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A Newsletter Covering Recent Environmental Developments and Caselaw

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Contents

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The Schnapf Environmental Journal is a bi-monthly report that provides updates on regulatory developments and highlights significant federal and state environmental law decisions affecting corporate and real estate transactions, and brownfield redevelopment. The information contained in this newsletter is not offered for the purposes of providing legal advice or establishing a client/attorney relationship. Environmental issues are highly complex and fact-specific and you should consult an environmental attorney for assistance with your environmental issues.

DUE DILIGENCE/ AUDITING/ DISCLOSURE/ ENFORCEMENT

All Appropriate Inquiry Update

It appears that EPA will not be finalizing its "All Appropriate Inquiry" ("AAI") rule until at least the end of the 2005. Under the Small Business Liability Relief and Brownfield Redevelopment Act ("2002 Brownfield Amendments"), the agency was originally required to promulgate its AAI standards by January 11, 2004. However, the agency did not issue its proposed rule until August 26, 2004 (69 FR 52543, August 26, 2004).

Most public comments focused on the definition of the environmental professional (EP), including education requirements, professional designations, the grandfather provision, EP reporting requirements and conclusions, and the tasks performed by the EP and those under the supervision of the EP. It is anticipated that EPA will modify this definition somewhat to allow more individuals to qualify as environmental professionals, apparently at the request of other federal agencies.

Another issue that has drawn attention involves the criterion requiring a property owner to evaluate the relationship of the purchase price of the property to the fair market value of the property in an uncontaminated condition. In the proposed rule, EPA did not mandate the services of an appraiser for determining the market value of the property.

The ASTM E 1527 Task Group has reviewed and revisited some of the differences between the E 1527 document and EPA's pre- compliance review. The ASTM agreed with most of EPA's suggestions, but differs with specifying exceptions to onsite visual inspections of the subject property. The Task Group has also discussed the public comments received by EPA and the potential impact on E 1527. ASTM has recently resubmitted the draft to EPA for a second compliance review. The E 1527 need not copy the AAI regulation, but it cannot be less stringent than the proposed rule if it is to be included as a reference.

Meanwhile, ASTM is in the process of revising its E1528-00 Transaction Screen. Many commentators thought ASTM would withdraw the standard because it does not satisfy EPA's interim AAI rule. However, some banks and other users find the transaction screen useful for identifying properties that may have environmental issues. As a result, ASTM is revising the standard to clarify that it is not intended to satisfy the CERCLA landowner liability defenses. Instead, the standard would indicate that it is intended to perform a limited review of commercial properties and residential properties that do not fall within the AAI rule.

The revised Transaction Screen could be performed by the user or an EP, but the EP would not render an opinion. The standard would also provide that a Phase I would be required if it was necessary for an EP to provide an opinion or to conduct further investigation. Among the other probable changes is changing the name of the standard to "Limited Due Diligence Transaction Screen," replacing "Recognized Environmental Conditions" with "Potential Environmental Concerns," and adjusting the search radius for various databases so that the information could be used for a Phase I.

EDR Survey Evaluates Impact of AAI on Environmental Consultants

According to the 2005 Environmental Site Assessment Industry Benchmark Report, 15% of the individuals currently performing Phase I Environmental Site Assessments (ESA) will not qualify as an EP as currently defined in EPA's AAI. Due to staffing changes that may be required by AAI and additional requirements, 45% of the 360 person surveyed believe that the average cost of a Phase I ESA will increase

by 10%-15%.

360 individuals at 283 companies participated in the survey. The study was published by EDR's Market Research Group, which provides strategic data and analysis on environmental due diligence trends, including market surveys, newsletters, information alerts and workshops.

One of the more illuminating results of the survey was how ESA staffing will change. According to the survey, individuals with less than three years of experience generally perform government record reviews while professionals with 3-5 years experience typically conduct the site inspections and interviews. Senior staff with 5-10 years of experience usually writes reports.

However, staffing practices vary with the size of the firm. At smaller firms, it is not unusual for senior staff to perform site inspections while junior staff at large firms often write reports under the supervision of senior staff. Indeed, the survey indicated that 35% of persons performing site visits for large firms would not qualify as an EP while only 12% of those working for small firms would not satisfy the definition of an EP. Because the proposed AAI strongly suggests that an EP should perform site inspections or be involved in the planning of the site visit, the survey suggests that the impact of AAI may disproportionately fall on large firms.

The survey confirmed a common perception that report writing is the most-time consuming task of the Phase I process. The standard turnaround time for completing Phase I ESAs is about 15 days while the time to complete so-called "Phase I Plus" reports seems to range from 15-20 days.

In response to a growing awareness of the impact environmental issues can have on property values, purchasers of commercial property are increasingly requesting add-on assessment services like asbestos and lead-based paint screenings. While preserving CERCLA defenses still remains one of the principal goals for performing Phase I ESAs, the respondents reported that 42% of the Phase I ESAs are now driven by business environmental risks. Mold assessments in particular are on the rise, with 66 percent of survey respondents reporting greater demand today than just one year ago.

Another early development in the Phase I ESA market highlighted in the report is the impact of the Sarbanes-Oxley Act, which has elevated the importance of financial disclosures about all types of risk, including environmental risk. Although the link between SOX and environmental due diligence is still new, EDR's survey results indicate that clients are starting to ask their consultants to tap into prior site assessments for critical information about their environmental risk exposure.

Commentary: *We have continually cautioned readers about the importance of performing thorough historical research during due diligence. An interesting tidbit in the EDR survey reaffirms this point. In the report, 50% of the respondents indicated that the leading cause for finding reports prepared by other consultants to be unsatisfactory was limited historical information. Other common deficiencies were insufficient site reconnaissance or incomplete government records.*

Lawyer Liable for Malpractice For Inadequate Due Diligence

A Long Island jury recently awarded a $44,000 verdict against a lawyer for failing to obtain a Phase I environmental site assessment in connection with a long-term lease that contained a purchase option. In *Barnett v. Schwartz,* (015391-2002, Nassau Cty.), the plaintiffs were aware that the property had been used by a business that manufactured commercial oil rags for the printing industry from 1983 through 1991. In December 1992, the plaintiffs entered into a two-year lease that granted the plaintiffs an option to purchase. The purchase option provided that the plaintiffs had inspected the premises and were accepting the premises "as is. " Prior to execution of the lease, the defendant lawyer sent two letters to the EPA and the New York Department of Environmental Conservation (NYDEC) inquiring about the environmental conditions of the property, but the lawyer was unable to prove that he had sent copies to the plaintiffs.

Two years after the plaintiffs took

possession of the property, NYDEC inspectors visited the property. The site was then placed on the state Superfund list. The plaintiffs exercised their purchase option in January 1995. One month prior to the August 2001 closing date, the defendant lawyer advised the plaintiffs to take acts to schedule a closing to avoid losing their rental payments and security.

The plaintiffs decided not to take title and filed a malpractice claim, seeking $1 million for lost rent, associated costs, furniture, equipment legal fees, taxes, funding and lost profits. The plaintiffs alleged that the defendant did not properly notify the plaintiffs of the potential hazards prior to the lease on the property, or take proper actions or give them proper advice during the lease of the property up to the time of the proposed closing.

The defendant asserted that he kept plaintiffs aware of the condition of the premises during their term of the lease and prior to exercising the purchase option, but that the plaintiffs elected to purchase the property. The defendant also stated that he notified plaintiffs in January 2001 that the plaintiffs would not prevail in a fraud action because they accepted the premises "as is."

Commentary: *The defendants in this case were not environmental lawyers and did not conduct the kind of due diligence that would be expected for this type of property. The plaintiffs were aware of the prior use, but the lawyer could not provide documentary evidence of his communications with the client. This verdict may cause lead lawyers to routinely make written recommendations to prospective tenant-clients that they obtain "Phase I" assessments. Lawyers should retain written proof that these recommendations have been given to clients. A lawyer's failure to provide documentary evidence of such recommendations may make the lawyer vulnerable to a malpractice claim even if the lawyer orally makes the same recommendations, and the client then refuses to heed them.*

New Jersey Bank Avoids $6 Million Cleanup

A major money center bank was able to convince the New Jersey Department of Environmental Protection (NJDEP) to withdraw a demand for reimbursement of $598K in past cleanup costs and $5.7M in natural resources damages. The NJDEP had alleged that the bank was strictly liable under the state Spill Compensation and Control Act (Spill Act) because a predecessor had held title to the contaminated property from October 1975 to July 1977.

In this case, a finance company (Finance Company) extended a loan to a former dry cleaner in 1974 that was secured by, *inter alia*, a second mortgage on the property. After the borrower defaulted on its loan, the holder of the first mortgage commenced a foreclosure action. The Finance Company purchased the property at the foreclosure sale for $57.3K. After holding title for 18 months, the Finance Company sold the property for $66K. In 1983, the Finance Company was acquired by another credit company (Credit Company) and operated as a subsidiary. The major money center bank (Bank) purchased the stock of the Credit Company in 1987.

In 1986, the Ocean Township Health Department discovered that drinking water wells in Dover Township were impacted with tetrachloroethylene (PCE) from the dry cleaning business. The NJDEP imposed a well restriction area (WEA) and recommended that all impacted properties seal their wells and connect to the municipal water supply system. Public funds were used to extend the municipal drinking water system.

NJDEP then issued a demand to the current and former owners and operators of the property. The NJDEP alleged that the Bank was a prior owner because it was a successor to the Finance Company.

After receiving the NJDEP demand, the Bank retained Dennis Krumholz of the Riker Danzig firm. Krumholz advised NJDEP that the Bank should not be liable because it fell within the Spill Act's secured creditor exemption. The Bank's counsel indicated that the Finance Company foreclosed on the property to protect its security interest, that there was no evidence that the Finance Company ever participated in the management of the dry cleaner and that selling the property within 18 months satisfied the requirement of the Spill Act's

secured creditor exemption that a foreclosing lending institution dispose of the property in a "reasonably expeditious" manner. The NJDEP agreed to not to pursue the Bank in the agency's cost recovery action.

Commentary: *This case illustrates two important points. First, it is important for banks to assess potential legacy issues when contemplating a merger with another financial institution. The liability at issue here involved a transaction that took place nearly 30 years ago.*

Second, the Bank benefited from case law holding that the Spill Act's secured creditor exemption could be applied retroactively. The secured creditor exemption was added to the Spill Act in 1993. Because the legislative history indicated that this was a curative amendment, courts have interpreted the exemption to apply to the initial enactment of the Spill Act. Thus, in determining how much diligence to conduct for legacy issues, banks should determine when any state lender liability safe harbor became effective.

