SCHNAPF ENVIRONMENTAL REPORT

A Newsletter Covering Recent Environmental Developments and Caselaw

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DUE DILIGENCE/ AUDITING/ DISCLOSURE/ ENFORCEMENT

Ninth Circuit Rules Environmental Report Does Not Have to Be Disclosed

One of the concerns of parties during due diligence is whether the information contained in the reports generated for a transaction have to be disclosed to the government. One strategy that has been used is to have the environmental lawyer retain the consultant to try to have the report protected by an attorney work product or attorney-client privilege.

In *United States v. Torf* (No. 03-30102, 11/26/03), the United States Court of Appeals for the Ninth Circuit ruled that an environmental consultant retained by a client threatened with criminal prosecution under environmental laws could withhold some documents from a grand jury because the consultant's report was also used to comply with an information request and consent order under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). In so ruling, the Ninth Circuit adopted the "dual purpose" rule that has been applied by the Third, Seventh, Eighth Circuit, and D.C. Circuits. The "dual purpose" rule allows the work product privilege to apply when the litigation purpose for creating the document so permeates the non-litigation purpose that the two purposes cannot be discretely factually separated.

In this case, EPA notified Ponderosa Paint Manufacturing Inc. in 2000 that it was being investigated for illegally transporting and disposing paint-related products after most of the company's assets were sold. Ponderosa then retained an attorney who, in turn, retained an environmental consultant on behalf of the company to help with its defense and assist with a site cleanup. The consultant's responsibilities included interviewing witnesses and responding to a CERCLA 104(e) information request. In its response to the CERCLA information request, the company specifically said that it was not waiving any work product privileges available under Federal Rule of Civil Procedure 26(b)(3). The company subsequently entered into an administrative order on consent (AOC) where it agreed to take certain response actions and to make available documentation related to the certain hazardous substances subject to its right to invoke the work product privilege.

Two years later a grand jury investigating the company subpoenaed "any and all records relating in any way to any work" related to waste disposed at the company's plant. The consultant refused to turn over some of his documents claiming the work product protection. A magistrate judge quashed the subpoena but a district court reversed, concluding that the protection did not apply because the documents would have been created despite the threat of litigation.

In reversing the district court, the Ninth Circuit said there was no question that all of the documents were produced in anticipation of litigation and that the threat of prosecution touched every document prepared by the consultant, including the documents prepared to comply with the CERCLA Information Request and AOC. The court held that the purposes of complying with the EPA request and order and drawing up documents for pre-litigation purposes could not be separated, and so the documents were shielded from discovery.

EPA Rulemaking Body Reaches Consensus on "All Appropriate Inquiry" Standard

The 2002 CERCLA Amendments required EPA to adopt standards for what constitutes "all appropriate inquiry" under the innocent purchaser, bona fide

prospective purchaser and contiguous property owner defenses. In November, the negotiated rulemaking committee selected by EPA reached consensus on the standard. EPA expects to publish a proposed rule for public comment in January.

The proposed rule will go beyond the ASTM E1527 standard practice that has become the de facto standard for performing environmental due diligence. Some trade organizations have estimated that the average price of an ESA will increase from around $1800 to around $2500. The ASTM E1528 Transaction Screen will not qualify for the new standard.

The proposed regulation requires Phase I environmental site assessments ("ESAs") be conducted by environmental professional. However, the issue of who qualified as an environmental professional turned out to be one of the most troublesome issues for the committee. The consensus proposal defines environmental professional as "a person who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding the presence of a release or threatened release to the surface or subsurface of a property, sufficient to meet the objectives and performance factors." The environmental professional must have a certain degree of experience, (e.g., current engineer's or geologist's license or registration from a state) and have the equivalent of three years of experience, be licensed by the federal government or a state to perform environmental site assessments and have three years of experience, or have at least five years of experience with related activities. Some members had wanted environmental professionals to be required to satisfy continuing education requirements but EPA representatives working with the panel said it would be financially and administratively difficult for the agency to create and oversee such a program. As a result, the panel agreed that environmental professionals should remain current in their field of expertise.

When performing a Phase I ESA, the proposed regulation requires environmental professionals to conduct interviews into past uses of the land with past and present owners, operators, and occupants as well as to conduct visual inspections of the sites and of adjoining sites. Some committee members felt this requirement was not feasible while others indicated that parties to a transaction often did not want to disclose their potential interest in a property. Environmental and community representatives, though, argued that occupants of neighboring properties often have observed certain activities that could provide valuable information. As a result, the panel ultimately agreed to require that professionals interview neighbors when other activities outlined in the standard are not sufficient to meet the objectives of the standard. The proposed rule also provides that visual inspections of adjoining properties must be conducted from the property line of the site being assessed, public rights-of-way, or other vantage points but not require the professional to be physically on the adjoining property.

Another significant change was the requirement for more robust historical research, including searches for recorded environmental cleanup liens and reviews of federal, state, tribal, and local government records.

The final version of the proposal does not require an environmental professional to recommend any further investigation such as sampling. One reason for adopting this position is that a buyer could still purchase the land and qualify for the BFPP defense so long as it exercises "reasonable steps" to address the contamination.

Property Owner Fined for Failing to Comply With Institutional Controls

The Massachusetts Department of Environmental Protection ("DEP") fined Worcester New Bond, LLC ("WNB") $17,500 for failing to comply with an Activity and Use Limitation ("AUL"). After purchasing the property in 1998, WNB filed a closure report and AUL deed restriction to ensure that potential health risks to workers and students were eliminated. DEP conducted an audit of cleanup actions at the site and found that WNB had not complied with AUL requirement to properly manage soil excavated at the site, provide Health and Safety Plans for construction workers, and maintain pavement to prevent exposure to

contaminated soil by full-time workers at the site. In addition, the investigation revealed that the extent of contamination had not been adequately characterized to support health risk conclusions. WNB has agreed to perform additional assessment at the site, correct the AUL violations, and reevaluate potential health risks at their property. Several commercial businesses and two schools currently occupy the site.

A property owned in Springfield, Massachusetts agreed to pay $7,000 for failing to properly characterize historical soil contamination. In this case, a 1998 site assessment found evidence of soil contamination from historical activities. However, the licensed consultant hired by the owner determined that the property did not pose a risk to the residents in the surrounding area and filed a cleanup closure statement for the site. The state DEP conducted an audit to as part of its quality control review of the LEP program and determined that additional assessments were required to support the consultant's conclusion. DEP issued a notice of non-compliance establishing schedule to complete those additional response actions. When the owner failed to submit the required documentation, the DEP invalidated the cleanup closure statement and notified the owner that it intended to assess a penalty. The owner then agreed to submit a revised closure statement.

Commentary: Some states have adopted licensed environmental professional ("LEP") programs where environmental consultants may assess and remediate contaminated sites without significant state oversight. While this approach can expedite site remediation, site owners and prospective purchasers need to carefully evaluate reports generated by licensed site professionals to ensure that they accurately characterize the site conditions.

Investment Group Seek Greater Disclosure of GHG Emissions

In October, the Carbon Disclosure Project sent letters to the 500 largest companies requesting that they disclose their greenhouse gas ("GHG") emissions. The Carbon Disclosure Project is composed of 87 institutional investors that manage over $ 9 trillion in assets.

The investment group believes that investors need to know how the companies they invest in could be affected by changes in energy policy and regulation. They are concerned that Climate Change may not only affect the financial results of the companies but also pose reputational risks as well. For example, recent reports indicate that because of the need to reduce carbon dioxide ("CO2") emissions by 2008, European automakers are spending 50% of their research and development budgets to improve fuel efficiency, including exploring new generations of turbochargers, gasoline and diesel high pressure direct injection systems, new transmissions systems such as dual clutch transmissions, starter-alternators, electric steering and new air-conditioning systems. European automakers voluntarily agreed to the 2008 emissions limit but are under pressure to further reduce emissions by 2012.

Meanwhile, A study by the Friends of the Earth ("FOE") indicated that 38% of publicly-traded companies in the United States now discuss the potential impact of climate change in their SEC filings. FOE indicated that that a majority of integrated oil and gas companies and large electric utilities now provide climate reporting to investors while domestic automobile, petrochemicals and insurance companies report at lower rates. Among reporting companies, 40% forecast that climate risks will adversely impact their firms while 15% maintain that global warming poses little to no risks. Approximately 27% state that the impact of climate change cannot be estimated while 18% of reporting companies avoid addressing the issue of financial risk altogether.

The Investor Network on Climate Risk ("INCR") recently requested that the SEC, corporate boards and Wall Street management firms to require increased corporate disclosure on the risks posed by climate change to investors. This "call for action" was made at the Institutional Investor Summit on Climate Risk held at the United Nations on November 21st. The newly-formed INCR currently includes treasurers from California, Connecticut, Maine, New Mexico, Oregon and Vermont, Comptrollers from New York City and New York State, the SEIU National Industry Pension Fund Director and the CWA/ITA Negotiated Pension Plan. INCR developed a

10-point action plan that includes: requesting that the SEC to enforce corporate disclosure requirements under regulation S-K on material risk and to re-interpret or change its proxy rules under Section 14(a)-8 relating to "ordinary business" so that shareholders have the right to vote on resolutions seeking reporting on financial risks from climate change; asking boards of directors to exercise their authority under the principle of "duty of care" to have management provide them with information and analysis on the potential financial risks from climate change as well as plans to mitigate such risks; requiring companies in sectors that are the major source of GHG to prepare financial analysis for shareholders showing how a company may be affected by regulatory, competitive, legal, and physical impacts of climate change, for companies that are not direct sources of GHG emissions but whose operations may be affected by climate change to analyze the potential impact of climate change on the company and report the results of that analysis to shareholders; requests investment managers to include potential financial impact of climate change in company analysis; urges institutional investors to adopt proxy voting guidelines to support the disclosure of the potential financial risk climate change and to vote for shareholder resolutions requesting disclosure of such information; requests Congress and the President to develop policies to address GHG emissions and assess the future financial impact of climate change; requests that state governments assess the potential financial impact of climate change on their states and businesses; supports the creation of an INCR.

