

SCHNAPF ENVIRONMENTAL JOURNAL

A Newsletter Covering Recent Environmental Developments and Caselaw

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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.

Part 2 of 2

HAZARDOUS WASTES/USTS

Plant Mothballing Results in Criminal Enforcement

One of the strategies frequently used to avoid triggering closure obligations under the federal Resource Conservation and Recovery Act (RCRA) or having to disclose decommissioning costs in SEC filings is for owners or operators to "mothball" a plant where the facility virtually ceases all operations and is staffed by a "skeleton" crew.

Publicly-traded Rhodia Inc., which is one of the world's largest specialty chemicals manufacturers, used this approach in 1997 for its elemental phosphorus manufacturing plant in Silver Bow County, MT. The federal government charged that the company illegally stored hazardous wastes in the form of elemental phosphorus sludge, and carbon brick and precipitator dust contaminated with elemental phosphorus waste. The carbon brick and precipitator dust had been discarded from a furnace at the site. The company entered into a plea agreement where it agreed to pay an \$18 million fine and to implement corrective action. The federal district court also sentenced Rhodia to at least five years probation, with the probationary period subject to extension if the corrective action takes longer than five years.

EPA Announces New CA Initiative

EPA recently launched its Corrective Action Smart Enforcement Strategy (CASES) to accelerate the pace of corrective actions at high priority RCRA facilities. EPA hopes that CASES will help it achieve its goal of controlling human exposure to environmental risks from hazardous waste at 95% of the high priority sites and controlling migration of contaminated groundwater at 70% of those facilities by 2005. To date, 74% of the 1714 high priority RCRA Corrective Action facilities have met the goal for human exposure and 63% met the benchmark for controlling groundwater.

EPA Issues Two State UST Delegations

EPA finalized its 1998 decision to partially authorize West Virginia to operate its UST program in lieu of federal enforcement. EPA indicated that it would continue to rely on its federal enforcement and inspection authority while West Virginia will have authority to inspect and enforce its underground storage tank requirements under State law. EPA indicated that some provisions of West Virginia UST program were broader in scope than the federal UST program and, therefore, were not part of the approved program that was codified. For example, West Virginia provides more extensive notification, such as requiring disclosures in deeds and leases. Because these provisions go beyond the federal program, they cannot be enforced by EPA. Instead, the state will continue to enforce such provisions.

EPA also codified its decision to authorize Virginia to operate its state UST program in lieu of the federal. Like West Virginia, some aspects of the Virginia program were broader than the federal program. For example, Virginia regulates heating oil greater than 5,000 gallons. Virginia does not allow installation of a UST system without corrosion protection under any circumstances; whereas EPA allows the installation of a UST system without corrosion protection if a corrosion expert determines that the site is not corrosive enough to cause the system to have a release due to corrosion during its operating life. In addition, the Virginia UST program requires owners and operators to obtain a permit, undergo a State inspection, and/or obtain a certificate of use in accordance with the Virginia Uniform Statewide Building Code for tank installation, tank repairs and release detection, and temporary closure, permanent tank closure, and changes-in-service. EPA's technical standards do not require permits or inspections of this nature, nor do they require conformance with State building codes. While the federal UST program provides an owner/operator with six

options to demonstrate compliance with the new tank installation requirements, Virginia does not allow two of these options (i.e., certification by the installer or inspection and approval of the installation by the implementing agency). Virginia's program requires that UST systems with impressed current corrosion protection systems cannot be inadvertently shut off, while EPA technical standards only require that the cathodic protection systems continuously provide corrosion protection. Virginia requires owners/operators to file and obtain a Corrective Action Permit (CAP) prior to performing corrective action whereas EPA has no such requirement. For site closure or change in service, Virginia goes beyond EPA and requires submittal of sampling results, description of the area sampled, and a site map. Virginia has established a state trust fund to assist owners and operators in demonstrating financial responsibility.

Commentary: *These two UST delegations illustrate how UST programs may differ from the federal UST program. During due diligence, it is important to review what tanks are subject to regulation, particularly heating oil tanks. While tanks used for on-site consumption of heating oil are exempt from the federal UST program, many states regulated these tanks but have different capacity thresholds. Purchasers should determine if heating oil tanks have been used in the past, especially in states where they are not regulated since they may have been closed in place without the kind of assessment that is required in the federal UST program.*

Maryland To Issue New Tank Requirements for MTBE

The Maryland Department of the Environment (MDE) will require installation of double-walled pipes on all regulated motor fuel underground storage systems and require built-in sensors to warn of leaks. The emergency regulations will also require increased groundwater sampling, mandate regular testing of tanks and fittings, and define steps that gas station owners and others must take when underground storage systems are suspected of contaminating groundwater. The regulations will apply in areas where wells are the primary source of

household drinking water and local geology makes it impractical for homeowners to find a new water source.

Double-walled piping must be installed for new UST systems by January 1, 2006 and for existing USTs that are at least 15 years old by that date. All existing UST systems must be upgraded by January 1, 2009. Owners or operators of USTs will have 30 days after the effective date of the regulations to begin quarterly sampling of water in on-site domestic wells and tank field observation pipes. They will also be required to conduct annual tightness tests for fittings in catchment basins and containment sumps. If sampling detects MTBE above 20 parts ppb, benzene at more than 5 ppb or BETX levels above 100 ppb, the UST owner/operator will be required to install three groundwater monitoring wells and submit samples from the new wells to MDE. They will also be required to perform an advanced helium leak detection test to identify vapor leaks. In addition to repairing all leaks immediately, the UST owner/operator will be required to install a soil vapor extraction system in the tank area to remove vapors. The regulatory review committee of the General Assembly must review and approve the proposed emergency regulations before they can become effective. The emergency regulations could become effective within the next month.

PA Tightens UST Tank Eligibility Requirements

The Pennsylvania DEP recently announced that will refer UST owners or operators with delinquent accounts to the state Attorney General's Office for collection. In addition, owners/operators who fail to maintain current registration accounts may become ineligible for coverage by the Underground Storage Tank Indemnification Fund (USTIF). The USTIF provides coverage of up to \$1.5 million per tank per occurrence with a \$5,000 per tank deductible.