NRC To Evaluate TCE Risks

The Board on Environmental Studies and Toxicology of the National Research Council of the NRC announced in December that it would identify and assess the key scientific issues for developing a risk assessment for trichloroethylene (TCE). The 18-month study will include reviewing toxicological, epidemiological, population susceptibility, and other published scientific literature as well as EPA's 2001 draft TCE health risk assessment. The committee will not develop its own risk assessment nor will it address any risk management issues.

Commentary: *TCE has been found in at least 861 NPL sites. EPA's 2001 draft health risk assessment lowered the cancer and non-cancer toxicity values so that compliance with the TCE drinking water standards was no longer acceptable at contaminated sites. Largely because of the revised risk assessment, EPA issued new draft guidance in 2002 (67 FR 71169, 11/29/02) for evaluating potential vapor intrusion at Superfund, RCRA Corrective Action and brownfield sites. Because the guidance uses conservative assumptions such as attenuation factors, EPA suggested that it was not appropriate for sites with petroleum contamination. The 2002 draft guidance replaced EPA's 2001 draft RCRA Environmental Indicators (EI) Supplemental Guidance for Evaluating the Vapor Intrusion to Indoor Air Pathway, but does not supersede State guidance.*

Prior to this draft guidance, EPA and states generally did not require any evaluation of the vapor intrusion pathway unless depth to groundwater was less than 15 feet. In contrast, the tiered approach of the 2002 draft guidance suggests evaluating potential vapor intrusion impacts if volatile organic compounds are within 100 feet of inhabited structures. The second tier would compare the groundwater and soil vapors to generic screening levels that are based on attenuation factors. The screening levels are set at risk levels ranging from 10^{-4} to 10^{-6}. If the second tier screening levels are exceeded, site-specific testing is then recommended.

SRI Issues Program for Social and Environmental Disclosure

SRI World Group, Inc., recently launched a global electronic reporting network that will enable companies to more efficiently report their social, environmental, economic and corporate governance information to firms that research corporate social and environmental performance for institutional investors.

Companies that use the OneReport™ will be able to collect and review sustainability data from different departments and facilities as well as make information on sustainability policies, programs and performance metrics more readily audited and easier to report in future years. OneReport™ can also be used to create reports based on the Global Reporting Initiative (GRI) guidelines. Thus far, approximately 20 research firms covering over 4,000 companies in 25 countries have agreed to collect sustainability data through OneReport™. They plan to use the data to construct stock indexes and create institutional-level research products that are used to help make investment and proxy voting decisions.

Meanwhile, 13 public pension funds with

assets of nearly $800 billion have asked the SEC to clarify that publicly traded companies should be disclosing the financial risks of global warming in their securities filings. The pension funds said that global warming poses material financial risk to many of the companies in their portfolios and the companies should disclose these risks in the "Management's Discussion and Analysis of Financial Conditions and Results of Operations (MD&A)" section of their filings since management is required to discuss known trends, events or uncertainties that are reasonably likely to have a material effect on a company's financial condition or operating performance.

According to a new Ceres study authored by the Investor Responsibility Research Center (IRRC), only two percent of the assets held by the largest 100 mutual funds in America voted to support shareholder resolutions calling for more corporate disclosure on the financial impacts from global warming in 2004. The study found that 25 of the 28 investment companies controlling these 100 funds abstained or opposed all shareholder proposals in 2004 involving global warming.

Beginning in 2004, the SEC required mutual funds to disclose their proxy voting policies and voting records (68 FR 6564, 02/07/2003). The report, "*Unexamined Risk: How Mutual Funds Vote on Global Warming Shareholder Resolutions*," said that only American Century, Columbia Funds and the Janus Funds voted in favor of any global warming proposals in 2004. However, those firms cast a majority of their votes as abstentions or in opposition to global warming proposals. Most of the largest mutual funds support a company's business strategy and proxy voting recommendations. None of the top 100 mutual funds have explicit proxy voting guidelines on global warming. Instead, they lump these resolutions with other stakeholder (or so-called "corporate social responsibility") proposals. In this catchall category funds typically apply one set of proxy voting guidelines. The report recommended that mutual funds recognize that company operating results and the value of mutual fund investments are being affected by climate change and urged investment entities to establish proxy-voting guidelines that address climate change.

Washington Circuit-Board Assembler Fined for EPCRA Violations

Printed Circuits Assembly Corporation (PCA) agreed to pay $26,180 for failing to report the use of lead at its Bellevue, Washington facility. Under the federal Emergency Planning and Community Right to Know Act (EPCRA) entities that manufacture, import, process or otherwise use certain quantities of hazardous substances must use Toxic Release Inventory (TRI) forms to report. PCA failed to report its use of lead after EPA lowered the reporting threshold for lead releases from 10,000 pounds to 100 pounds in 2001.

***Commentary**: This enforcement action illustrates the importance of evaluating environmental compliance during pre-acquisition due diligence. Non-compliance may result in substantial fines that could impact projected revenues. In addition, purchasers should evaluate environmental compliance to determine what permit modifications or capital expenditures may be needed to implement the purchaser's business plan. Often times, purchasers plan to increase production, change products or raw materials or consolidate operations. If these changes trigger permit modifications or installation of new pollution control systems, the purchaser may encounter delays in implementing its business plan.*

ENVIRONMENTAL CASES INVOLVING TRANSACTIONS

Supreme Court Narrows CERCLA Right of Contribution

The U.S. Supreme Court ruled in *Cooper Industries, Inc. v. Aviall Services, Inc*., (No. 02-1192 (12/13/04) that claims for contribution brought under CERCLA section 113(f)(1) may only be brought by a party that was sued under CERCLA Sections 106 or 107(a).

In this case, Aviall had purchased property from Cooper and subsequently discovered that the site was contaminated. The company reported the contamination to the state and performed a voluntary cleanup after the agency threatened to bring an enforcement action. Aviall initially filed both a cost recovery action under section 107 and a contribution action under section 113 to seek reimbursement of its cleanup costs, but later abandoned its 107 action. After conflicting decisions were issued by the district and appellate courts, the Supreme Court found that section 113(f)(1) only allowed contribution claims "during or following any civil action under" Sections 106 or 107(a). Since Aviall was never subject to such an action, the Court said it could not maintain a contribution action.

However, the Court left open whether plaintiffs had an implied right of contribution under Section 107 because of an old line of cases predating the 1986 amendments to CERCLA that had added the 113 right of contribution.

In the wake of the *Aviall* decision, a federal district court in New York ruled that a plaintiff who had voluntarily remediated a site in Long Island could not bring a CERCLA contribution action. In *AMW Materials Testing Inc. v. Town of Babylon*, No. 01 CV 4245, (E.D.N.Y. 12/20/04), an aircraft parts supplier spent $1 million to remediate its property after a fire caused hazardous substances to be released into the area's soil and storm drains. While the New York State Department of Environmental Conservation (NYDEC) monitored the cleanup, the agency did not take any judicial

or administrative action to compel the cleanup. Because the plaintiff was not subject to any enforcement action under either Section 106 or 107, the court said the company could not recover its cleanup costs from the defendant.

Commentary: *Under Aviall, parties may still pursue a contribution action under Section 113(f)(3) if they are performing a cleanup pursuant to an administrative settlement. To preserve their rights to bring a contribution action, owners or operators of contaminated property should consider entering into voluntary cleanup agreement or brownfield agreement with the state environmental agency that would be stylized as administrative settlements under 113(f)(3) of CERCLA or that would provide that it constitutes an administrative settlement under section 113(f)(3). Such an agreement could also provide the owner or operator with contribution protection from claims of other parties. The person performing the cleanup would still have to show that its cleanup complied with the national contingency plan and that the costs were "necessary" to prevail on its claim.*

Costs for Investigation Not Recoverable Without Cleanup

The federal Court of Appeals for the Tenth Circuit ruled that a landowner who investigates contamination at a site but does not perform a cleanup might not bring a CERCLA cost recover action. In *Young v. U.S.*, No. 02-7133, (10th Cir. 1/4/05), the plaintiffs acquired a 330-acre property at a substantially reduced price that was adjacent to a Superfund site in Henryetta, OK. The Superfund site had been operated as a smelter by Eagle-Picher until 1969 when it donated the land to the local government. The former smelter was eventually placed on the NPL and EPA performed a cleanup that was completed in 1998.

The plaintiffs generally knew about the EPA's cleanup actions at the Superfund site, but did not review any public documents concerning the site or conducted any due diligence prior to purchasing the 330-acre parcel in early 2000. After taking title, the plaintiffs hired an environmental consultant to conduct an "abbreviated" site investigation, and hired an environmental hydrology and engineering company to assess the potential risks to humans who worked on their property. They then filed a cost recovery claim of $237,273.

The district court had ruled that the plaintiff was not entitled to bring a cost recovery action because it was a PRP. On appeal, the Tenth Circuit determined that while some of the actions taken by the plaintiff could be considered response actions, CERCLA defines response costs as costs that are "necessary to the containment *and* cleanup of hazardous releases." Since the plaintiffs did not perform any cleanup, the costs of the work did not qualify as "necessary costs of response." Moreover, the court said that the plaintiffs had not met their burden of establishing that their costs were incurred consistent with the NCP.

Since the plaintiffs limited their claim to a cost recovery action under Sction 107, the court said it did not have to address the issue of whether the Aviall decision would preclude the plaintiff from bringing a contribution action.

Commentary: *In the district court decision, the plaintiffs asserted that they were not PRPs because they qualified for third party defense. They did not argue that they were entitled to the contiguous property owner defense or seek the benefit of EPA's 1995 policy for adjacent property owners. Indeed, the appeals court noted that when asked about the CPO defense at oral argument, attorneys for the parties said they were not aware of the defense.*

Cleanup Grants Relevant in Eminent Domain Proceeding

The Connecticut Supreme Court ruled that a municipality should consider availability of cleanup grants or the value of potential contribution claims when calculating a contaminated property's value in an eminent domain proceeding. In *Northeast Ct. Economic Alliance Inc. v. ATC Partnership*, No. 17083, Conn. 12/14/04), the trial court awarded the defendant damages of $1,752,365 plus interest and costs as compensation for condemnation of the Windham Mills complex located in the former city of Willimantic, CT.