A recent study by the Investor Responsibility Research Center examining how 20 of the largest emitters of GHG are factoring climate change into their business strategies and corporate governance policies revealed a disparity between European and United States-based companies. According to "*Corporate Governance and Climate Change: Making the Connection*" American-based petroleum companies are devoting virtually all of their development resources to finding new sources of oil and gas while their European competitors are increasingly focusing on renewable energy technologies. Similarly, American electric utilities are investing heavily in renovating old, coal-fired power plants and derive most of their profits from carbon-emitting fuels.

The report also found that some industrial sectors are going to face significant hurdles in reducing their impacts on climate change because the vast majority of GHG emissions come from end-use applications and not the manufacturing of their products. For example, manufacturing only accounts for 3% of the GHG emissions in the auto industry with the balance coming from driving. Likewise, production and refining of petroleum only accounts for 15% of GHG emissions associated with the petroleum industry. The other 85% of GHG emissions comes from customer use of petroleum products.

Commentary: With over 160 countries now committed to following the Kyoto Protocol and many countries adopting legal mechanisms to implement the goals of the treaty, it is increasingly important for purchasers and lenders of certain industrial sectors to evaluate potential climate change impacts on businesses during due diligence. Moreover, corporate directors and officers could possibly face liability under the "Business Judgment Rule" if they can be shown to have failed to exercise due care by disregarding information about the potential adverse financial consequences or reputational risk of climate change on their business. Indeed, some in the insurance industry believe they are already feeling the impacts of climate change as a result of weather-related losses. Administrators of institutional investment funds may also feel that they have a fiduciary duty to determine the impacts of climate change and seek changes in corporate strategies towards their GHG emissions.

Global GHG Register and Disclosure Standards Established

On December 9th, the World Economic Forum ("WEF") announced it had created a Global GHG Register. WEF hopes that the register will help companies disclose their GHG emissions, voluntarily reduce GHG emissions and facilitate trading in GHG credits by establishing a framework for measuring and recording GHG inventories.

Companies joining the Global GHG Register are required to develop a corporation-wide inventory of all six major greenhouse gases. The data must be verified and the information must be made publicly available on the Internet. As part of their inventories, companies may report offsets and GHG mitigation projects that could be of interest to potential investors, creating an added incentive for developing country firms to participate. Thus far, far eight companies have agreed to register GHG data in early 2004. These companies represent 800 million tons of CO2 or equivalent per year, approximately 5% of global GHG emissions.

The International Accounting Standards Board recently agreed to adopt a recommendation by the International Financial Reporting Interpretations Committee ("IRFIC") and revise the standard that will govern how GHG emissions credits will be recorded under the EU GHG emissions trading program. The IASB standard 38 ("IS 38") will require EU companies to account for the changes in value of emissions allowances in their income statements.

One of the key issues is that when the EU emissions trading scheme starts in January 2005, companies could see their accounts fluctuate because of changes in the market value of emissions credits. Under the current IS 38, companies were required to report on their income statements changes in liabilities because of actual emissions. However, the companies were not required to record changes in the value of the EAUs on their income statement.

Commentary: Because of the numerous GHG registries that are being developed at the national and state levels, it is important that companies make sure that counsel is in involved to make sure that GHG emission reductions are properly documented and recorded. Legal issues that could arise include whether the inventory should be company-wide or facility-specific, evaluation of what protocol should be used to document the registry, if the reductions qualify for a particular registry and how much credit a particular registry may award to particular reductions, and ensure that an appropriate system is established to ensure that the emission reductions are achieved. In transactions, it will also be important to evaluate the emission reduction policies of the target company to verify the accuracy of credits already registered and availability of additional credits.

ENVIRONMENTAL INSURANCE

REIT Agrees to $25 million Mold Settlement

One of the nation's largest real estate investment trusts will pay a multimillion-dollar settlement to more than 1,000 residents of an oceanfront apartment building in South Florida to end a class action mold lawsuit. According to filings submitted to the SEC, the Archstone-Smith Operating Trust estimates that total repair, settlement and related costs for Harbour House in Bal Harbour, Florida could reach $25 million.

Under the settlement, the company agreed to payments for every qualified class member in the lawsuit who lived in the 452-unit, oceanfront tower between June 2002 and January 2003. The company will pay each class member 100% of their personal property damages, 65% of rent obligation, $3,000 in "aggravation damages" for each class member who lived in the Miami-area building and 2.5 times actual expenses for certain medical conditions.

The class members alleged that an improper renovation of the building's heating, ventilation and air-conditioning system allowed harmful mold to spread throughout the building. During renovations, the air-conditioning system was shut down for several months. Mold was detected in 450 of the tower's 452 units. In some units, mold growth was 100 times ambient levels.

Tenants were not required to prove

that mold caused health problems and the settlement preserves the right of class members to pursue personal injury claims in a jury trial if they do not settle their individual claims in mediation. However, class members waived their right to pursue punitive damages.

Earlier this year, Archstone-Smith filed a $30 million breach of contract and negligence action against the architect and engineer claiming that handled the renovation of Harbour House.

Approximately 35 states have agreed to eliminate mold coverage from homeowner policies even when an event that led to the mold is covered by a policy. Other insurance companies are capping payments for mold or offering it as a separate add-on protection area.

Commentary: REITs and individual building owners are becoming increasingly concerned about liability for mold exposure. As a result, insurance agents and brokers who ignore these concerns could face liability for failing to recommend mold coverage.

AIR POLLUTION DEVELOPMENTS

EPA Proposes New SO2, NOx and Mercury Standards

In December, EPA proposed two related regulations to address emissions of sulfur dioxide ("SO2"), nitrogen oxide ("NOx") and mercury from power plants.

Under the Interstate Air Quality proposal, power plants in 29 eastern states and the District of Columbia would be required to reduce SO2 and NOx emissions in two phases. Power plants would be require to low SO2 emissions by 40% in 2010 down to 3.6 million tons and by another 2 million tons per year in 2015 for a total cut of approximately 70% from current levels. NOx emissions would be cut by 1.5 million tons in 2010 and 1.8 million tons annually in 2015 for a reduction of approximately 65% from present levels. Cumulatively, the rule will eliminate approximately 34 million tons of SO2 and NOx emissions by 2015.

The proposed "Utility Mercury Reductions Rule" would cut annual mercury emissions from coal-burning power plants by an estimated 48 tons by 2015. EPA indicated that it is considering approaches for achieving these goals. One approach would be for coal-fired power plants to install the same maximum achievable control technology ("MACT") of section 112 of the Clean Air Act ("CAA") that would be required for NOX and SO2 emissions under the Interstate Air Quality Rule. EPA estimates that this proposal would reduce nationwide emissions of mercury by 14 tons or 29% by the end of 2007.

The second approach for curtailing mercury emissions would be to establish a cap and trade program for mercury emissions under the New Source Performance Standards program of section 111 of the CAA. The cap on the total mercury emissions would be implemented in two phases in 2010 and 2018 so that total mercury emissions would be reduced to 15 tons by 2018, a reduction of 70% from current levels.

Commentary: In December 2000, EPA determined that coal- and oil-fired utility plants should be listed as sources of hazardous air pollutants (65 FR 79825, December 20, 2000) under section 112 of the CAA because of mercury emissions. It is estimated that the ensuing MACT standards that EPA would have been adopted would have reduced mercury emissions by 90% by 2008. Under the Utility Mercury Reductions Rule, EPA indicated that it was not required to exclusively could regulate HAPs under section 112 but could also do so under section 111 if the HAP was not from a source category that was not specifically required to be regulated under section 112. Because coal-fired units were not regulated under section 112 when EPA conducted its 1998 study of HAP emissions from utilities, EPA determined it had the authority to regulate mercury emissions under section 111. EPA also proposed to de-list coal-and oil-fired plants as a source category of HAPs under section 112(c).

Connecticut, Massachusetts, New Jersey and Wisconsin have proposed their own rules for reducing Mercury emissions from power plants, incinerators, and iron

and steel plants

EPA Changes NSR Enforcement Policy

EPA has announced that it will not pursue investigations on potential NSR enforcement actions unless the facilities are in violation of its routine maintenance, repair and replacement ("RMRR") rule under the New Source Review (NSR) program that was published in October 27, 2003 (68 FR 61248). However, the agency said it would still pursue all filed cases.

Meanwhile, on November 7, 2003, EPA published amendments to the final NSR rule that had been published on December 31, 2002 (67 FR 80186). In the wake of several petitions for reconsideration, EPA announced on July 30, 2003 (68 FR 44623) that it would reconsider six issues addressed in the revised NSR rule. After reconsidering those six issues, EPA concluded that two clarifications were warranted. The agency agreed to add a definition of a "replacement unit" that applies to reconstructed emission sources or other emission units that completely take the place of an existing emissions unit. The definition explicitly states that the existing unit must be removed or permanently disabled, or that a permit condition must prohibit the use of that unit. If the replaced unit is subsequently brought back into operation, it would have to be regulated as a new emission unit. In addition, EPA also explained that a facility would have to compare the actual emissions from the replaced unit against the projected actual emissions of the replacement unit to determine if the installing the replacement unit would result in a significant emissions increase. In addition, the facility may not generate emissions reductions credits that are attributable to the shutdown of the replaced unit.

EPA also clarified that the "potential-to-emit" approach ("PTE") may be used to calculate the baseline emissions of a new unit that is built after the 24-month period for establishing the plantwide applicability limitation ("PAL"). The PTE approach may not be used for existing emissions units that are modified after the PAL period.