Commentary: *Some state trust funds reimburse owners/operators for their costs while other states fund the work after the owner/operator satisfies a deductible. However, many state UST Trust Funds are*

beginning to run out of money. As a result, states are starting to strictly enforce eligibility requirements, are prioritizing sites so that the more contaminated sites get first crack at cleanup funds and are encouraging more risk-based cleanups to preserve resources. Purchasers of and lenders to contaminated properties that are enrolled in a state UST trust fund should determine the viability of the state program and the ranking of the site. For non-priority sites that will not have access to cleanup funds for several years, the purchaser should carefully assess the risks posed by the site. A lender concerned about credit and/or reputational risk may not be comfortable with a borrower waiting several years to commence a cleanup, especially if there is a potential for groundwater contamination to migrate and for vapors to migrate into buildings.

EPA Sues Long Island Landlord For Tenant Discharges Into Dry Wells

EPA has filed a complaint against property owner in Hempstead, Long Island because automotive repair and radiator shops leasing the property have been disposing hazardous wastes into dry wells. EPA has demanded that the property owner remediate and properly close the dry wells to prevent impacts to drinking water supplies.

Commentary: *Dry wells and septic tanks may be regulated as underground injection wells under the Safe Drinking Water Act. At many sites, these structures may have been installed prior to the enactment of the SDWA or at a time when the state or local governments may have not been adequately enforcing the program. Even if there are no on-going discharges to these structures, contaminated sediments in these structures can serve as a continuing source of contamination that can expose a current property owner to liability. Indeed, a number of shopping centers and commercial properties have been significantly contaminated by chlorinated solvents that have been discharged into on-site septic tanks by dry cleaners.*

TOXIC SUBSTANCES

Rhode Island and New York City LBP Rules Become Effective

The Rhode Island Lead Hazard Mitigation Law became effective on July 1st. Under the law, landlords must provide tenants with information about lead hazard control and correct identified lead hazards within 30 days of discovery. New property owners of buildings constructed prior to 1978 will have 10 days to visually inspect units and 60 days to remedy any hazards.

In New York City, Local Law 1 of 2004 became effective on August 2nd. The law applies to buildings constructed prior to 1960 and certain buildings built between 1960-1978. Landlords are required to perform annual inspections of residential units and must abate a lead hazard, which now includes lead dust as well as peeling paint.

Commentary: *Some nonprofit groups and private developers have stated that the NYC LPB law will discourage construction or renovation of low- and moderate-income tenants. Phipps Houses, which owns or manages 13,000 lower-income apartments, has decided not to bid for five federally assisted projects and indicated that it will probably not bid on other projects with possible LBP risk. Lemle & Wolf, a developer and manager of lower-income apartments, indicated that it has halted the rehabilitation of two five-story walk-ups in upper Manhattan because the procedures required by the law made apartment reconstruction impractical. Lenders have also expressed concerns about the new law. The Community Preservation Corporation, a consortium of banks that has become the largest provider of new mortgages to the city's midsize, older apartment buildings, recently said it would review mortgage applications to ensure that borrowers had obtained adequate liability insurance.*

LBP Disclosure Enforcement Actions

The EPA New England office has brought a number of lead based paint (LBP) enforcement actions that involved inspections at 150 properties. Ceebraid Signal Management Group of Freeport, NY has agreed to pay a \$95,000 penalty to

settle claims that it failed to comply with federal LBP disclosure requirements at 1,600 residential units it manages in Branford, Hamden, Danbury, Stamford and Norwalk, CT Under the settlement, Ceebraid will also spend a total of \$120,000 to test for and remove LBP at all seven of its apartment complexes and to develop a lead management plan to monitor the condition of its properties.

EPA is seeking \$730,000 from three large Rhode Island property owners for violations of federal LBP disclosure rules involving dozens of houses and apartments. Nearly all of the violations took place in low-income and minority neighborhoods. Topik Enterprises, LLC, faces a proposed penalty of \$152,460 for failing to provide 19 tenants the EPA-approved lead hazard information pamphlet.

Lead and Asbestos Encasement Designs (LAED), LLC was cited for failing to provide written warnings about the known presence of LBP hazards and faces a proposed penalty of \$90,200. EPA initiated the investigations against the two companies after the Health Department issued notices of violation and abatement orders.

Patrick C. Conley and three of his companies were accused of selling six residence homes in Providence, Pawtucket and several other communities without providing buyers with information about known LBP hazards in the buildings. The total proposed penalty against the four entities is up to \$157,520.

Norman Reisch and two of his companies were charged with violating federal LBP disclosure rules in five transactions involving properties in Providence, Warwick and Pawtucket, RI. Reisch and the companies face proposed penalties of up to \$330,100.

A Maine apartment building owner agreed to pay \$6,750 cash penalty and spend at least \$17,797 on LBP abatement projects in Biddleford. EPA charged that the owner of the company did not comply with an order of the Maine Department of Human Services to remove LBP hazards from the building and rented three additional units after the order without complying with the LBP disclosure rules.

The Department of Housing and Urban Development (HUD) has also stepped-up its enforcement efforts. The agency entered into a settlement with Dominion Management Services Inc. who agreed to pay a \$10,000 penalty and spend an estimated \$1 million to remove LBP from nearly 4,500 rental units to settle claims that it failed to comply with the LBP disclosure requirements. The company also agreed to spend \$70,000 on lead abatement work to be performed by the Sustainable Resources Center, a Minneapolis-based children's health project. Dominion owns and manages 22 residential properties in Minnesota, Wisconsin, South Dakota and Indiana, including 4,474 units that are covered by the settlement. The company is also among the largest HUD-assisted property management companies in the country.

HUD also entered into a settlement with Robert Zeman who owns 19 residential properties containing approximately 22 units in Minnesota. Zeman agreed to pay a \$2,000 fine and to abate all LBP in his properties at an estimated cost of \$200,000. HUD is actively negotiating settlements with another six landlords in Minneapolis impacting an additional 2,000 units.

Commentary: *During due diligence, lenders usually focus on the presence of LBP and rarely evaluate the borrower's compliance with the LBP disclosure rules. However, non-compliance may not only subject borrowers to substantial liability but could also expose lenders to credit and/or reputational risk. Thus, lenders and/or their consultants should consider reviewing the LBP compliance history during site inspections. For example, consultants could be required as part of the scope of work to randomly review property records to determine if copies of the required LBP disclosure rules are contained in the tenant files.*

California Retailers Cite For Lead in Jewelry and Candy

The California Attorney General charged 13 major retailers with failing to comply with Proposition 65 when they sold customers jewelry or candy containing lead.