The defendant acquired title to a former mill site consisting of 40-acres in the mid-1980s. The local government developed a master plan for redeveloping the property and after negotiations for the sale of the property were unsuccessful, the plaintiff commenced a condemnation proceeding. Because the plaintiff estimated the remediation costs ranged from $2.42 million to $4.04 million, the plaintiff proposed a condemnation price of $1. The trial judge awarded the defendant $1,753,365 as fair market value of the property. In arriving at the figure, the court determined that a prudent investor would seek any funds that might be available to offset the cleanup costs. Because a bond had already been issued to the plaintiff for the project, the court determined that 80% of the cleanup costs could be recouped from a $3 million development grant and money that might be potentially recoverable through a superfund contribution action.

On appeal from the plaintiff, the state Supreme Court acknowledged that whether availability of public economic development funds should be considered in calculating a property's value for just compensation purposes was an issue of first impression in the state. The court also noted that it was not aware of any decisions in other states addressing the issue.

The court then went on to state that condemnation proceedings were equitable actions and that Connecticut law was clear that in an eminent domain proceeding, a property owner should be put in as good condition by just compensation as he would have been had the property not been taken. To achieve that goal, the court said Connecticut law required consideration of all factors that reasonably might affect a property's value.

Turning to the facts of the case, the court noted that the available grants as well as the fact that the state already had awarded funds to Northeast, established that it was reasonably probable that such funds were available. The court said that it

required no great stretch of the imagination to conclude that a prospective real estate purchaser reasonably would consider the availability of such funds before purchasing a contaminated former industrial property located in an economically depressed region. The court found availability of such moneys could only enhance the value of the property in the eyes of a reasonable prospective purchaser. Furthermore, it would be inequitable to consider the impact of environmental contamination on the property's value in accordance with grant moneys. Therefore, the trial court did not err in taking the funds into account when determining the fair market value.

Commentary: *A New York state court also recently ruled in favor of a property owner in In the matter of New York v. Mobil Oil Corporation, 2004 N.Y. App. Div. LEXIS 12551 (Sup. Ct. 10/25/04). In that case, Mobil owned a six-acre petroleum storage facility in Brooklyn. After a 50,000-gallon spill, Mobil entered into consent orders with the New York City Department of Environmental Protection and the New York State Department of Environmental Conservation in 1990 to remediate the property. In 1997, New York City acquired the property through condemnation to expand a sewer treatment facility. As part of the condemnation proceeding, parties exchanged appraisals. Mobil valued the property at $10,300,000 based on the highest and best value for "big box" commercial development. The valuation did not include any additional remediation costs associated with residual contamination of the property. The City's primary appraiser valued the property at a preliminary value of $2,600,000 as of the date of the taking. However, this report also concluded that the net value of the property would be negative after a set-off for minimum cleanup and excavation in the amount of $ 3,704,399. Therefore, the City contended that Mobil was only entitled to nominal compensation of*

$1,000. After the condemnation, New York City also filed a cost recovery action under the state Navigation Law.

The trial court ruled that the cost of cleanup should not be considered since allowing the City to reduce the value of the property in the condemnation proceeding while at the same time requiring Mobil to pay damages in its Navigation Law action would likely produce an unfair result. Mobil also argued that the City could receive a "windfall profit" from the cost of the cleanup because it sought to deduct the projected cost of cleaning up the property for industrial development rather than the predicted cost of cleaning up the property for its intended use, a water pollution control plant.

On appeal, the court noted that there was a split of authority among other state courts on the admissibility of evidence of cleanup costs in determining fair market value in eminent domain proceedings. The court said that some states hold that evidence of contamination and remediation costs is relevant to market value while others have concluded that evidence should be excluded because the condemnor can seek recovery of its remediation costs in a separate action where the landowner's liability has been established.

Because the City had commenced such a proceeding against Mobil under the New York Navigation Law, the court held that property should be valued "as if remediated." To prevent any potential windfall to either side, the court remanded the matter back to the trial court with instructions to hold in escrow any award that may be rendered in the condemnation proceeding until the conclusion of the Navigation Law proceeding, and that the proceeds of the condemnation award should first be utilized to satisfy whatever judgment is recovered in the Navigation Law proceeding.

Innovative Consent Decree Helps City Facilitate Redevelopment

A recent consent decree illustrates another tool that local governments may use to help facilitate redevelopment of brownfield sites. Under a recent consent decree, North Shore Gas and General Motors agreed to perform a soil and groundwater remedial action at an anticipated cost of $27,000,000 for the Waukegan Manufactured Gas and Coke Plant (WCP) Site along Lake Michigan in Waukegan, IL.

The approved remedy was based on a commercial/industrial future use assumption and the City of Waukegan agreed to assume soil operation and maintenance

responsibilities after EPA determined that the soil remedial action had been satisfactorily completed. However, the City agreed to refrain from placing the industrial/commercial property reuse cap required by the Record of Decisions (ROD) for a period of time while the City tried to find a developer interested in constructing a residential project. The developer would be responsible for implementing any additional cleanup required to achieve a residential cleanup standard. If the City is unable to find a developer within the specified time, the consent decree requires the City to place the industrial/commercial reuse cap on the Site.

Output Agreement Leads to Liability

A party to a joint venture agreement was found liable as a CERCLA generator in *GenCorp Inc. v Olin Corp*., No. 03-3119, 03-3211, (6th Cir. 11/22/04). In this case, GenCorp (a/k/a General Tire and Rubber Company) manufactured urethane foam at a plant in Ashtabula, OH. Because toluene di-isocyanate (TDI) was a critical component of the foam, GenCorp sought a reliable and cost-effective source of this product. In 1962, GenCorp and Olin Corp reached an agreement whereby Olin agreed to build a TDI plant on land that was owned by and adjacent to GenCorp's own plant. Olin also agreed to build a second plant at its own expense to produce toluene di-amine (TDA) that was needed for the TDI manufacturing process. The parties agreed that Olin would pay GenCorp $ 10 a year for the lease of the land. In return, GenCorp agreed to purchase 50% of the TDI Plant's output at cost and a "charge-in" for the TDA supplied by Olin to the plant. Both parties remained free to sell TDI to third parties without sharing any profits from these sales. GenCorp also agreed to purchase hydrochloric acid from Olin and to supply steam from its PVC Plant to meet the TDI Plant requirements.

Olin initially retained title to the TDI Plant but the parties agreed that at some later date Olin would transfer title to the TDI Plant to GenCorp at Olin's then-current book value for the plant. GenCorp agreed to advance Olin up to one half of its total capital costs for the plant as a deposit towards its obligation to purchase and acquire the TDI Plant. The parties also agreed that they would both have to approve the engineering specifications for the plant and that Olin would not make any capital expenditures without GenCorp's approval after the plant's start-up.

The parties created a four-member committee composed of two representatives from each company to supervise the construction and management of the facility. Olin agreed to select a plant manager and to supervise the day-to-day operation of the plant. Olin also appointed a committee manager who was the sole party authorized to instruct the plant manager on behalf of the Committee. GenCorp supplied all of the TDI Plant's hourly workers, retained them on its payroll and negotiated a collective bargaining agreement for them. Olin supplied and paid many of the plant's supervisory employees including the Plant Manager and other departmental heads although GenCorp filled some management positions with its own employees. All employees ultimately reported to the Olin-appointed Plant Manager.

Over the years of the TDI Plant's operation, the Committee addressed waste disposal in a variety of ways. TDI employees disposed of some waste at the plant site while a hauler hired by the Olin Plant Manager disposed of waste at a facility known as the “Big D.” The costs for disposing TDI residue appeared as a line item on Olin's budget for the TDI Plant which the Committee approved and which GenCorp paid for as part of the variable costs incorporated into the TDI price. The Committee approved without dissension capital expenditures aimed at reducing the volume of waste generated by the plant. A GenCorp Committee member visited the Big D site more than once and criticized the facility’s disposal methods to Olin's Plant Manager. GenCorp and Olin jointly funded the "Golden TDI" research program that unsuccessfully sought other commercial uses for the TDI residue to reduce the volume of waste shipped offsite.

In 1971, the parties modified the agreement whereby GenCorp relinquished its right to purchase the TDI Plant in exchange for a $ 1.65 million payment from Olin as reimbursement for its earlier deposit. GenCorp also extended its lease for three additional twenty-year terms. In a separate

agreement signed on the same day, the parties agreed that GenCorp would purchase at least 80% of its yearly TDI requirements at a price determined under a new formula supplied by the agreement. The parties also unwound earlier employment arrangements by transferring the GenCorp employees working at the TDI Plant to Olin's payroll and by dissolving the TDI Committee.

After TDI operations ceased in 1981 and Olin dismantled the plant and implemented remedial actions, EPA then placed the Big D on the NPL. EPA identified Olin as a PRP and eventually issued an administrative order to Olin requiring it implement an RI/FS at the site. Olin implemented the remedy and sought contribution from GenCorp who argued that it never had title to or physically held the waste.

The federal district court ruled that GenCorp was liable as an "arranger" of hazardous waste disposal under CERCLA either by virtue of its affiliation with Olin in an "association" or "commercial entity" or because the two companies constituted a single person by virtue of activities carried out in its own name. The court also determined that GenCorp was liable as an "owner" and an "operator" of the land on which the plant was built. The district court concluded that GenCorp should bear 30% of the costs of Big D and Olin 70% while GenCorp should bear 40% of the costs of the facility and Olin 60%. These liability shares translated into costs to GenCorp of approximately $ 19 million.

On appeal, the Sixth Circuit affirmed that district court's findings that business arrangements the parties made for the TDI Plant encompassed plans or preparations for waste disposal. Because GenCorp participated in decisions involving waste disposal, the court affirmed that it was liable as an arranger for the disposal of hazardous substances.

GenCorp argued ruling in favor of Olin would expand generator liability to mere customers of waste-generating manufacturers or processors. However, the court said that this concern was unwarranted because GenCorp and Olin did not have a traditional buyer-seller relationship. Even though GenCorp never held title to the TDI Plant, the court said it had an active interest in the facility through its option to buy the plant, secured by its deposit, and its contribution of one half of the construction costs. Pointing to other factors such as the equal representation on the management committee, the court said GenCorp could have been held liable as operator of the TDI Plant.

SUPERFUND/BROWNFIELDS

EPA Estimates Remaining Site Cleanups Will Cost $280 Billion

A report issued by EPA in December estimates that 350,000 contaminated sites would require cleanup over the next 30 years at a projected cost of up to $253 billion. However, the report said that at the current pace, the cleanups could take 35 years to complete at a cost of $280 billion. In 1996, EPA had predicted that 217,000 sites would have to be remediated at a cost of $187 billion.

