SCHNAPF ENVIRONMENTAL REPORT

A Newsletter Covering Recent Environmental Developments and Caselaw

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Contents

DUE DILIGENCE/ AUDITING/ DISCLOSURE/ ENFORCEMENT

EPA Asked To Require Community Input for Due Diligence Standards

The Small Business Liability Relief and Brownfields Revitalization Act ("Brownfield Amendments") established the ASTM E1527 as the interim standards for satisfying the "appropriate inquiry" of the innocent purchaser defense for commercial property transactions that take place after May 31, 1997. The Brownfield Amendments also extended the "appropriate inquiry" requirement to purchasers who want to assert the Bona Fide Prospective Purchaser Defense and property owners who seek to qualify for the Contiguous Property Owner defense.

These interim standards are to remain in effect until EPA promulgates permanent due diligence standards. Under the Brownfield Amendments, EPA was directed to promulgate the permanent standards by January 11, 2004.

A coalition of community groups recently told EPA that local communities should have greater input on how environmental site assessments will be performed. To achieve this goal, the community representatives have asked the agency to build into its upcoming due diligence regulations a mechanism that requires a site's neighbors to be interviewed during the ESA process.

The community groups have relied on a relatively obscure provision of the Brownfield Amendments to support this request. Under section 128 of CERCLA provides that for a state brownfield program to qualify as an eligible state response program, the state must have mechanisms to provide meaningful opportunities for public participation. Specifically, this provision mandates that a state establish a mechanism to allow any person that is or may be affected by a release or threatened release of a hazardous substance, pollutant or contaminant at a brownfield site located in a community in which the person works or resides may request that a site assessment be performed.

The community representatives not only want the states to establish a process where individuals can request a state to order a property owner (or the state where there is no viable owner) to perform a site assessment but also want EPA to require that consultants performing private site assessments to be required to interview a certain number of individuals living in the community near a site. They feel this could be an effective tool to ensure early community input in cleanup and development decisions.

EPA Not Planning to Incorporate Transactions Screens In Due Diligence Standards

The Brownfield Amendments provides that the interim due diligence standard for transactions of commercial property after May 31, 1997 shall be the procedures established by ASTM "including the document known as" the ASTM E1527-00. Because of the use of the word "including" there has been considerable debate whether the ASTM E1528 Transaction Screen can satisfy the interim standard.

However, there appears to be no uncertainty among the EPA staff that have been assigned responsibility for drafting EPA's due diligence standard. This team has informed us that the transactional screen is not being considered as a possible standard because it does not satisfy all of the criteria set forth in CERCLA section 9601(35)(B)(iii).

Commentary: The volume of transaction screens continues to decrease. According to ESA report published by EDR Business Information Services, the number of transaction screens performed in the third quarter of 2002 decreased 6% to approximately 7,500. Compared to a year ago, transaction screen activity is down 18%. ESA Report attributed to decline to a tightening of lending standards. Banks are now requiring Phase I ESAs where they may have used transaction screens in the past. The average price of a transaction screen was $700.

Meanwhile, Phase I ESA activity fell 5.7% in the third quarter of 2002 and 5.5% from one year ago. 29% of all Phase I ESA were performed on commercial/office spaces with undeveloped land accounting for 15% of the Phase I ESA market, industrial properties at 13%, multi-family at 11%, retail 9% and telecommunications at 5%.

Study Finds Environmental Issues Kill 50% of Transactions

According to a survey conducted by CFO Research Services on behalf of Chubb Environmental Solutions, 50% of companies have recently declined to purchase property because of environmental issues. 140 Chief Financial Officers and Senior Vice Presidents participated in the survey which was conducted in June. The respondents work for service firms, heavy and light manufacturers, chemical firms and retailers/wholesale distribution. Annual company revenues ranged from less than $100 million to more than $1 billion.

53% of all respondents said that at least one business transaction has failed because of unresolved environmental issues. However, the failure rate was nearly 60% for heavy manufacturers.

The reason most cited by respondents for killing a deal was the refusal by one of the parties to remediate contaminated (59%). The second most common reason was the failure of a party to disclose the contamination (29%).

In addition, 35% of the companies surveyed said they had been investigated by a state or federal agency over environmental concerns. 76% of the companies that were investigated had been fined while 38% faced other consequences such as being required to cleanup a site or shutting down a facility. Nearly half of the companies reported that their boards receive regular updates on environmental risks.

Companies Increasing Environmental Disclosures in Public Filings

A study by KPMG has found that 45% of the 250 largest companies in the world are disclosing information about environmental and social issues that are not required by disclosure laws. While the survey found that Health, Safety and Environment ("HSE") reports remain the most common types of disclosures, companies are beginning to shift from environmental compliance to sustainability and other social issues. For example, many companies such as DuPont, Ford and BP have begun to disclose in the annual reports and SEC filings discussions on the risks they face from climate change. Other companies are issuing separate reports on sustainability and social responsibility issues.

Some of the companies are making the disclosures in response to pressure from shareholders. In May, the Rockefeller Philanthropy Advisors organized the Carbon Disclosure Project where investors representing $4 trillion in assets contacted 500 large corporations asking them to quantify their greenhouse gas emissions ("GHG") and discuss their plans to reduce GHG emissions. In June, the World Resources Institute reported in June that shareholders of petroleum companies could lose 6% or more of their investment value because of regulations to reduce emissions

of greenhouse gases ("GHG"). Only 3 of 17 energy companies studied in the report discussed the possible impacts of future GHG regulations on their future business operations. Some insurers such as Swiss Re have begun to review what their insureds are doing to manage GHG emissions and are considering excluding companies and directors from coverage.

In another study by PriceWaterhouseCoopers ("PWC"), 32% of respondents indicated that they have issued sustainability reports, 18% said they planned to do so within two years and another 23% said they anticipated discussing sustainability issues within 3-5 years. Of those companies in the PWC study that said they were discussing sustainability, 67% had revenues over $25 billion.

75% of the 140 businesses that participated in the PWC study said they had adopted some sustainability practices. The top five sustainability initiatives adopted by companies include pollution prevention (91%), environmental management systems (88%), employee volunteering (77%), community outreach (74%) and corporate philanthropy (74%).

89% of all the companies surveyed thought there would be an increasing emphasis on sustainability issues within the next five years. 53% of these companies said that reputational risk was the most important external driver for adopting sustainability practices. The other top reasons were customer demand (40%) and industry trends (39%).

Of the companies that have not yet adopted or do not plan to address sustainability issues, 82% said there was not a clear business justification for these measures. The other most common reasons were lack of stakeholder interest (62%), lack of management commitment (53%), difficulty in measuring results (47%) and absence of legal requirements (41%).

Commentary: Online environmental network Care2 and nonprofit consumer organization Co-op America recently created a website that is designed to help consumers identify and support socially and environmentally responsible businesses. The new resource makes it easier for consumers to find socially and environmentally responsible products.

EPA Inspector General Finds Widespread Errors in CERCLIS

According to an audit report issued by EPA's office of inspector general ("OIG"), more than 40% of the superfund site activity data contained in the Comprehensive Environmental Response, Compensation, and Liability System ("CERCLIS") tracking system is inaccurate or inadequately supported. The OIG said the inaccurate data included incorrect codes about the status of actions at the sites. The report also found that many sites were improperly identified as being on the National Priorities List ("NPL") or did not indicate they had been archived.Some sites had incorrect codes identifying what actions had been taken or indicating that no actions had been taken. Other sites had incorrect dates or information had not been entered for over ten years. The report recommended that EPA develop exception reports to identify sites that have not had any new information entered for a reasonable amount of time as well as for non-NPL sites where the status code indicate actions were underway or were required when the action had already been completed.

Commentary: The CERCLIS is the database of sites that are believed to have been impacted with releases of hazardous substances. For much of the Superfund program, sites that were designated as "no further remedial action planned" ("NFRAP") remained in the database. Even those these sites were not contaminated, they were essentially stigmatized by being on the CERCLIS. Some lenders did want to finance the redevelopment of these sites perhaps not understanding the difference between the CERCLIS and the NPL which is the list of the most seriously contaminated sites. As a result, EPA archived or removed approximately 30,000 NFRAP sites from the CERCLIS as part of its Superfund reforms of the mid-1990s.

EPA Announces Additional University Enforcement Actions

Central Connecticut State University ("CCSU") recently agreed to pay a $391,830 civil penalty for a variety of environmental violations. The violations were uncovered during a June 2001 EPA inspection of the 143-acre campus.

Most of the violations occurred at the university's chemistry and biology building, and the fine arts center. Violations

included failing to obtain a state hazardous waste storage permit, failure to conduct and document hazardous waste training, not performing waste determinations on hazardous waste and solid waste generated on campus, and failing to properly label and manage containers of hazardous waste. In addition, EPA said the university failed to prepare and implement an oil spill prevention plan for its five underground tanks, 31 aboveground tanks, and 28 transformers.

Three New York area universities face a total of $1.1 million in penalties for alleged violations of hazardous waste regulations. Columbia University was fined $797,029 for improper storage of hazardous wastes, failing to perform hazardous waste determinations, not developing an adequate contingency plan, failing to conduct hazardous waste training and establishing appropriate emergency procedures

Long Island University was fined $219,883 penalty for not conducting hazardous waste determinations, storing hazardous wastes without a permit, and failing to adequately respond to EPA information requests. The hazardous wastes violations involved mercury, organic solvents, picric acid, spent fluorescent light bulbs, used computer monitors and other wastes primarily generated by or used by the university's teaching and research laboratories and maintenance facilities at its Brooklyn campus.

New Jersey City University was fined $88,344 not performing hazardous waste determinations, improper storage of hazardous waste, not conducting hazardous waste training and failing to keep release detection records for two USTs that have subsequently been removed.

Cheese Manufacturer Uses EPA Audit Policy to Avoid 100% of Civil Penalties

EPA agreed to forgive $150,000 of potential civil violations that were voluntarily disclosed by cheesemaker Joseph Gallo Farms under the agency's audit policy. After conducting a voluntary audit, Gallo Farms notified EPA that the company had discovered that it had failed to file toxic release inventory ("TRIs") for the use and release of nitric acid and nitrate compounds. Gallo corrected the violations and submitted notification showing that the corrective action was taken within 14 days. The company used the Nitric acid to clean equipment. The Nitrate compounds were generated when the nitric acid is neutralized.

Facility Fined for Release of Refrigerants

Fresh Mark Inc. was fined $70,358 for failing to disclose a release of 7,000 pounds of anhydrous ammonia resulting from a broken refrigeration system valve at its sausage plant located in Canton, Ohio. The release lasted about three hours and the plant was evacuated at the time of the incident. EPA computer modeling indicated that the chemical plume drifted onto neighboring properties.

Under EPCRA, the company was required to immediately report releases of anhydrous ammonia release larger than 100 pounds to the National Response Center as well as state and local emergency response commissions but did not notify these authorities until more than 41 hours after the incident. The company did notify the Canton fire department within three hours into the incident.

Commentary: Facilities using hazardous chemicals may be subject to a myriad of federal, state and local release reporting requirements that may have different thresholds and time periods for reporting releases. This incident illustrates that a company that does not timely notify all appropriate government agencies of a reportable release may find itself subject to fines even if timely notified one agency.

This incident also demonstrates how easy it may be for a purchaser of contaminated property to lose its Bona Fide Prospective Purchaser defense. The new defense requires purchasers to comply with all reporting obligations. Simply notifying one agency may not be satisfy this obligation and cause a purchaser to forfeit its immunity from liability.

EU Adopts Additional Electronic Waste Requirements

The European Parliament recently imposed mandatory recycling requirements on manufacturers of electrical products. Under the "electro scrap" law, manufacturers must pay for the recycling of electrical goods ranging from shavers to refrigerators and laptop computers. The EU hopes that the requirements which go into effect in September 2005 will increase recycling of the six million tons of electronic waste to as

high as 75%. The new law also will also ban the use of toxic substances such as lead, mercury and cadmium in such household appliances from 2006

Manufacturers estimated the rules could cost $7.7 billion a year to collect and dispose of the waste. They warn the increases could be passed on to consumers, ranging from 50 cents for small appliances such as coffee makers to up to $20 for large appliances like refrigerators.

The law also told EU governments to "take appropriate measures" against companies that design equipment specifically to prevent reuse, forcing customers into buying new goods. Officials said the measure was aimed at producers of computer printer ink cartridges who introduced design features to make ink refills more difficult.

EPA Establishes New Electronic Database

EPA recently launched a new electronic database that provides detailed facility information under a variety of environmental programs to the public. The Enforcement and Compliance History Online ("ECHO") database provides information on federal and state compliance inspections, environmental violations, recent formal enforcement actions taken and demographic profile of surrounding area.

The system retrieves information from federal and state data entered into EPA databases including the Air Facility System, the Permit Compliance System for wastewater permits and the Resource Conservation and Recovery Act Information System for hazardous waste facilities. ECHO also provides links to additional state enforcement and compliance information. Data reports are updated monthly and cover a two-year period.

Although all of the information on ECHO was previously available to the public, ECHO integrates allows the public to access the information from a single source. ECHO can be found at www.epa.gov/echo.

Commentary: Some purchasers or attorneys may be tempted to use ECHO in lieu of performing a Phase I. However, ECHO is a limited regulatory database that would not satisfy the interim due diligence standards established under the Brownfield Amendments. In particular, ECHO would not satisfy the historical investigation requirements and is not focused on identifying evidence of releases of hazardous substances or petroleum. Nevertheless, ECHO could be useful as a screening device to identify facilities with significant regulatory or compliance issues.

ENVIRONMENTAL INSURANCE

Federal District Court Finds Mold in Shopping Center is Covered by "All Risk" Policy

The owner of a shopping center that suffered from mold because of water intrusion in the walls was allowed to bring an action under its "all risk policy". In *Churchill v. Factory Mutual Ins. Co.* (No. C02-3872 (W.D. Wash.10/23/02), the federal western district court of Washington rejected the insurer's motion for summary judgment and concluded that the all-risks policy covered mold damages.

However, the court found that that the question of whether the mold damage was the "efficient proximate cause" of the insured's loss was a question of fact that could not be resolved on summary judgment. As a result, the case will proceed to trial.