EPA determined that regulatory changes or clarifications were not needed for the remaining issues. These issues included eliminating the synthetic minor limits for purposes of the NSR program. Under this approach, a source could accept operating limits in a permit that would have the effect of reducing emissions and causing the source to not be considered a major source under NSR. Under the final NSR rule, facilities must reapportion the PTE of units formerly classified as synthetic minors among existing units during development of the PAL.

EPA also decided to retain the "reasonable possibility" standard for triggering certain recordkeeping and reporting requirements for facilities that will rely on projecting actual emissions following a physical or operational change.

Finally, the agency affirmed its decision not to require evaluation of emission units that installed state-of-the-art emission control technology ("Clean Units") when the area where the Clean Unit is located is redesignated from an "attainment" to non-attainment" area.

Commentary: 14 states (New York, California, Connecticut, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico, Pennsylvania, Rhode Island, Vermont, and Wisconsin) and more than 29 cities filed a challenge to the RMRR rule on October 27th. On November 26th, nine states led by Virginia sought to intervene in that lawsuit to support the EPA rule. Finally, Georgia, New Jersey, Wisconsin, North Carolina and South Carolina, and the cities of Cincinnati and Dayton, Ohio have announced that they will adopt their own requirements for NSR that are more stringent that the new federal rule.

EPA Announces Settlements in Refinery Initiative

Chevron USA Inc agreed to spend an estimated $275 million to install and implement innovative control technologies to reduce emissions at its refineries as part of a comprehensive NSR settlement. Under the agreement, Chevron will reduce annual NOx emissions by more than 3,300 tons and SO2 emissions by nearly 6,300 tons at refineries located in California, Hawaii, Mississippi and Utah. Chevron also agreed to pay a $3.5 million civil penalty and spend more than $4 million on further emissions controls and other environmental projects in communities around the company's refineries.

Earlier this fall, three refiners agreed to reduce refinery emissions by nearly 4,000 tons per year in five states. Under its Petroleum Refinery Initiative, EPA has reached settlements with 42 refineries representing nearly 40% of domestic refining capacity.

Company Fined for Excess Emissions from Emergency Generators

The Delaware Department of Natural Resources and Environmental Control ("DNREC") assessed a civil penalty of $15,000 against Verizon Delaware Inc. for installing two diesel-fired emergency generators without obtaining a permit. The company installed the generators at an office central office to provide uninterruptible phone service in the event of a power outage. The generators emit include NOx, carbon monoxide ("CO"), SO2, particulate matter ("PM"), and volatile organic compounds ("VOC")

Commentary: During due diligence, permitting requirements for emergency generators and associated storage tanks should be identified. Depending on the size of the tanks, secondary containment may be required for freestanding aboveground storage tanks that are used to fuel the generators.

Texas Court Resolves Dispute Over Rights to NOx Allowances

With cap and trade programs playing an increasingly important role in air pollution control programs, the rights to emission allowances created by those programs are becoming valuable assets in business transactions. Holders of allowances can generate cash by selling allowances to closed or underutilized facilities, or use allowances to increase production or make product changes. As a result, disputes are arising over who has rights to sell or use those allowances.

For example, a Texas appeals court was recently asked to determine whether the owner or operator of eight boilers at a co-generation facility was entitled to NOX allowances approved by the Texas Commission on Environmental Quality. In *Phillips Petroleum Co. v. Texas CEQ*, No. 03-03-00229-CV (Tex. Ct. App. 11/20/03), Phillips Petroleum ("Phillips") and the Sweeny Cogeneration Limited Partnership ("SCLP") entered into an agreement in 1995 for SCLP to construct and operate a cogeneration facility. To build three new cogeneration units, SCLP had to obtain an air quality permit from the Commission for the new NO_x emissions. The Commission determined that the new facility would be a major source of NO_x emissions and have to conduct a Non-attainment Area New Source Review ("NNSR") that would require more stringent and costly emissions control requirements than those for facilities exempt from the NNSR. However, a new facility could avoid the NNSR requirements by using "site-wide emissions netting" whereby the increased emissions from the new source of emissions would be averaged with decreased emissions from an existing source so that there would not be a net increase in emissions. To avoid the NNSR requirements, SCLP agreed to net emissions from the eight existing boilers with emissions from the new cogeneration units as if all of the units were one emission source. In its application, SCLP provided a copy of the agreement with Phillips that provided that SCLP would have control over emissions from the backup boilers and that SCLP would have the right to direct operation of the backup boilers to assure compliance with any air permit or other requirement relating to emissions from the project. The agreement also provided that SCLP would have the right to control the operation of all the backup boilers and direct the firing of other designated boilers. The agreement also indicated that while Phillips would maintain and operate the backup boilers, such operation would be on behalf of SCLP and subject to its direction if it obtained the air permit.

The Commission initially determined that SCLP's application was deficient because SCLP did not submit sufficient proof that it would "maintain ultimate operational control" over the boilers. Phillips responded that if the Commission added special conditions in the permit, including a clause that the permit regulates the eight boilers only by limiting their emissions, "during the term of the permit, and as long as emissions from the standby boilers are limited by the permit, Phillips agrees that it has no authority independent of the Partnership's authority under the permit, to cause emissions from the boilers."

In December 2000, the Commission

created a NOX cap and trade program that allocated allowances to facilities based on emissions generated from 1997 to 1999. In June 2001, Phillips and SCLP filed competing applications claiming entitlement to the emissions allowances for the boilers. SCLP asserted it was entitlement to the allocations for the boilers because Phillips had represented in 1996 that SCLP had control of the boilers, the boilers were included in SCLP's air quality permit; and the boilers were transferred to SCLP's emissions inventory account in 1999. Phillips contended that SCLP could not be the operator of the six boilers that were shut down and, as to the other two boilers, Phillips had the "better claim" because it ceded operational control to SCLP only for the purposes of site-wide emissions netting, not for allocation of emissions allowances. SCLP responded that Phillips's ownership of the boilers was irrelevant because the Commission had to deposit the emissions allowances into the account for a "site."

The Commission allocated the allowances to SCLP because the 1996 netting exercise demonstrated that the boilers and the cogeneration facility were under the common control of SCLP and therefore represented a "site" under both the netting rules and the emissions cap and trade rules. Phillips challenged the Commission's decision as arbitrary and unreasonable. The appeals court affirmed a state trial court ruling upholding the Commission's decision. The appeals court said Commission had properly based the allowance allocation on operational control because the emission trading rule definition of a "site" referred to sources "under the control of the same person". The court said the record reflected that the boilers were part of SCLP's source under the NNSR regulations and the emission trading regulations. Therefore, the Commission's decision to allocate the NO_x emissions allowances to SCLP was reasonable.

Federal and State Asbestos Enforcement Actions

EPA and state environmental agencies are continuing to vigorously enforce the asbestos regulations that have been issued under the Clean Air Act. The asbestos rules establish notification requirements and procedures when performing renovation or demolition of buildings having asbestos-containing materials ("ACM"). These ACM regulations were extensively revised in 1990. Owners and operators of buildings (e.g., building managers, contractors, etc.) must comply with the ACM rules when more than 260 linear feet or 160 square feet of friable ACM is to be disturbed during construction activities.

For example, Andre Parker of Riverdale, N.Y. and his company, were convicted for falsifying laboratory analysis from asbestos abatement projects and illegal asbestos removal and dumping throughout New York City and central and upstate New York. Parker also directed his employees to perform illegal asbestos abatement at 33 public housing buildings in Plattsburgh, N.Y. The employees then dumped hundreds of bags of asbestos at numerous locations throughout the city of Plattsburgh. When sentenced, Parker faces a maximum possible jail sentence of up to 40 years and/or fines up to $2 million. Parker Environmental Management Group faces a maximum possible fine of up to $5.5 million.

Several Virginia contractors pled guilty to charges of buying false asbestos training certificates from F&M Environmental Technologies Inc. F&M had previously pled guilty in 2001 to selling these certificates. The false certificates were used to obtain contracts for asbestos project monitoring inspections, management planning and industrial hygiene services at a number of facilities in Virginia.

A contractor from Toledo, Ohio was sentenced to serve six months of home confinement and two years of probation illegally removing 300 linear feet of asbestos-containing pipe insulation from a building in downtown Toledo, Ohio in May 2000. The defendant to comply with federal asbestos workplace practices by not ensuring that the asbestos was adequately wetted down before removal.

SchoolCraft Construction Inc. agreed to pay a penalty of $3,326 based on ability to pay and will dismiss its appeal of an Environmental Appeals Board ("EAB") decision pending before the Southern District Court of Ohio. In June 1993, EPA alleged that SchoolCraft failed to keep asbestos-containing material wet during

renovation of Cline elementary school in Centerville, Ohio. SchoolCraft had supervisory authority over all renovation work at Cline Elementary while a subcontractor, Seneca, conducted the actual removal of asbestos. An administrative law judge concluded that SchoolCraft was not an "owner" or "operator" within the meaning of the Asbestos NESHAP. EPA appealed this initial decision to the EAB which reversed the dismissal and concluded that SchoolCraft supervised the renovation of Cline Elementary and therefore qualified as an operator under the Asbestos NESHAP. The EAB remanded the case to the Presiding Officer to make specific findings of fact and conclusions on whether or not the violations had occurred. In June 1998, the ALJ found that the violations had occurred, that SchoolCraft was liable for them and assessed a $20,000 civil penalty against SchoolCraft. SchoolCraft appealed this ruling to the EAB, and the EAB upheld the June 1998 decision on July 7, 1999. SchoolCraft appealed the EAB decision to the District Court and argued again that it was not an "operator" under the CAA and that the $20,000 civil penalty is unfair. Briefs were filed in 2000. EPA reached the settlement based on the company's five years of income tax returns.

