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Contents

DUE DILIGENCE AND SUSTAINABLE DEVELOPMENT 2

DUE DILIGENCE IN THE ERA OF CLIMATE CHANGE 2
COMPLYING WITH GREEN BUILDING INITIATIVES 4
FITCH ADDRESSES NEW EPA STANDARDS FOR ENVIRONMENTAL SITE ASSESSMENTS .. 5
FITCH REVISED CRITERIA FOR SMALL LOAN BALANCE 6
CONGRESS CONSIDERING AMENDING SEC DISCLOSURE TO INCLUDE GHG EMISSIONS 7
CORPORATE SHAREHOLDERS VOTE ON RISING NUMBER OF CLIMATE RESOLUTIONS 8
IMPACT OF CLIMATE CHANGE ON D&O INSURANCE 9
EPA SEEKS TO EXPAND USE OF AUDIT POLICY FOR NEW OWNERS 10
NYC UNVEILS PLAN TO SPEED UP BROWNFIELD REDEVELOPMENT 12
JURY RULES IN FAVOR OF DEFENDANTS IN LANDMARK VAPOR INTRUSION CASE 13

Author's Note: During the past six months, the momentum to take action to address Climate Change reached critical mass. Regardless if one believes that Climate Change is primarily or just partially anthropogenic in origin, it is now clear that purchasers, owners, and lenders as well as their professional service providers are going to have to take Climate Change into account when evaluating future transactions. As a result, this issue of the SEJ will focus on how Climate Change will impact the due diligence.

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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 AND SUSTAINABLE DEVELOPMENT

Due Diligence in the Era of Climate Change

During the past few years, a patchwork of state and local governments have adopted mandatory greenhouse gas (GHG) emissions reduction programs that are designed to reduce local GHG emissions. In addition, 31 states have formed The Climate Registry to measure, track, verify and report GHG gas emissions accurately.

The conventional wisdom is that the transportation and industrial sectors will be most affected by these local GHG initiatives. However, when one takes a close look at these local regulatory initiatives, it is clear that the brunt of the GHG emissions reductions will fall on owners and operators of multi-family residential and commercial buildings since the buildings account for the largest source of GHG emissions in most cities. As a result, the costs to comply with the aggressive GHG emissions reduction strategies may soon become an important element of due diligence.

The Energy Department estimates that public and private buildings consume about three-quarters of the nation's electricity and emit about half of its greenhouse gases. Commercial buildings consume about 40 percent of the nation's natural gas. In densely populated older cities with well-developed mass transit systems, buildings account for an even higher percentage of GHG emissions. Indeed, New York City just released a GHG inventory that showed that the consumption of electricity, natural gas, fuel oil and steam needed to operate buildings generates 79% of the city's total GHG emissions. City-owned buildings represented 64% of the government GHG emissions.

Pressure to reduce GHG emissions is not only coming from local governments, though Pension funds and other institutional investors that control large pools of money and have been active in filing shareholder initiatives to reduce GHG emissions of companies, but is now beginning to focus on building investments that will satisfy sustainable or green standards. According to representatives from the real estate industry, influential tenants are demanding green office space in large cities, doing due diligence on buildings' sustainability and asking about the certification level of the building.

With the growing public and private pressure to reduce GHG emissions, it would not be surprising if purchasers and their lenders start requiring evaluation of a building’s carbon footprint during due diligence. It is possible that this issue would be considered as another non-scope item in the Phase I like other environmental issues or would be considered addressed as part of the Property Condition Assessment reports.

Much of the focus to date has been on the indirect GHG emissions of buildings through reducing energy consumption by swapping out inefficient lights, installing light sensors and better-insulated windows, and adjusting heating, ventilation and air-conditioning (HVAC) systems. However, energy consumption is only a part of a building's carbon footprint. Many large buildings have large oil-fired boilers that emit significant amounts of GHG directly into the atmosphere and are considered "major sources" under the Clean Air Act that must obtain a Title V air pollution permit. Indeed, a building owner in New York City was recently fined $190,000 for not obtaining Title V permits for two buildings.

