes from Asian Carp**

The attorneys general of Michigan, Minnesota, Ohio, Pennsylvania, and Wisconsin have sued the U.S. Army Corps of Engineers (Corps) and the Metropolitan Water Reclamation District of Greater Chicago, seeking to compel emergency action that would prevent Asian carp from entering Lake Michigan and to expedite plans for a permanent barrier against the carp. *Michigan v. U.S., No. 10-4557 (filed 07/19/10)*.

The complaint seeks a declaratory judgment that the carp pose a public nuisance and an injunction to abate the nuisance and implement permanent measures to physically separate the carp-infested Illinois waters from Lake Michigan. It also asks the court to order the Corps to complete a feasibility study on permanently separating the Great Lakes from the Mississippi River system within 18 months.



Plaintiffs further allege that carp entering the Great Lakes “allow[] grave and likely incomparable harm to the aquatic resources of the Great Lakes and the shared public rights to them.” Asian carp can grow up to 100 pounds and feed almost continuously, according to the complaint. Plaintiffs allege that they will destroy the Great Lakes’ fishing industry.

#### **[6] Greenhouse Gases: Lawsuit Challenges Washington State Executive Order to Reduce GHG Emissions**

The Evergreen Freedom Foundation Constitutional Law Center has filed a lawsuit on behalf of six state residents in a Washington state court to challenge an executive order issued by Governor Christine Gregoire (D) on May 21, 2010, directing state agencies to reduce greenhouse gas (GHG) emissions. *Erickson v. Gregoire, No. 10-1613 (Thurston County Super. Ct. filed 07/21/10)*. The complaint alleges that the executive order violates the separation of powers doctrine because a bill that would have accomplished the same goals failed to pass out of the state legislature before the order was issued. The complaint also alleges that any agency actions taken under the order’s authority would be an unconstitutional expenditure of public funds. The complaint names several state agencies as defendants in addition to the governor and seeks an order declaring the executive order unconstitutional and enjoining its implementation.

#### **[7] Greenhouse Gases: EPA Settles Challenges to Mandatory GHG Reporting Rule**

EPA has reportedly agreed to make several changes to a rule issued on October 30, 2009, regarding mandatory reporting of greenhouse gases (GHG) in the chemical, fertilizer, natural gas, and refining industries. 75 *Fed. Reg.* 42,085 (7/20/10). EPA is required to make the changes under proposed

settlements that will resolve some challenges to the rule. *Am. Chemistry Council v. EPA, No. 09-1325 (D.C. Cir. settlement announced 07/20/10)*.

After EPA issued the rule, eight parties filed petitions for review to challenge it. Those challenges were consolidated with the *American Chemistry Council* action. Under the proposed settlements, EPA has agreed to (i) propose and finalize changes to reporting requirements for general stationary fuel combustion sources, (ii) modify monitoring and reporting requirements for oil refineries, (iii) modify monitoring and reporting requirements for fertilizer production, and (iv) modify monitoring and reporting requirements for suppliers of natural gas. Several parties did not join the settlement, and negotiations with some of the parties are reportedly still ongoing. See BNA Daily Environment Report, July 21, 2010.

#### **[8] Prop. 65: Turf Manufacturer and Supplier Settle Lawsuit over Warning Labels**

According to news sources, the nation’s largest turf manufacturer and supplier have settled litigation brought by the California attorney general’s office alleging violations of the warning label requirements of the state’s Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65). *California v. Beaulieu Group LLC*, No. 847310 (Cal. Super. Ct. consent judgment filed 07/16/10). Prop. 65 requires warning labels on products containing chemicals the state has identified as causing cancer or reproductive harm. Turf manufactured by Beaulieu Group and supplied by Field Turf USA is used in public facilities in the state such as school, day care centers and playgrounds. Testing by state authorities and others found that some turf samples contained more than 5,000 parts per million lead—more than 10 times EPA limits. Beaulieu agreed to pay a civil



penalty of \$285,000 and replace all the toxic turf it manufactured. Field Turf agreed to replace fields, installed before 2003, that tested high for lead and pay a civil penalty of \$212,500. Lead-based pigments are used to color synthetic turf products. See *Los Angeles Times*, July 16, 2010; *Greenwire*, July 19, 2010.

## Legislation, Regulations and Guidance

### [9] White House: OMB Asks Agencies to Prioritize Science and Technology in Budget Submission

The White House Office of Management and Budget (OMB) has **issued** a July 21, 2010, memorandum asking all federal agencies to prioritize science and technology in their budget submissions for 2012. The memo directs the agencies to explain in their submissions how they will reallocate resources from lower-priority areas to science and technology initiatives addressing six key challenges, which include (i) reducing dependence on energy imports while curbing greenhouse gas emissions; (ii) mitigating the impacts of global climate change; and (iii) managing the competing demands on land, water and oceans for the production of food, fiber, biofuels, and ecosystem services based on sustainability and biodiversity. To achieve a total research and development investment that reaches 3 percent of the gross domestic product, the memo urges agencies to collaborate with OMB and the Office of Science Technology Policy in classifying and reporting these activities accurately.