The lawsuit seeks an injunction prohibiting the stores from selling the jewelry in California without providing the required warning about lead exposure and seeks civil penalties of up to \$2,500 for each violation. Proposition 65 requires businesses to provide "clear and reasonable" warnings when they expose people to substances known by the state to cause cancer or reproductive harm. State tests detected lead in the metal and nonmetal parts of costume jewelry above the level requiring a warning to consumers. The jewelry includes necklaces made with plastic cords and metal jewelry made with low-grade tin. The state lawsuit was filed after the Oakland-based Center for Environmental Health (CEH) announced it planned to sue 43 retailers for inadequate lead warnings.

The California Attorney filed another lawsuit 33 companies that make or sell sweets imported from Mexico and Brazil. Tests conducted by the state found the candy contains lead at levels high enough to harm children. Ingesting lead can impair brain development and cause other behavioral and developmental problems. The lawsuit seeks an order to halt the sales of the candy until they contain appropriate warnings and seeks fines of with \$2,500 for each violation. The principal source of the lead contamination is believed to be leaded glazes on clay pots used by small candy makers in Mexico. In 2001, the California Department of Health Services (DHS) warned consumers to avoid eating candy lollipops labeled Dulmex brand "Bolorindo" because the product and its wrapper contain excessively high levels of lead.

Earlier this year, DHS warned consumers, particularly infants, young children and pregnant women, to avoid eating Chaca Chaca, an imported chili-based candy from Mexico, because this product may contain excessively high levels of lead that could cause serious health problems.

Dry Cleaner Contamination Impacts Adjacent Homes

The Pennsylvania DEP has determined that a former dry cleaner in Monroeville has impaired indoor air quality at eight nearby residences. The DEP conducted its investigation after a purchaser of the

commercial property, Walnut Capital, had discovered during due diligence that the groundwater beneath the site had been impacted with tetrachloroethene (PCE) and had migrated to the area where the homes were located. DEP will install a reverse airflow system to create a high-pressure zone beneath the homes and prevent contaminants from entering the residences. DEP will conduct post-remediation testing in the homes to ensure the remediation system is effective. PADEP has not yet determined when the PCE release took place or identified the responsible party.

The Oregon Department of Environmental Quality (DEQ) will commence a cleanup of PCE soil and groundwater contamination discovered beneath the location of a former dry cleaner at the Mohawk Shopping Center in Springfield, OR. Municipal water supply wells are located about one-half mile from the site but the PCE contamination is not currently threatening the supply wells. The DEQ and the property owner, McKay Investment Company, will jointly fund the remedial project. McKay will dismantle a portion of the building to allow DEQ to excavate contaminated soil. After the soil is removed, the excavation will be filled with clean soil and the building will be reconstructed. The Oregon Dry Cleaner Program will pay for the soil excavation and disposal as well as any other on-site treatment that is required.

Commentary: *The ASTM E1527-00 requires environmental professionals to review historical records with no more than five-year intervals. However, many so-called commodity style reports frequently have time gaps of ten years. With anecdotal evidence suggesting that the average dry cleaner operates at a site for only three years, reports with such large time gaps could fail to detect the existence of a former dry cleaner. Thus, it is important that consultants strictly comply with the five-year interval requirements when conducting due diligence on older shopping centers. (These timeframes will change with AAI requirements of updates within one year and 180 days of transfer of title.)*

Report Finds More Products Containing PCBs

A report issued by the Harvard School of Public Health has found elevated levels of polychlorinated biphenyl (PCB) in caulking used in schools, universities and other public buildings. The report suggests that caulking and sealing materials may be a previously unknown and widespread source of PCB contamination in schools and buildings constructed in the 1960s and 1970s.

The study, published in the July 2004 issue of "Environmental Health Perspectives," surveyed 24 buildings in the Greater Boston Area. One-third of the buildings contained caulking materials with PCB concentrations exceeding 50 ppm. In some cases, the PCB content was nearly 1,000 times the EPA standard. The researchers also found that much of the 30-year old caulking was deteriorating and that just touching caulking may cause exposure. The researchers recommended that additional investigation be required to determine if this was an isolated incident or if PCB use in caulking was widespread. If so, the study said that caulking could contaminate building interiors and the soil around the buildings much like LBP. The report noted that studies in Finland found high levels of soil PCB contamination in play areas near buildings containing these caulking materials.

EPA Issues Guidelines for Nail Salons

First it was gasoline stations and then dry cleaners. Now, nail salons have been added to the list of potentially undesirable tenants for owners of shopping center owners. According to EPA, solvents, hardeners, fragrances and drying or curing agents used in nail salons may be hazardous to workers, customers, and the environment if not used or disposed of properly. Many chemicals present in nail products are very volatile and evaporate into the air at room temperature where nail technicians and customers breathe them. In addition, nail technicians and customers may also breathe in dust that is produced when filing artificial nails. This dust may contain harmful substances such as glues, benzoyl peroxide, silica and methacrylate polymers.

EPA recommends that nail salons adopt best management practices to minimize risks to workers and customers. The most important measure is to install a local exhaust ventilation system since the building heating, ventilating and air-conditioning system (HVAC) will only dilute a small percentage of the air inside the shop. To capture vapors and dust, and to exchange indoor air with fresh air from outside the building, EPA says that a nail salon should have a ventilated table with dust and charcoal filters, a ceiling-mounted exhaust vent, or a wall-mounted exhaust vent or all three. The EPA also recommends that salon owners install freestanding air purifiers at worktables, and suggests that

workers wear dust masks when applying chemicals.

Commentary: *Because of the risk of toxic tort claims, shopping center owners should require nail saloon tenants to adopt the EPA best management practices or install the local exhaust systems.*

AIR POLLUTION DEVELOPMENTS

Review of Recent Clean Air Act Regulatory Actions

The first phase of the so-called NOx SIP Call became effective in 19 eastern states and the District of Columbia on May 31st. Those jurisdictions are required to cut nitrogen oxides (NOx) emissions by 600,000 tons through September.

EPA also announced that second phase of the NOx SIP would begin May 1, 2007. Under phase 2, the same states plus Georgia and Missouri will have to reduce NOx annually until total NOx emissions are reduced by 900,000 tons per year. The principal mechanism for achieving the NOx emissions reductions is through the EPA cap and trade program known as the NOx Budget Trading Program.