Thus, it is not inconceivable that in the near future, purchasers and lenders will be routinely asking if a building meets the requirements of local Climate Change initiatives and, if not, require cost estimates for bringing the building into compliance. If a building is not located in a jurisdiction that has adopted a Climate Change program, the lender might as a condition of the loan require the borrower to make capital investments to reduce the carbon footprint of the building. These costs may not only involve energy efficiency measures but possibly boiler retrofits and pollution control technology. For construction loans, lenders or anchor tenants may require developers to covenant that the building will meet certain sustainability standards or certifications. Landlords may start to inquire about the energy needs of tenants and require energy-intensive tenants such as medical offices to take measures to reduce their energy consumption. Shareholders and members of co-ops and condos may want to reduce their buildings carbon footprint.

Commentary: *According to a recent McKinsey report, market distortions provide disincentives for building owners and occupants to make energy-efficient investments in residential buildings. For example, a person renting an apartment may use appliances that consume a lot of electric power but the landlord has little incentive to buy more efficient appliances because the tenant pays the electricity bills. Likewise, renters have little incentive to buy energy-efficient appliances that might have to be left in the apartment when they vacate it.*

At C40 Large Cities Climate Summit held earlier this month in New York City, the William J. Clinton Foundation announced the creation of a global Energy Efficiency Building Retrofit Program that will provide investment capital to help 16 cities reduce their GHG emissions. The Energy Efficiency Building Retrofit Program will provide both cities and private building owners with access to capital to retrofit existing buildings with more energy efficient products that is expected to reduce energy consumption by 20% to 50%.

The first step of the retrofit project will be energy audits of older municipal buildings to identify systems or structures that could be replaced or upgraded. Five banks (ABN AMRO, CitiGroup, Deutsche Bank, JPMorgan Chase, and UBS) have committed to provide $1 billion to cities and private building owners

to finance the retrofits at no net cost. Cities and building owners will pay back the loans plus interest with the energy savings generated by the reduced energy costs thanks to the building retrofits. The upgrades would be done by four international energy-services companies who would guarantee a certain level of energy and monetary savings for particular projects. If the expected savings are not realized, those companies will pay the difference or make the changes in the buildings to achieve the savings. To expedite the project, the bank paperwork and building permitting will be streamlined so that the work can begin on groups of buildings, rather than one at a time.

Complying With Green Building Initiatives

A recent study by McGraw Hill Cos. estimated that the market for green buildings could approach $60 billion by 2010, or roughly 10 percent of the overall residential and nonresidential construction markets. The McGraw-Hill Cos. study indicated that green buildings currently constitute less than 5% percent of total construction, but that figure is expected to double by 2010. The Green Building Alliance estimates that the U.S. green building products market is now about $8 billion and may increase to $32 billion by 2010. In contrast, the market was less than $800 million six years ago.

The key question for developers, building owners and their professional service provides will be what standard should be used to demonstrate compliance and what professionals should be doing the post-occupancy certifications?

Several states with mandatory green-building rules use the Green Building Initiative (GBI) "Green Globes" standard as well as the Leadership in Energy & Environmental Design (LEED) construction certification standard adopted by the U.S Green Building Council. Both standards have been accredited by the American National Standards Institute (ANSI), the United States' official certifier of more than 10,000 voluntary consensus standards across dozens of business sectors.

While GBI is in the process of having its Green Globe standard accredited by ANSI, the U.S. Green Building Council does not plan to submit its LEED system for certification but instead is partnering with the American Society of Heating and Air-Conditioning Engineers and the Illuminating Engineering Society of North America to integrate LEED into commercial building codes. The National Association of Home Builders Research Center, which is also an ANSI standards developer, submitted its parent trade group's Model Green Home Building guidelines for national standard certification this past summer.