The site estimates contained in "*Cleaning Up the Nation's Waste Sites, Markets and Technology Trends, 2004 Edition*," include an estimated 150,000 sites to be remediated under state voluntary cleanup and brownfield programs, 125,000 UST sites that are expected to need remediation within the next 10 years as well as about 6,400 DOD facilities and 5,000 Department of Energy sites. The total does not include sites that are currently undergoing cleanup or where cleanups have been completed.

The report estimated that there are 77,000 known contaminated sites and that 9,267 additional contaminated sites are discovered each year. Of the estimated 350,000 contaminated sites, less than 1% would be addressed by the federal Superfund program, but would consume 15% of the estimated future cleanup costs. EPA estimated that 43% of the future cleanups would involve UST sites

EPA Announces Return to Use Designation

In our prior issue, we discussed EPA's "Return to Use" (RTU) program that is a part of the agency's Superfund Reuse Initiative (SRI). Last month, EPA announced that it had issued a "Return to Use" designation for the Grand Rapids Superfund site. The 120-acre Butterworth #2 Landfill was added to the National Priorities List (NPL) in 1983. A four-foot-thick cap was installed over most of the site that will be used for recreational purposes. A 250-foot trail will be built at the southwest corner of the site to connect to an existing path that will allow bicyclists and skaters to go from one end of the site to the other. EPA provided an EPA landscape design consultant as in-kind services to help the city parks department evaluate a range of additional ideas for the site, including interpretive walks, picnic areas, an archery range and a concert venue.

Commentary: *RTU focuses on the approximately 500 National Priorities List sites where remedies were implemented before the SRI. Prior to SRI, remedy selection was focused primarily on removing immediate threats to human health and the environment and less on how the site would be used after cleanup. Under SRI, EPA will consider future site use when determining a remedy and ensuring that the remedy would be consistent with anticipated or potential use. With pre-1999 remedies, EPA will consider modifying restrictive fences or deed limitations that go beyond what is required for the site to remain protective and will consider issuing Ready for Reuse (RfR) determinations.*

EPA Issues New Institutional Control Guidance

EPA recently issued its *Strategy to Ensure Institutional Control Implementation at Superfund Sites*. The guidance focuses on evaluating Institutional Controls (ICs) at sites where all construction of all remedies is complete. Prior EPA IC guidance was directed at explaining the kinds of ICs, what types of ICs may be appropriate, and how they should be designed and selected.

This IC Strategy guidance will serve as a roadmap for EPA regional and headquarters personnel for preparing and implementing specific action plans to ensure the proper implementation of ICs at Superfund sites. The action plans will include gathering and entering information in the Institutional Controls Tracking System (ICTS), evaluating the data generated through ICTS, prioritizing and conducting site-specific follow-up activities, building the capacity to better manage and review IC

information, and coordinating with other interested parties. EPA expects that the Agency will undertake the projects outlined in this IC Strategy over the next five years.

Commentary: *EPA has previously issued two IC guidance documents. In September 2000, EPA issued its final "Institutional Controls: A Site Manager's Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups" (EPA 540-F-00-005, OSWER 9355.0-74FS-P, September 2000). This guidance was intended to provide Superfund and RCRA site managers and other decision makers with an overview of the types of institutional controls (ICs) that are commonly available, including their relative strengths and weaknesses, and to provide a discussion of the key factors to consider when evaluating and selecting ICs in Superfund and RCRA Corrective Action cleanups.*

In February 2003, EPA announced its draft "Institutional Controls: A Guide to Implementing, Monitoring, and Enforcing Institutional Controls at Superfund, Brownfields, Federal Facility, UST and RCRA Corrective Action Cleanups." This guidance is intended to provide Superfund, Brownfields, Federal Facility, UST, and RCRA corrective action site managers and site attorneys with an overview of responsibilities for the implementation, monitoring, and enforcement of institutional controls (ICs) at their sites. It also discusses some of the common issues site managers and site attorneys may encounter when carrying out these responsibilities. EPA will be issuing this as final this Spring.

GAO Finds Brownfield Progress Data Unclear

The GAO issued a report concluding that EPA has inadequate performance measures for assessing the effectiveness of its brownfield program. Thus, it is difficult to evaluate how brownfield financial assistance is facilitating cleanups, reducing environmental risks, generating jobs or stimulating the reuse of contaminated properties.

According to "*Brownfield Redevelopment: Stakeholders Report That EPA's Program Helps to Redevelop Sites, but Additional Measures Could Complement Agency Efforts,*" EPA has provided reports to Congress on the cumulative sites assessed, jobs generated, and cleanup and redevelopment funds leveraged by the program. However, GAO said it is difficult to isolate the impact of the brownfield funds because EPA has not begun reporting data on the cleanup activities of grant recipients and the brownfield money is often combined with funds from other sources. Another problem highlighted by the report was that EPA does not collect data on the assistance to state voluntary cleanup programs (VCP), which accounted for about one-third of the total brownfield program funds in 2003 and 2004.

The report also discussed suggestions provided by stakeholders and recipients of the brownfield financial assistance. The stakeholders suggested that Congress eliminate the requirement that recipients must have acquired title to the brownfield after January 2002. They also suggested that administrative guidelines were too stringent and discouraged the use of revolving loan funds. Others said that EPA should give priority to applicants with proven administrative expertise or to coalitions that can consolidate administrative functions. Another suggestion was to broaden the federal tax credit for remediation costs.

Ohio Adopts Model Law on Land Use Controls

Ohio became the first state to adopt the Uniform Environmental Covenants Act (UECA) that establishes mechanisms for creating, enforcing, modifying, and terminating environmental covenants. The National Conference of Commissioners on Uniform State Laws (NCCUSL) approved UECA in August 2003 to establish a uniform approach for implementing land use restrictions.

Recorded use restrictions are playing an increasingly important role in remedy selection. The restrictions are used to allow the use of risk-based cleanup where parties leave residual contamination in soil or groundwater. The NCCUSL hopes that UECA will encourage the reuse of contaminated properties by providing regulators, buyers, sellers, lessors, lenders, title companies and the local community with a greater ability to track and rely on the

enforceability of environmental covenants.

According to NCCUSL, the UECA is being considered by the legislatures of Nebraska, and Pennsylvania. NCCUSL believes 25 states will introduce the model law in 2005. More information about UECA and the status of related state legislation is available on the Web at http://www.environmentalcovenants.org.

NJ Enacts NRD Legislation

New Jersey Acting Governor Richard J. Codey signed legislation designed to ensure that a recent enforcement initiative by the state Department of Environmental Protection will not discourage redevelopment of brownfield sites.

The legislation provides that purchasers of contaminated property who acquired title on or after January 6, 1998 will not be liable for claims for natural resource damages. The landowner must have purchased the property after the discharge of a hazardous substance occurred. In addition, the developer cannot be responsible for the discharge of a hazardous substance at the property or be corporate successors to the discharger or any other liable person. However, the law will not apply to purchasers of contaminated property who have already agreed to make natural resource damages payments.

The bill also provides that brownfield developers will not be responsible for remediating contamination that may have migrated off-site. To qualify for this relief, the property owner must show the discharge occurred prior to the time it acquired title, it is not responsible for any contamination at the site, that the off-site contamination is from more than one source and that it will not pose a risk to public health or the environment if it is not remediated.

Commentary: *Under the New Jersey Spill Compensation and Control Act, responsible parties are not only liable for the cost of remediating discharges of hazardous substances, but also the cost of restoring or replacing natural resources damaged by the discharge. In September 2003, the NJDEP began actively pursing NRD claims. As part of this enforcement initiative, the NJDEP retained an attorney on a contingency basis to pursue NRD claims. In addition, all requests for NFA letters are reviewed for possible NRD and the NJDEP will not issue NFAs for such sites until the NRD claim is settled. The NJDEP established a formula for settling NRD claims that calculates the volume of contaminated groundwater and the period of time that the contaminated groundwater will be above state cleanup levels. The effect of this formula is that a party using a natural attenuation or enhanced bioremediation approach may initially reduce its cleanup costs, but could find itself subject to significant NRD claims depending on how long the remedial action will take to attain groundwater standards.*

GAO Issues BRAC Report

According to a report issued by the GAO, the Department of Defense (DOD) has transferred about 72% of 504,000 acres of property under its Base Realignments and Closures program. GAO said the total rose to 90% if leased acreage was included and that transfer of the remaining acreage has been delayed primarily because of contamination.

The report, "*Military Base Closures: Updated Status of Prior Base Realignments and Closures"* (GAO-05-138, January 13, 2005), said that DOD had spent about $8.3 billion on BRAC environmental cleanup through fiscal year 2003 and expected to spend another $3.6 billion. GAO said that while the estimated costs for environmental remediation remained within the range of prior estimates, these costs could increase because of unknown or undetermined future cleanup liabilities, such as additional cleanups for unexploded ordnance

The report said that DOD data estimated the BRAC process had generated $28.9 billion in net savings or cost avoidances and that the DOD expected to save about $7 billion each year thereafter. GAO expressed some concern over the accuracy of the purported savings because the DOD had not regularly updated those figures. In addition, GAO said that the estimates did not reflect all BRAC-related costs, such as $1.9 billion incurred by DOD and other federal agencies for redevelopment assistance.

NY Issues Draft VI Guidance

In November, the NYSDEC issued draft policy for evaluating potential vapor intrusion

(VI) at contaminated sites. The proposed policy will apply to all sites that are currently under investigation and currently being reviewed by NYSDEC as well as sites that will be reviewed in the future. However, the primary policy is to establish a process for investigating potential VI pathway at sites where remedial decisions were made prior to January 1, 2003.

In its background statement, the NYSDEC defined VI as the migration of volatile chemicals (VOCs) from the subsurface into overlying or adjacent buildings. In extreme cases, the vapors may accumulate in buildings to levels that may pose near-term safety hazards (e.g., explosion), acute health effects, or aesthetic problems (e.g., odors). Typically, however, if vapors do migrate into buildings, the levels are considerably lower and pose different health concerns that relate to chronic effects based on long term exposure to low chemical concentrations.

The policy also explained VI was historically considered to be a potential issue only when a VOCs contamination was located adjacent to or directly beneath the foundation of an occupied building. If the dissolved contaminant plume was more than 15 feet deep, there was an assumption that any vapors entering buildings would not represent an indoor air concern.

NYSDEC estimates that 750 sites in New York may be impacted from VOCs. For ongoing sites where final remedial decisions have not been made, the agency policy will be to evaluate the VI pathway during the site investigation process like any other media. NYSDEC will be issuing a guidance document for evaluating the soil vapor intrusion pathway that will describe the appropriate investigation methodology and how to evaluate the investigation data.