One key factor the court relied on was that while the policy in dispute did not refer to mold, the standard policy form the insurer had used before and after the form involved in this dispute expressly excluded mold from coverage.

The insurer argued that the insured could not recover because the policy only covered "fortuitous" losses and asserted that this term applied to sudden and discrete events. The court agreed that the policy should only cover fortuitous events as a matter of public policy but said that under Washington law the term excluded losses that the parties could reasonably have foreseen. The court held that the insured had the burden of showing that the mold damage in question fit within this definition but that this was a question of fact that could not be resolved on summary judgment.

The court said that the policy language was not ambiguous and that the insurer could not show that the express language of any exclusions covered mold or

water intrusion damage.

Federal District Court Grants Summary Judgment to Insurer for Defective Mold Damages Complaint

A federal judge for the eastern district of Louisiana granted an insurer's motion for summary judgment because the complaint failed to link mold infestation to a covered peril. In *Herzog v. State Farm Fire & Casualty Co.* (No. 02-4, E.D. La.), a homeowner discovered mold in his home in 2001. State Farm paid for living expenses to allow Herzog to live at another location while an investigation was conducted. Herzog subsequently determined the mold had been carried into the house through the air and had contaminated the contents of the home. After Herzog filed claim for the damage to his personal property, State Farm denied coverage. Herzog then commenced his lawsuit and both parties filed summary judgment motions.

The homeowner policy covered losses from lightening, fire, explosion, windstorm, or sudden or accidental overflow from a plumbing or heating system. court found that the complaint did not list any of the enumerated perils listed in the homeowner policy as a cause of the loss. Accordingly, the court granted summary judgement in favor of the defendant.

New York State Court Rules that Migration Is Not An Occurrence

A New York appeals court recently held that continuing migration of preexisting contaminants in the soil is not an "occurrence" triggering coverage under an excess liability policy (*Long Island Lighting Co. v. Allianz Underwriters Ins. Co.*, N.Y. App. Div., 1st Dept., No. 07693, 10/24/02). In this case, a utility sought coverage for the costs to remediate former coal gasification plants that had been closed since the 1950s.. However, the court said that the triggering event for coverage was the initial release of contaminants and that the continuing migration of the contaminants was not a "causal occurrence." Because the releases took place prior to the time the policy took effect and there were no new releases during the policy period, the court found the insured was not entitled to coverage.

CGL Policy Does Not Cover Cleanup Costs Incurred Pursuant to Administrative Order

A California appellate court recently ruled that an insurer's indemnify obligation does not include costs incurred to clean up ground water contamination pursuant to an administrative compliance order or to settle non-litigated property damage claims. In *County of San Diego v. Ace Property and Casualty Insurance Co.* (Cal. Ct. App., 4th Dist., 1st Div., No. D038707, 11/14/02) San Diego County began operating a landfill in 1969 that was located above an aquifer used by area homeowners. In March 1997, the Regional Water Quality Control Board issued an administrative order requiring the county to investigate and remediate groundwater contamination associated with the landfill. After completing a cleanup and paying approximately $580,000 to settle property damage claims of the homeowners, the county filed a claim with its insurer. After the insurer denied the claim, the county filed a declaratory judgment action and the defendant moved for summary judgment.

The trial court granted the motion, holding that that California Supreme Court case in *Lloyd's of London v. Superior Court* (24 Ca. 4th 945 2001)("Powerine") had previously ruled that the term "damages" used in a CGL policy was limited to money that an insured was ordered to spend by a court. The county appealed, arguing that the Powerine decision did not apply to the county's claim because the county's insurance policy was a third party liability policy that did not have a clause requiring the insurer to defend against "suits". However, the state Court of Appeal for the Fourth District found that the Powerine decision had indicated that the term "damages" in the insuring clause was limited to court-ordered damages and affirmed the trial court.

AIR POLLUTION DEVELOPMENTS

EPA Issues Revised NSR Rule

EPA issued final and proposed rules to reform the New Source Review ("NSR") program (67 FR 80185-80289, 80290-

80314, December 31, 2002). The revisions culminate a 10-year process to examine and reform the NSR program. The final rule made the following four changes to the NSR Program:

Plantwide Applicability Limits ("PALs")- Facilities that agree to operate within strict site-wide emissions caps called PALs will be given flexibility to modify their operations without undergoing NSR so long as the modifications do not cause emissions to violate their plantwide cap. Environmentalists have criticized this provision, asserting that it could that the PAL could be set higher than current emission levels and that it could prevent states from complying with increasingly stringent requirements. Indeed, some state regulators asked EPA to provide for a declining PAL.

Clean Unit Provision- Facilities that obtain NSR permits that require the installation of best available control technology ("BACT") will be exempt from further NSR requirements for ten years provided the additional modifications do not cause the facility to exceed its permit limitations. Some state regulators also objected to this provision, arguing that this exemption combined with the new method for calculating emissions will allow facilities to make modifications or add new sources that could increase emissions without having to install pollution control technology.

Emissions Baseline Calculation- The final rule will allow facilities to calculate projected emissions from the modification based on projected actual emissions as opposed to the projected potential emissions. This change is likely to result in lower emissions and less likely to trigger NSR review. In addition, facilities will be allowed to use any consecutive 24-month period in the previous decade as a baseline so long as all current emission limitations are taken into account. The "baseline emissions" provision does not apply to power plants. EPA indicated this baseline emission rule would allow facilities to take business cycles into account. However, environmental organizations and some state regulators argue that this approach will allow facilities to use the highest polluting and significantly increase emissions over current levels without having to install pollution control equipment.

Pollution Control and Prevention Projects- Projects that would result in a net reduction of overall facility emissions would simply have to provide a notice to their permitting authority instead of applying for an NSR permit.

The proposed rule which will effect power plants would expand the types of projects that would fall within the NSR exemption for "routine maintenance, repair and replacement" ("RMR&R"). Two categories of activities would automatically constitute RMR&R and would not trigger NSR review:

Annual Maintenance, Repair and Replacement Allowance- The proposal would establish cost thresholds that vary with the industrial sector. Projects that fall below the cost threshold would be considered RMR&R and not trigger NSR review regardless of the quantity of pollutants produced.

Equipment Replacement Approach- The other category would allow facilities to replace existing equipment with functionally equivalent new equipment without undergoing NSR provided the cost of the new equipment is below a specified threshold. New equipment changes that fall below the threshold will be considered RMR&R. The threshold will be set at levels that allow replacement of components typically replaced in the relevant industrial to promote the safe, efficient and operation of such sources.

Commentary: On December 31st, 9 northeast states sued EPA to block the revised NSR rules.

Ethanol Plants Resolve Enter Into NSR Settlement

12 ethanol facilities located in Minnesota entered into comprehensive civil settlements with the federal government and the state of Minnesota to resolve allegations that the plants failed to comply with NSR requirements.

Under the settlements, each plant will install air pollution control equipment that will reduce emissions of volatile organic compounds ("VOCs") by 95% from the feed dryers and also substantially reduce annual emissions of carbon monoxide ("CO"), nitrogen oxide ("NOx"), particulate matter ("pm") and hazardous air pollutants. The new equipment will cost most of the plants $1 million to $2 million. Each facility will also pay a civil penalty ranging from $29,000 - $39,000.

Commentary: Ethanol is primarily made from corn and is used as an automobile fuel alone or blended with gasoline to increase the oxygen content of the fuel and lower tail pipe emissions. During the ethanol manufacturing process, dry mills burn off gasses which emit volatile organic compounds and carbon monoxide into the air.

States Imposing Greater Restrictions on Emission Credits

In our last issue, we discussed that NJ had terminated its open market emissions trading programs. Other states are taking closer looks at their trading programs as well.

For example, EPA recently approved a change in Louisiana's SIP that will prevent facilities from using emissions credits from prior emissions reductions to offset new emission reduction requirements required by enforcement actions or changes in regulations. (67 FR 61088, Sept. 27, 2002). Like many other states, Louisiana had previously allowed facilities to "bank" their surplus credits and then use them against future emissions increases. Now, the credits must be "surplus" when actually used and not when they are generated.

EU Parliament Approves GHG Emission Trading

The European Parliament approved legislation establishing a greenhouse gas ("GHG") emission cap and trading program. The trading system is expected to be a cornerstone of the European Union's ("EU") program to meet its Kyoto Protocol obligations. The EU member states are required to GHG emissions by 8% from 1990 levels by 2012.

The first phase of the proposed GHG cap and trade system will commence in 2005 and apply to companies involved with heat and power production, steel, cement, glass, tile, paper and cardboard production. EU member states will be required to establish CO2 emission cap for the covered industrial sectors. However, some industrial sectors may be able to opt-out of the program until 2008 if the European Commission approves the delayed participation. All covered industrial sectors will be required to participate in the second phase of the trading system from 2008-2012.

Allocations of emission permits will be free of charge for the first three years of the program but beginning in 2008, EU member states may auction up to 10% of allowances from 2008.

Facilities that exceed their CO2 emission ceilings will be fined 40 euros per ton of excess emission during the first phase and 100 euros during the second phase.

Commentary: The Kyoto Protocol requires industrialized countries to collectively reduce GHG emissions by 5.2% between 2008-2012. The pact will become effective when it is ratified by at least 55 states contributing at least 55% of the industrialized world's 1990 greenhouse gas emissions. The treaty is expected to become effective in 2003 after Russian ratification.

According to the International Energy Agency ("IEA"), global energy-related CO2 emissions have risen 13% since 1990 with industrialized countries accounting for 13.7gigatons ("Gt") of CO2 annually while developing nations producing 8.9 Gt.

A report issued by the European Economic Agency ("EEA") on December 6th indicated that the EU would not meet its goals for GHG emission reductions under the Kyoto Protocol. Pursuant to the EU burden-sharing agreement, EU countries must collectively reduce emissions of the six GHG identified in the pact by 8% by 2012. According to the EEA report, though, the EU member states will only slash GHG emissions by 4.7% by 2010. The study "Greenhouse Gas Emission Trends and Projections in Europe" found that Finland, France, Germany, Luxembourg, Sweden and the United Kingdom are on track to meet their targets the other 9 countries will have to take additional measures to reach their targets. The countries with the largest projected excessive GHG emissions are Spain which is projected to exceed its GHG reduction target by 26.2%, Ireland (17.5%), Portugal (16.6%), Belgium (10%) and Austria (9.2%). The report found that while most industries were reducing their GHG emissions, these reductions were offset by large increases in vehicular GHG emissions which increased 19% since 1990.

According to the federal Energy Information Administration ("EIA"), U.S. GHG emissions fell 1.2% in 2001. The EIA attributed the decline to the recession. U.S.

GHG emissions were 11.9% higher than 1990 levels.

Trading of CO2 Allowances Rises Sharply in 2002

A report issued by the World Bank estimates that the volume of CO2 allowance trades in 2002 will be five times the 2001 levels. According to the report "State of the Carbon Market", the volume of CO2 trades in 2002 will be approximately 60-67 metric tons of carbon equivalent (MtCO2e).

The report found that the allowances were trading for an average of $10 per MtCO2e in industrialized countries and $3 to $4 in developing countries. The current prices are approximately half that estimated by the World Bank just a year ago. The World Bank attributes the pricing decline to the refusal of the United States to join the Kyoto Protocol since the withdrawal of United States has slashed demand for GHG trading allowances in half. When Russia ratifies the treaty in 2003, it is possible that prices could drop further because Russia has substantial excess or surplus allowances to sell as a result of the collapse of its economy.

Despite the abundance of carbon assets in developing countries that are available to investors and facilities, the report found that the private sector was avoiding transactions with developing nations. Instead, the private sector transactions were mainly taking in Latin American companies that have more stable governments.

The World Bank has financed a number of projects that help developing countries receive money to implement clean energy projects through its $180 million Prototype Carbon Fund ("PCF"). Once the PCF approves a project, a GHG emissions baseline will be developed that estimates the volume of GHG that would have been emitted if the clean energy project was not built. The difference between the baseline and the amount of GHG emissions from the "clean" energy resource is the carbon credit. Some of the projects that PCF has helped finance include a power plant with methane from a landfill in Latvia, a wind farm in Colombia and a power plant in Nicaragua fueled by rice husks.

Commentary: Signatories to the Kyoto Protocol may trade allowances before the treaty becomes effective because signatories are awarded a five-year allocation of assigned amount units ("AAUs"). The AAUs are allocated directly to governments who can manage their inventories before the treaty becomes effective. Each AAU represents the right to emit one MtCO2e.

Under the treaty's "International Emissions Trading" program, two types of market-based mechanisms are created. The first kind is the AAU mechanism and the other is the Clean Development Mechanism ("CDM").

For example, a trade of AAUs recently took place between the Slovak Republic and a major Japanese trading house. Under the transaction, Slovakia guaranteed to transfer 200,000 assigned amount units ("AAUs") out of its 2008-2012 GHG allocation to the Japanese buyer. The proceeds from the sale of AAUs will enable the Slovak Republic to finance at least 21 GHG emission reduction projects.

Report Challenges Effectiveness of GHG Sequestration

The Kyoto Protocol will allow member states to plant forests to help them meet their targets for cutting GHG emissions. The concept is that the additional acres of forests will soak up or "sequester" CO2 emissions. For example, Italy plans to achieve between 10% and 40% of its GHG emission reductions through forest planting.

European forests are absorbing up to 400 million tons a year of CO2 which represents 30% of the continent's CO2 emissions. Regulators assumed that most of this carbon sequestration came from young forests because old forests were thought to be in equilibrium with the atmosphere so that they absorbed as much CO2 as they released.

However, a study by CarboEurope has found that the new forests actually release more carbon during their first 10 years of growth than they absorb. The report said the reason for this discrepancy is the difference in the soils. The soil associated with older forests has much more accumulated organic matter and this buried material typically contains three to four times as much carbon as the vegetation growing above. When ground is cleared for forest planting, the report found that the rotting organic matter in the soil releases a surge of CO_2 into the air. In addition, the report found

that new forests planted on wet, peaty soils would never absorb as much carbon as they release.

Thus, the report suggests that conservation of old forests is a better policy for tackling global warming than planting new ones. However, the Kyoto Protocol does not provide incentives against deforestation since countries can claim credits cutting down existing natural forests and replacing them with plantations.