Two contractors were sentenced following their guilty pleas to state charges that they illegally stripped friable asbestos at a nursing home in Justice, Illinois in 2001. One defendant received 30 months probation and was required to pay $7500 restitution to the Rosary Hill Convalescence Home, a facility staffed by nuns of the Dominican Sisters of Chicago. The other defendant was sentenced to 18 months probation and was required to pay $1,000 in restitution to Rosary Hill.

A Wisconsin contractor was indicted for improperly removing asbestos-containing ceiling and flooring materials from the Evangelical Lutheran Church in Mt. Horeb, Wisconsin in 2002. According to the indictment, the defendant used a licensed asbestos removal firm to remove the flooring but conspired to unlawfully remove the asbestos-containing ceiling material without complying with the asbestos notification requirement, and failed to properly label asbestos-containing bags.

The Illinois Environmental Protection Agency also commenced an enforcement action against the owner of Sully's Irish Pub in Peoria, Illinois. The agency alleged that the pub owner improperly removed pipe insulation and did not provide the required notification. After an inspection revealed that asbestos fibers had been released, the pub was closed until asbestos abatement was properly completed.

R.M. Technologies Inc. of Lawrence, Massachusetts contractor agreed to pay an $8,000 penalty for failing to comply with the asbestos notification requirements. During a May 2003 inspection, state DEP personnel determined that the contractor had conducted asbestos removal work at a multi-unit residential.

The owners and operators of three office buildings in Worcester, Massachusetts agreed to pay a $90,000 violating asbestos notification and workpractice rules. As part of the settlement, the property owners also agreed to hire licensed personnel to conduct asbestos surveys of each building to identify the locations, amounts, types and conditions of remaining asbestos-containing materials, and to incorporate the survey results into an operation and maintenance plan for each building.

A siding contractor, a home improvement contractor and two homeowners agreed to pay $123,750 to resolve asbestos-related violations at three residential properties. The violations involved the mishandling of several different asbestos-containing products, including pipe insulation and transite siding. Although individual penalty assessments ranged from $22,500 to $56,200, the individuals paid reduced fines based on their financial inability to pay the full penalty amounts. In addition to paying negotiated penalty settlements, the homeowners were required to retain a licensed asbestos contractor to decontaminate all affected areas of their properties, properly remove and dispose of the asbestos waste. The homeowners were also required to retain a licensed asbestos project monitor to conduct sampling of affected areas to document that clearance levels were attained and that these areas could be safely reoccupied.

E.I. DuPont agreed to pay Ohio EPA a $23,000 penalty in connection with

removal of ACM during a demolition and renovation project at the facility from May to November 2002. Dupont initially notified Ohio EPA that the project would take place from May 23, 2002 until July 31, 2002 but failed to notify the agency that the work continue past its projected completion date. In addition, Ohio EPA determined that asbestos in the disposal bags had not been wetted as required.

Domestic GHG Developments

The Department of Energy ("DOE") released proposed revisions to its guidelines for voluntarily reporting GHG emissions under section 1605(b) of the Energy Policy Act of 1992. Under the revised guidelines, a wide range of entities, including utilities, manufacturers, landowners and citizens, will be able to register their greenhouse gas emissions reductions if they provide entity-wide emissions data and demonstrate entity-wide emission reductions after 2002. Other technical changes to registry reporting requirements are being developed and will be made available for review and comment at a later date.

Meanwhile, the Iowa Farm Bureau Federation has announced a four-year pilot program to aggregate and trade carbon credits from Iowa fields. The credits will be generated from carbon sequestered in no-tilled and minimum-tilled cropland and permanent pasture. For permanent pasture to qualify, it must have been seeded to grass continuously since Jan. 1, 1999.

The credits will be aggregated with the Farm Bureau for purposes of trading them on the newly formed Chicago Climate Exchange. Initially, Farm Bureau will aggregate three types of exchange offsets: exchange soil offsets ("XSOs"), exchange forestry offsets ("XFOs") and exchange methane offsets ("XMOs"). As an aggregator, Farm Bureau will collect registration information, provide administrative services, transact trades on the exchange and distribute proceeds to project participants. It is estimated credits could generate $1-$5 per acre per year for farmers on the exchange during the pilot program.

According to project sponsors, research has indicated that no-till and minimum-till each sequester at least one-half ton of CO2 equivalent per acre in the soil each year while permanent pasture captures up to three-quarters of a ton per acre annually. On June 6, 2003, the USDA announced that GHG emission reduction and sequestration will be priorities in its forest and agriculture conservation programs, such as the Environmental Quality Incentives Program and Conservation Reserve Program. USDA will provide financial incentives, technical assistance, demonstrations, pilot programs, education, and capacity building, along with measurements to assess the success of these efforts.

Meanwhile, Entergy became the first United States utility to seek carbon emissions credits from a geological sequestration project. The utility entered into an agreement with Blue Source, Inc. to purchase geologic carbon sequestration credits to meet the company's voluntary CO2 limits. In the past, Entergy's sequestration projects have centered on carbon sequestration through reforestation. This project, though, deposits the CO2 emissions back into old oil wells to that are no longer productive using conventional extraction techniques.

Blue Source anticipates that it will create over 7 million tons GHG emission reduction credit through geological sequestration. Presently, Blue Source has existing GHG reduction inventories exceeding 200 million tons through 2012.

International GHG Trading Developments

A progress report commissioned by the European Union has determined that 13 of the 15 EU members will miss their GHG emission targets under the 1997 Kyoto Protocol unless they implement additional measures and policies to reduce GHG emissions. Without further actions, the report said the EU would reduce GHG emissions by only 0.5% instead of the 8% that the EU is committed to achieve by 2012.

Another report from Germany's institute for economy ("DIW") estimated that CO2 emissions from EU member states increased almost 4% in 2002 from 2001 and that CO2 emissions from developing countries have rose 9%. In total, the DIW estimated that CO2 emissions were almost 20% higher in 2002 than in 1990.

A report by the World Bank has found that the volume of CO2 emissions

trading increased to 71 million tons for the first ten months of 2003, up from 29 million in 2002 and 13 million in 2001. While increase is significant, the total amount of trades is only a fraction of worldwide energy-related carbon emissions which are expected to rise to a total 8.3 billion tons by 2010

According to the "State of the Carbon Market 2003", power sector projects including hydropower, biomass, and wind energy accounted for half of the emission reductions that were traded in 2003. Emission reductions created by renewable resources represented about 37% of traded volumes. The prices paid in emissions trading rose to a range of Euros (€) 4 to €6 per ton in 2003. The market value of these 2003 trades is estimated at more than $200 million this year. UBS Warburg has forecast will rise from €6 per allowance in 2006 to €28 per allowance by 2010 because of carbon trading.

On December 11th, the European Investment Bank ("EIB") announced two lending facilities to facilitate EU emissions trading. The €500 million Dedicated Financing Facility will offer loans for commitment for companies in the EU emissions trading scheme ("ETS") looking to invest in CO2 reduction projects. The EIB is also contemplating launching a Technical Assistance Facility (TAF) to provide conditional grant finance to help identify market carbon credits from Joint Implementation ("JI") and Clean Development Mechanism ("CDM") projects that would be linked to the EU ETS allowance market. CDMs enable companies from industrialized nations to obtain credits in return for sponsoring emission-reducing projects in the developing countries.

The Netherlands and the European Bank for Reconstruction and Development ("EBRD") have also launched a new Carbon Fund to invest in CO2 reduction measures in central and eastern Europe. The EBRD will use €32 million of Dutch funds to buy carbon credits from energy efficiency projects, such as district heating upgrades, and renewable energy projects under the fund would fall under the JI mechanism. The credits will help the Netherlands meet its obligation under the Kyoto Protocol while channeling investment into JI countries.

Meanwhile, EcoSecurities and E+Co launched a new enterprise, 2E Carbon Access that will focus solely on small-scale Clean Development Mechanism ("CDM") projects. 2E Carbon Access will aim to identify, prepare, and supplying investment-ready, small-scale energy projects to committed buyers of certified emission reductions ("CERs") that serve as the CDM currency. Small-scale CDM projects include renewable energy projects with capacity of 15 MW or less, energy efficiency projects that reduce energy consumption by up to the equivalent of 15 GWh per year and other projects that both reduce emissions and directly emit less than 15,000 tons of CO2 equivalent per year. A recent study by Point Carbon concluded that EU members were increasingly relying on purchasing CERs to meet their GHG targets as opposed to actual emissions reductions. The World Bank has also established a Community Development Carbon Fund for small projects, and the BioCarbon Fund for carbon sequestration or sinks projects.

Existing EU member countries are required to submit national allocation plans ("NAPs") to the European Commission by March 31, 2004 while new members have until May 31st. The E.U. Commission will review and approve the national plans before actual trading can start. Companies in Europe have already expressed concern at possible competition distortion because of different principles being applied by the various nations in drafting their plan. Open questions include the number of certificates to be awarded, the measurement of emissions, the recognition of early action, and coordinating emission trading with other environmentally-friendly measures

Commentary: The World Business Council on Sustainable Development ("WBCSD") and the World Resources Institute ("WRI") announced that they are revising their Greenhouse Gas Protocol ("GHG Protocol") that was developed in 2001 to establish internationally-accepted accounting and reporting standards for greenhouse gas emissions from companies. The updated protocol will contain step-by-step guidance to help companies set and report progress toward voluntary GHG reduction targets. The new tool is intended to give companies a framework to manage as well as measure GHG emissions. The WBCSD is also developing a framework for business to

measure reductions in standalone projects and facilitate CDMs.

Study Estimates NOx Emissions from Shipping Industry

A study by the University of Delaware has found that air pollution from international shipping could be double previous estimates. If the figures are confirmed, regulations and climate models may need revising.

According to the study, annual NOx emissions from tankers, container ships and trawlers approximate total NOx emissions from the United States. The estimates are based on fuel sales and the average performance of marine engines. Because the pollution from ships can impair local air quality, some ports are requiring vessels to take actions to reduce NOx emissions. For example, Los Angeles requires harbor ships to slow as they near port to reduce their emissions.