EPA proposed an amendment to its 1999 Regional Haze Rule for 156 national parks and wilderness areas (69 FR 25183, 5/5/04). The proposed rule requires states to consider the visibility impacts on national parks and other areas that are subject to the Prevention of Significant Deterioration (PSD) permit program. States would have until 2008 to submit plans for reducing emissions from 26 categories of pollution sources built between 1962 and 1977 (including utility and industrial boilers, pulp mills, refineries and smelters) that have the potential to emit more than 250 tons a year of visibility impairing pollutants, including PM2.5, SO₂, NOx and some volatile organic compounds. The proposed amendments do establish set federal emission limits for these plants but propose guidelines for best available retrofit technology (BART) that states may use to determine which facilities must install controls and the type of controls they must use. States would have the option of allowing individual facilities to use an emissions trading program instead of installing BART controls. Depending on the control strategy adopted by a state, implementation of the BART program would begin in 2014, with full implementation by 2018.

In June, EPA issued a supplement to its proposed Clean Air Interstate Rule that provided additional implementation details such as how states may integrate the rule with their NOx and SO₂ emission budgets,

and how to adopt cap-and-trade programs (69 FR 32683, 6/10/04). The Clean Air Interstate Rule would establish permanent caps to reduce NOx and sulfur dioxide (SO₂) emissions in the eastern United States. When fully implemented in 2015, NOx emissions from the electric power sector would be 65% below current levels and SO₂ emissions would be reduced by 70% from current levels by 2015. Each of the 29 states affected and the District of Columbia would be required to submit plans to EPA demonstrating how they will meet their assigned SO₂ and NOx emissions budget

In August, EPA proposed its first residual risk standard to address health risks associated with emissions of hazardous air pollutants (HAP) (69 FR 48337, 9/9/04). Under Section 112 of the CAA, EPA was first required to establish national Maximum Achievable Control Technologies (MACT) for categories of industries emitting HAP emissions. The agency is also authorized to promulgate more stringent standards to address health risks remaining after sources have complied with their applicable MACT. The proposed standard was issued for coke oven emissions from steel mills and foundries and would require the affected sources to meet more stringent visible emission limits using a combination of pollution prevention and work practices.

EPA agreed to reconsider certain aspects of the Routine Maintenance Repair and Replacement (RMRR) rule that it adopted last year as part of the revisions to the New Source Review (NSR) program. Among the issues for public comment are EPA's authority to adopt the RMRR rule and the basis for selecting the 20% cost threshold for determining if a replacement was routine.

At the state level, Massachusetts issued the nation's most stringent limits on mercury emissions from coal-fired power plants. The new limits will force operators of four power plants to reduce mercury emissions by 85% by 2008 and 95% by 2012. Power plants generate approximately 20% of the mercury emissions in Massachusetts, with municipal incinerators

accounting for almost 50% of the state's mercury emissions.

Commentary: *Because emissions controls and offsets may vary depending on the severity of the ozone non-attainment, similar facilities in different parts of the country may have to comply with differing air pollution control requirements depending on the classification of the area where the facility is located. In addition, facilities that plan on expanding operations, increasing production or altering products may have to obtain different levels of emissions reduction credits to offset the increased emissions. It may be more costly and time-consuming to upgrade or introduce product changes at plants located in poorer air quality regions or near sensitive populations or receptors. A purchaser of an ongoing business that plans to change operations will have to carefully review its business plans for various facilities with the new requirements. In some cases, purchasers may want to try to focus the operational changes on non-attainment areas that have less severe ozone classifications.*

NSR Enforcement Actions

In July, Akron-based FirstEnergy Corp. agreed to reduce NO_x and SO₂ emissions for its coal-burning power plant by at least 90% percent by 2010 at a cost estimated to be \$1.1 billion. The federal government had alleged that FirstEnergy had failed to undergo NSR and install best available pollution control technology (BACT) when its Sammis plant was upgraded between 1984 and 1998. The settlement resolves the first NSR lawsuit to go to trial. After a three-week trial last year, a federal district court ruled that FirstEnergy was required to undergo NSR. The second phase of the trial was to have started July 19 to determine what pollution controls must be installed and whether penalties would be levied.

Weyerhaeuser Company has agreed to pay \$900,000 to settle allegations that its pulp and paper plant in northwestern Pennsylvania had failed to undergo NSR when the plant modified two coal-fired boilers. EPA had issued a notice of violation in 1999 to the former owner of the plant, Willamette Industries Inc. Weyerhaeuser

acquired the plant in 2002 as part of its merger with Willamette. In October 2003, Weyerhaeuser installed \$5.5 million in pollution control equipment to reduce SO₂ emissions by 95%

Meanwhile, four states (Connecticut, New Jersey, New York and Pennsylvania) filed a Notice of Intent to Sue to Allegheny Energy, Inc. that the company had failed to undergo NSR when it made improvements to five power plants in West Virginia. Allegheny Energy is the fifth largest SO₂ emitter and tenth largest emitter of NO_x.

Study Says EPA Inadequately Monitoring Refinery Compliance

A recent report by the EPA Inspector General concluded that the agency lacks sufficient information to determine if oil refineries are complying with court-ordered emissions reductions. As part of its oil refinery enforcement initiative, EPA has entered into 11 consent decrees with 42 refiners representing 39% of the nation's refining capacity. The report also indicated that 45% of the 156 domestic refineries are located within three miles of population centers containing 25,000 or more people and 26% are within three miles of population centers with at least 50,000.

Commentary: *This report highlights the importance of reviewing environmental compliance during environmental due diligence. In addition to determining if a facility is currently in compliance with its permits, purchasers should also review the status of compliance with any existing administrative or judicial consent decrees and verify the cost estimates for work that remains to be completed. If the purchaser's business plans call for expansion, modification or even product substitution that could result in a change in air emissions, the purchaser will need to evaluate the impact such plans would have with existing compliance orders and projected cost estimates.*

Domestic GHG Developments

In a landmark lawsuit, eight states (California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, Wisconsin) and the City of New York are

seeking an order against the owners of 174 coal-burning plants in 20 states to reduce their emissions of carbon dioxide (CO₂) (*State of Connecticut, et al v. AEP*, S.D.N.Y. 7/21/04). The lawsuit against American Electric Power (AEP) Company, Southern Company, Xcel Energy, Cinergy Corporation and the Tennessee Valley Authority seek injunctive relief under federal common law and state law of public nuisance to require the defendants to reduce their CO₂ emissions. Two conservation groups also filed a parallel lawsuit against the same five defendants (*Audubon Society of New Hampshire v. AEP*, S.D.N.Y. 7/21/04). The complaints allege that the plants owned or operated by the defendants emit approximately 10% of the nation's annual total CO₂ emissions and 25% of the total utility industry CO₂ emissions. Some of the defendants have already voluntarily agreed to reduce CO₂ emissions under EPA's climate leader program and are participating in carbon sequestration projects. However, the plaintiffs maintain that these voluntary cuts are insufficient to address global warming.