Group Sues US for GHG

A coalition of environmental organizations filed a lawsuit charging that EPA had failed to comply with a mandatory duty under the CAA to address GHG emissions.

The action filed by the Center for Technology Assessment ("CTA") the Sierra Club, and Greenpeace asked the Court of Appeals for the District of Columbia to declare that EPA had unreasonably failed to respond to a petition filed in 1999 requesting EPA to promulgate regulations to address CO2 emissions from vehicles. The petition had asserted that EPA had a mandatory duty under §202 of the Clean Air Act to regulate greenhouse gas emissions from new motor vehicles. The petitioners claimed this duty was triggered because EPA has already made legal findings that emissions from each GHG meets the CAA definition of "air pollutant" and that the emission of these "air pollutants" may be reasonably anticipated to endanger public health or welfare.

Under § 302(g) of the CAA, an "air pollutant" is defined as air pollutant agent or combination of such agents including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters ambient air. The definition includes precursors to the formation of air pollutants.

The petition had pointed to an April 10, 1998 memorandum from then EPA General Counsel Jonathan Z. Cannon that said the § 302(g) definition of "air pollutant" applied to SO_2, NO_x, CO_2 and mercury from electric power generation because they were physical and chemical substances emitted into the ambient air. The memorandum further noted that Congress explicitly recognized CO_2 emissions as an "air pollutant" under § 103(g) of the CAA.

Moreover, the plaintiffs argue that EPA is mandated under §202(a) to promulgate standards air pollutants from new motor vehicles may reasonably be anticipated to endanger public health or welfare. Since EPA has already made formal findings that the emission of air pollutants CO_2, CH_4, N_2O, and HFCs from mobile sources poses actual or potential harmful effects of the public health and welfare, the plaintiffs charge that EPA was required to regulate the emissions of CO_2, CH_4, N_2O, and HFCs from new motor vehicles under § 202.

Federal Government Developing Revising Guidelines For Tracking Voluntary GHG Reductions

As part of the Bush Administration's climate change initiative, several federal agencies are working together to develop a national voluntary GHG emissions reduction program. Earlier this year, the departments of Energy, Commerce and Agriculture proposed a new, transferable credit system for registering and verifying GHG emissions. The four agencies have are working with EPA to improve the existing voluntary GHG reduction registration program of section 1605(b) of the 1992 Energy Policy Act.

For example, the Department of Agriculture recently announced it will develop rules and guidelines to identify land-use practices for crops, animal agriculture, range and pastures and forests that may be used for GHG offsets. Stationary and mobile sources would be allowed to register GHG emissions credits under the Energy Policy Act for forestry projects or agricultural practices such as tree planting or using carbon-rich soil for vegetation.

EPA, meanwhile, has developed a draft Climate Leaders GHG Inventory Protocol where participants develop corporate GHG emissions inventories, set corporate emissions reductions and report on their progress. The agency draft protocol also establishes procedures for documenting GHG emission reductions form corporate-owned vehicles. In exchange, the participants will receive technical assistance from EPA and be identified as environmental leaders by EPA. Thus far, 31 companies have joined the program.

Wind Energy Tax Credits Extended

As part of the economic stimulus package signed by President Bush, the federal wind energy Production Tax Credit ("PTC") that had expired December 31, 2001 was extended retroactively from that date to December 31, 2003. The extension will allow several stalled projects across the country to proceed.

For example, manufactures of wind turbines and towers had to furloughed workers because the delay caused a halt in orders for new turbines. At the time the credits had expired, the U.S. wind industry had installed more than twice as much new generating capacity as in any previous year.

Commentary: Wind is the world's fastest growing alternative energy source, growing at about 35% annually for the past 5 years and is expected to grow 22-30% annually for the next five years. To stimulate demand for renewable energy, EPA is working with states to include renewable energy credits in their State Implementation Plans ("SIPs") and developing a national tracking system for renewable energy credits. The credits could be traded using renewable energy certificate. Generators of these certificates could then sell them on the open market or to retail electricity markets.

States Continue to Take Actions to Reduce GHG Emissions

According to a study by the Pew Center on Global Climate Change, one-third of the states have approved legislation or executive orders during the past three years to reduce GHG emissions.

Meanwhile, California Governor Gray Davis recently signed a bill that creates a forest carbon registry to enable landowners to receive GHG credits. Under the law, companies and private landowners can register forest projects that can be shown to reduce greenhouse gases such as carbon dioxide.

Commentary: The Governor also signed a bill that requires the California Air Resources Board to Study the potential health impacts of indoor air. The report which must be completed by January 1, 2004 will study the effects of a wide range of pollutants including carbon monoxide and mold from a variety of sources including building materials, furnishings, appliances, paints, consumer products, office equipment, wood stoves and fireplaces.

Food Distribution Facilities Fined for Not Filing Risk Management Plan

A food manufacturing and distribution facility in Chelsea, Mass. agreed to pay a $46,525 penalty for allegedly filing a late and inadequate plan to prevent accidental releases of ammonia from the facility. Under section 113(r) of the CAA, Kayem, Inc was required to file a risk management plan (RMP) because it uses over 10,000 pounds of refrigerant anhydrous ammonia at the distribution facility. The company also failed to file a Toxic Release Inventory form for 1999.

EPA also entered into a settlement with dairy processor Dean Northeast LLC of Franklin, Mass. The company agreed to pay a $ 31,080 penalty for failing to timely file a RMP for anhydrous ammonia.

Commentary: These enforcement matters demonstrate the importance of performing environmental due diligence on warehouse and distribution facilities. These facilities often contain quantities of hazardous chemicals that may trigger compliance requirements under the CAA or EPCRA and may also use USTs for heating.

EPA Proposes Final HAPs

EPA completed its major rulemaking requirements under section 112(d) of the 1990 CAA Amendments when it proposed national emission standards for hazardous air pollutants (NESHAP) for ten categories of sources of hazardous air pollutants ("HAP"). (67 FR 78273, December 23, 2002). The standards were issued for iron and steel furnances, automobile and light-duty truck coating operations, combustion turbines, industrial and commercial boilers and heaters, lime manufacturing, metal can surface coating, plywood and composite wood products manufacturing, reciprocating internal combustion engines, and taconite iron ore processing.

One of the more significant standards was the proposed NESHAP for iron and steel foundries. Approximately 650 iron and steel foundries exist in the country and EPA estimated that 100 foundries are major sources of HAP that would become subject to the proposed rule. Most of these major sources are operated by manufacturers of automobiles and large industrial equipment and by suppliers of these manufacturers. The HAPs emitted by facilities in the iron and steel foundries

source category include metal and organic compounds. For iron and steel foundries that produce low alloy metal castings, metal HAP emitted are primarily lead and manganese with smaller amounts of cadmium, chromium, and nickel. For iron and steel foundries that produce high alloy metal or stainless steel castings, metal HAP emissions of chromium and nickel can be significant. Organic HAP emissions include acetophenone, benzene, cumene, dibenzofurans, dioxins, formaldehyde, methanol, naphthalene, phenol, pyrene, toluene, triethylamine, and xylene. The proposed NESHAP would reduce nationwide HAP emissions from iron and steel foundries by over 900 tons per year (tpy).

The proposed coating rule applies to facilities engaged in the surface coating of new automobile or new light-duty truck bodies or collections of body parts for new automobiles or new light-duty trucks that are a major source, located at a major source or are a part of a major source of HAP emissions. Automobile customizers, body shops, and refinishers are excluded from this source category as well as the coating of separate, non-body miscellaneous metal and plastic parts that are not attached to the vehicle body at the time that the coatings are applied.

Commentary: Section 112 of the CAA requires EPA to list categories and subcategories of major sources and area sources emitting one or more of the 188 HAPs listed in section 112(b), and to establish technology-based standards for new and existing major sources in those listed categories. Major sources of HAP are those that emit or have the potential to emit equal to, or greater than 10 tpy of any HAP or 25 tpy of any combination of HAP. Area sources are stationary sources of HAP that are not major sources. The regulation of area sources is discretionary. If EPA determines that an area source poses a threat of adverse effects on human health or the environment, then the source category can be added to the list of area sources to be regulated.

Section 112(d) of the CAA requires all major sources to meet HAP emissions standards reflecting application of the maximum achievable control technology ("MACT"). MACT is the minimum control level allowed for NESHAP and is designed to ensure that all major sources achieve the level of control at least as stringent as that already achieved by the better-controlled and lower-emitting sources in each source category or subcategory. For new sources, the MACT floor cannot be less stringent than the emission control that is achieved in practice by the best-controlled similar source. The MACT standards for existing sources can be less stringent than standards for new sources, but they cannot be less stringent than the average emission limitation achieved by the best-performing 12% of existing sources in the category or subcategory (or the best-performing five sources for categories or subcategories with fewer than 30 sources). EPA may promulgate standards more stringent than MACT based on the consideration of cost of achieving the emissions reductions, any non-air quality health and environmental impacts, and energy requirements. For the automobile and light-duty truck coating operations, combustion turbines, industrial and commercial boilers and heaters, plywood and composite wood products manufacturing, and reciprocating internal combustion engines, EPA requested comments on alternative standards for some facilities within these categories that EPA concluded posed a low risk to health.

EPA has now published NESHAPs for 65 source categories and has proposed rules for 30 additional source categories

Real Estate Entities Join EPA Energy Star Program

During the past few years, EPA has extended its Energy Star program to commercial real estate, retail, industrial and hospitality properties to encourage energy efficiency and lower GHG emissions. The Energy Star Building Label program is a voluntary, market-driven and performance-based partnership between the public and private sectors to demonstrate how commercial space can be built and operated more energy efficiently and more profitably. Investment property managers are using ENERGY STAR to maximize operating profits by targeting energy and cost performance improvements that increase net operating income and asset value.

Recently, EPA announced that approximately eight billion square feet of office, industrial, retail and hospitality properties has been enrolled in the Energy

Star program. Nearly 35 million square feet of these properties are commercial office space. EPA estimates that the owners of these properties have saved approximately $14 million in operational costs and eliminated CO2 emissions equivalent to 15,000 automobiles.

To qualify for the Energy Star label, buildings must meet strict energy performance criteria that certify them in the top 25% of all comparable buildings for energy efficiency. They must also meet minimum standards for healthy indoor air quality. Some of the 350 Energy Star office buildings are new structures that have incorporated sustainable building design such as high-performance window glazes, "smart" thermostats and alternative methods of on-site electricity generation including fuel cells, photovoltaic panels and micro-turbines. and unique air ventilation systems that improve tenant comfort as well as energy efficiency. Older buildings have also qualified for Energy Star status through renovations that incorporate more efficient lighting, heating, and ventilation and air-conditioning equipment. The properties are located in 17 states and range from state-of-the-art office towers to historic structures built during the Depression.

Commentary: The largest single operating expense for buildings owned by the commercial real estate industry is energy costs. EPA estimates that electrical use in commercial buildings has doubled in the last 17 years and may increase another 150% by 2030. A federal study indicated that energy use in residential and commercial buildings represents nearly 34% of total energy consumption in the United States. Computer use accounts for roughly 8% of U.S. electric energy output.

WATER POLLUTION/ENDANGERED SPECIES

EPA Withdraws Revisions to TMDL Rule

EPA proposed to withdraw the revisions to the Total Maximum Daily Loads ("TMDLs") that was originally proposed in July 2000 (65 FR 43586, July 13, 2000). The July 2000 rule amended and clarified existing regulations requiring states to identify waters that are not meeting applicable water quality standards and to establish the amount of pollutants that the waters could receive to achieve the water quality standards for those waters. The TMDL rule was supposed to become effective in April 2003. The existing TMDL regulations will remain in effect. EPA indicated it received voluminous comments during the public comment period and determined that significant changes would have to be made to the rule. The agency also said it would need additional time beyond April 2003 to decide whether and how to revise the currently TMDL regulations.

Commentary: Under section 402, an individual NPDES permit or a general permit applicable to multiple similar facilities or activities authorizes discharges of pollutants to waters of the United States. NPDES permits commonly contain numerical limits on the amounts of specified pollutants that may be discharged and may specify best management practices ("BMPs") designed to minimize water quality impacts. Technology-based limitations represent the degree of control that can be achieved by point sources using various levels of pollution control technology. If necessary to achieve or maintain compliance with applicable water quality standards, NPDES permits must contain water quality-based limitations more stringent than the applicable technology-based requirements. One basis for water quality-based effluent limits in NPDES permits is a wasteload allocation from a TMDL. States were required to submit new lists of impaired waters by October 1, 2002. In 2001 and 2002, more than 5,000 TMDLs were approved or established under the current TMDL rule. The number of TMDLs approved or established annually has steadily increased in the last four years jumping from 500 in 1999 to nearly 3000 in 2002.

EPA and Corps Issue New Wetlands Mitigation Strategy

On December 26th, EPA and the Army Corps of Engineers ("Corps") in

conjunction with the Departments of Agriculture, Commerce, Interior, and Transportation released a comprehensive National Wetlands Mitigation Action Plan as well as a revised Wetlands Mitigation Regulatory Guidance Letter. The regulatory action is in response to the 2001 National Academy of Sciences ("NAS") report that concluded the compensatory wetlands mitigation policy was not working.

The National Wetlands Mitigation Action Plan lists 17 action items that the agencies will undertake to improve the effectiveness of restoring wetlands that are impacted or lost to activities governed by clean water laws.

The regulatory guidance letter "Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899" ("RGL 02-2") reaffirms the Corps commitment to the "no net loss" of wetlands and supercedes RGL 01-1 that had been issued on October 31, 2001. The Corps traditionally used acreage when determining the impacts to aquatic resources and the amount of compensation that was required. However, the new guidance encourages district offices to increase their analysis of the functions that are lost or that could be restored when reviewing a mitigation plan. In conducting a functionality analysis, the districts will be required to consider the needs of the overall watershed or ecosystem and not just the portion of the wetlands that will be impacted by the authorized activity. The guidance indicates that the objective will be to provide at least a 1-1 functional replacement. Where the functions lost where considered highly valuable but the replacement wetlands has a low functionability, the mitigation ratio would be higher than 1-to-1. In contrast, if the newly created wetlands have a high function and the lost wetlands were a low functioning wetlands, the ratio may be less than 1-to-1. In the absence of reliabile functional anlysis, the Corps will use at least a one-to-one acreage mitigation requirement as a surrogate to satisfy the no net of function requirement.