Thus far, the LEED standard is the dominant certification tool. More than 1200 public and private buildings have been certified under LEED with another 4500 on the under development. Fifty-five cities, 20 states and eight federal agencies have policies requiring or encouraging various levels of LEED certification for new buildings. However, GBI has successfully

lobbied some state legislatures to amend green building laws to recognize Green Globes as well as LEED.

Under the LEED system, commercial and residential developers register their buildings and projects to integrate technologies and building materials such as photovoltaic panels, low-water faucets, low-toxic paint, double-pane windows and rooftop gardens to help conserve energy, water and other resources. For new or remodeled buildings, the council has four LEED levels -- Platinum, Gold, Silver and Certified that are based on a point system. For example, points are awarded for indoor air quality, energy efficiency and location on a brownfield site.

Fitch Addresses New EPA Standards for Environmental Site Assessments

Fitch Ratings recently announced that issuers of commercial mortgage-backed securities (CMBS) should perform Phase I environmental site assessments (ESAs) that comply with ASTM E1527-05 ("Environmental Site Assessments and Environmental Insurance in U.S. CMBS Transactions," April 30, 2007).

Fitch indicated that the changes most frequently cited by CMBS issuers from the previously recommended Phase I scope were the requirement that the Phase I be performed by an Environmental Professional, the additional record review, the need for on-site inspections and interviews, and the requirement that investigators include opinions and recommendations in their reports. (ASTM E1527-05 does not call for recommendations but Findings and Opinions.) Fitch said that the changes in ASTM E1527-05 require practices that Fitch has historically expected to be included in Phase I reports and that the new practices required under ASTME1527-05 Phase I do not present material changes to Fitch's previous expectations for Phase I evaluations.

Fitch did state that it expects that issuers will at a minimum address the following four areas in their scopes for Phase I ESAs reports:

• ESAs should be performed by nationally or regionally recognized and appropriately qualified environmental professionals *selected by the issuers, not the borrowers*.[emphasis added]

• ESAs should review all appropriate available local, state, and federal records, databases, maps, and archives to ascertain reported incidents of exposure to contaminants and the possibility of contamination based on the historical use of the buildings or property.

• ESAs should assess the likelihood of contamination from any volatile organic compounds and/or petroleum products through observations, interviews, a physical inspection of the property, and a visual inspection of neighboring properties.

• ESAs should contain a written opinion from the consultant regarding the possible necessity of additional investigation to more fully characterize suspected environmental conditions on the

property and express an opinion on the quality of the information that was available to the investigator in conducting the assessment. For loans on properties that have a previous history of environmental contamination, where there is a strong likelihood of the presence of unremediated contamination, and/or an ongoing or incomplete investigation or remediation that is being included in a CMBS transaction, Fitch expects issuers to require that borrowers rigorously meet the criteria set forth in the new EPA ASTM E1527-05 Phase I final AAI standards for a CERCLA defense.

Fitch also strongly encouraged issuers to include other non-scope ASTM environmental hazards in their ESA scopes including visual observations for asbestos and mold, an appropriate investigation for lead-based paint in residential and hotel properties, an investigation for the presence of lead in the drinking water as well as investigation for petroleum products and other volatile organic compounds that may not be included in ASTM published standards.

Acknowledging the change in the insurance market, Fitch noted that insurance is not an appropriate substitute for investigation, especially if a borrower wants to be able to claim the 'innocent landowner' defense. Fitch said that while some insurance products can provide comfort to borrowers as a hedge against future environmental contamination events, there was only a limited number of instances when insurance purchased on loans in CMBS transactions can influence levels in CMBS transactions. Fitch indicated that while environmental risk factors generally contribute minimally to the probability of default, they are likely to have a higher impact when assessing the loss severity. Fitch did state said that defaulted loans with environmental issues often experience a greater loss severity and that insurance could sometimes lessen the penalty Fitch applies in assessing loss severity that will be experienced by those loans.