The California Air Resources Board (ARB) has proposed to limit greenhouse gas emissions (GHG) from passenger cars and light trucks. The rule would implement emission reductions in two phases. During the first phase (2009-2012), ARB will reduce emissions from cars and light trucks by 25%, and 18% for larger trucks and SUVs. When fully implemented in 2016, ARB believes total emission reductions will be 34% for cars and light trucks, and 25% for larger vehicles. The board estimated that the first phase of the regulation would add about \$292 to the costs of cars and small trucks and about \$308 to the cost of large pickups and SUVs. For the second phase, ARB estimates that average cost increases will be \$626 for cars and \$955 for large pickups and SUVs. Under a state law passed in 2002, ARB is required to adopt its GHG regulation by 2005.

The Department of Energy (DOE) has announced that seven new states and 13 organizations have joined the Carbon Sequestration Regional Partnership Program. The program now has 154 organizations from 40 states and three Indian nations. The first phase of the program is to determine technical feasibility

and cost of capturing and sequestering CO₂ emissions in deep geologic formations, agricultural forests, and degraded land systems. In 2005, DOE will select technologies for small-scale validation testing. DOE is providing approximately \$13 million to support the partnerships during the first phase of the project. Three participating organizations are contributing another \$7.2 million.

Commentary: *United States has elected to rely on sequestering CO₂ rather than adopting the CO₂ emissions limits required by the Kyoto protocol. The DOE is the centerpiece of this strategy.*

Emission Broker Arrested

The former operator of a Pasadena-based internet auction house who helped design California's South Coast Air Quality Management District (SCAQMD) emission trading program was arrested in June on charges that the broker engaged in \$80 million in fabricated emissions trades. Over 300 companies rely on the SCAQMD Reclaim Trading Credits (RTCs) program to comply with their air emissions limits. Dozens of oil and power companies were clients of her company. Several firms sued the broker in 2001 and 2002, alleging that the broker was unable to account for millions of dollars in RTCs that they purchased from her firm.

Commentary: *This development and the shutdown of New Jersey's emission trading program last year highlight the importance for purchasers to verifying emissions credits that are used by business to comply with their air emissions requirements. During due diligence, purchasers should verify that emissions credits have been properly registered with the appropriate regulatory agency and that the business has acquired the appropriate amount of emissions credits.*

Study Says Asbestos Deaths Have Yet to Peak

Although deaths from long-ago exposure to the asbestos have dramatically increased during the past two decades, a recent study by the federal Centers for Disease Control and Prevention (CDC) predicts that the death rate will not peak for

another ten years. Thus, companies who manufactured products with asbestos containing materials will likely face another decade of accelerating asbestos claims.

The CDC report was based on death certificates of nearly 125,000 people who had lung condition asbestos-related illnesses. CDC said the nation is only now beginning to see the health effects on workers who were exposed from World War II until the late 1970s when asbestos use was at its peak. The CDC said that 1,493 people died from asbestos in 2000, compared with 77 in 1968. Coastal states such as Alaska, Washington, Mississippi, Virginia, Massachusetts, and Maine were among those with the highest rates of asbestosis mortality between 1982 and 2000.

Commentary: *There is a common misconception that products may no longer be sold or manufactured with asbestos-containing materials. In fact, the CDC reported that more than 3,000 products, including brake linings, engine gaskets, building materials and roof coatings contain at least 1% asbestos, and that friable asbestos-containing materials are still present in thousands of older buildings.*

A May 2003 study by Global Environment & Technology Foundation found that workers and consumers were at risk because of insufficient labeling and products imported from countries where asbestos is still used. They noted that EPA's definition of asbestos-containing materials may not be sufficiently protective. The study said that when the 1% rule was adopted, it was based on the amount of asbestos that could be reliably measured and not based on what level of asbestos could pose health risks to people handling the material. The report also recommended that EPA update its "purple" and "green" books as well as implement more consistent enforcement, and that the definition of asbestos include amphibole forms of asbestos. The report also found that the quality asbestos abatement work has declined and buildings owners and agents were not effectively managing existing asbestos materials.

EPA Halts Use of Experimental Asbestos Abatement Technique

To reduce the costs of asbestos abatement, EPA authorized a pilot program for some cities that would allow them to use the so-called wet method for building demolitions. Under this approach, the building would be sprayed with water as it was demolished instead of first removing asbestos-containing materials on the theory that the water would prevent asbestos fibers from being released into the air or soil. For example, St. Louis has used the technique to level about 260 residential and eight commercial buildings that contained asbestos. EPA recently halted the use of this technique after it concluded that asbestos fibers could be released once the material dried.

Commentary: *EPA and state agencies are keeping busy bringing civil and criminal enforcement actions against buildings owners, operators and contractors for failing to comply with the standard asbestos abatement rules. The most common violations have been hiring non-licensed contractors, failing to file required notifications, failing to comply with asbestos work practices during removal and disposal of asbestos, and improper disposal of asbestos debris. For example, a contractor was assessed \$45,000 by a federal judge for failing to comply with federal asbestos regulations during a May 2001 renovation at the Ohio Valley Christian Center of the Assemblies of God in Wheeling, WV. The court found that Chippewa employees used shovels to break asbestos shingles loose from the roof and did not adequately wet or contain asbestos-containing materials during renovation activities. EPA had also initially sought a \$36,300 penalty from the Christian Center board of trustees who had contracted with Chippewa to remove 3500 square feet of asbestos-containing roof shingles. However, EPA resolved its complaint against the center for \$500 penalty under its "ability to pay" policy.*

The partners of Smith Renovations were sentenced for improper removal of asbestos from the Evangelical Lutheran Church in Mt. Horeb, WI in July 2002. The company was retained to renovate the church and remove asbestos-containing ceiling and flooring material. The

defendants improperly scraped the ceilings of numerous classrooms without following asbestos workpractices. One partner was sentenced to six months of community confinement and five years of probation while the other owner of the business was sentenced to three months of community confinement and five years of probation. Both men were also required to pay \$50,380 in restitution to the church.