Many of the 750 sites have already been remediated and are either in the long-term monitoring phase or were closed once remedial objectives established for the cleanup were met. However, the agency said that recent evidence and a better understanding of vapor intrusion has led it to conclude that the VI pathway may need to be re-evaluated at these sites.

For the pre-2003 sites where remedial actions have been completed, NYSDEC has developed screening criteria and prioritization score sheets to help identify if there may be a potential for subsurface vapor intrusion at a site. The screening document is a series of questions that address the nature of VOCs known or reasonably suspected to be present in the subsurface.

To expedite the screening process, NYSDEC generated a list of sites where chlorinated volatile organic compounds (CVOCs) were disposed or detected in soil or groundwater. NYSDEC decided to target CVOC sites first because CVOCs are found at the vast majority of contaminated sites, do not readily biodegrade and they may accumulate indoors without being noticed by the occupants because of their high odor threshold.

While the NYSDEC recognized that non-chlorinated VOCs (such as benzene and toluene) also have some potential for vapor intrusion, they represent less of a concern for several reasons. In addition, the agency said that non-chlorinated volatile compounds generally have an odor or taste when they are present in drinking water or breathing space and that sites below the odor thresholds are generally below levels of concern and do not represent a threat to public health. Moreover, non-chlorinated VOCs also readily biodegrade in the presence of oxygen, which is readily available in the vadose zone (zone above the groundwater table) that contaminants must pass before entering a basement or crawl space. For these reasons, the agency decided to defer taking action on sites with non-chlorinated VOCs until further monitoring is evaluated and used to verify these assumptions.

Based on this effort, NYSDEC has developed a list of approximately 400 closed sites that may be subject to further remediation for VI. Sites meeting the screening criteria will be ranked and prioritized using a score for soil and a groundwater score sheet. The score sheets will evaluate sites based on site-specific information such as chemical concentration, depth to contaminated groundwater and soil, soil type, land use above impacted areas at or near the site, presence of NAPL, preferential vapor flow paths, and proximity to sensitive receptors (e.g., daycare facilities, schools, and hospitals). A weighting factor will be assigned to each condition depending on the answer. For

instance, if the depth to contaminated groundwater is between 15 and 50 ft below grade, then that condition will be given a weight factor of 4. Sites with soil contamination and sites with groundwater contamination will be prioritized separately.

After the initial list has been reviewed by DEC staff as a check on the validity of the screening process and to find out about other potential sites which for one reason or another did not rank as highly, a manageable number of pre-2003 sites will be targeted initially for further study to determine whether indoor air impacts associated with site contaminants exist. This determination will require a certain amount of field sampling and characterization to supplement any existing information. The scope of the sampling will be determined on a site-specific basis, but will generally involve soil gas sampling between any remaining on-site sources of VOCs and the nearest occupied buildings to estimate the extent of any vapor plumes associated with the site that could impact these structures.

If soil gas contamination is not found within 100 feet of an existing occupied structure or one that is planned, then the site will be given a low priority and further investigation of vapor impacts will be deferred. If soil gas sampling indicates that vapors have migrated beneath an occupied building, then sub-slab and indoor air sampling will be necessary to further evaluate potential impacts.

If groundwater within 100 feet of or beneath an occupied building is contaminated with VOCs, then sub-slab and indoor air sampling will be initiated. If recent groundwater quality data is not available, a limited groundwater investigation may be required to evaluate current groundwater conditions (i.e., nature and extent) downgradient of any remaining on-site sources of VOCs and make this determination. If groundwater contaminated with VOCs is not found within 100 feet of an occupied building, then the site will be given a low priority and further investigation of vapor impacts will be deferred.

HAZARDOUS WASTES/USTS

EPA Inspections Find USTs Violations at 70% of Idaho Convenience and Service Stations

EPA has determined that 70% of the gas stations and convenience stores operating in Idaho were not in compliance with the 1998 UST regulations. During the past year, EPA conducted inspections at 76 facilities and identified 93 violations. 52% of the violations involved lack of leak detection, improper operation of the tanks, and missing or incomplete records. 26% of the violations involve failing to upgrade USTs or improper equipment installation.

Commentary: *Purchasers or lenders for properties with upgraded USTs often believe that these sites do not pose significant risks of leaks. However, there is growing evidence that many properties with new or upgraded USTs may be impacted by equipment that is improperly installed or operated. Another common cause of spills in areas with cold weather is damaged spill overflow equipment known as "spill buckets". This equipment is designed to collect fuel in a fill line after a tank has reached its capacity. However, the spill buckets are often damaged during the winter months during snow removal. As a result, purchasers and their lenders should consider performing tightness testing on new UST systems to ensure that their integrity has not been compromised.*

AIR POLUTION DEVELOPMENTS

EPA Announces Non-Attainment Areas for PM 2.5

In December, EPA identified 224 counties in 20 states and the District of Columbia that are not in compliance with the National Ambient Air Quality Standards (NAAQS) for particulate matter (PM 2.5). States will have until 2008 to come up with new plans for reducing the PM 2.5 and must attain compliance by 2010. In severe cases, EPA could extend the compliance deadline to 2015. Areas with the largest concentrations of non-attainment counties include the Los Angeles basin and interior central California, the corridor from the District of Columbia to New York City, the region from Cincinnati to Pittsburgh, the Ohio River Valley, Atlanta, Chicago, Detroit and St. Louis. To reduce PM 2.5 emissions, states may have to modify their transportation plans, impose more stringent emission controls on stationary sources and implement tougher vehicle emission and inspection programs.

EPA Enters Into Cooperative Agreement With AFOs

EPA announced that it has entered into an air quality compliance agreement to address emissions from animal feeding operations (AFOs). AFOs may sign up to participate within 90 days following publication of the agreement in the *Federal Register*. EPA anticipates that 4,000 AFOs are expected to participate and that 30 operations will be subject to monitoring.

Operators of participating AFOs will pay a civil penalty of between $200 and $100,000, based on the size and number of farms in their operation, and also will contribute $2,500 to a fund that will cover the cost of the two-year emissions monitoring program. In exchange for the payments, AFOs will receive immunity from past violations and future violations that may occur while EPA finalizes its AFO air emission regulations. However, EPA is not barred from taking action to address imminent and substantial endangerments caused by the AFOs. The agreement also preserves the authority of state and local authorities to enforce odor or nuisance laws.

Data from the monitoring program will help EPA develop a method for estimating emissions from different types and sizes of feeding operations. Once these methods have been established, the AFO operators will be required to apply for all applicable air permits, install all required pollution controls, and implement any best management practices.

Enforcement Actions Brought Against Businesses For Failing To File Risk Management Plans

The EPA Region 5 office is seeking $121,137 from the Coca-Cola Bottling Company of Wisconsin for not filing and implementing a risk management plan (RMP). In its administrative complaint, EPA alleged that the facility owned and operated a process involving more than 10,000 pounds of anhydrous ammonia from June 21, 1999 to August 29, 2004.

Meanwhile, a Nevada geothermal energy facility agreed to pay $3,000 for failing to timely file a RMP. Empire Energy submitted its RMP plan to EPA last June, four years after the deadline. Empire had more than 64,000 pounds of isopentane at its facility, which is more than six times EPA's threshold quantity. EPA offered Empire a reduced penalty because the company acted quickly after it discovered the violation problem and the facility presents a relatively low risk to the public.

Commentary: *Under section 112(r) of the Clean Air Act (CAA), facilities using extremely hazardous substances (EHS) above specified threshold quantities were required to develop and submit RMPs in June 1999. The plan must include an assessment of the potential effects of an accidental release, history of accidents over the past five years, evaluation of worst-case scenarios and employee training. The plan must also include an emergency response program that outlines procedures for informing the public and response agencies, such as the police and fire departments, in the event of an accident.*

Prospective purchasers or lessees sometimes do not require environmental site assessments of warehouse facilities that store EHS because these facilities are often viewed as not posing significant environmental risks. Since the owner and tenants of a warehouse could be jointly liable for personal injuries or property damage resulting from explosions or accidental releases of hazardous substances from a warehouse, prospective purchasers or lessees of warehouse facilities may want to perform due diligence to determine if the warehouse they are considering will be subject to state or federal RMP requirements. They may want to limit themselves to occupying or owning warehouses that do not store ANY substances regulated by section 112(r).

Former Owners of Utility Plants Included in Landmark NY Power Plant Settlement

The current operators of six coal-burning power plants in upstate New York agreed to significantly reduce SO^2 and NOx emissions. The six plants agreed to take actions that will slash SO^2 emissions in half and cut NOx emissions by 20%.

The agreements were contained in two separate settlements. The first agreement resolved a lawsuit brought against NRG Energy, Inc., and its former owner, Niagara Mohawk Power Corporation for failing to comply with the New Source Review (NSR) program when they implemented modifications to the Huntley and Dunkirk power plants in western New York. Under the settlement, NRG agreed to reduce SO^2 emissions by 87% and NOx emissions by 81%. Niagara Mohawk agreed to pay a $3 million fine, to donate 2,500 acres of land along the Salmon River in Oswego County to the state, and to spend another $3 million on environmental projects in the region.

The second agreement involved four smaller plants in the Finger Lakes and Southern Tier regions of New York. The current owner of these plants, AES, agreed to reduce NOx emissions by at least 70% and SO^2 emissions by at least 90%. The former owner of the plants, the New York State Electric and Gas Corporation, agreed to pay a $700,000 fine, and AES will provide $1 million toward environmentally friendly projects.

EIA Reports on U.S. GHG Emissions

A report by the Energy Information Administration (EIA) found that United States greenhouse gas emissions (GHG) increased by 0.7 percent in 2003. The report, "Emissions of Greenhouse Gases in the United States 2003" said the 2003 increase was well below the rate of economic growth of 3.0% and below the average annual growth rate of 1.0% in greenhouse gas emissions since 1990. Emissions of CO^2 increased by 0.8% and emissions of methane increased by 0.5% while emissions of hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF6) decreased by 0.3 percent in 2003.

The EIA said that energy-related emissions of CO^2 have increased by 16% since 1990. The report also found that while land use change and forestry practices sequestered enough carbon dioxide to offset 19.2% CO^2 emissions in 1990, that figure dropped to 11.9% in 2002. The greenhouse gas intensity of the economy (emissions per unit of economic output) fell by 2.3% from 2002 to 2003. While methane emissions decreased by 15% since 1990, the EIA found that emissions of HFCs, PFCs and SF6 grew by 62% since 1990, although most of that increase occurred during the early and mid-1990s.