Commentary: *Although Fitch did not expressly refer to "vapor intrusion," it is interesting to note the rating agency did emphasize the need to investigate the possibility of impacts from volatile organic compounds and petroleum products on two separate occasions. This would seem to suggest that issuers and environmental consultants should consider the potential for vapor intrusion in their Phase I ESAs.*

Fitch Revised Criteria for Small Loan Balance

Fitch also recently revised its criteria for CMBS transactions involving small-balance loans on multi-family and commercial properties. The criteria apply to loans under $3 million.

Originators of small-balance loans have typically used environmental insurance in lieu of performing Phase I ESAs. However, the revised Fitch criteria seems to back away somewhat from this approach. The revised criteria provides that environmental assessments should be conducted

by a state-licensed professional and should conform to all state and federal requirements. Fitch emphasized that comprehensive historical review of the prior uses at the property is important to the appropriate level of environmental review.

The agency said that at a minimum, it would expect a written summary detailing the scope of the assessment, findings, and written recommendations for additional testing. As part of an abbreviated environmental assessment, Fitch indicated that a borrower should complete an environmental questionnaire that complies with the ASTM E-1528 and also addresses asbestos containing materials (ACM), lead-based paint (LBP), and radon. Fitch said that it expected the environmental assessor to review the questionnaire, perform a limited database search for the property and nearby parcels, and review a current rent roll for tenants to determine if they could create environmentally hazardous conditions. As the loan size increases, Fitch said that the assessor should conduct a site inspection of the property, perform an analysis of historical uses through fire insurance maps, and investigate and document ownership of any transformers at the property. Regardless of loan size, lenders should obtain a representation and warranty from the borrower stating that it has not and will not use, cause, or allow on the property any hazardous material in any manner that violates federal, state, or local laws, ordinances, regulations, orders, directives, or policies.

For properties built before 1980, Fitch said that asbestos and LBP operations and maintenance programs should be outlined or reviewed. For multifamily properties in high radon propensity areas, radon tests should be performed.

Issuers that choose to forego environmental investigations and substitute environmental insurance can view Fitch's opinions and guidelines in its "Environmental Insurance in CMBS Transactions," dated Sept. 29, 2000.

Congress Considering Amending SEC Disclosure To Include GHG Emissions

The United States Congress is considering amending the environmental disclosure requirements adopted by the Securities and Exchange in Regulation S-K to extend to GHG emissions. The "Global Warming Pollution Act" (S.309), also known as the Sanders-Boxer bill, would require issuers of securities under the Securities Exchange Act of 1934 (the '34 Act) to disclose to investors certain risks to the issuer related to climate change. The "Global Warming Reduction Act of 2007" (S.485), also known as the Kerry-Snowe bill, would apply to issuers of securities under the '34 Act with a market capitalization of more that $1 billion regardless of whether the issuer is publicly or privately held.

Both bills would require companies to make two disclosures. First, issuers would be required to disclose their financial exposure stemming from their own GHG emissions. The second disclosure would be the impact that global

warming might have on issuers' interests even if the issuer is not an emitter subject to GHG reduction requirements implemented as a result of the bills. The bills also would require the SEC to work with the Financial Accounting Standards Board and other appropriate organizations to establish uniform standards for these climate change disclosures.

The bills would also direct the SEC to issue an interpretive release that would remain in effect until the SEC can amend Items 101 and 303 of Regulations S-K to clarify when global warming would be considered "material" and a "know trend.”

Under Item 101, registrants have an obligation to make certain disclosures regarding the "material effects" that compliance with federal, state or local laws and regulations relating to the protection of the environment have on capital expenditures, earnings and the competitive position of the registrant and its subsidiaries. The bills would identify international commitments made by the United States to reduce greenhouse gases as a "material effect." Thus, registrants would be required to consider if their own compliance or non-compliance with environmental laws will materially effect the ability of the United States, as a country, to meet these international commitments.