The Corps district offices will determine the appropriate amount of wetlands compensation that will be requiredbased on the functions that were lost or adversely affected by the project. In approving mitigation plans, the Districts will also take into account the availability of suitable locations, feasibility, costs and other logistical issues. that acres of wetlands lost to development be replaced by an equal or larger amount of newly created wetlands will use watershed policy is intedned to provide greater consistency across the Corps 38 district offices on issues such as the timing of mitigation activities and the party responsible for mitigation success. The guidanceleter emphasizes a watershed-wide approach to prospective mitigation efforts for proposed projects impacting wetlands and other waters, increased use of functional assessment tools; and improved performance standards. The guidance letter also emphasizes monitoring, long-term management, and financial assurances to help ensure that restored wetlands actually result in planned environmental gains.

The guidance favors the use of mitigation on-site or at contiguous or adjacent properties when practicable. Off-site mitigation may be used when there is no practical opportunity for on-site mitigation or where off-site mitigation will provide greater benefits (i.e., higher functioning) than on-site miitigation. However, off-site mitigation should be in the same geographic area. The resources established by a mitigation project will have to be permanently protected by appropriate real estate instruments (e.g., easements, deed restrictions, transfers of title, etc). Monitoring will be required for a certain periof of time, usually 5-to years and the financial assurances will be required of the party responsible for long-term management of the mitigation project.

Communities Turning to Wetlands for Wastewater Treatment

40% of the nation's surface waters fail to achieve water quality standards because of pollutants from nonpoint sources such as farms, streets, parking lots, and suburban back yards. To address this significant source of pollution, communities are looking to wetlands to naturally remove such contaminants as nitrogen and organic compounds from polluted water. One of the most ambitious examples of this approach is the plan under development by the Irvine Ranch Water District ("IRWD").

The IRWD plans to construct about 37 small wetlands scattered throughout the San Diego Creek watershed. Dry-weather runoff from existing and new development will be directed through the network of ponds and marshes where plants and microscopic organisms will absorb nitrogen and other nutrients as well as break down other contaminants. Once biological processes have cleaned it, the runoff will be allowed to flow into the waterways. Some of the wetlands will be installed in existing storm water and flood retention basins. In new development areas, however, the district expects landowners to provide property or easements and to pay for the costs of constructing the wetlands and related facilities.

The IRWD treatment system is modeled after a 1996 marsh restoration project that reduced algae blooms in Newport Bay by 25%. The district diverted the flow from San Diego Creek into a restored wetlands complex where the wastewater was circulated for several days and was filtered by algae, cattails, bulrushes, and other aquatic vegetation. When the water was returned to the creek channel, nitrogen levels were reduced by 50%.

An estimated 1,000 natural treatment projects have been undertaken across the country. The Tennessee Valley Authority has developed nearly two-dozen wetlands to treat acid drainage from its coal mines and coal-fired power plants in Alabama and Tennessee. Constructed wetlands treat municipal sewage in Benton, Tenn., acid mine drainage at Patoka River National Wildlife Refuge in Indiana, metal-contaminated drainage from a steel mill in Pennsylvania, and urban runoff at Lake Whitney in Hamden, Conn.

In California, wetlands remove dairy cow waste from agricultural runoff in Chino, fecal coliform from street runoff in Laguna Niguel, and contaminants from municipal sewage plant discharges in Pacifica. Chevron operates a nitrate-removing wetland at its refinery in Richmond. The Orange County Water District uses a complex of 50 small wetlands behind Prado Dam in Riverside County to remove nitrates from the Santa Ana River before it is allowed to recharge the local groundwater basin.

EPA Brings SPCC Enforcement Actions

In our last issue, we discussed the EPA's revised SPCC regulations. EPA recently announced today it has filed complaints against four municipal garages and two water treatment facilities in New England for failing to complete required oil spill prevention measures. The facilities are located adjacent to water bodies or have stormwater collection systems that drain into water bodies so that an oil or gasoline spill would likely reach surface waters. The facilities are required to come into compliance and face possible penalties for the alleged violations ranging up to $27,500 per facility. Earlier this year, EPA filed complaints against nine other drinking water and wastewater treatment plants in New England for SPCC violations.

Federal Wetlands Enforcement Actions

Pietraszek Enterprises, Inc., its president and vice president have been ordered to restore damages to Monument Creek and adjacent wetlands from the recent construction of their Staybridge Suites Hotel in Colorado Springs.

The Pietraszeks completed construction of the hotel in Spring 2002 without obtaining wetlands permit. The Army Corps of Engineers (the "Corps") ordered the Pietraszeks to cease and desist from their wetlands-related activities, and the Pikes Peak Regional Building Department issued a separate cease and desist order for failure to obtain a floodplain development permit. Furthermore, the actions may have impacted habitat for the Prebles Meadow Jumping Mouse, a federally recognized threatened and endangered species under the Endangered Species Act.

The Pietraszeks were ordered to obtain all required permits, develop a restoration and mitigation plan for EPA for approval using a qualified wetland scientist and install erosion controls to protect the disturbed area and adjacent wetlands from further sedimentation or other pollutants.

State Wetlands Enforcement Actions

A Florida county court sentenced Kenneth Therrien to six months jail and a $5000 fine for filling over three acres of wetlands on his property near Silver Springs. A neighbor who was concerned that Therrien's filling activities would cause flooding contacted the Florida Department of Environmental Protection ("DEP"). The DEP ordered Therrien to stop filling the

wetlands three times before bringing the criminal action.

Meanwhile, a developer was fined $4,000 and order to replace wetlands that were destroyed during road access preparation for construction of a Wal-Mart Super center and Lowe's Home Improvement Center in Unity Township, Westmoreland County. DEP approved plans to fill 750 linear feet of unnamed tributaries to Ninemile Run and the filling in of 0.72 acre of wetlands. Colony will construct 1.63 acres of replacement wetlands adjacent to Ninemile Run. A buffer will be established along another 200 feet of the tributary. During construction, the developer will have to follow an Erosion and Sedimentation Control Plan to manage runoff from the site.

EPA Stormwater Enforcement Actions

EPA filed complaints against two homebuilders for violating storm water regulations at residential development sites in Fairfax Co., Va. EPA is seeking a $32,600 penalty against Centex International, Inc. of Dallas, Tex., for violations at the Avondale Glen development in Great Falls, Va., and a $21,600 penalty against KSI Services, Inc. of Vienna, Va. for violations at three developments in the Lorton Town Center development in Lorton, Va. In addition, EPA ordered Centex to implement applicable storm water permit requirements within 30 days, and required KSI to either cease discharging storm water or apply for a storm water permit within 30 days.

EPA alleged that Centex failed to place perimeter controls around soil piles, did not install diversion dikes and conveyance piping, and failed to limit clearing and grading near a stream channel. Storm water runoff from this site flows into a tributary of Difficult Run which ultimately discharges to the Potomac River.

EPA's complaint against KSI alleges that the company failed to have a storm water permit for three construction sites in the Lorton Town Center development. Runoff from these sites flows into a tributary of Pohick Creek, which drains into the Potomac River.

HAZARDOUS WASTES/USTS

Ready for Reuse Certificate Issued for Federal Facility

EPA and the Texas Commission on Environmental Quality ("TCEQ") issued a "Ready For Reuse" certificate for the Brooks Air Force Base in San Antonio. The Air Force officially transferred the facility to the Brooks Development Authority in July 2002.

The Ready for Reuse technical determination is the first of its kind to be issued in Texas and the first for a federal facility nationwide. The certification verifies that the RCRA corrective action has been successfully completed at the 1300-acre facility and that environmental conditions on this property are protective of its future use as a technology and business park.

Commentary: EPA issued its guidance for recognizing completion of corrective actions in 2001(66 FR 50195, October 1, 2001). The guidance indicated that the agency might issue a completion document after it determines the corrective action requirements of a RCRA permit or corrective action order has been satisfied. For facilities with RCRA corrective requirements in their permits, the permitting agency would modify the permit to indicate that the corrective action has been completed. If there are no other conditions in the permit, the expiration date of the permit could be moved up. At non-permitted facilities with facility-wide corrective action, the completion may be acknowledged by terminating the interim status through the administrative procedures for denying permits. However, the regulatory agency may choose to use alternative terminology such as a "no permit necessary determination". Where the corrective action only involves a portion of a facility, a partial completion determination could be issued. For example, a facility that has completed closure at a SWMU but still conducting post-closure care at a HWMU would not have its interim status terminated

Last year, EPA issued a memorandum "Comfort/Status Letters for RCRA Brownfield Sites" (February 5, 2001) authorizing the use of comfort letters for brownfield sites associated with TSDF or generator-only facilities. The guidance document indicated that the letters may be used to facilitate cleanup or reuse of a brownfield site where there is a realistic

perception or probability that EPA will initiate a RCRA cleanup and there is no other mechanism to adequately address the party's concerns. Examples of such letters include a letter indicating that corrective action is being or has been performed under supervision by a delegated state and that EPA intends to rely on the state to resolve any current or future closure or corrective action. Another type of letter is that corrective action has been performed or is about to be completed at the facility and that EPA does not anticipate further work will be required once the activities have been successfully completed. The last letter suggested by the guidance is that the property has not been identified as being subject to RCRA and therefore EPA does not anticipate initiating any response actions at the site.

Used Oil Mixture Presumption and Small Quantity Generators

The used oil management standards of 40 CFR Part 279 provides that used oil containing more than 1,000 parts per million of total halogens is presumed to have been mixed with a listed hazardous waste and will be regulated as a hazardous waste. This rebuttable presumption does not apply to metalworking oils and used oils destined for reclamation that are contaminated with chlorofluorocarbons (CFCs) removed from certain refrigeration units specified in 40 CFR 279.10. Also not subject to the presumption are mixtures of used oil and the listed hazardous wastes produced by conditionally exempt small quantity generators ("CESQG") that are sent to a used oil collection center. These mixtures are considered excluded CESQG used oil mixture 40 CFR 261.5(j) and 279.10(b)(3).

Used oil handlers can rebut the used oil mixture presumption by showing that the used oil was not mixed with listed hazardous wastes. To qualify for the CESQG exclusion, generators must produce documentation showing that the used oil is mixture was produced by a CESQG and subsequent used oil handlers should maintain the documentation for this used oil stream. Rebuttals from each generator of used oil are necessary to rebut the presumption of mixing when used oils from multiple sources are combined and the total halogen concentration of the mixture is greater than 1,000 ppm.

Owner of Closed Facility Charged With Illegal Storage of Hazardous Waste

The owner of a closed textile company in West Hazleton, Pa., was charged illegally storing hazardous waste at a defunct textile plant. Myron H. Feldman was a part owner in several companies involved in textile manufacturing and dying transported a trailer containing chemicals used in water-proofing fabric to another plants located in East Stroudsburg, Pa. where they sat unused and deteriorating for years. When the second facility ceased operating in May 1998, almost 400 drums and other containers of unusable chemicals were abandoned. The Pennsylvania Department of Environmental Protection (PADEP) conducted a cleanup at the facility in 1995 which cost approximately $ 230,000.

Commentary: When facility operations are terminated, raw materials used in the business may be recycled or sold for reuse without triggering the RCRA hazardous waste management requirements. However, if the containers are abandoned or the materials are allowed to deteriorate so they may no longer be used, they have to be handled as hazardous wastes.

NRC and EPA Enter into MOA

EPA has agreed to allow the Nuclear Regulatory Commission ("NRC") to continue to have primary responsibility for supervising the decommissioning and decontamination of radiological facilities that hold NRC licenses. The Memorandum of Agreement ("MOA") will cover facilities that handle or generate radioactive material including nuclear power plants, medical facilities, research laboratories and industrial facilities. The new agreement extends EPA's NRC deferral policy that was established in 1983.

Under the agreement, EPA would consider listing a facility on the National Priorities List ("NPL") if the agency determines that contamination at a facility currently under the deferral policy was not being properly addressed. As part of the agreement, the NRC agreed to consult with EPA when groundwater is contaminated, if the NRC contemplates a restricted use or residual radioactive soil will remain at concentrations that exceed the levels set forth in the MOA.

EPA Establishes Pilot Rule for Cathode Ray Tubes in Region III

In our July issue, we discussed EPA's proposal to exclude cathode ray tubes ("CRTs") and certain other electronic materials from the hazardous waste regulations of RCRA subtitle C (June 12, 2002, 67 FR 40508-40528). In December, EPA issued a direct final rule excluding used CRTs and glass removed from CRTs from the definition of ``solid waste" in the EPA Region III Mid-Atlantic States (which include the States of Delaware, Maryland, and West Virginia, the Commonwealths of Pennsylvania and Virginia, and the District of Columbia). In addition, rule clarifies when used CRTs and other used electronic equipment become a ``solid waste."

EPA promulgated the direct rule to support an ongoing e-Cycling Pilot Project of EPA Region III's Mid-Atlantic States that is promoting reuse and recycling of electronics. EPA believes that the direct final rule will encourage increased recycling and better management of these materials in Region III states. The agency also hopes that the regional rule will produce information about the CRT conditional exclusion that will be useful to EPA as it assesses the appropriateness of adopting the RCRA exclusion nationally. EPA expects to withdraw the regional rule if and when a final national rule becomes effective. The rule will become effective on February 24, 2003 without further notice unless EPA receives adverse comment by January 27, 2003. If adverse comments are received, the final rule will become a proposed rule.

CRT glass contains lead and this constituent often exhibits the toxicity characteristic ("TC"). As a result, many used CRTs are classified as characteristic hazardous wastes under the RCRA and are subject to the hazardous waste regulations of RCRA Subtitle C unless they come from a household or a conditionally exempt small quantity generator ("CESQGs"). These CESQGs may choose to send their wastes to a municipal solid waste landfill or other facility approved by the state for the management of industrial or municipal non-hazardous wastes, including recycling facilities.