Meanwhile, the Department of Energy entered into a Memorandum of Understanding (MOU) with Power Partners to establish a voluntary framework for reducing the GHG emission intensity of the power generation sector. Under the MOU, the Energy Department and Power Partners will work together to develop a process for identifying high priority areas for the research, development, demonstration and deployment of technologies that could contribute to reducing greenhouse gas emissions. The MOU was signed by The American Public Power Association, Edison Electric Institute, Electric Power Supply Association, Large Public Power Council, National Rural Electric Cooperative Association, Nuclear Energy Institute, and Tennessee Valley Authority.

Power Partners is one of 13 trade associations or business groups taking part in the Climate VISION (Voluntary Innovative Sector Initiatives: Opportunities Now) program to support President Bush's goal of reducing the GHG intensity of the United States' economy by 18% between 2002 and 2012. Power Partners has pledged to collectively reduce the power sector's GHG intensity by an equivalent of 3% to 5% (measured as emissions per unit of electricity produced) below the 2000-2002 baseline levels.

Study Suggests EPA Revise Radon Policy

Researchers at Lawrence Berkeley National Laboratory, and Columbia University have developed a new map that they say more accurately depicts those areas where homes may have elevated levels of radon gas. The researchers said that EPA's current model was based on short-term radon measurements from a survey in the 1980s. Using newer data from long-term exposure studies, the researchers have developed a new radon map that shows median living-area radon levels for counties. The map, which is available at www.stat.columbia.edu/radon/, may be used to evaluate the specific risk of a particular homeowner.

Meanwhile, the New Jersey Department of Environmental Protection (NJDEP) recently issued new radon testing guidance that uses a three-tier system according to the potential for identifying homes with indoor radon problems. The tier system classifies municipalities as having high (Tier 1), moderate (Tier 2) or low (Tier 3) potential for indoor radon levels. For municipalities in Tiers 1 and 2, NJDEP will provide materials to develop an outreach program for homeowners.

Commentary: *Radon is a radioactive, invisible and odorless gas that comes from the decay of naturally occurring uranium in the soil. Radon can accumulate in homes and buildings at dangerous levels. Radon is the second leading cause of lung cancer in the U.S., with about 21,000 lung cancer deaths each year attributable to radon exposure. EPA has established a federal action level of four (4) Pico Curies per liter (pCi/L). When a building has radon levels above 4 pCi/L, EPA suggests that the homeowner consider steps to reduce long-term exposure to radon gas. Radon mitigation systems can be installed at an average cost of $1,200. The average indoor radon level in the United States is about 1.3 pCi/L.*

Review of Asbestos Enforcement Actions

The president of an asbestos abatement company pleaded guilty to violating the Clean Air Act by directing his employees to remove asbestos without following federal workplace standards. The violations took place in January 2003 when the defendant's company, MJR Contracting LLC, was performing asbestos abatement in connection with the demolition of the Pequot Motor Inn in Fairfield, CT. Luxury condominiums were supposed to be constructed at the site and the project was halted in February 2003 until proper work practices were implemented. According to the indictment, MJR submitted a bid that was considered high by the project's general contractor. The president of MJR then resubmitted a lower bid and sought to cut corners by directing his workers to illegally remove and dispose of 160 square feet of asbestos. The violations included failing to adequately wet asbestos debris, failing to store the asbestos in leak-proof containers or wrapping and not labeling the asbestos. According to a plea agreement, Michael Robichaud will likely be sentenced to 6-12 months in prison. He also faces a maximum fine of up to $250,000.

EPA is seeking $17,584 penalty from the Power Component Systems, Inc. (PCS) of Hanover, MD and the Big Spring School District for failing to comply with the asbestos workpractices during a May 2004 renovation of the Big Spring High School in Newville, PA. According to EPA, approximately 82,000 square feet of asbestos-containing floor tile and 750 feet of asbestos-containing pipe insulation was removed during the renovation project. An EPA inspector observed dry, crushed asbestos tile debris in the hallways and rooms of the high school, mechanical chipping machines at the facility, and noted that the floor tile had been subject to

sanding, grinding, cutting and abrading during removal. The inspector also observed dry asbestos pipe insulation in bags in the school's mechanical room.

The Yonkers Public Schools system has agreed to spend at least $131,000 to bring all of its 43 schools into compliance with the Asbestos Hazard Emergency Response Act (AHERA) by September 2005. AHERA requires local educational authorities to inspect all school buildings for visible damage; develop and implement asbestos-management plans; and keep the public, students and teachers informed about asbestos related hazards. After school officials at five schools were unable to provide asbestos management plans to EPA inspectors in 2002 and 2003, Yonkers agreed to conducted evaluations at all schools with asbestos-containing materials under EPA oversight. Under AHERA, fines may be used to correct violations. Yonkers plans to use the $131,000 to correct problems found at its 43 schools.

WATER POLLUTION/ENDANGERED SPECIES/DRINKING WATER

Stormwater Enforcement Actions

Twelve contractors working on seven projects in the Denver area agreed to pay $426,256 for failing to comply with stormwater rules for construction sites. EPA alleged that the companies failed to obtain stormwater permits, did not develop or implement stormwater pollution prevention plans (SPPP), did not implement or maintain appropriate best management practices to minimize runoff, and failed to conduct site inspections at the seven projects, which included shopping centers and residential developments.

EPA also announced that it had issued an administrative order to Wal-Mart and its contractor for failing to maintain best management practices to control runoff from storm water at Wal Mart's 28-acre Caguas construction site. The companies did not develop a SPPP and did not conduct the site inspections required by the Construction General Permit. EPA alleges that the companies failed to stabilize bare soil after construction had ceased for several months. EPA entered into a consent decree with Wal Mart in 2004 where the company agreed to pay $3.1 million, spend $250,000 on a Supplemental Environmental Project, and implement a comprehensive personnel and recordkeeping system.

Commentary: *Stormwater control used to concern local planning officials and project engineers. However, these examples illustrate how stormwater compliance is now an issue that must be addressed by builders, contractors, developers and construction lawyers.*

Operators of construction sites that disturb one or more acres of land (or less than one acre if the site is part of a common plan of development or sale) are required to file a Notice of Intent and SPPP with EPA or the state permitting agency. The site operator must implement the SPPP during construction, conduct periodic inspections and keep records of these inspections until active construction ceases and the site meets the jurisdiction's definition of "final stabilization." Once the site is stabilized, the construction site operator files a Notice of Termination with EPA or the state permitting agency.

Because EPA believes that only 1/3 of all construction sites are complying with the stormwater permit program, the agency launched a national Stormwater Compliance and Enforcement Strategy in 2003. The national strategy contains two enforcement models: A sector-based approach and a watershed-based approach. Beginning in fiscal year 2005, the agency will be focusing on companies that fail to file for permits (non-filers). In fiscal year 2008, EPA will begin focusing on compliance and small municipal systems that are not complying with permit requirements (non-implementers).

The sector-based approach focuses on commercial "big-box" retail stores, and large national and residential developers. Under this approach, EPA will first identify and prioritize companies for investigation using inspection data and compliance history information to make the determination. The agency will then issue section 308 letters to obtain information on the company's compliance history and to look for potential examples of noncompliance. Based on this review, EPA will then determine if an enforcement action should be commenced. The enforcement action can be in the form of a Notice of Violation, an administrative order seeking penalty, or pursue a civil penalty through a judicial action. The penalty formula will usually include a monetary fine, a Supplemental Environmental Project and imposition of a comprehensive recordkeeping system.

The watershed-based approach will focus on industrial facilities located in impaired watersheds. EPA believes that a majority of industrial facilities have either not obtained a stormwater permit or are not in compliance with their permit.

To expedite settlements and compliance, EPA has established an Expedited Settlement Offer (ESO) program limited to construction sites and auto salvage yards because these entities often involve facilities or sites where the cumulative effect of discharges can have significant environmental impact. The ESO is available to first time offenders that meet the following requirements: construction sites up to 50 acres, sites where the calculated penalty is less than $15,000, sites where there is no evidence of significant environmental impact (e.g., turbidity observed in receiving water), and sites where there are no non-allowable storm water discharges (e.g., a process wastewater discharge such as truck washing or discharge from a concrete batch plant operation). The penalties associated with the ESO program range from $500 to $15,000.

EPA Collaborates With NC and SC on Stormwater Violations

EPA recently announced the results of a coordinated enforcement initiative with the North Carolina Department of Environment and Natural Resources (NCDENR), and the South Carolina Department of Health and Environmental Control (SCDHEC) involving storm water inspections at construction sites exceeding one acre of disturbed land within the Charlotte metropolitan area. Each site was evaluated based upon compliance with North Carolina's Construction General Permit for Storm Water Point Source Discharges at Construction Sites or South Carolina's General Permit for Storm Water Discharges from Construction Activities associated with industrial construction, issued under the National Pollutant Discharge Elimination System (NPDES) Permit Program. EPA, NCDENR, SCDHEC, and local agencies evaluated the facilities impact on the receiving streams and their compliance with the federal and state storm water regulations. The inspections resulted in the issuance of either an Administrative Order (AO) or a Notice of Violations (NOV) to 11 companies. The AO requires the submission of either an application for an individual stormwater permit or a NOI for coverage under the general permit along with the installation and/or maintenance of Best Management Practices (BMPs) throughout the site.

Commentary: *BMPs are intended to reduce or prevent pollutants associated with industrial activities from coming into contact with stormwater and discharges of non-stormwater. BMPs can include a variety of pollution prevention measures or other low-cost pollution control measures. They generally fall into two categories: Non-Structural (e.g., maintenance procedures, prohibitions, spill response, materials handling, vegetative erosion controls, etc) and structural (e.g., runoff controls, detention ponds, secondary containment, etc).*

California Proposes Revised Industrial General Stormwater Permit

The California State Water Quality Control Board has proposed a new draft state Industrial General Permit for discharges of stormwater associated with industrial activities. This draft Industrial General Permit will replace the 1997 permit and applies to 11 categories of facilities. Operators of those facilities within the 11 categories must obtain the general permit even if the covered activity is not the primary function of the facility. For example, a school district is not within the 11 categories, but a vehicle maintenance facility operated by the district would be subject to the general permit. Facilities that discharge stormwater to local sanitary sewer systems or combined sewers will not be subject to the permit though they may be subject to local ordinances that prohibit stormwater connections to sanitary sewers. Facilities that treat stormwater prior to discharge or dispose of stormwater in on-site ponds are also not subject to the permit.