Under Item 303(a)(1), registrants are required to make certain disclosures regarding "known trends" that will result in, or are reasonably likely to result in, a material increase or decrease in the registrant’s liquidity. Item 303(a)(3) also requires registrant to identify "known trends" that the registrant reasonably believes will have a material impact, whether favorable or unfavorable, on net sales or revenues or income from continuing operations. By classifying global warming as a known trend, the bills would require issuers to disclose the potentially material effects that global warming has on an issuer’s liquidity and operations.

Corporate Shareholders Vote on Rising Number of Climate Resolutions

Regardless if Congress enacts legislation clarifying disclosures for GHG emissions, companies are facing increased pressure from shareholders to make more comprehensive disclosure about climate change.

During the 2007 proxy season, investors have filed 42 global warming resolutions, nearly double the number of climate-related resolutions filed just three years ago. The resolutions were filed by state and city pension funds and labor, foundation, religious and other institutional shareholders who collectively manage more than $200 billion in assets. Some of the resolutions at these companies are not proceeding to a vote either because the proposal was withdrawn by shareholders after a satisfactory pledge by the company to implement the request, or because the SEC excluded the proposal on technical grounds.

Despite the greater interest in climate change disclosure, many of the resolutions are being voted down by shareholders. For example, Ford

Motor Company shareholders filed a resolution asking on Ford to reduce its domestic GHG emissions 60% to 80% by 2050. The proposal also asked Ford to adopt "quantitative goals for reducing total greenhouse gas emissions from the company's products and operations". However, the proposal garnered only 14.12% votes of the shareholders. Likewise, only 10% Whole Foods shareholders supported a resolution requesting the company to increase its energy efficiency and just nine percent of Chevron shareholders supported a similar proposal. Twenty-two percent of the Dominion Resources shareholders supported a resolution requesting that the board issued a report on how the company is responding "to rising regulatory, competitive, and public pressure to significantly reduce carbon dioxide and other emissions from the company's current and proposed power plant operations."

Commentary: *The Investor Network on Climate Risk, representing $3 trillion in assets, recently renewed its request to the Securities and Exchange Commission chairman to clarify that climate change is a material risk requiring disclosure on security filings and requesting specific guidance regarding the information companies must provide to investors on the financial risks posed by climate change.*

Impact of Climate Change On D&O Insurance

The United States Supreme Court ruling in *Massachusetts v. EPA*, 2007 that carbon dioxide emissions are "pollutants" and the court's relaxation of the standing requirements for seeking damages related to climate change could fuel further action by shareholder and environmental organizations against companies with significant GHG emissions. This, in turn, may raise concerns about the availability of insurance coverage for claims against corporate directors and officers related to climate change.

Indeed, according to a recent report by global insurance brokerage firm, Marsh, Inc., insurers are becoming more concerned about their potential exposure to risk associated with climate change. As a result, insurers are beginning to raise issues related to climate change in the underwriting process that precedes issuance and renewal of Directors & Officers (D&O) policies. Among the questions that insurers are asking are: Does your company allocate responsibility for the management of climate-related risks? Are there independent board members tasked with addressing climate-related issues? What progress, if any, has your company made in quantifying, disclosing and/or reporting its emissions profile and planning for future regulatory scenarios?

Some insurers have indicated that they may begin to exclude coverage for all climate risks from its D&O policy if a policyholder cannot show that it is taking prudent steps to prevent losses associated with climate change. Insurers facing significant claims under D&O policies related to climate change risks also are likely to try seek to rescind D&O policies issued to corporations that failed to disclose the potential risk for

such claims in the underwriting process.