The direct final rule will revise management requirements for used CRTs and glass removed from CRTs by creating a conditional exclusion from the definition of solid waste for these materials when they are recycled within the EPA Region III states. The rule principally addresses used CRTs and glass removed from CRTs destined for recycling in Region III states. The regulations do not distinguish between intact CRTs, and CRTs that are broken.

Used CRTs undergoing repairs before resale or distribution will not be considered "reclaimed" and therefore will be considered to be products ``in use" rather than solid wastes. Used CRTs being recycled in Region III states that are managed under certain conditions will bed excluded from the definition of solid waste. Used, broken CRTs sent for recycling would not be solid wastes if they are transported and stored in an appropriate container in an enclosed building. Users and resellers sending used CRTs to recyclers will have to check with their authorized states to see which RCRA Subtitle C requirements, if any, will be applicable to their activities. However, both used and unused CRTs sent for disposal will remain regulated as a solid waste that is subject to the hazardous waste management program.

The regional rule is narrower in scope than the proposed national rule. The regional rule only includes the conditional exclusion for used CRTs and processed CRT glass. The proposed national rule addresses mercury-containing equipment and export issues.

Commentary: Over the past several years, representatives of original equipment manufacturers, retailers, transporters and dismantlers with EPA Region III and its states to identify barriers to successful recycling of end-of-life electronics, and to propose possible solutions. As part of this effort, Region III and the states developed the State-EPA Region III e-Cycling Pilot Project to test different regional approaches. The purpose of the Pilot Project is to significantly increase the number of end-of-life electronics that are recycled and to determine whether the approaches being implemented in EPA Region III's states will achieve this goal. EPA has also provided funding to assist the Region III states in implementing the Pilot Project. These funds have been used to develop public education and outreach materials, collect pertinent data, and provide general support to the e-

Cycling Pilot Project. The states in the Mid-Atlantic region have, in turn, have provided assistance to local governments having jurisdiction over waste collection activities. The assistance has included development of outreach materials (such as model press releases, public service announcements, brochures, fact sheets and newspaper advertisements) to gain greater participation in the e-Cycling Pilot Project. Meanwhile, the electronic equipment retailers, manufacturers, waste transporters and recyclers have helped develop an infrastructure to transport and recycle these end-of-life electronic materials. For example, several retailers and manufactures already have or are planning ``take back'' programs to allow their customers to return end-of-life electronics to the place of purchase.

Federal Government Files Lawsuit Against NYC for UST Violations

The federal government filed a lawsuit against the City of New York ("NYC") for failing to comply with the requirements of the federal underground storage tanks ("USTS"). 16 NYC agencies or departments collectively owns at least 1,600 underground storage tanks in at least 400 locations The complaint alleges that City facilities failed to comply with the 1998 deadline for upgrading USTs, did not maintain adequate records and failed to take corrective action. Based on the number of USTs it owns, NYC faces a potential fine of $17.6 million a day. NYC officials say it has spent more than $140 million over the past 10 years to bring its USTs into compliance with state and federal laws.

Owner Entitled to Reimbursement From UST Fund Prior to Approval of Cleanup Plan

A Virginia state court allowed a property owner's contractor to obtain reimbursement from the Virginia Petroleum Storage Tank Fund for the costs to remove contaminated soil prior to receiving approval from the state Department of Environmental Quality ("VADEQ").

In *May Department Stores Company v. Commonwealth of Virginia* (No. 3356-01-2, Va. App.), the plaintiff reported the discovery of petroleum releases at a distribution center during the excavation of two USTs in March 1993. On April 2nd, the VADEQ directed the plaintiff to submit an initial abatement measure report ("IAR") and a site characterization report ("SCR"). Three days later, the plaintiff's contractor requested guidance from the VADEQ about the scope of the cleanup. When the VADEQ had not responded in two weeks, the contractor began removing visibly contaminated soil. On April 21st, the VADEQ notified the contractor to remove visibly contaminated soil but did not discuss the scope of the cleanup. After the plaintiff submitted its IAR and SCR, the VADEQ issued a no further action letter.

The plaintiff then applied for reimbursement of approximately $600,000. The VADEQ only authorized payment of $76,000 because of documentary issues. After resubmitting its application, the VADEQ awarded the plaintiff an additional $62,000 but denied reimbursement for removal costs incurred prior to April 21st and for costs of the soil excavation below the water table. The plaintiff appealed the decision and the trial court affirmed. However, the appeals court reversed the decision, ruling that the state UST law required UST owners or operators to take initial abatement actions to prevent further releases or migration. Since these actions do not require prior approval by VADEQ, the court said the plaintiff was entitled to be reimbursed for these expenses.

Commentary: Because of limited funding and instances of fraudulent applications, many state UST trust funds have strict procedures for applying for cost reimbursements. If a UST owner or operator intends to seek reimbursement if a purchaser will be taking an assignment of any rights to reimbursement of UST funds, it is important to understand these eligibility and administrative requirements prior to commencing any UST work or closing the transaction.

State Court Reduces Penalties Assessment Against Lessor of Gasoline Station

In *DNREC v. Front Street Properties* (No. 398, 2001 Sup. Ct. 10/29/02), the Front Street Properties ('FSP") acquired a shopping center with a gasoline station in 1986 and renegotiated the existing lease with Easton Petroleum, Inc. ("Easton"), the operator of the service station. In 1991, Easton filed a chapter 11 bankruptcy proceeding and continued to operate at the

property until it went out of business in 1995. Easton left the USTs at the site. The Delaware UST regulations require that either the owner or operator permanently close USTs that are out-of-service for more than 12 months.

FSP filed an adversary proceeding in the bankruptcy proceeding to force Easton to comply with the terms of the lease. In August 1998, Easton removed the USTs. The state Department of Natural Resources and Environmental Control ("DNREC") then sought civil penalties from FSP and its partner AHK Properties for the period of time that the USTs remained illegally in the ground. The trial judge suspended a portion of the penalties and assessed FSP and AHK $14,500 and $7,070, respectively. The trial court said it reduced the penalties because FSP had no history of environmental violations and its actions did not cause any demonstrable environmental harm. In addition, the court felt the amount of the penalties would be sufficient to notify the regulated community that DNREC should be taken seriously. Both the DNREC and FSP appealed.

FSP argued that it was not liable as an owner or operator of the USTs. The court said that the Delaware Underground Storage Tank Act defined a responsible party has anyone who has a legal or equitable interest in a UST or facility containing a UST. Because the lease provided that all improvements and fixtures at the property were the sole property of the lessor that the lessee had no right to remove, the court rejected FSP's argument it was not a UST owner or operator. Moreover, the bankruptcy proceeding terminated the lease so that USTs reverted to the defendant. The court also found that the trial court had not abused its discretion in reducing the penalties.

Commentary: One of the powerful tools that a debtor has in a bankruptcy proceeding is to reject burdensome leases. If the property owner does not insist that the debtor address environmental issues at the site, the property owner can find itself saddled with the costs of remediating the environmental problems with no recourse to the debtor. Thus, it is important for landlords to evaluate the environmental conditions of any property that a debtor proposes to reject and file claims or request relief from the bankruptcy court.

TOXIC SUBSTANCES

Federal LBP Enforcement Actions

Franklin Pierce Law Center agreed to pay a fine of $22,374 and spend at least $103,265 to resolve alleged violations of federal LBP disclosure rules. EPA alleged that the law school failed to provide student residents with the BP disclosure notices for five homes located in Concord that the law school rents to students Under the terms of the agreement, Franklin Pierce will abate lead paint in the interiors of the properties that it now leases for student housing. The school will follow HUD Guidelines for performing the abatement

EPA also filed enforcement complaints against two Manchester, New Hampshire realty companies for failing to provide required LBP notices to homebuyers and renters. EPA proposed a fine of $33,892 for Senecal Properties and $13,200 for Lacerte Realty.

EPA filed a complaint against New York Presbyterian Hospital seeking $324,060 in fines for failing to provide LBP notices to physicians and their families living in 29 residential units located in White Plains, New York. Seven of those units had children under the age of six and two had children between the ages of six and eighteen. In addition, at least two women were pregnant and gave birth to their children while living in the White Plains housing. Neither received any lead disclosure information from the hospital prior to or during their pregnancies.

Contractor Fined for Improper Disposal of LBP Debris

D&D Sandblasting of Somerset, Mass. agreed to pay a $5,363 fine for failing to properly test and identify lead-containing hazardous waste while sandblasting a building in Falls River, Mass. EPA alleged that the company generated failed to properly test the debris and identify it as a hazardous material. As a result, the paint

debris was included among 8.9 tons of waste shipped to a solid waste landfill that is not licensed to accept hazardous waste. Lead dust and debris also contaminated large parts of the building, including the dance studio, which taught children under age 6 and employed a pregnant dance director.

Commentary: In 1998, EPA proposed to suspend the RCRA toxicity rule for LBP debris generated by deleading, renovation or demolition activities at target housing covered by the LBP disclosure rule as well as public and commercial buildings if the LBP debris was managed in accordance with the requirements of the proposed rule. EPA recently withdrew the proposed rule because of adverse comments. When a building owner hires a contractor who produces hazardous waste, both the owner and contractor can be liable as co-generators of the LBP Debris.

Utility Fined for Abandoning PCB Transformers

A New Hampshire utility agreed to pay a $6,765 fine to settle allegations that it failed to properly mark and store PCB-contaminated transformers and dispose of them in a timely manner. EPA had charged that Fitchburg Gas and Electric ("FG&E") had formerly operated an electrical substation in a building in Fitchburg and had left behind two transformers that were contaminated with PCBs. The agency said the company failed to properly date the two out-of-service PCB-contaminated transformers be properly dated, stored two regulated transformers on site for no more than 30 days without registering the facility and failed to dispose the stored PCB-contaminated transformers be disposed of within one year.

Commentary: This enforcement proceeding shows the importance of determining the status of transformers when acquiring a business with mothballed or abandoned facilities. During due diligence, the purchaser should determine who owns the transformers, if the transformers contain PCBs, if they have been properly registered and whether the owner has complied with the other PCB storage, marking and disposal requirements.

SUPERFUND/BROWNFIELDS

EPA Issues Guidelines for Brownfield Financial Assistance

The Small Business Liability Relief and Brownfield Revitalization Act ("Brownfield Amendments") created a statutory brownfield financing program. In October, EPA issued two guidance documents that establish the new national brownfield program and replace the administrative brownfield assessment and cleanup revolving loan fund pilot programs that the agency established in 1995.

The "*Proposal Guidelines for Brownfields Assessment, Revolving Loan Fund, and Cleanup Grants*" ("Brownfield Funding Guidance") created a two-step procedure for applying for brownfield loans and grants and also contained EPA's preliminary interpretation of the parties and sites that are eligible for financial assistance. EPA indicated that it expected to make up to 200 awards in fiscal year 2003. This financial assistance may be used to address sites contaminated by petroleum and hazardous substances, pollutants, or contaminants including hazardous substances co-mingled with petroleum.

The deadline for submitting preliminary applications (known as Initial Proposals) for the 2003 assessment, revolving loan fund, and cleanup grants was December 16th.

Eligible applicants may apply for three types of funding. The first category is brownfield assessment grants. These grants may be used to inventory, characterize, assess, and conduct planning and community involvement related to brownfield sites. The grants may be awarded to an eligible entity on a community-wide or individual site basis Eligible entities may apply for up to $200,000 to address sites contaminated by hazardous substances, pollutants, or contaminants including hazardous substances co-mingled with petroleum) and up to $200,000 to address sites contaminated by petroleum. Recipients may also use a part of their grant to pay for insurance premiums. Applicants may request a waiver of the $200,000 limits up to $350,000 for sites contaminated by

hazardous substances, pollutants, or contaminants including hazardous substances co-mingled with petroleum and up to $350,000 to address sites contaminated by petroleum. The waiver request is based on the anticipated level of contamination, size, or ownership status of the site. However, this waiver request would have to be processed by EPA headquarters and can complicate review of the applicant's proposal

The second category of financial assistance is the brownfield revolving loan fund ("RLF") grants. Eligible entities may receive up to $1 million for a five-year period to capitalize their own brownfield revolving loan programs. These funds may be used to address sites contaminated by petroleum and hazardous substances, pollutants, or contaminants including hazardous substances co-mingled with petroleum. Coalitions of eligible entities may apply together under one recipient for up to $1,000,000 per eligible entity. These funds may be used to remediate brownfield sites in the form of 1 or more loans to an eligible entity, a site owner, a site developer, or another person selected by the eligible entity.

RLF grant recipients must use at least 60% of the funds to capitalize a revolving loan fund. The RLFs should generally provide no-interest or low-interest loans for brownfields cleanups. An RLF grant recipient may also use its funds to award subgrants to other eligible entities including nonprofit organizations for brownfield cleanups on sites owned by the subgrantee. However, an RLF grant recipient may use no more than 40% of the RLF for cleanup subgrants and may not subgrant to itself. Recipients may also use a part of their grant or loan to pay for insurance premiums.

Existing Brownfields Cleanup Revolving Loan Fund ("BCRLF") recipients, may choose to "transition" their grants to the requirements of the new law. EPA's "*Transitional Guidelines for Brownfield Cleanup Revolving Loan Fund Pilots"* indicated that BCRLF recipients who choose to transition must comply with all requirements of the new law. BCRLF recipients who do not choose to transition will continue to operate pursuant to the terms and conditions of their existing cooperative agreements

The third category of brownfield funding is the brownfield cleanup grants. Eligible governmental entities and non-profit organizations may receive direct grants to remediate eligible brownfield sites owned by the eligible entity or non-profit organization. An eligible entity may apply for two-year cleanup grants of up to $200,000 per site for as many as five sites that are owned by the applicant. These funds may be used to address sites contaminated by petroleum and hazardous substances, pollutants, or contaminants including hazardous substances co-mingled with petroleum. Recipients may also use a part of their grant to pay for insurance premiums.

Both the revolving loan fund and cleanup grants require a 20% cost share which may be in the form of a contribution of money, labor, material, or services from a non-federal source. If the cost share is in the form of contribution of labor, material, or other services, it must be incurred for an eligible and allowable cost under the grant and not for ineligible costs. An applicant may request a waiver of the 20% cost share requirement based on hardship.