### [10] HAZMAT: DOT Proposes Rule Incorporating Cargo Tank Permits into HAZMAT Regulations

The U.S. Department of Transportation's (DOT's) Pipeline and Hazardous Materials Safety Administration (PHMSA) has published a notice of proposed rulemaking (NPRM) that would amend hazardous materials regulations to incorporate provisions contained in six cargo tank special permits. **75 Fed. Reg. 42,364 (7/21/10)**. According to PHMSA, these permits "allow a company or individual to package or ship a hazardous material in a manner that varies from the regulations provided an equivalent level of safety is maintained."

To reduce an applications backlog, the NPRM would revise the regulations by providing authorization (i) to transport liquefied petroleum gas in "moveable fuel storage tenders" used exclusively for agricultural purposes; (ii) to transport Division 6.1 liquid pesticide fumigants in DOT Specification MC 306 and DOT 406 cargo tank motor vehicles and DOT 57 portable tanks used for agricultural purposes; (iii) to transport certain hazardous materials used for roadway striping in non-DOT specification cargo tanks; (iv) for private motor carriers to transport liquefied petroleum gas in consumer storage containers with quantities greater than 5 percent of the container's water capacity; (v) for field trucks to transport securely-mounted nurse tanks, which are used to transport and apply anhydrous ammonia fertilizers; and (vi) for nurse tanks with missing or illegible American Society of Mechanical Engineers plates to continue to be used in anhydrous ammonia service under specified conditions. PHMSA will accept comments on the NPRM until August 20, 2010.



### [11] Standard Setting: ASTM Revises Standard on Vapor Encroachment Screening

ASTM International has reportedly revised its Standard Guide for Vapor Encroachment Screening on Property Involved in Real Estate Transactions (E2600-10). The guide provides a two-part vapor encroachment screening process for real estate parcels that (i) identifies known or suspected contaminated properties within the area of concern (1/3-mile for volatile compounds), and (ii) evaluates characteristics of known plumes resulting from contaminated properties. If it is determined that vapors from a plume could reach the property's subsurface, further investigation beyond the scope of the guide would be warranted, including measures to establish whether vapor intrusion is occurring at any building on the property and whether the vapor encroachment condition is a recognized environmental condition under ASTM's Phase I standard. The revised guide, which updates a previous March 2008 version, can be purchased from ASTM's Website at [www.astm.org](http://www.astm.org). See *Martindale.com*, July 22, 2010.

## Scientific/Technical Items

### [12] Climate Change: Report Claims Climate Change Will Lead to U.S. Water Shortage

A TetraTech Inc. [report](#) commissioned by the Natural Resources Defense Council claims that climate change will lead to decreased precipitation and increased water demands, causing water shortages throughout the United States. The report evaluates projected shifts in precipitation, water withdrawal for domestic use and power plant cooling, and potential evapotranspiration, the amount of precipitation lost to the atmosphere through evaporation or plant transpiration. The findings apparently suggest that,

in the future, the renewable water supply will be lower than withdrawal, thereby increasing areas vulnerable to water shortages. In particular, the report identifies the Great Plains and the Southwest regions as most likely to face "extreme risk" for water shortages. It also estimates that more than 1,100 counties throughout the contiguous 48 states will see "greater risks of water shortages due to the effects of climate change."

### [13] Greenhouse Gases: CRS Report Addresses Carbon Capture and Sequestration

A recent Congressional Research Service [report](#) assesses the current status and future prospects for carbon capture and storage (CCS) technology, as well as the potential of emerging technologies, such as advanced and novel sorbents, for carbon dioxide (CO<sub>2</sub>) capture. Titled *Carbon Capture: A Technology Assessment*, the report claims that CCS has attracted worldwide interest because of (i) a growing consensus that large reductions in global CO<sub>2</sub> emissions are necessary to avoid serious climate change impacts; (ii) a realization that large emission reductions cannot be achieved easily or quickly by simply using less energy or by replacing fossil fuels with alternative energy sources that emit little or no CO<sub>2</sub>; and (iii) energy-economic models showing that adding CCS to other greenhouse gas reduction measures significantly lowers the cost of mitigating climate change.

With 10 chapters and numerous illustrations of CCS technologies, the report describes the processes that have and can be used in CCS. It also explains that the major impediments to wide-scale deployment of current technologies "are their high costs and large energy requirements for operation," although the costs would be reduced substantially with widespread application.



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