Commentary: *How can a corporation increase the probability that its directors and officers are covered for costs associated with climate change claims? The company should be prepared to discuss climate risk issues, corporate governance steps that have been implemented to address these issues and planning for future regulatory requirements during policy application and renewal process. The insured should also provide documentation about its program to quantify, disclose and report its GHG emissions.*

Most D & O policies contain a pollution exclusion. It is unclear if a climate change claim against a corporation and its directors and officers would fall within under the pollution exclusion. Like most insurance litigation, the answer will largely depends on the language of the policy, the nature of the allegations and the actions or omissions of the corporation and its board. Thus, insureds should closely review the pollution exclusion and try to negotiate exceptions or writebacks that provide that the exclusion will not apply to shareholder claims and certain types of defense costs. The insured should also try to negotiate a narrow definition of the bodily injury and property damage exclusions in the policies as well as negotiate coverage to pay for certain governmental fines and penalties.

If these strategies are not satisfactory, companies could also consider non-traditional D&O insurance to supplement the transfer of climate change risk for directors and officers. For example, the Bermudian insurance market offers specialized D&O policies that do not include a pollution exclusion. Dedicated limits may also be available that provide broader coverage than a typical D&O policy without a pollution exclusion.

EPA Seeks to Expand Use of Audit Policy for New Owners

EPA announced that is seeking public comments to expand its policy for reducing penalties to companies for self-disclosing environmental violations to purchasers of recently acquired facilities (72 FR 27116, May 14, 2007).

The current audit policy offers reduced penalties to companies that self-police their programs, promptly disclose and correct any violations discovered, and take steps to prevent future violations. As of October 1, 2006, regulated entities and organizations have resolved actual or potential violations at 9,255 facilities but half of the disclosures have involved reporting violations that have not produced significant reductions in pollutant emissions once the violations are corrected. The agency said that its strategic plan is to increase the number of self-disclosures that have the potential to yield significant environmental benefits while affecting compliance with Federal environmental requirements.

The agency said that its recent experience with corporate-wide auditing agreements following a corporate merger or acquisition has heightened its interest in exploring if

encouraging new owners of regulated facilities to discover, disclose, correct, and prevent the recurrence of environmental violations would help EPA meet this goal. The proposed change to the audit policy would be designed to encourage new owners who may have purchased a property on a tight deadline without time to conduct due diligence to voluntarily disclose any violations they might discover. EPA said there has been some anecdotal accounts that suggest that new owners often have to make purchasing decisions based upon more limited information about environmental compliance issues than may have been available in the past.

EPA feels that new owners may be particularly well-situated and highly motivated to invest in making a ‘‘clean start’’ for their new facilities by implementing thorough self-audits, disclosing any violations found, promptly correcting the violations and making the substantial improvements that will enhance their ability to remain in compliance going forward. The agency also suggested that new facility managers may also have access to new infusions of capital that could be used to achieve the kind of improvements that yield significant benefit to the environment. However, the agency is concerned that certain disincentives may stand in the way of new owners that may be interested in taking these steps, and there may be equitable reasons for considering particular incentives to encourage self-auditing and disclosure at the time a new owner takes control.

The agency solicited comments on whether offering tailored incentives to new owners may have unintended adverse consequences such as discouraging due diligence, timely compliance and a level playing field, or other negative effects. The Agency also requested comment on how EPA could most efficiently determine who is a bona-fide new owner, and how the Agency should evaluate whether such incentives are successful in securing the prompt correction of environmental violations and significant improvement to the environment. EPA is also seeking input from the public on how best to encourage new owners to use the audit policy. EPA will accept written comments until July 13, 2007. The agency intends to develop a pilot program and evaluate it at the end of three years.

The agency also issued a document called an “Audit Policy: Frequently Asked Questions” on April 30, 2007 that recognizes that owners of newly acquired facilities are uniquely situated to examine and improve performance at newly acquired facilities. For example, the document explains that new owners may be eligible for penalty mitigation under the Audit Policy for violations at newly acquired facilities, which are discovered as part of a compliance examination agreed to be undertaken prior to the 1st annual certification under Title V of the Clean Air Act, or which are disclosed before that time. Generally, Clean Air Act (CAA) violations discovered during activities supporting Title V certification requirements are not eligible for

penalty mitigation under the Policy. Condition 2 of the Audit Policy requires that disclosed violations must not be discovered through a legally mandated monitoring or sampling requirement prescribed by statute or regulation; therefore, examination of CAA compliance accompanying a Title V annual certification is not voluntary. However, EPA wants to encourage new owners to examine facility operations to determine compliance, correct violations, and upgrade deficient equipment and practices. Thus, for new owners that in good faith undertake such efforts and inform the Agency of such actions, either by disclosure in writing or entry into an audit agreement with EPA prior to submission of the facility's first annual Title V certification under new ownership, the violations disclosed would be considered voluntarily discovered for purposes of the Audit Policy