The Brownfield Amendments provided that only "eligible entities" may qualify for brownfield funding. In addition, nonprofit organizations may receive cleanup grants. The Brownfield Funding Guidance indicated that eligible non-profits include corporations, trusts, associations, cooperatives, or other organizations operated primarily for scientific, educational, service, charitable, or similar purpose in the public interest that are not organized primarily for profit and use net proceeds to maintain, improve, or expand the operation of the organization.

To be eligible for funding, the property must fall within the new CERCLA definition of a "brownfield site". The Brownfield Amendments listed types of properties that were excluded from funding eligibility. The Brownfield Funding Guidance narrowed some of these exceptions. For example, the Brownfield Amendments stated that petroleum sites may be eligible for funding if they are of "relatively low risk" compared with other "petroleum-only" sites in the state, there is no viable responsible party and the site is not subject to a RCRA

§9003(h) corrective action order. The Brownfield Funding Guidance indicated that sites that are not being cleaned up with federal LUST Funds or that are subject to a response action under the Oil Pollution Act of 1990 ("OPA") would be considered "low-risk" sites. Moreover, to satisfy the requirement that there is no other viable responsible party, the applicant simply has to indicate that it owns the site and is not responsible for the contamination. The fact that financially viable former owners or operators may exist will not preclude the current, innocent owner from applying for brownfield financial assistance.

For mine-scarred lands, the Brownfield Funding Guidance indicated that eligible sites include land, associated waters, and surrounding watersheds where extraction, beneficiation, or processing of coal, ores and minerals has taken place. Examples of non-coal mine-scarred lands include abandoned surface and deep mines, abandoned waste rock or spent ore piles, abandoned roads constructed wholly or partially of waste rock or spent ore, abandoned tailings, disposal ponds, or piles, abandoned ore concentration mills, abandoned smelters, abandoned cyanide heap leach piles, abandoned dams constructed wholly or partially or waste rock, tailings, or spent ore, abandoned dumps or dump areas used for the disposal of waste rock or spent ore, acid or alkaline rock drainage, and waters affected by abandoned metal mine drainage or runoff, including stream beds and adjacent watersheds.

Mine-scarred lands include abandoned coal mines and lands scarred by strip mining such as abandoned surface coal mine areas, abandoned deep coal mines, abandoned coal processing areas, abandoned coal refuse areas, acid or alkaline mine drainage, and associated waters affected by abandoned coal mine (or acid mine) drainage or runoff, including stream beds and adjacent watersheds.

Sites with Controlled Substances that are eligible for brownfields funding may include private residences, formerly used for the manufacture and/or distribution of methamphetamines or other illegal drugs where there is a presence or potential presence of controlled substances or pollutants, contaminants, or hazardous substances (*e.g.,* red phosphorous, kerosene, acids).

For the CERCLA removal action exclusion, the guidance indicated that once a removal action is complete, the property may be eligible for brownfields funding without having to obtain a property-specific funding determination. Applicants for such sites would have to include documentation that the removal action was completed. For purposes of eligibility for brownfields funding, EPA said that a removal action will be considered complete when the actions specified in the action memorandum are met or when the contractor has demobilized and left the site. Parcels of facilities not affected by removal action at the same property may apply for brownfields funding and may be eligible for brownfields funding on a property-specific basis. If a federal brownfields-funded site assessment results in identifying the need for a new removal action, the grantee may continue to expend assessment grant funds on additional assessment activities. However, any additional expenditure of federal brownfield funds and any additional site assessment activities should be conducted in coordination with the OSC for the site. Nevertheless, sites where there are removal actions may be eligible for brownfields funding if a grant or loan applicant can demonstrate that brownfields funding will ensure protection of human health and the environment and promote economic development, or the preservation of green space. In such cases, EPA will consider providing funding to an eligible entity for assessment or clean up activities at the site, on a property-specific basis.

The exclusion for RCRA-regulated sites does not include RCRA interim status facilities that are not subject to any administrative or judicial order or consent decree, interim status facilities that are subject to administrative or judicial orders that do not include corrective action requirements or any other cleanup requirements, and parcels of RCRA facilities that are not subject to a RCRA permit or administrative or judicial order. While permitted facilities that have filed closure notifications and are proceeding with final closure are generally not eligible for funding, RCRA hazardous waste landfills that have submitted closure

notifications may be eligible for brownfields funding if a grant or loan applicant can demonstrate that brownfields funding will ensure protection of human health and the environment and promote economic development, or the preservation of green space. EPA will consider providing funding to an eligible entity for assessment or clean up activities at the site on a property-specific basis. Any property or site that has been issued a RCRA permit may also be eligible for brownfields funding on a site-specific basis if a grant or loan applicant can demonstrate that brownfields funding will ensure protection of human health and the environment and promote economic development, or the preservation of green space.

EPA said that the exclusion for properties held or under the control of the federal government would not apply to privately-owned, Formerly Used Defense Sites ("FUDS") or privately-owned, Formerly Utilized Sites Remedial Action Program ("FUSRAP") properties. In addition, the exclusion would not apply to other former federal properties.

The guidance indicated that the PCB exclusion applies to portions of properties where there has been a release or disposal "PCB remediation waste" and EPA has initiated an involuntary action to address the PCB contamination. However, the exclusion will not apply for site assessment grants for portions of properties where EPA has initiated an involuntary action with any person to address PCB contamination. EPA also indicated that all portions of properties are eligible for cleanup and RLF grants except where EPA has an ongoing action against a disposer to address PCB contamination.

The LUST exclusion will not apply for any of the USTfields pilots, sites or portions of properties where an assessment was completed using LUST trust funds and the state has determined that the site is a low-priority UST site but additional cleanup is required and the site is a good candidate for economic revitalization. Another category of LUST sites that are eligible for brownfield funding are sites or portions of properties where LUST money was spent for emergency activities, the site was then determined to be ineligible for further expenditures of LUST trust funds but additional funding is necessary for continued assessment and/or cleanup that will contribute to economic revitalization of the site. Finally, when a state agency has used LUST trust fund money for state program oversight activities but has not expended LUST trust funds for specific assessment and/or cleanup activities at the site, the site may be eligible for brownfields funding under a property-specific basis.

EPA To Award New Job Training Grants

EPA also announced that the deadline for submitting proposals for the new National Brownfields Job Training Grants has been extended to February 14, 2003. To assist applicants, the agency issued a "*Proposal Guidelines for Brownfields Job Training Grants*" (67 FR 79083, December 27, 2002).

Eligible entities and non-profit organizations may be awarded National brownfields job training grants The grants may be used to provide training to facilitate site assessment, remediation of brownfields sites, or site preparation. Each Job Training grant may be up to $200,000 for a two-year period. EPA expects to select approximately 10 Brownfields Environmental Job Training grants by the end of April 2003. Grant applicants must be located within or near one of the EPA-funded brownfields grant communities.

The National Brownfields Job Training Grants will be awarded on a competitive basis using a one-step proposal selection process. As with the brownfield funding program, applicants for job training grants will be evaluated using two criteria: threshold criteria and ranking criteria. Applicants must meet the threshold criteria to be considered for an award. Once past this hurdle, the applicants will be evaluated using the ranking criteria to determine whether to make an award and the amount of funds to be awarded.

EPA Announces Targeted Brownfield Assessments

Since 1997, the EPA has been funding state and tribal response programs including Superfund Core funding for state and tribal voluntary cleanup programs as well as pre-remedial site assessment funding for conducting Targeted Brownfields

Assessments ("TBAs"). This program has been used in the past to supplement state and tribal assessment activities at Brownfield sites and was funded by appropriations to the superfund program.

EPA recently announced that would award up to $1.5 million in Targeted Brownfields Assessments grants (67 FR 70594, November 25, 2002). This round of Targeted Brownfield Assessments will be funded out of the $50 million state response program authorized by the Brownfield Amendments.

The specific eligibility requirements are set forth in the "Grant Funding Guidance for State and Tribal Response Programs." In general, for a state or Indian tribe to receive funding under CERCLA section 128(a), it must either have entered into a Memoranda of Agreement ("MOAs") with EPA or demonstrate that their response program has the following elements:

A timely survey and inventory of brownfield sites in the state or tribal land- EPA will negotiate work plans with states and Indian tribes to achieve this goal efficiently and within a realistic time frame.

Oversight and enforcement authorities or other mechanisms and resources- States and Indian tribes must include, or demonstrate that they are taking reasonable steps to include enforcement, funding, or other programmatic resources (including staff) to ensure that the necessary response activities are completed if the person conducting the response activities fails to complete the activity, including operation and maintenance or long-term monitoring activities.

Mechanisms and resources to provide meaningful opportunities for public participation- States and Indian tribes must include, or be taking reasonable steps to include mechanisms and resources for public participation, including public access to documents, a mechanism enabling persons in communities affected by a brownfield to request performance of a site assessment, and

Mechanisms for approval of a cleanup plan and certification that cleanup is complete- This mechanism can include a licensed site professional program.

Additionally, states and Indian tribes including those with MOAs (Arkansas, Colorado, Delaware, Florida, Illinois, Indiana, Kansas, Maryland, Michigan, Minnesota, Missouri, New Mexico, Ohio, Oklahoma, Rhode Island, Texas, Virginia, Wisconsin, and Wyoming) must maintain and make available to the public a record of sites at which response actions have been completed in the previous year and are planned to be addressed in the upcoming year in order to qualify for section 128(a) funding.

Commentary: The Targeted Brownfield Assessment program can be a valuable alternative to developers and non-profits that do not qualify for or receive the competitive national brownfield grants. Targeted site assessment grants can be used by community groups to determine if a site poses health risks to nearby residents. Unlike the competitive brownfield grants, community groups do not need to own the site to qualify for this financial assistance but only have to have access to the site.

EPA Launches Green Building Brownfield Initiative

To spur construction of environmentally friendly buildings on Brownfields properties, EPA recently awarded eight Green Buildings on Brownfields demonstration pilot projects. Green buildings conserve energy, water and materials and create healthy indoor and outdoor environments. EPA will provide $15,000T in technical assistance primarily in the form of consultant services for building design and water efficiency. EPA hopes these pilots serve as models for localities and developers to build residential, commercial, institutional and industrial buildings green buildings or remodeling of existing buildings on Brownfields. The projects are located in: Springfield, Mass.; Toledo, Ohio; Kauai, Hawaii; Mt. Shasta, Calif.; Spartanburg, S.C.; Little Rock, Ark.; St. Louis, Mo.; and Baltimore, Md. The pilots include and even major.

For example, the Green Building on Brownfields for Springfield involves construction of a 25,000 square foot building on a Brownfield that incorporates the following design elements: optimal energy performance, use of renewable energy sources, daylighting technology, and the use of low-emitting construction materials. The area consists of ten properties, totaling 1.2 acres. Springfield previously received a $400,000 Brownfield Assessment Pilot grant.

Report Discusses Obstacles for Developing Rural Brownfields

A report by the National Association of Development Organizations found brownfield redevelopment in rural and small metropolitan areas faces many obstacles. According to "*The State of Rural and Small Metropolitan Brownfields Redevelopment",* the most common challenges for rural brownfields are limited local funding resources and technical assistance for leveraging additional funds, misinformation about the costs and health risks associated with brownfields, reuse restrictions, inconsistent support from state programs, rural demographics that limit local technical expertise and drives up project costs, and rural geography that drives down redevelopment demand because of the abundance of green space.

Indianapolis Establishes RLF

The City of Indianapolis recently created a brownfield revolving loan program that will provide $300,000 in financial assistance to developers and non-profits to investigate and remediate brownfields. Since the program's inception, the city has awarded seven grants totaling $82,282.

Under the city RLF, grants are available for community groups and non-profits. The maximum grants to these groups will be $20,000 with a 50% match. In addition, loans of up to $50,000 are available for private developers and non-profits. The loans will carry interest rates ranging from 2.5% to 3.0% depending on the length of the loan.

HUD Awards 23 Brownfield Grants

HUD recently awarded $25.3 million in Brownfield Economic Development Initiative ("BEDI") grants to 23 communities. The agency also guaranteed $98.8 million in section 108 loans for projects on brownfield sites. Since 1998, HUD has awarded $124 million in BEDI grants and $548 million Section 108-guaranteed-loans in 99 communities. These funds have leveraged another $3.2 billion in other public and private funds.

Anaheim will receive $650,000 of BEDI funds and $6.5 million in Section 108 loan funds for the development of a brownfield site as a 25-acre retail center and public plaza. The project will include a home improvement center, a supermarket, four retail establishments and restaurants. The City estimates the project will result in the creation of 605 new jobs. The BEDI funds will be used to fund the first two years of interest payments on the Section 108-guaranteed loan and the Section 108 funds will be used to fund property acquisition, demolition and relocation. An additional $3.3 million in other public development funds have been committed to the project. Total project costs are estimated to be more than $50 million.

Bakersfield will receive $250,000 of BEDI funds and $1 million in Section 108 loan funds to redevelop a brownfield site on the Old Town Kern Mixed-Use Project. The project will develop 40,000 square feet of new retail space, rehabilitation of a 23,000 square foot building, construction of 50 units of senior citizen housing, along with the construction of a public plaza area and a cultural theater. The Old Town Kern Mixed-Use Project is expected to create 106 new jobs for the community. The City will use the BEDI grant and the Section 108 loan for acquisition and clearance. The City expects this project to generate an additional $952,500 in other private investment. Total project costs are estimated to equal $13 million.

Los Angeles will receive $2 million of BEDI funds and $5,525,000 million of Section 108 loan funds for a brownfield site in South Central Los Angeles. The new development will involve the demolition of Santa Barbara Plaza and the construction of new retail space, homes, senior housing and a community center. The Marlton Square development is expected to create 413 new jobs for the community along with 140 homes for moderate-income homebuyers and 180 units of affordable senior housing. The City will use the BEDI grant for interest payments on the Section 108 loan, as well as for demolition and environmental remediation. The Section 108 loan will be used for property acquisition and the relocation of existing businesses. Total project costs are estimated at $125 million.

Los Angeles will also receive $1,400,000 of BEDI funds and $7,400,000 million in Section 108 loan funds for the Black and Decker property in the San Fernando Valley. The developed will include construction of new retail and industrial space, anchored by a Lowe's home

improvement store and a Gigante supermarket. The project is expected to create 622 new jobs for the community. The City will use the BEDI grant for interest payments on the Section 108 loan and for project delivery costs. The Section 108 loan will be used for property acquisition. The City expects this project to leverage an additional $3,000,000 in private investment. Total project costs are estimated at over $40 million.