The study also found that GHG emissions from the shipping industry are about the same as the commercial airline industry. Because these industries are shared between nations, they are exempt from the Kyoto Protocol.

Illegal Trading of ODS Continues

A non-profit organization estimated that between 20,000 to 30,000 tons a year of ozone depleting substances ("ODS") are illegally traded each year despite global efforts to phase out the substances.

According to the Environmental Investigation Agency ("EIA"), Singapore and Dubai are major transit points in the illegal trade in chlorofluorocarbons ("CFCs"). The study found that at least four Singaporean companies re-export chlorofluorocarbons to the United States either directly or through southern Africa using false documentation and packing. Other major markets include Russia, Vietnam, Nepal, Cambodia, and China. EIA reported that the Singaporean dealers make between 75% and 225% profit on each kilogram (2.20 pounds) of the CFCs, depending on where they are sold.

A federal grand jury in Connecticut returned a 32 count indictment charging five men with engaging in a scheme to unlawfully import and sell chlorofluorocarbons ("CFCs") gases in the United States (United *States v. Himes*, D. Conn., No. 3012CR174). The United States Department of Justice ("USDOJ") asserted stated that the defendants participated in a $24 million tax fraud, wire fraud and money laundering scheme in which they allegedly imported and sold more than 1 million pounds of CFCs into the United States from 1995 to 1998.

WATER POLLUTION/ENDANGERED SPECIES

EPA and Corps Decline To Issue New Isolated Wetlands Guidance

EPA and the Army Corps of Engineers ("Corps") recently announced that they would not issue a new rule on federal regulatory jurisdiction over isolated wetlands. The agencies had originally published an advance notice of proposed rulemaking January 15, 2003 (68 FR 1991) to clarify the definition of waters of the United States following United States Supreme Court 2001 decision invalidating the use of the Migratory Bird Rule to assert jurisdiction over isolated wetlands. (Solid Waste Agency of Northern Cook County v. Corps of Engineers, 531 U.S. 159).

The New England District office of the Corps proposed new mitigation guidance on December 15th. The guidance implements the National Wetlands Mitigation Action Plan ("MAP") that was issued on December 24, 2002. The district office will use the guidance to evaluate all mitigation for unavoidable impacts to wetlands associated with permit applications. A sample mitigation checklist is included in the guidance. The guidance provides that environmental impact statement will not be required. In addition, implementation of the guidance will not affect any species listed as threatened or endangered under the Endangered Species Act of 1973 or historic resources considered eligible or potentially

eligible for listing on the National Register of Historic Places will be affected.

Commentary: The wetlands permit program authorized by section 404 of the Clean Water Act ("CAA") is the principal federal program for regulating development in wetlands. However, there are approximately 30 other federal programs that are playing an increasingly important role in protecting and restoring millions of acres of wetlands. These programs include the Food Security Act's "Swampbuster" requirements, the Wetlands Reserve Program, Conservation Reserve Program and the Water Bank Program administered by the Department of Agriculture, the Landowner Incentive Program, Watershed Assistance Grants, and the Cooperative Endangered Species Conservation Fund administered by the Fish and Wildlife Service's, the Coastal Wetlands Restoration Program established by the National Marine Fisheries Service, and the North American Wetlands Conservation grants awarded by the Migratory Bird Conservation Commission. Other EPA programs that are being used to protect wetlands include the "Five-Star Restoration" grant program, the EPA wetlands grants programs and the National Estuary Program.

Fifth Circuit Clarifies Impact of SWANCC on OPA

The United States Court of Appeals for the Fifth Circuit held that the Oil Pollution Act of 1990 ("OPA") applied to discharges of oil impact waters that are adjacent to navigable water. In reaching its decision, the Fifth Circuit ruled that the definition of "waters of the United States" used for the wetlands program of section 404 of the CWA was applicable to the OPA.

In *United States v. Needham (*No. 02-30217, 12/16/03), oil spilled from a well into an adjacent drainage ditch known as the Boyou Cutoff. The flow of the Boyou Cutoff was diverted by a dam to the Boyou Folse, a non-navigable waterbody that was adjacent to an open body of water known as the Company Canal. The owner of the well began a cleanup but did not have the financial resources to complete the cleanup. EPA and Coast Guard completed the cleanup and sought recovery of their costs under the OPA. The defendant filed a chapter 11 bankruptcy proceeding that stayed the complaint and EPA filed a proof of claim. The debtor objected to the claim on the grounds that they had not discharged oil to a navigable waterway. The bankruptcy court sustained the debtors' objection, finding that the Boyou Cutoff could not be considered "waters of the United States " under SWANCC since it was neither navigable nor adjacent to navigable water.

The Fifth Circuit first ruled that OPA jurisdiction did not extend to non-navigable tributaries of navigable water. However, the court said the bankruptcy court had failed to consider the impacts of the discharge on the Bayou Folse since the parties had stipulated that the oil spill had reached that waterbody. Because the Bayou Folse was adjacent to navigable water, the court ruled that the defendants were liable under OPA for the costs of the discharge into waters of the United States and remanded the matter to the bankruptcy court for further consideration of other defenses that might be available to the defendants.

District Court Upholds Wetlands Permit Denial

The United States District Court for the District of Puerto Rico upheld the denial of a wetlands permit application by the Corps because the developer failed to show that there were no practical alternatives to the project.

In *Bahia Park, S.E. v. United States* (2003 U.S. Dist. LEXIS 18319, 9/30/2003), the plaintiff began constructing a 300-unit, medium-income apartment project on property it owned in Catano, Puerto Rico. A portion of the property was located in the largest wetland area within the vicinity of San Juan Bay. After the plaintiff had filled 0.3 acres of wetlands, the Corps issued a cease and desist order. The plaintiff then filed an after-the-fact permit proposing to fill seven acres of marshland on the grounds that there were no practicable alternatives. The Corps eventually denied the permit because the project was not water-dependent, that the plaintiff had failed to show that the alternatives sites identified in the application were not practicable and that the plaintiff had failed to adequately search for alternative sites.

In its complaint, the plaintiff claimed that the Corps applied its practical alternative analysis in an arbitrary and

capriciously manner. The plaintiff argued that the first alternative was not practical because the cost of providing access to that site increased the cost of the project. The court rejected this argument, ruling that while the cost might reduce the plaintiff's profits, it did not render the project prohibitively expensive.

The plaintiff also argued that the first alternative site was not suitable for a middle-income project because it was located near a warehouse district and too far from upscale neighborhoods. However, the court found that the plaintiff's own expert had indicated the site suitable for low-income housing and therefore it was suitable for residential development. Moreover, the court said that such a development would enhance the value of the property by making the area suitable for middle-income housing.

Finally, the plaintiff asserted that the Corps had improperly refused to consider its mitigation proposal as part of its practical alternatives analysis. The court indicated that the Corps guidelines provide that mitigation may be considered if there are no practical alternatives. Since the court had already held that the first alternative site was a practical alternative, the court upheld the Corps determination.

Broader State Wetlands Definition Is Not Preempted By "Swampbuster" Rule

In *Citizens For Honesty and Integrity in Regional Planning and Karl J. Turecek vs. County of San Diego*, 258 F. Supp. 2d 1132(S.D. Cal 2003), an owner of farmland filed an application for a major use permit to develop its property. In January 2003, the County denied the Plaintiff's application on the grounds that the project would destroy wetlands on the property. The plaintiff argued that since it had received funds under the so-called "Swampbuster" provisions of Title XII of the Food Security Act ("FSA") of 1985 (16 U.S.C.S. § 3801 et seq.), the property did not contain wetlands.

The county responded that the FSA provision used a different definition of wetlands. The Swampbuster provisions defines "wetland" as any property consisting of hydric soils, wetland hydrology AND hydrophytic vegetation (16 U.S.C. § 3801 (a)(18)). In contrast, the County of San Diego's Resource Protection Ordinance ("RPO") defines "wetland" as any property containing hydric soils, wetland hydrology OR hydrophytic vegetation. The plaintiff then sought a declaratory judgment that the county ordinance's definition of "wetland" was preempted by the federal Swampbuster wetlands definition.

The federal district court acknowledged that the RPO defined "wetland" more broadly than the FSA. The court said that Congress could preempt state laws under the Commerce Clause of the United States Constitution (Art. VI, Cl.2) or can seek to influence state choices by attaching eligibility for federal funds under the Spending Clause. The court found that the Swampbuster provision was intended to provide incentives to conserve wetlands by denying federal loans and farm subsidies to persons who produce agricultural commodities on converted wetland. Relying on *United States v. Dierckman*, 201 F.3d 915, 922 (7th Cir. 2000), the court held that the Swampbuster provision was enacted under the Spending Clause of the Constitution (art. I, § 8). As a result, the Swampbuster provision of the FSA did not preempt the county's RPO since the State of California or its political subdivisions received funding under the Swampbuster provisions.

Commentary: The Supremacy Clause of the United States Constitution invalidates state laws that interfere with or are contrary to federal law. Federal preemption may be divided into three categories: express preemption; conflict preemption; and field preemption. Express preemption occurs when Congress expressly states within the federal statute that it intends to preempt state law. Conflict preemption will be implied when compliance with both the federal and state law is physically impossible or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress (California v. ARC America Corp., 490 U.S. 93 (1989)). Field preemption occurs whenever federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it (*Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991)).

Wetlands Enforcement Actions

Meadville Real Estate L.P. and its partners agreed to pay a $10,000 penalty

filling in two acres of wetlands near a tributary of Van Horn Creek. According to EPA, Meadville Real Estate applied for a permit as part of the Vernon Town Square commercial development project but did not wait for the permit from the Army Corps before beginning to discharge fill into the wetlands in October 2001. Pursuant to the permit that the Army Corps issued in September 2002, Meadville Real Estate created five acres of new wetlands to mitigate the filling of two acres of wetlands at the site.