New owners may be eligible for penalty mitigation under the Audit Policy for violations at newly acquired facilities irrespective of the disclosing entity's compliance history at other facilities. EPA's primary interest is to encourage owners of newly acquired facilities to undertake a comprehensive examination of and improvements to a facility's environmental compliance and its compliance management systems. Notwithstanding a new owner's history of violations at its other facilities, if its efforts to examine and improve upon an acquired facility's environmental operations are thorough and are likely to result in improved compliance, EPA's intent is to encourage such examinations.

Commentary: *EPA announced that K-Mart has agreed to pay a $102,422 fine to violations at 17 distribution centers that the company discovered as part of a voluntary audit. The company voluntarily disclosed reported violations under the Clean Water Act (CWA), Resource Conservation and Recovery Act (RCRA) and the Emergency Planning and Community Right-To-Know Act (EPRCA). If EPA had discovered the violations through an inspection, the company would have faced a fine of more than $1.6 million. Following discovery and disclosure of the violations, K-Mart prepared and implemented spill prevention control and countermeasures plans (SPCC), applied for stormwater permits, complied with hazardous waste generator requirements, and submitted reports to state and local emergency planning and response organizations.*

NYC Unveils Plan to Speed up Brownfield Redevelopment

As part of the PlaNYC that New York City Mayor Michael Bloomberg announced on Earth Day, the city plans to speed the clean-up of the estimated 7,600 acres of brownfields in the city. Under the brownfield component of PlaNYC, New York City plans to request legislative authority to establish a new city office of environmental remediation that will develop city-specific remediation guidelines and oversee remediation of brownfield sites in much the same way that states receive delegation to administer environmental programs

from EPA. PlanNYC also calls for a new $15 million fund to support brownfield redevelopment. The city also plans to create a database of historic uses across New York City to identify potential brownfields, and also create an insurance program and legal protections to limit the liability of developers willing to clean up land they did not pollute.

Jury Rules in Favor of Defendants in Landmark Vapor Intrusion Case

A Pennsylvania jury rejected allegations of four homeowners that they had suffered health problems from exposure to vapors from a 1998 spill at the former Blue Bell gas. The eight women and four men concluded that the gasoline contamination had not reached one of the plaintiffs' homes and that while vapors did reach the properties of the other three plaintiffs, there was no evidence that the vapors actually entered the plaintiffs' homes.

Prior to the five-week trial, the plaintiffs in *Susan B. Fralick Ball v. .Bayard Pump & Tank,* No. 99-06438 (Ct. Common Pleas- Montgomery Ct), judge Maurino Rossanese had ruled that the plaintiffs could introduce testimony of an expert who used a modified version of the Johnson & Ettinger vapor intrusion model to retrospectively establish the levels of benzene vapors that would have been present in their homes (See SEJ January/February 2007 issue). The judge then issued an order providing that the claims of four plaintiffs would be tried before a single jury. Each side was allowed to identify two plaintiffs whose claims would be heard by the jury. One homeowner claimed that her son suffered autism as a result of her exposure to vapors while she was pregnant. Another plaintiff asserted she had contracted leukemia from exposure to the benzene vapors. The two other plaintiffs whose claims were heard by the jury alleged that they suffered headaches but were primarily seeking property damage.

The jury verdict does not end the litigation, however. Forty-five other property owners are seeking damages for diminution of property value and there are a number of cross-claims filed among some of the defendants.

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