The draft general permit has four significant changes from the 1997 permit. The draft permit would require facilities to develop site-specific BMPs that must be incorporated into their SPPPs. The minimum BMPs will have to achieve either Best Available Technology economically achievable (BAT) or Best Practicable Control Technology currently achievable (BCT). The permit will also require facilities to implement more extensive sampling for pollutants associated with the particular industry and perform a one-time

comprehensive scan for metals, Chemical Oxygen Demand (COD), and semi-volatile organic compounds (SVOCs) that SWRCB will use to develop numeric effluent limitations. The draft permit will also require discharges to comply with water quality standards. If a discharge causes a violation of water quality standards, the facility must revise its SPPP and improve BMPs.

The draft permit will apply to all industries including those classified as "light industry." Those facilities will now either have to apply for a Conditional Exemption by submitting a "no exposure certification" (NEC) or obtain coverage under the general permit. The NEC is designed primarily for facilities where industrial activities are conducted inside buildings and all of the materials used or handled are not exposed to stormwater.

Commentary: *The federal stormwater initiative and proposed draft permit illustrate how stormwater compliance is becoming an increasingly important issue for businesses that traditionally may not be viewed as posing significant environmental problems. A common problem is discharge of non-stormwater into stormwater drainage systems. Examples of these unpermitted discharges include rinse water from washing of vehicles, buildings as well as equipment and materials that have spilled-on surfaces that are washed into stormwater conveyance systems. Another common form of unauthorized non-stormwater discharges is liquids poured or washed into floor drains.*

Purchasers and lenders should consider evaluating stormwater compliance for existing properties. In addition, construction lenders and developers need to consider stormwater issues during the design of projects particularly if projects are to be located near sensitive ecosystems or surface water that does not comply with water quality standards. Local stormwater requirements may determine where structures may be constructed as well as the type of construction materials used.

NJDEP Stormwater Enforcement Action Results in Eviction of Tenant

The NJDEP fined an automotive parts store $65,000 for improperly storing automotive parts including engine blocks, transmissions, batteries and gasoline tanks outdoors without taking required steps to prevent these items from leaking into the ground. Coach Auto Parts also failed to submit to DEP an annual self-inspection compliance certification. DEP required Coach Auto Parts to properly store its automotive materials within sixty days and issued a compliance evaluation to encourage the facility to comply with the terms of its Stormwater Discharge permit. However, subsequent inspections in September 2003 and January and February 2004 revealed that the facility continued to improperly store automotive fluids and drained automotive fluid directly from vehicles onto the ground. In response to the facility's continued noncompliance, DEP fined Coach Auto Parts $65,000. Coach Auto Parts has been evicted from the property and is no longer operating.

Sewer Discharges Result in Substantial Fines

Allegheny Ludlum Corp. has agreed to pay a $2,375,000 penalty as a part of a settlement over alleged Clean Water Act violations at the company's Pittsburgh area steel mills and finishing plants. The settlement concludes more than nine years of litigation over unlawful discharges of oil and toxic pollutants, including chromium, copper, zinc, and nickel from two facilities that discharged into nearby rivers and to a sewage treatment plant. In 2001, a federal district court imposed a $8.24 million fine. The Court of Appeals for the Third Circuit affirmed the ruling in 2004 but remanded the case back to the district court to consider the company's claim that it had overstated its violations in its water monitoring reports because of laboratory error. The settlement announced was a result of a court-ordered mediation.

BEF Corp. along with its founder and president pleaded guilty to discharging silver-laden and acidic wastewater into sewers operated by the City of Bethlehem, PA, and the City of Allentown, PA. Under the plea agreement, the company and its president will jointly pay $700,000 in fines. In addition, the company president faces up to one year in prison. BEF buys used one-hour photo processing machines,

refurbishes them and then resells them throughout the world. During the refurbishment process, BEF generated silver-laden and acidic wastewater that was illegally discharged into sewers.

Commentary: *Shopping centers and commercial buildings may contain tenants such as photo processing shops and medical offices that generate wastewater containing silver and mercury. The local sewer authority may require tenants to treat their wastes prior to discharge into the sewer system. Since the owner of the property will often be viewed as owning the pipes discharging into the sewer system, it is important during due diligence to determine if tenants are properly treating their wastewater and managing any hazardous wastes generated by the treatment process.*

Wetlands Enforcement Roundup

EPA is continuing to aggressively pursue property owners and contractors who fail to comply with the wetlands permit program. For example, three Virginia-based contractors agreed to pay $32,500 to resolve charges that they improperly filled 8.75 acres of wetlands in Suffolk, VA. These wetlands were headwaters of the Nansemond and James River systems and were filled with dirt, sand blast grit and mulch to create a road through the property.

In another Virginia case, a property owner and its land clearing contractor agreed to pay a $2,556 penalty and restore the 2.5 acres wetlands that had been unlawfully disturbed by ditching and filling activities in Newport News, VA. In addition, the property owner, J. Denbigh Associates, Inc. agreed to preserve an additional 4.1 acres of wetlands near Grafton Ponds, place deed restrictions protecting the remaining 25 acres of wetlands on the site, and buy six acres in a wetlands mitigation bank. According to EPA, the ditches were not stabilized, causing the erosion of sediment into Stoney Run, a tributary of the James River. The parties did not obtain a construction general permit or implement an SPPP.

Taunton Development Corporation, Condyne LLC and G. Lopes Construction, Inc., agreed to pay $137,500 to settle claims that they illegally filled in nine acres of wetlands during construction of a 1 million square foot warehouse.

The St. Louis-based J.H. Berra Construction Co., Inc., (Berra) of St. Louis agreed to pay a $20,000 fine and perform two mitigation projects to settle claims that it improperly filled wetlands along a quarter-mile stretch of an unnamed tributary of Creve Coeur Creek near Mayerling Drive in Maryland Heights, MO. According to EPA, Berra placed fill material into the unnamed tributary to prevent stream bank erosion in a residential development without looking into practicable alternatives. Instead of exploring practicable alternatives such as bioengineered methods to stabilize the stream banks, Berra decided to pipe the stream and place fill material into the creek to support the pipe. As part of the settlement, Berra agreed to implement an on-site project mitigation project through the Missouri Conservation Heritage Foundation Stream Stewardship Trust Fund (Trust Fund) that will involve creating habitat for aquatic life on top of the fill material and the planting of native trees and shrubs to prevent erosion. The second mitigation project will involve paying $60,000 to the Trust Fund to restore and enhance damaged stream banks in the area.

In a criminal enforcement case, Jeffrey Balch of Marathon, FL, was sentenced to five months in prison followed by five months of home confinement. In addition, he was ordered to pay a $15,000 criminal fine and pay $66,122 to the Florida Keys Restoration Fund. He was also ordered to remove illegally placed fill materials. Balch owned bay front property in Marathon. He allowed Felix Equities, a contractor for the Little Venice Sewerage Project to dump excavated fill on his property. Balch then used heavy equipment to place the fill into the waters of Florida Bay.

Corps Reverses Wetlands Decision After NY Threatens Action

The Army Corps of Engineers (Corps) reversed an earlier decision and agreed to assert jurisdiction over 19 acres of wetlands near Syracuse, NY after New York Attorney General Eliot Spitzer filed a notice of intent to sue the Corps. In August 2003 Greenfield Homes, LLC requested jurisdictional determination that wetlands in Lysander, NY

was not subject to the wetlands permit program. The Corps ruled that because the wetlands were not adjacent to any navigable water, the developer did not have to obtain a permit.

However, Spitzer's office contended that because the wetland drains into a tributary of the Seneca River, the developer could not be allowed to fill the wetlands without first obtaining a permit and providing compensation for the lost wetlands. The Attorney Gneral also indicated that construction of residential development has already impacted the remaining wetlands and has exacerbated regional flooding problems since water formally held by the wetlands is now flowing to downstream areas. After receiving the notice, the Corps visited the site and confirmed that the wetlands were connected to a tributary of the river and therefore were subject to its jurisdiction.

Commentary: *In 2004, a GAO report found that the district offices of the Corps had adopted differing interpretations on whether wetlands that were connected to artificial ditches that eventually drained into a tributary of navigable water were subject to the 404 permit program.*

According to a report "Down the Drain: The Destruction of Waters and Wildlife in the Southwest," isolated wetlands in Texas and other Southwestern states are in particular danger from development and runoff from livestock feedlots and oil fields. One of the problems the report highlighted was that the Corps frequently made jurisdictional determinations without conducting site visits. Instead, the report said, the Corps often relied on maps and consultant reports rather than firsthand inspections.

Converted Farm To Provide Mitigation Credits For Highway Projects

A farm that was created in the 1950s by draining wetlands is being converted to a wetlands bank and will provide wetlands credits for a highway-widening project. The work being performed by scientists from the University of Minnesota Duluth (UMD) has included plugging the ditches that were used to drain the former wetlands, grading the 350-acre site and planting wild mosses, sedges, Labrador tea and other bog plants. The Minnesota Department of Transportation (MDOT) plans to pay the wetlands bank $1.6 million to purchase wetlands "credits" for 200 acres of the wetlands bank. The credits will be used to compensate for wetlands that will be lost as part of the 20 mile expansion of U.S. Highway 53. The Minnesota Board of Water and Soil Resources also bought credits for another 100 acres of the Fens bog to help county road departments and other local governments mitigate wetland destruction.

According to the UMD scientists, the Fens project is the first in the United States to provide a mix of wooded swamp and peat bog. Because the wetlands being created are the same as those being destroyed, the agencies only have to replace the wetlands on an acre-to-acre ratio.

The agencies are paying the university $8,000 per acre of credit which is about twice as much as it will cost the university to restore the wetlands. UMD plans to use the extra revenue to endow a trust fund to continue its research into wetlands and their restoration.

Commentary: *Minnesota has eight different types of wetlands (e.g., shallow marshes, deep marshes and shrub swamps) and has established different wetland banks that may be used to compensate for the particular kind of wetlands being lost.*

Under a 1990 memorandum of agreement (MOA) between EPA and the Army Corps of Engineers, mitigation measures must be applied using "sequencing" criteria that first require an applicant to avoid wetlands impacts to the "maximum extent practicable." In this analysis, the agencies will ask if there are any practicable alternatives that would not result in a loss of wetlands. A permit will not be issued if a practicable alternative exists which is less environmentally damaging. If an alternative does not exist, applicant must redesign the project to minimize the unavoidable impacts of the project. Finally, if the first two conditions are not feasible, the MOA states that compensatory mitigation measures should be taken in areas adjacent to or contiguous to the site. If that is not possible then off-site mitigation is permissible, but should be taken in the same geographic area. When developing

compensatory mitigation, the function and value of the aquatic resources are to be considered, which not only includes habitat for animal or plant life, but also the natural filtration function provided by the wetlands, flood control and groundwater recharge. A one-to-one ratio is usually used for determining how many acres of wetlands must be restored or created. However, more acres of land may be needed to adequately replace functions that are lost by high quality wetlands or where there is a low likelihood of success.