Barnsley Inn & Gardens, L.P., owner of a golf and convention resort near Adairsville, Georgia, agreed to pay a $15,000 penalty to settle claims that it improperly filled in 5 acres f wetlands during construction of the golf course. The enforcement action arose out of an inappropriate claim the company made under the CWA's farm pond exemption. A farm pond is excluded from Section 404 permitting requirements when the pond has an agricultural purpose, is sized according to its stated need, and does not adversely affect downstream or upstream waters. A pond constructed as a golf water hazard and fishing amenity did not fall within the farm pond exemption. Under the terms of the settlement, Barnsley will conduct onsite restoration work to return the natural flow of local creek that is designated as secondary trout stream. The company also agreed to complete a Supplemental Environmental Project consisting of purchasing and transferring $100,000 in rights to two parcels of land that will be permanently preserved. One parcel consisting of 10 acres of land will be used to buffer the Etowah River from the effects of runoff pollution, sedimentation, and other impacts from upland development. The second parcel consists of 28 acres of Drummond Swamp. The Chattowah Open Land Trust will hold easements on both properties to protect them from future development.

New England Concrete ("NEC") of Amesbury, Massachusetts agreed to pay a $100,000 fine, restore wetlands and fund some additional environmental protection projects to settle claims that it violated the state Wetlands Protection Act. NEC also agreed to develop a storm water management plan, develop a solid waste management plan, audit environmental compliance at another site, and implement an invasive species control plan. If NEC satisfactorily restores the wetland and develops the plans, $50,000 of the penalty will be suspended. According to the state DEP, NEC filled nearly an acre of bordering vegetated wetland with 8-10 feet of fill on one portion of its site and deposited and buried concrete rubble, tires and machinery within the 100-foot buffer zone of the wetland on another portion of the site. NEC also allowed silt-laden storm water to discharge into the wetland and cause further damage to the resource area.

The Massachusetts DEP also fined Holland's Used Auto Parts $180,000 for filling two acres of wetlands. The company will also have to restore the wetlands. The DEP claims that the company de-vegetated and drained wetlands, constructed a massive concrete wall that stretched through 1,000 feet of the wetlands and a buffer zone, and constructed a building on the filled wetlands. The DEP also asserted that the company built a trench that discharges contaminated storm water to the remaining wetlands. According to the agency, the destroyed wetlands were an endangered species habitat and a public drinking water supply.

Stormwater Enforcement Actions

EPA recently ordered an Arizona land developer to comply with stormwater runoff regulations at a property under construction in Anthem, Ariz. EPA inspectors found that Pulte Homes Corporation had insufficient controls in place at the Corte Bella Country Club development site. In addition, the company did not have a stormwater pollution prevention plan as required by its stormwater permit.

Continental Engineering and Manufacturing, Inc. ("CEM") of Chaska, Minnesota, was sentenced to pay $55,000 in fines and restitution on October 30th for dumping waste material into a storm drain that emptied into a tributary of the Minnesota River. The former chief executive officer of CEM directed two employees to dump into the storm drain the contents of 30 drums of industrial wastes that included cutting machine oils.

Enforcement Actions Involving Commercial Septic Systems

The operator of the Mary Lyon Nursing Home and Rehabilitation Center has agreed to pay a $5,750 penalty to the state Department of Environmental Protection ("DEP") for operating an on-site septic system without a groundwater discharge permit. In addition to paying the fine, comply with DEP wastewater regulations and relocate a drinking water supply well to ensure that a sufficient protective zone exists around the well.

Valley Design Corporation agreed to pay a $10,000 penalty discharging industrial wastewater to an onsite septic system not designed for that activity. Preliminary testing of the septic system revealed that traces of TCE. In addition to the fine, the company will conduct a comprehensive assessment of the septic system to determine any impacts to the environment.

Commentary: Thousands of homes in rural areas as well as many commercial establishments such as funeral homes, taxidermy shops, car washes, beauty shops, food processing facilities, restaurants and nursing homes use onsite systems for wastewater treatment.

However, the wastewater from some commercial enterprises is very different in concentration and flow rates than residential properties. Generally, commercial establishments produce wastewater considered high-strength and often produce this effluent at sporadically high flow rates. As a result, many commercial septic systems would be regulated as "Class V Injection Wells" under the Underground Injection Control ("UIC") program of the Safe Drinking Water Act ("SDWA"). Underground injection wells are classified according to their depth and injection practice. Class V wells are those that are used to inject non-hazardous fluids into shallow formations that may be used as drinking water supplies.

The UIC program is concerned about businesses that inadvertently use their septic system as a Class V well. Thus, photo processing, electroplating, and dry cleaning establishments that directly discharging wastewater from an industrial or commercial process into a septic system could be considered operating a Class V injection well in violation of the UIC program.

Malfunctioning sewage systems are one of the leading causes of waterborne illnesses in Pennsylvania. As a result, many states have established loan programs to reimburse local governments for the costs of ensuring that new and repaired on-lot systems are properly sited, designed, permitted and inspected. For example, in Pennsylvania, Act 537 requires municipalities to enforce on-lot sewage system requirements, including evaluation and permitting of new systems, proper repair of malfunctioning systems and timely complaint investigations. These duties are usually carried out by Sewage Enforcement Officers who must pass a state-administered test to receive certification from a state board.

EPA Launches SPCC Enforcement Initiative

EPA charged two New Jersey marinas with failing to comply with Spill Prevention Control and Countermeasure ("SPCC") requirements. The marinas were charged with failing to prepare and implement an SPCC plan for their facility, failing to provide secondary containment in the area where fuel trucks fill the tanks and for not keeping accurate records of tank maintenance. EPA is seeking a $20,200 penalty from the Utsch Marina in Cape May and $11,000 from Bridge Marina in Lake Hopatcong.

EPA launched its marina inspection initiative in New Jersey in October 2002. Before making inspections, the Agency urged 450 marinas to do a self-audit of their facilities or to ask EPA assistance to determine if the SPCC regulations applied to them and if so, whether they were in compliance. EPA ultimately determined that 122 marinas stored enough fuel to be subject to the regulations. Of these, 72 asked for compliance assistance and were given one year, under EPA oversight, to comply with the regulations. The remaining 50 marinas did not respond to EPA's request and now face penalties.

EPA is seeking penalties of more than $400,000 against 17 facilities in North Dakota for violations of the SPCC Plan regulations. The facilities did not have secondary containment, inadequate or no SPCC Plans, no employee training,

inadequate facility security and failed to promptly clean up oil spills EPA conducted 44 SPCC inspections at facilities in eastern North Dakota in September 2002. Thirteen facilities either had no violations or took the required corrective actions to achieve compliance subsequent to the inspections. An additional 12 facilities had less serious violations that will be promptly addressed and will include smaller penalties.

Claremont, New Hampshire has agreed to pay $6,000 for failing to have a SPCC Plan for its public works garage and the transfer station. While the facilities had some secondary containment, they did not comply with other SPCC requirements such as employee training, tank inspections, and site security measures. New Bedford will pay a $5,000 fine for failing to develop an SPCC Plan and will implement a formal environmental management system at the city's water treatment facility and public works garage at an estimated cost of $20,000.

Commentary: EPA first developed the SPCC requirements in 1973 to prevent oil spills from affecting rivers, bays and other surface waters. The SPCC requirements were revised in 2002 (see our July 2002 issue for a more detailed discussion on the SPCC program). Any facility that has aboveground oil storage capacity in excess of 1,320 gallons and stores diesel oil, fuel oil, heating oil, lubricating oil, gasoline, kerosene, fuel additives, mineral spirits, solvents or waste oil must develop and implement a SPCC Plan. The facility must demonstrate in the plan that they have built secondary containment for tanks, trained personnel, analyzed the trajectory a fuel spill might take, inspected tanks regularly and kept records of those inspections, among other things. The plan must also include detailed facility diagrams and a description of how the facility would deal with a release of fuel if it happened.

County Anti-Sludge Ordinance Preempted by State Law

Urbanized areas generate a large volume of sludge from their publicly-owned treatment plants ("POTWs"). With limited disposal options, these governments have been exporting their sludge to rural areas for use as fertilizer. Farmers have enthusiastically embraced this practice since it provides them with nutrient-rich fertilizer for free. Indeed, in Virginia, the state health department estimates that 42,400 acres of land in thirty-three Virginia counties were fertilized with so-called biosolids in 2001.

However, residents in these areas are becoming increasingly concerned that applying this so-called bio-solids to agricultural land could produce health or safety risks from bacteria, viruses, heavy metals, and other pollutants that may contaminate their drinking water or runoff into surface waters. As a result, some local governments are enacting ordinances prohibiting this practice.

In *O'Brien v. Appomattox* (No. 6:02 CV 00043, W.D. Va. 11/17/03), a federal district court struck down such a local ordinance because it conflicted with a state law. In this case, the state legislature had enacted a law in 2001 that granted county governments with the right to pass ordinances providing for the testing and monitoring of biosolids. The board of county supervisors had adopted a zoning ordinance in February 2002 creating an agricultural overlay district covering 88% of the county where land application of biosolids would be tightly regulated within the new zoning district. The board then passed a second ordinance that prohibited the aboveground application of sludge, and instead required that any application be done through direct soil injection. The ordinance expressed the intent of the board to ban the land application of biosolids if the state legislature gave them such authority.