An asbestos enforcement action in Martinsburg, WV was interesting because the owners of a restaurant were not only sentenced to a three years probation, but also ordered to pay \$52,000 in restitution for medical monitoring of workers that they had illegally hired. The owners had hired the workers to remove and dispose of asbestos from a building in Martinsburg that they were renovating for their new restaurant.

The Commonwealth of Massachusetts recently completed an asbestos enforcement initiative that resulted in 45 major enforcement actions and netted \$1.2 million in penalties. The state targeted school abatement projects and worksites

with contractors who had previous history of poor removal practices. The enforcement sweep also targeted residential projects where friable asbestos, asbestos plumbing insulation and exterior asbestos shingle were improperly removed.

Another Massachusetts asbestos enforcement action was noteworthy because it demonstrated how property owners might be able to use special state programs to reduce the amount of their fines. Benjamin Builders Realty Trust was fined \$56,250 for failing to notify the state DEP and failing to comply with asbestos work practices but the state DEP agreed to suspend \$36,250 of the penalty under its Interim Policy on Compliance Incentives for Small Businesses. The remaining \$20,000 fine will be paid in five payments of \$4,000 to the state. If the trust fails to comply with any provisions of the settlement or is found to be in violation of the regulations within the next 12 months, it will have to pay the state the \$36,250 of the original fine that was waived.

WATER POLLUTION/ENDANGERED SPECIES

Facilities Fined for Sewer System Discharges

Tyco Electronics, a subsidiary of Tyco International, agreed to pay a total of \$14.4 million to settle claims that it illegally discharged wastewater into the local sewer system. EPA and the Connecticut DEP alleged that between 1999 and June 2001, three Tyco facilities discharged excessive levels of toxic metals and failed to collect required sampling and then submit discharge monitoring reports. One facility also constructed piping to allow it to discharge untreated wastewater into the sewer system. Under the plea agreement with the federal government, Tyco will pay a \$6 million fine to the United States, make a \$2.7 million payment to the CTDEP natural resources fund, and provide \$500,000 to the Towns of Stafford and Manchester to fund sewer and water treatment system improvements. The company also agreed to spend \$300,000 to install wastewater treatment systems at two facilities. In a separate state settlement, Tyco International agreed to pay the CTDEP \$2 million in penalties and spend \$2.4 million to improve its wastewater treatment systems. Part of that money will go to the installation of sampling "ports" accessible to state DEP staff so the agency can monitor compliance.

Rees Plating Corporation of Stark County and three officers were sentenced for discharging unpermitted levels of zinc and chromium into the Massillon, OH public sewer. The firm's president and a vice-president will serve five months in prison, five months home confinement and 19 months of supervised release. They were also fined \$5,000 each. Another vice president was sentenced to six months of home confinement followed by 18 months of probation. The company was ordered to print a public apology in the *Canton Repository* newspaper.

A manufacturer of inorganic chemicals pled guilty to charges that its plants in St. Louis, MO, Chester, PA and Baltimore, MD improperly discharging wastewater into public sewers and surface waters. The government charged that

discharges from PQ Corporation's St. Louis and Chester facilities exceeded applicable pretreatment limits and that the Baltimore facility discharged pollutants without a permit. Under the terms of the plea agreement, PQ will pay a \$450,000 fine, provide \$60,000 in restitution to the City of Baltimore, \$47,000 to the Delaware County Regional Water Quality Control Authority, serve three years probation and pay \$50,000 to fund community service projects.

A yarn processing facility in Lowell, MA agreed to plead guilty for negligently discharging wastewater into a local river through an unpermitted pipe. Under the terms of the agreement, Dutton Yarn Company, L.P. agreed to pay a \$300,000 fine and establish an environmental compliance program. Prosecutors said the company was negligent because it had access to architectural drawings showing the pipe and that there were multiple manhole covers in plain sight at the plant that led to the pipe.

Another Connecticut firm also pleaded guilty to illegally discharging wastewater to a sewer system. Bridgeport Aluminum Finishing was charged with exceeding the discharge limits of its wastewater permit. The government also claimed that the company routinely discharged approximately 8,000 gallons of untreated wastewater on Friday evenings. The owner of the company faces up to a year in prison and a \$100,000 fine. The company faces a fine between \$5,000 and \$50,000 for each of the four violations. As part of the plea bargain, the company must develop an environmental regulatory compliance program. The accompanying manual must be given to employees within 60 days in an effort to prevent a future discharge. The company also agreed to hire an independent consultant within the next 15 days to perform an environmental audit of its facility and comply with the consultant's recommendations. Additionally, the company agreed to have its Bridgeport facility audited for the next three years by the U.S. Attorney's Office.

Precision Lithography agreed to pay a \$14,000 for discharging untreated

industrial wastewater to the South Hadley Wastewater Treatment Plant. As part of the order, the company must hire a registered professional engineer and must upgrade pretreatment system.

Commentary: *When performing due diligence on businesses that discharge into the sewer system, it is advisable to determine if the discharge requires a local permit and meets the local pre-treatment program. It is also important to evaluate the compliance and capacity of the local sewer authority. If the sewer plant has a history of non-compliance, it may seek to temporarily limit discharges from industrial or large dischargers and possibly require those dischargers to install additional pre-treatment systems. In addition, if the purchaser's business plans call for increased production, it is important to determine if the sewer authority can accommodate the additional flow.*

EPA Targets Construction Sites for Storm Water Violations

EPA recently launched an enforcement initiative to ensure that builders and contractors are complying with the requirements of the national storm water Construction General Permit (CGP). EPA intends to resolve most of the violations using its new Expedited Settlement Offer (ESO) Policy. EPA will use its ESO policy for construction sites that meet certain criteria, such as sites less than 50 acres and operators that are first-time violators.

For example, Wal-Mart recently agreed to pay a \$3.1 million civil penalty and to reduce storm water runoff at its sites by instituting better control measures. In addition to the penalty, Wal-Mart agreed to spend \$250,000 on an environmental project that will help protect sensitive wetlands or waterways in one of the affected states. The complaint cited violations at 24 sites in nine states and included allegations of failure to obtain a permit before starting construction, failure to develop a plan to control polluted runoff from the construction site, failure to adequately install sediment and erosion controls on the sites and failure to self-inspect sites and prevent discharges of sediments to sensitive ecosystems. Wal-Mart also agreed to exercise more rigorous

oversight of its 150 contractors at its construction sites across the country by using qualified personnel to oversee construction, conduct training and frequent inspections, report to EPA and take quick corrective actions. In 2001, Wal-Mart and several contractors agreed to pay \$1 million to address storm water violations at 17 sites in several states and to develop a storm water training program for its contractors and to inspect and oversee storm water controls at construction sites. EPA subsequently determined that Wal-Mart had not achieved consistent compliance at construction sites.