New York and DC Violated LIW Sampling Rules

The New York State Department of Health (NYDOH) has determined that New York City violated the federal lead and copper rule promulgated under the Safe Drinking Water Act (SDWA) when it tested its drinking for lead during the past six years. When NYDOH properly tabulated the sampling results, the NYC drinking water exhibited slightly elevated levels of lead from 2000 through 2002.

The NYDOH did not issue any fines, but required that the city's Department of Environmental Protection (NYCDEP) develop a plan by the end of the year for replacing all service lines and pipes where lead is found to be leaching into drinking water as well as to increase the frequency of lead testing to every six months from once a year. NYCDEP will also be required to begin a program to inform citizens how to determine how much lead is in their tap water. The NYCDOH began investigating the city's LIW testing program after reports circulated that public water suppliers in other parts of the country were not properly reporting their LIW test results.

Meanwhile, EPA issued an amended administrative order on January 14, 2005 to the District of Columbia's Water and Sewer Authority (WASA) after determining the agency had improperly concluded that 400 homes tested in 2003 had acceptable levels of lead in drinking water (LIW). EPA determined that WASA flushed taps for five minutes prior to collecting samples and that this was an improper testing protocol. As a result, WASA concluded that 66% of the households tested had LIW below the federal action level of 15 parts per billion (ppb) when in fact only 27.5% of the homes had acceptable levels of LIW under the correct testing protocol. Test results for the last six months of 2004 showed that 90% of homes where water was tested have lead levels of 59 ppb or lower. The amended order requires WASA to notify customers who received inaccurate information and to replace the lead service lines supplying drinking water to those homes.

Under the original June 2004 order, WASA was obligated to replace certain lead service lines (LSL) by 2007. Thus far, WASA has replaced 2,800 LSL and plans to replace all the city's estimated 23,000 lead pipes by 2010 at a cost of $300 million. EPA has encouraged property owners to consider replacing the portion of the LSL on their private property.

In response to the reporting problems uncovered in a number of cities, EPA issued guidance clarifying how LIW samples should be collected and reported. Key elements of the guidance include what samples are used to calculate the 90th percentile concentration (which is the basis for determining if water suppliers need to take action), how to report samples that are taken outside of a specific compliance time frame; what to do if the minimum number of samples are not collected, how sampling problems may be avoided and when samples may be invalidated.

Commentary: *The NYC and WASA cases illustrate the importance of properly conducting LIW sampling during due diligence. Many banks require this sampling but use different protocols. One common procedure is to take a standing sample, which is a sample taken from a tap where the water has not been used for at least six hours. This would then be followed by one or more flush samples, usually 30 seconds and then two minutes. The Centers for Disease Control has established guidelines for homes with public or private LSLs. The CDC recommends that residents should run high-volume taps (such as showers) for five minutes using cold water and to run the kitchen tap with cold water for one or two minutes before using any tap water for drinking or cooking, especially if the water has not been used for more than 6 hours.*

Day Care Centers Fined for SWDA Violations

Eleven daycare centers were cited by the Massachusetts DEP for using unpermitted on-site water systems. The DEP inspected all day care providers with 25 or more children or those that had less than 25 children, but shared a water supply with an adjoining business. The state DEP began inspecting private water supplies in spring 2004 after water quality violations were found in private systems that serviced gas station/doughnut shop combinations.

Meanwhile, the Ohio EPA ordered the owner of a public water system used by Gentle Touch Day Care to pay a $5,500 penalty and take certain corrective actions. The agency identified numerous violations during 2003-04 including failing to perform repeat sampling after detecting excessive levels of total coliform, failing to monitor for certain chemicals, asbestos, copper and lead; and failing to notify users of the system of the above violations. A corrective action plan must be prepared within 60 days and implemented within 60 days of agency approval. One of the required actions is to abandon the existing water well and obtain an alternative drinking water source such as drilling a new well, connecting to the village of Dresden's water system or transporting water to the site for daily use. Until the violations are corrected, bottled water must be provided to the day care center.

Commentary: *These enforcement initiates are further illustrations of the importance of collecting drinking water samples during due diligence. In these cases, the facilities were considered public water supply systems because they served 25 or more people for at least 60 days/ year.*

Part of the confusion with day care centers and other facilities is that state environmental agencies or local health agencies with jurisdiction over drinking water are not usually involved in the licensing process. As a result, the facility owner may not be aware of that it may be required to register as a public water supply system or sample its drinking water.

NAS Issues Recommendation for Perchlorate Drinking Water Standard

The National Academy of Sciences (NAS) released a report on perchlorate that recommended a reference dose (RfD) of 0.7 milligrams per kilogram of a person's body weight per day. Based on body weight and daily water consumption, this RfD is roughly equivalent to a drinking water standard of 20 parts per billion (ppb). In 2002, EPA announced a preliminary risk assessment that recommended an RfD of 0.00003 milligrams of perchlorate per kilogram of body weight that was comparable to 1 ppb while industry groups have proposed a drinking water standard of 200 ppb. California has proposed a perchlorate drinking-water standard of 6 ppb.

According to "Health Implications of Perchlorate Ingestion," drinking water in 35 states has been impacted with perchlorate. The report did not specify a drinking water standard since a RfD is simply the amount of a substance per unit of body weight that that may be safely consumed from all sources. Other factors such as amount of drinking water consumed and other sources of exposure must be evaluated in determining a maximum contaminant level (MCL). For example, the draft EPA MCL was based on an assumption that a 70-kilogram male would drink 2 liters of water per day and obtain 80% of the dose through water.

Further complicating the task of establishing an MCL for perchlorate is that a significant percentage of perchlorate exposure comes from food. Some studies have suggested that 40% to 60% of perchlorate consumed in California is from food. Indeed, a recent study released by the federal Food and Drug Administration (FDA) found perchlorate above the EPA preliminary risk assessment in a majority of samples of lettuce, bottled drinking water, and milk. Perchlorate was found in 217 of 232 samples of milk and lettuce in 15 states. The average concentration of perchlorate was 10.49 ppb and approximately 60% of the samples exceeded 6 ppb. The highest detected level was 11.9 ppb, which was found in 25 samples of romaine lettuce. 38% of the 104 samples of raw and pasteurized milk exceeded 6 ppb. Lettuce samples were collected at the grower or packing shed while bottled water samples were collected at retail locations.

Commentary: *The principal use of most of the perchlorate manufactured in the United States is as an oxidizer for solid rocket propellant. Perchlorate is also used in pyrotechnics, such as fireworks, gunpowder, explosives, and highway flares. In addition, perchlorate is used in a wide variety of industrial processes, including, but not limited to, tanning and leather finishing, rubber manufacture, paint and enamel production, additives in lubricating oils, and in fertilizer.*

TOXIC SUBSTANCES

LBP Enforcement Actions

In one of the largest lead-based paint (LBP) enforcement actions brought by the Department of Housing and Urban Development (HUD) and EPA, a Boston-based real estate company agreed to remove LBP hazards from approximately 10,400 apartments in seven states and the District of Columbia at a cost of $3.7 million and to pay a $105,000 civil penalty. HUD and EPA claim that WinnResidential Limited Partnership failed to comply with the LBP disclosure requirements in buildings located in California, the District of Columbia, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, and Virginia. Some of the violations occurred at former industrial buildings that Winn is converting to residential housing projects.

A Chicago landlord agreed to pay a $150,000 fine for failing to provide required LBP disclosures to tenants in 45 apartment units. In addition to not providing tenants with the mandated LBP disclosure statement, EPA and HUD alleged that Ivan Zugalj failed to provide copies of LBP abatement orders that had been issued to him by the city department of public health.

Commentary: *Because LBP is a non-scope item under the ASTM E1527-00 Phase I standard, parties performing due diligence have to specifically request that LBP be addressed. In most instances, users usually ask consultants to determine if there are obvious lead hazards (e.g., peeling paint) or require consultants collect LBP samples, but seldom verify if building management is complying with the LBP disclosure rules even though dozens of property management companies have been forced to pay significant fines for improper disclosure during the past few years. Federal and state regulators are continuing to actively investigate and prosecute improper LBP disclosure cases. Purchasers of buildings could find themselves subject to substantial fines for uncorrected violations of their predecessors. As a result, purchasers and their lenders should randomly search tenant files during due diligence to evaluate compliance with the LBP.*

Contractor Fined For Improper Management of PCB-Contaminated Soil

A Rhode Island-based construction company agreed to pay $46,750 to settle charges that it improperly handled and disposed of PCBs in soils during a construction project in New Haven, CT. According to EPA, the Gilbane Building Company excavated and disposed of 2,750 tons of PCB-contaminated soil by allegedly mixing it with low PCB-concentration soils containing 191 ppm.

Commentary: *One of the complications in brownfield redevelopment is encountering previously unsuspected contamination such as PCBs. Many urban brownfield sites may have been PCB-contaminated from leaking transformers or other electrical equipment that may have contained PCBs. When performing site investigation, developers should try to determine what kind of electrical equipment may have been present on the property and develop contingency planning for encountering previously unknown contamination.*

Medical Device Manufacturer Fined For FIFRA Violation

A Plymouth, MA medical manufacturer agreed to pay $10K because it failed to obtain approval from EPA before making anti-bacterial claims of one of its products. The company also agreed to spend $38K to

provide medical supplies such as alcohol-based hand wipes to more than 60 nonprofit, school-based health centers in Connecticut.

EPA originally sought $300K from Doctor's Research Group (DRG) for allegedly committing 52 violations of the Insecticide, Fungicide and Rodenticide Act (FIFRA) when the company made claims that its Safeseal product contained a compound that could kill bacteria on stethoscopes. DRG launched Safeseal in early 2001, targeting the product for emergency rooms, burn units and neonatal units where infection control is particularly critical, as well as physicians' offices and with emergency crews. The product even appeared on the television show "ER." Although the FDA approved the product, EPA said that the DNG had to register the product as a pesticide because it was being marketed as an anti-microbial product.

Commentary: *An increasing number of businesses including retailers that would not appear to have environmental liability are becoming targets of FIFRA enforcement for selling products that make anti-microbial claims. It is important to confirm that products that could be considered pesticides have been registered or that EPA has determined that the product does not have to comply with FIFRA.*