The plaintiff cattle farmer wanted to apply biosolids to 322 acres of farmland, which he uses partly for pasture and partly for hay production. In March 2002, the state department of health issued permits allowing two suppliers of biosolids that provided that the permit holders must separately address compliance with local zoning and planning requirements. The plaintiff entered into agreements with these suppliers and then filed a request for a preliminary injunction, claiming that the county ordinance effectively prohibited the application of biosolids. The plaintiff said he would be irreparably harmed because he will be required to spend at least $65,000 on alternative fertilizers and that he will lose approximately $15,000 due to reduced hay

yields. He acknowledged that acknowledge that he would be unable to recover money damages because of the county's right to assert the defense of sovereign immunity. In addition, he claimed that he would suffer the loss of the environmental and conservation benefits of biosolids to his property along with additional environmental damages from reverting to chemical fertilizers.

The court found that the state legislature had enacted a comprehensive program for regulating biosolids, that any county ordinance must not be inconsistent with the Constitution and laws of the United States or the state, and that that counties did not have any authority to regulate biosolids beyond their powers to conduct testing and monitoring.

Commentary: Biosolids contain nutrients such as nitrogen, phosphorus and potassium and trace elements such as calcium, copper, iron, magnesium, manganese, sulfur and zinc that are necessary for crop production and growth. Biosolids also replenish the organic matter and improve soil structure by increasing the soil's ability to absorb and store moisture. Crops use the organic nitrogen and phosphorous found in biosolids very efficiently because these plant nutrients are released slowly throughout the growing season. This enables the crop to absorb these nutrients as the crop grows. This efficiency lessens the likelihood of groundwater pollution of nitrogen and phosphorous.

EPA has promulgated standards for the use and disposal of biosolids at 40 CFR Part 503. These federal standards contain numerical limits for metals, pathogen reduction standards, site restriction, crop harvesting restrictions and monitoring, record keeping and reporting requirements for land applied biosolids as well as similar requirements for biosolids that are surface disposed or incinerated. In October, EPA determined that no numeric limitations, monitoring, operational standards, or management practices were required to protect public health and the environment from reasonably anticipated adverse effects from exposure to dioxins in land-applied sewage sludge (68 FR 61083, October 24, 2003). Approximately 54% of biosolids is applied to land to fertilize and condition soils, 28% is disposed of at municipal solid waste landfills, 17% is incinerated and 1% is disposed of in lagoons or sewage sludge-only landfills.

Biosolids have been used successfully at mine sites to establish sustainable vegetation and are also being used as inexpensive cover or caps at brownfield sites. The organic matter inorganic matrix and nutrients present in the biosolids reduce the bio-availability of toxic substances often found in at mines and brownfield sites and can also regenerate the soil layer. This regeneration is very important for reclaiming abandoned mine sites with little or no topsoil.

HAZARDOUS WASTES/USTS

EPA Region 6 Issues RCRA Ready for Reuse Determinations

EPA Region 6 and the Louisiana Department of Environmental Quality ("LDEQ") issued the first "ready for reuse" determination in Louisiana for the ExxonMobil Chemical Company's Baton Rouge Plastics Plant (BRPP). The BRPP produces low-density polyethylene in the form of plastic pellets. The facility became a TSDF in 1991 following promulgation of EPA's Boiler and Industrial Furnace regulation in 1991. In response, the EPA conducted a RCRA Facility Assessment ("RFA") identified 35 Solid Waste Management Units ("SWMUs") and 6 Areas Of Concern ("AOCs"). The facility was then required to perform a RCRA Facility Investigation ("RFI") at 12 SWMUs undergo to determine if hazardous wastes or hazardous constituents had been released. In 1999, EPA Region 6 conducted a Screening Level Risk Evaluation (SLRE) of all 35 SWMUs and determined that the nature and extent of potential contamination at the facility had not been adequately investigated. BRPP developed and implemented a sampling and analysis plan (SAP) to evaluate potential current and future health risks associated with this site. After the SAP was completed, BRPP agreed to implement RCRA corrective action in accordance with the Region 6 Corrective

Action Strategy ("CAS"). LDEQ issued a "no further action" determination and EPA followed with its Ready for Reuse Determination based on information contained in the facility's Risk Evaluation Report. The report indicated that there were releases of hazardous constituents but that the residual concentrations did not present an unacceptable risk to human health or the environment based on risk-based cleanup levels established by LDEQ as well as the current and reasonably expected future commercial/industrial use of the facility. The current zoning in the area restricts the BRPP facility to industrial use and shallow groundwater in the area is not used or designated for use as a drinking water source or beneficial resource. As a condition of the Read for Reuse Determination letter, BFPP was required filed a notice in the local land records describing the environmental conditions at the BRPP facility and is responsible for maintaining the use restriction. BFPP must also report any changes in site conditions to the LDEQ, including environmental conditions, land use, site receptors, and remedy performance. If site conditions do change, EPA will revaluate its suitability determination.

EPA Region 6 and the Oklahoma Corporation Commission ("OCC") issued the first "ready for reuse" determination for petroleum storage tanks associated with former gasoline stations in Sayre, Oklahoma. Sayre is located in rural western near Interstate 40 and old Route 66. Many of the town's has stations closed after the interstate was constructed. In 2001, Sayre asked the OCC for help dealing with 19 properties containing abandoned service stations. The city obtained access agreements from the individual property owners while the OCC used the State UST Trust Fund to perform site assessments and necessary, cleanups. The OCC removed seven tanks, excavated soil and razed a dilapidated building. No Further Action Determinations were issued for 12 of the sites and risk assessments were performed on 7 of the sites. Two of these sites required remediation. To make other properties more marketable, the city removed an additional 15 tanks from five other sites, razed a second building, and received Final Closure Letters for the tanks. EPA Region 6 then issued its Ready For Reuse Determination Letter confirming that the properties had been successfully investigated and remediated to the extent that environmental conditions at the sites are protective of human health and the environment based on their current and anticipated future use as commercial/industrial properties. The property owners were required to file deed notices in the local land records. If conditions at the Properties change, including environmental conditions, land use, site receptors, and remedy performance, EPA will revisit its suitability determination. In addition, EPA reserved the right to owners or operators of the properties to take additional actions if the agency becomes aware of new or additional information that materially impacts this Ready for Reuse Determination.

Commentary: EPA Region 6 has now issued six Ready for Reuse Certificates. The certificates are part of the Region 6 long-term corrective action "measure of success" program that recognizes when a site has been addressed or remediated to the extent that it is safe for reuse or redevelopment. The certificate is not intended to be a clean-closure but instead serves as a determination that the site is considered acceptable for its designated reuse.

EPA Proposed Change to Definition of Solid Waste

To significantly increase the recovery of metals, solvents and other usable materials, EPA proposed to revise the definition of solid waste under the Resource Conservation and Recovery Act ("RCRA"). The proposed rule establishes criteria for determining when certain hazardous secondary materials would be considered to be legitimately recyclable and not discarded so that they would not be considered wastes subject to regulation under RCRA Subtitle C (68 Fr 61557, October 28, 2003).

The proposal would allow reclamation of certain types of hazardous secondary materials if they were recycled in a continuous process within the same industry. A continuous process is one with no momentary stoppage and where the company reclaiming or recovering the material has to be the same one that generated it.

The proposed amendment specifies four general criteria for distinguishing legitimate hazardous waste recycling from improper recycling. The four criteria are that the material must be managed as a valuable commodity, the material must provide a useful contribution to the recycling process or to a product of the recycling process, the recycling process must yield a valuable product or intermediate that is sold or used under specific conditions, and the product of the recycling process must not contain significant amounts of hazardous constituents.

The proposal would not alter the regulatory status of hazardous recyclable materials that are recycled by a commercial or third-party reclaimer that is not within the same industry, materials placed on the land for beneficial use, those burned for energy recovery, and materials considered inherently waste-like such as certain dioxin-containing wastes.

EPA estimated that the proposed rule would encourage the recycling of approximately 1 million tons of hazardous waste annually and encourage recovery of materials worth an estimated $1 billion each year. The industries that would be most affected by the proposal include inorganic chemicals, plastic materials and resins, pharmaceutical preparations, cyclic crudes (acids, dyes and pigments), intermediates (specialty chemicals), industrial organic chemicals, nonferrous metals (such as lead), plating and polishing, and printed circuit boards.

Commentary: To become regulated as a RCRA hazardous waste, a material must first qualify as a solid waste. A solid waste is considered a hazardous waste if it is explicitly listed in subpart D of part 261 or if it exhibits one of the four hazardous characteristics specified in subpart C of part 261.

The “definition of solid waste" separates recyclable hazardous secondary materials into two broad categories: those that are classified as solid wastes when recycled and are subject to regulation under RCRA, or those that are not considered solid wastes when they are recycled, and thus are not regulated. The existing part 261 regulations identify types of recycling practices that are fully regulated because they resemble waste management rather than normal industrial production These practices include recycling of “inherently waste-like" materials, recycling of materials that are “used in a manner constituting disposal," and “burning of materials for energy recovery." The proposed rule does not affect how these recycling practices are regulated. It has always been difficult to classify easily which types of so-called "hazardous secondary materials" are considered "discarded" if they are used or reused in particular ways.

Hazardous secondary materials that are not regulated as wastes when they are recycled include materials that are used or reused directly as effective substitutes for commercial products, and those which can be used as ingredients in an industrial process, provided the materials are not being reclaimed (40 CFR 261.2). The current regulations also provide certain specific exemptions and exclusions from the definition of solid waste for particular recycling practices. For example, pulping liquors from paper manufacturing that are reclaimed in a pulping liquor recovery furnace and then reused in the pulping process are excluded from regulation under 40 CFR 261.4(a)(6). In some cases, these exclusions specify certain conditions that must be met in order to qualify for and maintain the excluded status of the recycled material.

EPA Clarifies Eligibility of Petroleum-Contaminated Sites for Brownfield Funds

A petroleum-contaminated sites or portion of a site contaminated with petroleum may be eligible for brownfields funding if the EPA or a state determines that the site meets certain statutory criteria. In its guidance for the 2004 brownfield funding, EPA clarified the eligibility criteria for petroleum-contaminated sites.