New Hampshire developers agreed to pay \$70,000 to settle claims that they failed to obtain stormwater permits for residential projects in Methuen, MA. The case stems from an enforcement order issued by the Methuen Conservation Commission for failing to maintain erosion controls necessary to protect wetlands. EPA inspectors then found that the companies failed to maintain a detention basin, which resulted in discharges of turbid water into wetlands and into a brook that leads to the Merrimack River, which is a source of drinking water. Another New Hampshire-based firm faces a fine of \$137,000 for failing to implement adequate erosion and sediment controls at a 43-acre construction site in Pelham, NH.

Stormwater runoff from construction sites is also being addressed by state environmental agencies. For example, the T.H. Properties LLC (THP) agreed to pay Pennsylvania DEP (PADEP) a \$50,000 penalty for failing to erect adequate sediment controls during construction of the Hunter Ridge development. As part of the settlement, THP will also be required to adopt "low-impact development" practices for future projects. THP must ensure the existence of riparian buffers for all streams along and within its properties. The agreement provides for stipulated penalties of up to \$2,000 per day for pollution from sediment discharges to surface water and \$750 per day for violations of the agreement not causing pollution. Reading Site Contractors (RSC) agreed to pay \$77,000 for erosion and sediment control violations at a road improvement site. RSC could face additional stipulated penalties that range from \$1,500 to \$2,500 per violation per day

for actual pollution to any local waterway to \$500 to \$1,500 per violation per day for any other uncorrected violations.

Commercial facilities operating fleets of vehicles are also vulnerable to stormwater enforcement actions. For example, EPA recently issued a compliance order to Pepsi Bottling Co. of Tucson, AZ requiring it to immediately obtain an stormwater discharge permit, submit a SPPP and to cleanup the facility to minimize pollutants in storm water runoff. EPA charged that the facility lacked effective management practices or an adequate containment system to prevent stormwater from coming into direct contact with oil and grease from its truck fleet before entering municipal storm drains.

Commentary: *According to a 2002 report by the Pew Oceans Commission Pollution from runoff from paved surfaces, such as parking lots, highways and rooftops is the fastest growing source of water pollution across the country.*

Stormwater Ponds Can Expose Property Owners to Cleanup Liability

In addition to stormwater violations, owners of industrial or commercial properties can also find themselves subject to cleanup liability for contaminated sediments in water retention pond. For example, the owner of the former Sheffield Measurement Facility in Dayton, OH performed a site assessment under the state Voluntary Action Program (VAP) and agreed to impose deed restrictions on the site after learning that sediments in the 1.2 acre storm water retention pond contained low levels of heavy metals and other contaminants. The source of the contamination was believed to be runoff that flowed across paved surfaces at the facility. The deed restrictions will require the property owner to maintain the existing fence around the retention pond to ensure limited access and prohibit the installation of wells for drinking water.

Commentary: *Wastewater retention lagoons were commonly used at industrial and commercial properties until the 1980s. When they became filled with sludges, the facility operators would often fill and*

landscape the impoundment and construct a new pond. During due diligence, it is important to determine how wastewater was managed in the past. Purchasers should make sure that aerial photographs are reviewed. The local historical society can also be a good source of useful information.

Wetlands Enforcement Actions

In a case demonstrating the interplay between stormwater runoff and the wetlands program, developers of an exclusive 13,000 acre gated residential development in Big Sky, MT agreed to pay \$1.8 million to settle allegations that they released sediments into tributaries of the Gallatin River and filled nearby wetlands. The settlement is believed to be the largest ever collected by the EPA for unauthorized discharges of sediments into wetlands. After Yellowstone Mountain Club failed to comply with a September 2001 order requiring the developer to implement stormwater controls, EPA charged the company with 60 violations of the Clean Water Act related to the construction of a golf course, ski runs and roads. The developer must now implement erosion control measures, delineate the wetlands, perform corrective measures on the ski hill, roads and golf course, and submit a long-term site restoration and monitoring plan. In June, Yellowstone Development, LLC agreed to pay \$200,000 for failing to implement adequate erosion and sediment controls.

Landowners who fail to comply with state or federal wetlands programs may not only incur substantial penalties but are increasing being forced to restore the damaged wetlands. For example, a landowner in Hawaii was ordered to restore sensitive wetlands adjacent to the Hanalei River that he illegally filled in 2002 and 2003. EPA charged that Ed Ben-Dor of Hanalei, Kauai had contractors excavate a pond and dig a ditch in wetlands, and then bury the remaining wetlands with dredged soils and imported materials. Under the settlement, Ben-Dor submit a wetlands restoration plan that will include removing the fill materials and replanting the wetland with native plant species recommended by the Natural Resources Conservation Service.

The President and CEO of Aurora Communications International, Inc. has

agreed to pay a penalty of \$17,000 and to restore wetlands, streams, and inter-tidal areas that were damaged by a number of road-building and mechanized land-clearing projects conducted on Aurora's property on Cook Inlet, AL. EPA charged that Alexander Kozned directed activities that disrupted or filled 2.71 acres of wetlands and disrupted hydrologic flow over a larger area of the property. Under the settlement, Kozned and Aurora must remove certain specified roads and fill pads, re-grade or fill certain specified ditches that are impairing the site's hydrologic functions, and establish an approximately 50 acre conservation easement at the site. The work must be completed within six months and the company must perform five years of monitoring to ensure that hydrology is restored and that the re-vegetation efforts are successful.

Environmental Protection Agency recently fined mining operators Joseph Weber and Albert Julian \$11,000 for illegal grading and dumping fill materials into California's San Luis Rey River. The violations could have resulted in a penalty of approximately \$150,000, but, in view of Webers and Julians' inability to pay the full amount, the penalty was reduced to \$6,000 and \$5,000, respectively. The mining involved extraction of aggregate from the San Luis Rey River to be later sold for construction purposes.

Corps Agrees to Extend Coverage to Irrigation Canals

The Corps' Seattle office has agreed to assert jurisdiction over irrigation canals and drainage ditches that are connected to navigable or interstate waterways. The decision was part of a settlement resolving a lawsuit that the National Wildlife Federation had threatened to bring involving development of a site for a Costco store. The Seattle district office had previously ruled that wetlands connected to a manmade ditch were not connected to navigable waters and therefore could be filled for a parking lot.