Richmond will receive $1 million of BEDI funds and $1 million in Section 108 loan funds for 13.9-acre brownfield site in the downtown redevelopment area. The Miraflores Housing Development Project will develop 100 low-income rental units and 100 ownership units for sale to low- and moderate-income first time homebuyers. The City will use the BEDI grant and the Section 108 loan guarantee for environmental remediation and site preparation. The City expects this project to generate an additional $1 million in other private investment. Total project costs are estimated to be $55 million.

San Jose will receive $2 million of BEDI funds and $18 million of Section 108 loan funds to construct two retail centers. The project will involve remediation of the site where gas stations, dry cleaners and abandoned agricultural wells have been located. The BEDI funds will be used to assist in land assembly. The Section 108 loan will also be used to finance land assembly and acquisition. The City's Redevelopment Agency has committed an additional $14 million to the project and estimates the creation of more than 600 jobs. Total project costs are estimated to total $71.4 million.

Visalia, California will receive $244,000 of BEDI funds and $855,000 of Section 108 loan funds to construct a parking structure in conjunction with a major expansion of the Kaweah Delta Health Care District Hospital in the downtown area. The BEDI funds will be used to acquire and remediate a nearby brownfield site, relocate existing businesses and demolish existing structures. The Section 108 funds will be used for design and land assembly costs for the parking structure. The first phase of the hospital expansion is expected to generate 200 new jobs, with total project costs of $75 million.

Miami will receive $1 million of BEDI funds and $4 million in Section 108 loan funds for a brownfield project that will result in 198 units of affordable and market rate for-sale housing along with new commercial and retail space. The Wagner Square Project is expected to create 195 new jobs for the community. The City will use the BEDI grant for site remediation. The Section 108 loan will be used for acquisition, remediation and construction. Total project costs are estimated to total $34 million.

Pompano Beach will receive $500,000 of BEDI funds and $2.8 million of Section 108 loan funds for remediation and redevelopment of a brownfield site in the City's Northwest Community Redevelopment Area. The project will include 24 acres of retail and office space, housing for the elderly and mixed-income housing, and is expected to create 238 new jobs for the community. The City will use the BEDI grant to pay the interest on the Section 108 loan for the first two years. The108 loan will be used for property acquisition, remediation, relocation and construction costs. The City expects this project to generate an additional $500,000 in other public funds. Total project costs are estimated to be $55 million.

Rockford, Illinois will receive $300,000 of BEDI funds and $900,000 of Section 108 loan guarantee to remediate a brownfield site in the South Main Street Redevelopment project. The City will use the BEDI grant for remediation and the Section 108 loan will be used by the Rockford Local Development Corporation for part of the construction of the project. Approximately $4.4 million of other public dollars have been leveraged for the project, and total project costs are estimated at $ 7.2 million.

Waterloo, Iowa will receive $2 million in BEDI funds and $8.75 million in Section 108 loan funds to finance brownfields redevelopment, river walk improvements and affordable housing along its Cedar Valley Riverfront Renaissance initiative. The BEDI funds will be used to finance the River walk Loop project as well as site clearance activities at brownfield sites in the East River District. BEDI funds will also be used to provide homebuyer assistance to low- and moderate-income families in the Cedar River neighborhood. The Section 108 loan will be used to finance the acquisition of brownfield properties and for other site improvements. The City estimates the creation of more than 580 jobs as a result of these investments and total project costs are estimated to at more than $72.5 million.

Worcester, Mass. will receive $1 million of BEDI funds and $2.45 million in Section 108 loan funds for the 30 acre Gardner-Kilby-Hammond Street Neighborhood Revitalization Project. The project includes the construction of a new Worcester Boy's and Girl's Club facility, the Clark University athletic complex and 80 units of affordable rental and homeownership housing. The Gardner-Kilby-Hammond project is expected to create 300 new jobs for the community. The City will use the BEDI grant and the Section 108 loan for site preparation and environmental remediation. The City expects this project to generate an additional $3 million in other private investment. Total project costs are estimated at $32 million.

Flint, Michigan will receive $780,000 of BEDI funds and $1,872,000 of Section 108 loan funds to remediate and rehabilitate a downtown 55,000 square foot building and its 20,000 square foot annex. The BEDI funds and the Section 108 will be used to assist in the remediation and rehabilitation of the buildings and for working capital. The City estimates that 213 jobs will be created as a result of the project. Total project costs are estimated at $2.9 million.

Wayne County will receive $650,000 of BEDI funds and $750,000 of Section 108 loan funds to remediate and redevelop a brownfield site in the City of Hamtramck. The project will include rehabilitation of 62 homes and the construction of 50 new homes for low- and moderate-income residents. Wayne County will use both the BEDI grant and the Section 108 loan for site preparation and construction costs. The County expects this project to generate an additional $2,096,774 in other public funds. Total project costs for the development of the infrastructure are estimated to be $2,400,000.

Carlsbad, New Mexico will receive $775,000 in BEDI funds and $2,015,000 in Section 108 loan funds for a water park on the 35-acre Burlington Northern Santa Fe Railway brownfield site. The BEDI and 108 funds will finance infrastructure and construction costs, as well as architectural and engineering fees. The BEDI funds will serve as a grant and the Section 108 funds will be a loan to the private developer of the water park. An additional $2,060,000 will be leveraged by the BEDI funds, with total project costs of $4,850,000. The City estimates the creation of 100 new jobs through the development of the water park.

New York City will receive $665,000 of BEDI funds and $3,265,000 in Section 108 loan funds to redevelop the former Rheingold brewery in Brooklyn. The project

will create 40 new units of low-income condominium housing units along with 18,000 square feet of new retail space to enhance community access to such services as a supermarket. The City will use the BEDI grant to as a loan loss reserve for the Section 108 loan guarantee and for construction of the commercial and retail portion of the development. The Section 108 loan will also be used to finance construction of the new commercial and retail space. The City expects this project to generate an additional $2,112,000 in other public funds. Total project costs are estimated to be $11,900,000.

Yonkers will receive $1 million of BEDI funds and $3 million in Section 108 loan funds to develop the 4-acre Nepperhan Valley Industrial Center in the Yonkers federal Empowerment Zone. The BEDI funds will be used for acquisition of the parcels needed for the Industrial Center and to finance a portion of the required remediation of the brownfield site. The Section 108 loan will be used by the City to partner with a private developer for the acquisition and construction of commercial and industrial flex-space buildings. The funds will also provide assistance to finance relocation activity, clearance, demolition, site preparation and the construction of site improvements, along with loans to businesses locating to the Center. The project is expected to create 76 new jobs, and total project costs are estimated to be $8.9 million.

Chester County, Pennsylvania will receive $2 million of BEDI funds and $4 million in Section 108 loan funds for remediation and site preparation the former Phoenix Steel Plant in the Borough of Phoenixville. The project will involve waterfront, commercial and retail development, and is expected to create 200 new jobs. The County will use both the BEDI grant and the Section 108 loan for remediation and site preparation. Leveraging of public resources is estimated at $3.1 million and the total project costs are estimated to be $60 million.

Pittsburgh will receive $1.5 million of BEDI funds and $4.5 million in Section 108 loan funds to redevelop the South Side Works Project. The City will construct a five level, 810-space parking garage, which will support an office building as well as a retail, restaurant and entertainment complex. The City will use the BEDI and the Section 108 loan for construction of the parking facility. Total project costs are estimated to be $13 million.

Reading will receive $1.1 million of BEDI funds and $3.5 million in Section 108 loan funds to develop a 65,000 square foot office building. The City will use the BEDI and the Section 108 loan guarantee to finance the construction. The city expects the project will create 150 new jobs and generate an additional $4.9 million in other private investment. Total project costs are estimated to be $10 million.

East Providence, Rhode Island will receive $2 million of BEDI funds and $3 million in Section 108 loan funds to develop construct approximately 75,000 square feet of retail and office space. The East Pointe Commercial Development Project is expected to create 145 new jobs for the community. The City will use the BEDI grant and the Section 108 funds for acquisition, remediation and construction. Total project costs are estimated to be $20 million.

Orem, Utah will receive $500,000 of BEDI funds and $3 million in Section 108 loan funds to create a business loan fund. The loan fund will be used along with private funds to redevelop blighted commercial and industrial areas within the City. The Section 108 funds will be used to assist existing businesses and attract new businesses to the City. The BEDI funds will be used in conjunction with the Section 108 loan funds in a ratio of one dollar for every six dollars of 108 funds. In addition to these funds, the City of Orem has committed $125,000 of in-kind services to the project. The City anticipates that a minimum of 175 jobs will be created through the loan fund, with total project costs of $3,825,000.

EPA Announces a Handful of PPAs

Some EPA regional offices are continuing to enter into Prospective Purchaser Agreements ("PPAs") to facilitate sales of contaminated property. The agreements surveyed in this issue have fairly sophisticated sales provisions.

For example, the Town of Oyster Bay (the "Town") entered into a PPA to acquire a 15-acres of the 30-acre Liberty Industrial Finishing Superfund site in Farmingdale, Long Island that will be used to expand a public park. In exchange for a

covenant not to sue, contribution protection and the release of the unperfected federal lien against the property, the Town will pay to EPA the difference between the value of the property in an uncontaminated condition ("clean value") which will not be less than $5,300,000 and the condemnation award that the Town will be required to pay to the owners of the Property to take the property by eminent domain taking provided that the Town shall not pay less than $500,000. EPA will have the right to object to the amount of the condemnation award and retain its own appraisal to determine the clean value of the property for its highest and best use. If the Town objects to EPA's appraised clean value, a third appraiser shall be appointed to determine the value of the property. The clean value would then be the greater of either the amount determine by the third appraiser or $5,300,000. The Town also had the option to pay EPA $4,152,000. In addition, the Town will remove approximately 73,000 cubic yards of soil that will be disposed at an off-site facility and backfill the excavation with clean soil. The Town will also remove all liquids and sludges from USTs and subsurface structures on the site, and impose record a deed restrictions limiting the property use to commercial/industrial purposes or recreational uses on the western side of the site. Interestingly, the Town is also required to exercise "appropriate care" as required by the 2002 Brownfield Amendments as opposed to the "due care" traditionally used in PPAs. The Town also had to acknowledge that it might not be able to use the site until the remedy was completed and that the groundwater treatment system was under the control of the parties responsible for performing the groundwater remedy.

EPA entered into a PPA to allow a bankruptcy trustee to transfer 140 acres of the 500-acre Midwest Portland Cement Superfund Site located in East Fultonham to the successful bidder through a judicial sale. The site had been operated by the Midwest Portland Cement Company ("MPC") as a cement manufacturing and limestone mining facility until ceasing operations in March 1993. The buildings were demolished or salvaged by a contractor and numerous containers, drums, tanks and transformers containing hazardous substances remained at the hazardous. EPA issued a 106 order to MPC and the contractor 1996 but neither party completed the work. In May 1997, an involuntary petition for liquidation was filed under chapter 7 of the Bankruptcy Code and a bankruptcy trustee was appointed in June 1997. In November 1997, bankruptcy court awarded administrative expense priority to EPA and the agency initiated response actions that were completed in January 1998. The trustee and EPA settled EPA's claim and filed a motion for approval of an allowed claim of $350,000. The purchaser, Belmont Leasing, intends to conduct limestone and other mineral mining operations at the site. In exchange for a covenant not to sue, the purchaser will pay $350,000 to EPA, provide future access to the Site, exercise due care with respect to any existing contamination, cooperate with EPA and the Ohio Environmental Protection Agency ("OEPA""), comply with all relevant environmental laws and regulations including closure of any remaining hazardous waste management units identified by OEPA and record a notice of the PPA and the remedy selected by EPA in the title records for the site.

The PPA for the Barber's Orchard Antique Mall in Waynesville, North Carolina was particularly interesting because it was the first time we have seen a PPA contain a waiver of EPA's right to perfect a windfall lien under the Brownfield Amendments. The 500-acre site had been used as an apple orchard from the early 1900s until 1988. During that time, the owners used an unconventional pesticide spraying system consisting of underground piping and mixing/pumping stations that carried a dilute pesticide from a central mixing area throughout the orchard. Hoses were connected to valves to spray trees. The site became heavily contaminated with pesticides from leaks, spills and flushing of the lines. A residential development was constructed on the property in 1988. After pesticide contamination was discovered in 1999, EPA initiated an emergency removal action and began excavating contaminated soil from 28 residences. The property was placed on the NPL in 2001. In exchange for a covenant not to sue and contribution protection, the purchasers agreed to pay EPA $3,000, exercise due care, provide access to EPA, record a notice of the PPA in the local land records and exercise due

care. EPA also agreed to waive its right to perfect a windfall lien on the property.

The consent decree in *U.S. v. JoAnne Pollio as Executrix of the Estate of Richard Pollio* (3:00 CV 2451 GLG) effectively operated as a PPA. In this matter, Richard Pollio was the president, director and sole shareholder of Somers Industrial Finishing Company ("Somers"). Fro, 1972 to 1984, Pollio held title to the site where Somers operated its metal finishing business. From 1978 to 1985, title to the land was held in a trust and Somers acquired the property in January 1985.

In 1996, EPA notified to Somer providing the company with the opportunity to perform or finance a removal action at its facility. When Somer did not respond, EPA conducted a removal action at the Somers facility in 1997 and incurred $979,500 in response costs. Richard Pollio died on December 19, 1999 and his wife, Jo Anne Pollio, was appointed executrix of the estate in March 2000. On November 7, 2000, EPA notified the estate that it was a PRP and the agency perfected a lien on the property for the amount of its response costs.