Commentary: A recent 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.

IRS Tightens Rules for Donations of Easements to Nonprofits

The Internal Revenue Service (IRS) recently issued a notice that it will be scrutinizing claims for charitable contribution deductions involving transfers of easements on real property to charitable organizations and for transfers of easements in connection with purchases of real property from charitable organizations.

The IRS said it has become aware that some taxpayers are claiming inappropriate charitable contribution deductions for easement transfers that do not qualify as qualified conservation contributions, or are claiming deductions for amounts that exceed the fair market value of the donated easement. In addition, the IRS said some taxpayers are claiming inappropriate charitable contribution deductions for cash payments or easement transfers to charitable organizations in connection with the purchase of real property. In some of these questionable cases, the agency said the charitable organization purchases the property and places a conservation easement on it. Then, the charitable organization sells the property subject to the easement to a buyer for a price that is substantially less than the price paid by the charitable organization for the property. As part of the sale, the buyer makes a second payment, designated as a "charitable contribution," to the charitable organization. The total of the payments from the buyer to the charitable organization fully reimburses the charitable organization for the cost of the property.

The IRS indicated agreements to create conservation easements would be allowed so long as these agreements are qualified. The agency said that one permitted conservation purpose was "protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem." Another permitted conservation purpose is preservation of open space, including farmland and forestland, for the scenic enjoyment of the general public or pursuant to a clearly delineated governmental conservation policy. However,

the IRS cautioned that if the public benefit of an open space easement was not significant, the charitable contribution deduction would be disallowed.

The agency said it might impose penalties on promoters, appraisers and other persons involved in these disallowed transactions. In addition, the IRS said it might challenge the tax-exempt status of the charitable organization if the organization's operation is for a substantial non-exempt purpose or impermissible private benefit.

EPA Issues New ESA Conservation Rules

The US Fish and Wildlife Service (USFWS) announced revised regulations to encourage private landowners to undertake voluntary conservation measures on their property to benefit threatened, endangered and at-risk species. The new regulations are designed to enhance its Safe Harbor and Candidate Conservation Agreement with Assurances (CCAA) policies.

Under a Safe Harbor agreement, private landowners that agree to take actions to benefit species that are listed as threatened or endangered under the federal Endangered Species Act (ESA) will not be subject to further restrictions on the use of the land if their conservation measures increase populations of the species on the property. CCAAs apply to species that are proposed or candidates for listing under the ESA. These agreements assure landowners that further restrictions will not be imposed on their property if the species is listed in the future. To date, USFWS has entered into 23 Safe Harbor permits involving more than 130 landowners and another 50 are being negotiated. Seven CCAAs have been signed with approximately 25 CCAAs under development.

EPA Reconsidering LIW Program

Water samples from eight large water systems across the United States including those serving the Boston-area, New York, and Washington, DC exceeded the EPA action level of 15 parts per billion (ppb) lead-in-water (LIW) in 2003. Since 2000, 27 large and 237 medium systems have exceeded the LIW action level in one or more monitoring periods. As a result,

EPA is reviewing its LIW regulatory program.

EPA promulgated its Lead and Copper Rule (LCR) in 1991 under the Safe Drinking Water Act. The LCR attempts to reduce levels of lead in drinking water supplies by requiring public water systems (PWS) to ensure that lead concentrations do not exceed maximum contaminant levels (MCLs) at the water source as well to use corrosion control measures to prevent lead from leaching from piping. These anti-corrosives cause a thin film to build up in lead piping and prevent corrosive elements in water from dissolving lead.

However, disinfectants used by water systems can work against the corrosion inhibitors by lower the oxidizing potential of water, thereby increasing the likelihood that lead will dissolve into the water. This problem was exacerbated when many water treatment plants switched disinfectants to comply with the 1998 Disinfection Byproducts Rule (DBR), the change in water chemistry caused lead to leach from piping and pipe coatings.

Recently, EPA approved adding orthophosphate to the drinking water system serving Washington, D.C and Northern Virginia to reduce LIW detected in thousands of D.C. homes since 2002. The chemical will be fed continuously into drinking water at a cost of \$600,000 a year. EPA and District officials have warned residents that their water may appear reddish because the treatment may disturb rust deposits inside water mains. Residents are advised not to drink or cook with red water. All residents were urged to flush water from the tap for 60 seconds before using water for drinking or cooking, and to only use cold water for drinking or cooking. Homeowners with lead pipes to run water for 10 minutes before using it for drinking or cooking. Pregnant women, nursing mothers and children younger than 6 in those homes should drink only filtered water.

Commentary: *The LCR only applies to public water systems. EPA does not have authority under the SDWA to require private property owners to take actions to reduce lead leaching from plumbing, lead solder or brass fixtures unless the property owner is supplying its own source of water to users. For example, a purchaser of a business in*

Canton, OH was recently fined \$46,750 for violating the SDWA. Because the business served more than 50 people for more than 60 days per year from its own well, it was regulated as a PWS. The purchaser only sporadically collected required monthly water samples, failed to properly treat the water which had high bacteria levels, added a chlorination system without obtaining approval from the Ohio EPA, and did not file required water quality reports.

Blasting and Fertilizer Runoff Might Cause Perchlorate Contamination

Perchlorate is being an increasing problem in water supplies across the nation. Usually, perchlorate is found in groundwater near facilities that have manufactured or tested rocket fuels and explosives. There is now mounting evidence that other operations such as construction activity and farming may be sources of the contaminant. For example, blasting operations appear to be the source of perchlorate contamination in Westford, MA. An investigation conducted after the chemical was detected in a town water well found perchlorate in a

storm drain and retention pond at the site that was being blasted to construct a town highway garage. The construction site is three-quarters of a mile from the town well. Meanwhile, samples from the drinking water wells of Tewksbury, MA detected found perchlorate levels above the state recommended standard. Water Department officials subsequently determined that the Merrimack River was the source of the contamination. It is believed that fertilizer runoff may be the source of the perchlorate in the river.

Commentary: *Perchlorate is used in a wide range of applications, including pyrotechnics and fireworks, blasting agents, solid rocket fuel, matches, lubricating oils, nuclear reactors, air bags, and fertilizers. The chemical is highly soluble and because it does not easily adhere to soil particles, it is extremely mobile. In addition, because perchlorate is fairly inert, it does not easily breakdown in water. As a result, the contamination can persist.*

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