Under the terms of the consent decree, the estate agreed to pay EPA $106,000 in past response costs within 30 days of the entry of the decree, construct a chain link fence around the perimeter of the cap, seed any areas of the cap that was not covered with vegetation, and use its best efforts to transfer the property. Best efforts were described as listing the property with a broker, advertising the property for sale in trade journals or newspapers of general circulation, responding to reasonable inquiries and allowing the property to be shown at reasonable times. The estate was also required to file a deed notice indicating that EPA had conducted a removal action and that contaminated soil existed beneath an impermeable cap that was covered with stone and loam. Any proposed sale price must be at least equal to 90% of the fair market value of the property which was either the price obtained under actual market conditions, the price obtained at a foreclosure sale or the balance of the mortgage if there was a transfer by deed or other assignment in lieu of foreclosure. The estate would tender the net sales proceeds to EPA within 30 days of the effective date of any transfer. The instrument conveying title would have to have a provision whereby the purchaser agreed not engage in enumerated prohibited activities such as drilling, excavation or removal or soil above or adjacent to the cap. The conveyance instrument would also indicate that the United States was a third party beneficiary of the agreement. In addition, within 30 days of transferring title or the termination of the estate's obligation to transfer the property, the estate would make an additional payment of $10,000 to further reimburse EPA for its past response costs. If the estate was unable to sell the property within one year of the effective date of the consent decree, the United States had the right to commence a judicial sale of the property pursuant to 28 U.S.C. §2001 and 42 U.S.C. 9607(l). The consent decree also contained stipulated penalties of $200 per day per violation. In exchange for the foregoing, the estate would receive a covenant not to sue and contribution protection.

California State Superfund Law Does Not Require NCP Compliance

The California Court of Appeals for the Fourth District ruled that the state Polanco Redevelopment Act does not require compliance with the NCP, thereby allowing a redevelopment agency to recover cleanup costs associated with the redevelopment of a contaminated site in downtown San Diego.

In *Redevelopment Agency of the City of San Diego v. Salvation Army* (Cal. Ct. App., 4th Dist., D038835, 10/21/02), the San Diego Redevelopment Agency discovered USTs while performing an environmental site assessment of the 35 blocks East Village Redevelopment District. The city requested that the site's current owner, the Salvation Army, prepare a remediation plan. When the Salvation Army failed to comply with the request, the city implemented its own cleanup. Lead from incinerator ash was also discovered during the cleanup. The city then sought recovery of its cleanup costs from the Salvation Army.

A trial court awarded the city $236,800 and the Salvation Army appealed, arguing that the city's excavation and removal actions did not constitute necessary responses to "an actual threat to human health or the environment," as required by the NCP. However, the appeals court found that while the Polanco Act did incorporate

CERCLA's definition of PRPs, the law did not incorporate CERCLA's procedural requirements for performing cleanups. Instead, the court said the law authorizes a redevelopment agency to take any necessary actions that are consistent with other state and federal laws and does not limit a redevelopment agency's rights to those available under CERCLA. Since the redevelopment agency complied with all of procedural requirements of the Polanco Act, the appeals court affirmed the lower court ruling.

In a similar case, the Michigan Court of Appeals ruled in *Omega Environmental, Inc. v. Saco & Saco, Inc* (No. 223195, Mich. App. 9/20/02) that the state superfund law did not require compliance with the NCP. Moreover, the court said that cleanups could exceed applicable standards when it was necessary to protect future exposed parties such as construction workers and that the costs for such work were recoverable.

Commentary: In the 1980s, many states enacted their own superfund laws that modeled CERCLA. However, as Superfund reform became bogged down at the federal level, states began modifying their own superfund laws to provide incentives for redeveloping contaminated. As a result, many state superfunds may now share some similarities with CERCLA but have their own unique innocent purchaser or lender liability provisions as well as their own cleanup procedures that permit the use of risk-based cleanups. Since these state laws generally permit cost recovery or contribution actions, it is important for purchases of business or property to understand the local superfund laws and to tailor their due diligence to satisfy the requirements of those states.

For example, purchasers in New Jersey must perform a preliminary assessment to qualify for the state innocent purchaser's defense. This investigation addresses more issues than the ASTM E1527-00. Thus, a purchaser performing a Phase I ESA that meets the requirements of the ASTM E1527-00 will not be able to assert the innocent purchaser's defense in New Jersey.

Contribution Actions May Proceed In Absence of Federal Enforcement Action

An *en banc* panel of the Court of Appeals for the Tenth Circuit reversed an earlier decision and held that CERCLA contribution suits may be commenced costs without a pre-existing federal enforcement action or a private party action.

In *Aviall Services Inc. v. Cooper Industries Inc.*, (5th Cir., No. 00-10197, 11/14/02), the plaintiff purchased property in 1981 that had been used for aircraft maintenance by the defendant. Several years later, the plaintiff discovered the property was contaminated and remediated the site pursuant to an order issued by the Texas Natural Resource Conservation Commission ("TNRCC"). The plaintiff filed a contribution action in 1997 but the district court denied the claim because no CERCLA claims had been filed against Aviall. A three judge panel of the Fifth Circuit affirmed the trial court's ruling. The panel based its opinion on the first sentence of CERCLA section 113(f) that states any person may seek contribution from any person liable or potentially liable under section 107 during or following any civil action brought under sections 106 or 107 of CERCLA. However, the full court rejected both rulings, saying the prior decisions had effectively converted the term "may" to "shall" or "must" so that contribution claims were only available following the filing of a CERCLA civil action. Instead, the court said the proper reading of the phrase was a statement of non-exclusive circumstances under which a contribution action could be brought.

A similar decision was reached by the federal district court for the eastern district of Wisconsin in Waukesha v. Viacom Inc.(No. 01-C-872). In that case, the plaintiff owned a landfill and brought a contribution action against successors of generators who had disposed hazardous substances in the landfill from 1970 until 1996. The court agreed with the *Aviall* case and denied the defendants motion to dismiss.

Likewise, in *218 Lakeview Associates, L.P. v. Bigayer* (N.Y.L.J. Sept. 10, 2002 E.D.N.Y.), the owner of a shopping center was allowed to file a contribution action against former owners of dry cleaners that had caused releases of PERC at the property. The plaintiff entered into a voluntary cleanup agreement with the state Department of Environmental Conservation ("NYDEC") to remediate soil and

groundwater. The federal district court ruled that CERCLA section 113(f) does not require a party to be subject to an CERCLA action and denied the defendant's motion to dismiss.

Commentary: Nearly every state has established a voluntary cleanup program to help encourage the remediation of contamination properties. One of the keys to the success of these programs is the ability of the volunteer to seek recovery under of its cleanup costs under CERCLA from parties that are responsible for the contamination, particularly if the state superfund or brownfield law does not have an adequate mechanism for recovering costs from responsible parties . Fortunately, courts in the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits have ruled that plaintiffs do not have to be subject to enforcement actions to bring CERCLA contribution actions.

EPA To Perform Removal Action at Shopping Center

EPA has agreed to perform a cleanup at a shopping center where a string of dry cleaning establishments released tetrachloroethylene ("PCE") into the soil and groundwater beneath the site.

Since 1964, the current property owner has leased a portion of the building to dry cleaning businesses. In March 2000, two drums of PCE waste were found abandoned in a wooded area near the property. The Connecticut DEP conducted a soil and groundwater investigation at the site that revealed high concentrations of PCE in soils and groundwater. The contamination is believed to have occurred in the 1990s while a previous dry-cleaning business operated on the site. EPA estimates the cost of the removal action will be $360,000

Meanwhile, Michael Rosenberg who operated Avenue Cleaners at the site from 1995 to 1999 agreed to pay $249,054.70 in restitution and was sentenced to 18 months in prison after pleading guilty to illegally dumping hazardous waste in two Connecticut towns.

Commentary: The owner of the property will likely be required to reimburse EPA for costs incurred above the amount of the restitution since the owner leased the space to the dry cleaner that was responsible for the contamination and benefited from that operation from the rent it received. Since the owner executed a lease with the responsible party, it will not be able to assert the CERCLA third party defense.

This case also illustrates the importance of performing comprehensive historical investigations at older shopping centers. While current dry cleaners may operate their businesses in an environmentally sound manner, a recent study from Florida indicated that over 90% of dry cleaners operating before 1990 have released dry cleaning solvents into the environment. The ASTM E1527-00 standard also only requires that consultants review historical sources at five-year intervals. This interval can be a problem for older shopping centers that may have had dry cleaners. Yet, the average dry cleaner operates for three years so a five-year interval might not identify the existence of a dry cleaner tenant.

Another data gap routinely encountered is reliance on city directories to identify former tenants at shopping centers. However, many city directories only list the owner of the property. To ensure that a comprehensive list of tenants is developed, the client should request the consultant to review commercially available business directories. These directories should be reviewed for every year that the shopping center was in existence to make sure that environmentally problematic tenants like dry cleaners will be identified.

ENVIRONMENTAL CASES INVOLVING CORPORATE AND REAL ESTATE TRANSACTIONS

District Court Allows Lawsuit to Proceed Against Dry Cleaner Franchisor

A federal district judge for the eastern district of Louisiana allowed a

lawsuit to proceed against the franchisor of three dry cleaner establishments that allegedly released Perchloroethylene ("PERC") into the soil and groundwater at a shopping center.

In *Stewart-Sterling One, LLC. v. Tricon Global Restaurants, Inc.* (Civ A 00-47, August 9, 2002), the current owner of a shopping center alleged that PERC had migrated from an adjoining property that was currently owned by Kentucky Fried Chicken ("KFC") and been operated as a dry cleaner business from 1963-1991.

KFC had purchased the former dry cleaner property in 1991. Prior to the acquisition, KFC had performed a phase I that had disclosed the existence of an aboveground storage tank that had been used to store PERC. KFC demanded that the tank be removed as a condition of the closing but did not perform a phase II to determine if the dry cleaning operations had impacted the property. After the closing, KFC razed the existing structure and constructed a new restaurant. When KFC tried to sell the property in 1998, a prospective purchaser performed sampling that revealed the site had been impacted with PERC and that the PERC had migrated under an adjoining shopping center.

The plaintiff then brought a RCRA citizen suit against KFC to compel a cleanup and sought to hold the franchisor vicariously liable for the acts of its former dry cleaning franchisees. Under Louisiana law, a person may be liable for the acts of an agent when the person had the right to control the physical details of the agent to an extent that would suggest that there was a master/servant relationship. The franchisor filed a motion for summary judgment, arguing that it did not meet the test because it had not paid the salaries of its franchisee's employees and had not controlled the business of its franchisees.

However, the court ruled that actual control was not required to hold a person vicariously liable so long as the person had the power or right to control the activities. The court found that the franchise agreement gave the franchisor considerable control and that the franchisor had visited the site on multiple occasions to evaluate the store on its dry cleaning operation, personnel, store design and equipment. Because there were material facts in dispute, the court denied the franchisor's summary judgment motion.

Pennsylvania District Court Allows Use of Substantial Continuity Test

A federal judge from the eastern district of Pennsylvania approved the use of the Substantial Continuity Test in a lawsuit involving a state funded cleanup at a plant formerly owned by a defunct corporation. In *Pennsylvania v. Concept Sciences* (No. 02-2888, E.D. Pa., 12/2/02), an explosion occurred in February 1999 at a plant owned by Concept Sciences, Inc ("CSI"). The state DEP initiated a response action and eventually demolished the building. In March 1999, the DEP notified CSI that it could be liable for the response costs incurred by the agency. One year later, PPT Research, Inc. ("PPT") purchased the assets of CSI.

The state filed a cost recovery action against CSI and PPT, arguing that PPT was a successor corporation under the substantial continuity test and that PPT knew or should have known about CSI's potential liability for the plant explosion. The defendants filed a motion to dismiss, asserting that the Court of Appeals for the Third Circuit had not approved the use of the substantial continuity test for determining corporate liability. However, the court said that the Third Circuit had yet to provide any instructions on the use of this theory of liability so that prior decisions from the eastern district that applied the theory were controlling.

Commentary: The general rule in most American jurisdictions is that a corporation that acquires the assets of another company is not liable for the actions of its predecessor. Over the years, the courts have developed four exceptions to the general rule of non-liability for asset purchasers to make sure that corporations do not evade their liabilities or to prevent corporate evasion of liability or debt through the use of corporate formalities. These exceptions are the express or implied assumption of liabilities, de facto merger, mere continuation or fraud. These exceptions have been developed under state law and the particular elements required to satisfy the exceptions can vary among the states.

Courts tend to strictly construe these exceptions. As a result, plaintiffs have had a difficult time prevailing against asset

purchasers particularly under the "*de facto*" and "Mere Continuity" tests where courts have required a high degree of continuity in management, personnel and stockholders. Because of this and to ensure uniform interpretation of federal laws, many courts have adopted a federal common law approach known as the "Continuity of Enterprise" or "Substantial Continuity" doctrine in CERCLA litigation. This test is essentially a more relaxed version of the "mere continuation" exception. However, instead of focusing on the corporate entity, the Continuity of Enterprise exception analyzes whether the business operation has continued. Under this theory, a successor corporation may be found liable if it continues the same business or manufacturing operation as its predecessor even if there is no continuity of ownership. Factors the courts have examined include: retention of the same employees; retention of the same supervisory personnel; retention of the same production facilities in the same location; production of the same product; retention of the same name; continuity of assets; continuity of general business operations; and does successor hold itself out as a continuation of the previous enterprise. Often times, the outcome of a CERCLA contribution or cost recovery will depend on whether a court adopts the traditional state theory of corporate successor liability or the Substantial Continuity test.

 The Schnapf Environmental Report is a bi-monthly newsletter which provides updates on regulatory developments and highlights significant federal and state environmental law decisions affecting corporate and real estate transactions, and brownfield redevelopment. The newsletter is published by Law Professor Lawrence P. Schnapf, 55 E.87th Street, #8B, New York, New York 10128. Telephone: (212) 996-5395. Fax: (503) 213-9314. E-Mail: LSchnapf@environmental-law.net. Subscription rate for the Schnapf Environmental Report is $99 for one year (six issues) or $25 per issue.

We also offer a seminar "Environmental Problems in Business Transactions" which has been approved by the New York Continuing Legal Education Board as an Accredited Mandatory Continuing Legal Education ("MCLE") Program. The fee for the seminar is $20 per credit hour. A course book with transactional forms is included with the seminar. The course book may be purchased separately for $99. The seminar can be conducted at your office or at periodic department meetings that you might organize over the course of the year. If you are interested in this seminar or purchasing the course book, please contact Lawrence Schnapf.

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.