The first criterion is that the site pose a “relatively low risk” compared to other petroleum sites. EPA identified types of petroleum-contaminated sites would be considered high-risk sites. These include sites being cleaned up using LUST trust fund monies and any petroleum-contaminated site that currently is subject to a response under the Oil Pollution Act (OPA).

EPA or a state is also required to

determine that there is no "viable responsible party" that can address the petroleum contamination at the site. This determination is based on both viability and responsibility. EPA indicated that a viable party will be deemed to exist for purpose of funding eligibility if all of the following factors are present at the time of the award: First, a party is subject to judgment or administrative order requiring it to assess or clean up the site, or an enforcement action or citizen suit has been filed against the party that, if successful would require that party to assess, investigate, or clean up the site. In addition, that party is financially capable of satisfying obligations under federal or state law to assess, investigate or clean up the site.

The third criterion is that the eligible entity has not caused or contributed to the petroleum contamination. EPA requires applicants to indicate if they own the site for which funding is requested and to describe if the applicant caused or contributed to the petroleum contamination or other environmental concerns at the site.

Finally petroleum-contaminated sites must not be subject to a corrective action order under a Resource Conservation and Recovery Act (RCRA) §9003(h). If EPA awards an applicant a revolving loan fund grant, the state or EPA must make the same determination for a site that will be cleaned up under a loan or subgrant.

EPA Announces New UST Brownfield Initiative

EPA plans to create partnerships to promote the reuse of petroleum-contaminated brownfield sites under a new program announced on November 21st.

Under its "Partnership Initiative for Reusing Petroleum Brownfields" EPA wants to partner with state and regional governments as well as with private sector companies who may be interested in reusing petroleum contaminated properties. EPA hopes to create at least one partnership in each of the following four reuse scenarios this year: retail/commercial, residential, ecological/recreational (e.g. parks), or community/public purposes (e.g., fire stations).

For example, EPA is looking for private sector partnerships with companies willing to promote retail/commercial reuses by locating and opening new operations on petroleum contaminated brownfields properties. As part of the partnership, a private sector entity could commit to a company-wide goal of locating a certain percentage of its planned new shops/businesses on petroleum contaminated brownfields properties. Alternatively, the company may identify site-specific petroleum contaminated brownfield properties and commit to locate new operations on the specified sites. EPA, in turn, could provide public recognition could also help facilitate the cleanup at specific sites identified by our partners to help remove bureaucratic barriers, facilitate quicker cleanup and reuse, and meet the needs of all stakeholders involved.

To promote residential development and housing, EPA is working with Housing and Urban Development ("HUD"), Habitat for Humanity International, and other associations. EPA is looking to develop an expanded partnership to further promote residential/housing reuse. Under this partnership, EPA and its partners would work together to leverage public and private resources, streamline petroleum contaminated brownfield site cleanups which target abandoned gas stations, and create an opportunity to reuse these properties for public and private housing. EPA, HUD, and other stakeholders hope to accelerate the cleanup and revitalization of 15-30 abandoned gas station sites in two or more cities that have been identified as an environmental priority and land use target.

This partnership could be completed in several phases. In the first phase, EPA, HUD, and other stakeholders would designate certain communities as residential partnership pilots after considering among other things, site characteristics, market conditions, and stakeholder interest and involvement. In the second phase, EPA and HUD would work with other stakeholders to facilitate federal coordination and integrate cleanup and revitalization activities to help ensure timely cleanup and reuse. In the third phase, EPA would work with its partners to evaluate the success of the pilot for future application.

EPA has an established partnership with the Wildlife Habitat Council ("WHC") to promote ecological/recreational reuse at petroleum contaminated brownfields

properties. WHC will provide design expertise to maximize the ecological benefit of the reuse and help bring together key parties in a community to help reuse petroleum-contaminated properties for parks, wetlands, and other ecological and recreational uses. EPA wants to expand this partnership to other private and public sector entities to focus on abandoned gas stations and other petroleum contaminated lands. Public and private sector partners could invest in communities by reusing abandoned gas stations and other brownfields properties for ecological/recreational purposes.

Under formal and/or informal agreements between EPA and its partners, each partner would contribute something to promote reuse of former petroleum brownfields properties. EPA could provide assistance to address obstacles and challenges to cleaning up and reusing these properties. This assistance might include identifying communities with existing USTfields pilots and brownfields grants, providing federal assistance to identify and facilitate resolution of obstacles to development. EPA also contemplates using a number of enforcement tools such *as* Ready for Reuse determinations for property owners who are not eligible for federal brownfields grants comfort letters and multi-site cleanup agreements to resolve liability concerns

UST Enforcement Actions

The owner of the American Inn assisted living facility in Southwick, Connecticut and a fuel delivery company were fined $16,500 for failing to report and properly respond to a release of No. 2 fuel oil. The spill occurred during an oil delivery and impacted a paved area and grassy area in the vicinity of a large underground oil storage tank. The fuel delivery company tried to clean up some of the oil but ended up improperly transporting oil-contaminated snow from the property.

The operator of a Brooklyn gasoline station and the property owner face over $16,000 in penalties for failing to upgrade or close a 4,000 gallon UST, not performing release detection, failing maintaining leak detection records and not responding to an EPA information request. The owner of the property, S&M Realty, was fined as owner of the tank.

TOXIC SUBSTANCES

LBP Enforcement Review

The Maryland Department of the Environment ("MDE") is seeking $100,000 in fines from an owner of four residential properties in Baltimore. The owner is also an employee of the Baltimore Childhood Lead Poisoning Prevention Program. MDE asserted that Ali Sardorizadeh and the company he controls, Ferdosi Inc., failed to register the four properties with the MDE and that the properties are not in compliance with lead hazard risk reduction standards.

Commentary: Maryland's Reduction of Lead Risk in Housing Law requires owners of rental property constructed before 1950 to meet a lead hazard risk reduction standard. Property owners are required to meet the standard whenever there is tenant turnover. As of Feb. 24, 2001 property owners were required to ensure that no less than 50% of their units were in compliance with the lead hazard risk reduction standard. Owners of residential rental dwellings units constructed before 1950 are required to register each affected property with MDE.

EPA Study Finds Children Face Increased Cancer Risk from CCA Exposure

The draft EPA study concludes that children exposed to outdoor decks and playsets pressure-treated with Chromated copper arsenate ('CCA") face an increased risk of cancer. However, EPA emphasized that the findings of the November 13th report were preliminary and will be evaluated by

EPA's Scientific Advisory Panel.

According to the draft version of the new study, 90% of children regularly exposed to CCA-treated wood face a greater than one in 1 million cancer risk. In southern states where children spend more time playing outdoors, 10% of all children face a cancer risk 100 times higher than children in the general population.

Commentary: The manufacture and use of products containing CCA had been authorized under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). In February 2002, manufacturers of CCA requested EPA to cancel their FIFRA registrations for residential uses of CCA-treated wood. In April, EPA formalized the use termination for residential uses. This action prohibited treating of playground equipment, decks, patios, gazebos, walkways, residential fencing, picnic tables, boardwalks and landscape timbers with CCA after Dec. 30, 2003(68 FR 17366, April 9, 2003). However, the product could continue to be used for preservative treatment of certain categories of forest products including Lumber and Timber for Salt Water Use Only, Piles, Poles, Plywood, Wood for Highway Construction, Wood for Marine Construction, Sawn Timber Used To Support Residential and Commercial Structures, Sawn Crossarms, Structural Glued Laminated Members and Laminations Before Gluing, Structural Composite Lumber, and Shakes and Shingles.

In its February 2002 news release announcing the phase-out, EPA stated that it did not believe there was any reason to remove or replace CCA-treated structures, including decks or playground equipment, or to remove or replace surrounding soils. In November, Consumer Product Safety Commission ("CPSC") voted unanimously to deny a petition to ban the use of CCA in playground equipment because of the decision of CCA manufacturers to end CCA treatment of wood for consumer uses by the end of 2003. EPA and CPSC also announced that they are investigating the use of wood sealants coatings to reduce amount of arsenic released from CCA-treated wood.

SUPERFUND/BROWNFIELDS

EPA Issues Ready for Reuse Certificates

EPA's Region 5 office in Chicago issued the first Ready for Reuse certificate in the Midwest for the H.O.D. Landfill Superfund site next to Antioch Community High School in Antioch, Ill. The 121-acre H.O.D. Landfill Superfund site contains a 51-acre municipal and industrial landfill that operated from about 1963 to 1984. EPA selected a final cleanup plan for the site in September 1998. A series of cleanup activities were completed between August 2000 and August 2002. Approximately 30 acres of the site is being converted to a multi-use athletic field adjacent to the school. In addition, methane gas extracted from the landfill is now being used to produce the school's heat and electricity, and a wetland along one side of the site will be used for student science projects. The area surrounding the site is a mix of agricultural, industrial and residential land uses.

EPA Announces Additional PPAs

While EPA indicated in its May 2002 guidance on Prospective Purchaser Agreements ("PPAs") that PPAs are no longer necessary, it appears that EPA is willing to enter into these agreements for certain publicly-supported projects.

EPA agreed to amend a February 2001 prospective purchaser agreement ("PPA") with Home Depot to facilitate the purchase of two parcels located within the San Fernando Valley Superfund site in Glendale, California. Home Depot estimates the new store that will be built on the site will result in approximately 250 new jobs and additional new tax revenue. Under the amendment, Home Depot will implement an approved Remedial Action Plan ("RAP") that will take the site redevelopment into account. Home Depot will excavate some of the contaminated soil to accommodate construction of its new store, install a soil vapor extraction system and construct a 53-

foot deep slurry wall around the perimeter of the property. Home Depot will also make a $10,000 payment to EPA, file a notice of the agreement and the August 2000 consent decree with the Regional Water Quality Control Board in the local land records, exercise due care regarding the existing contamination and provide copies of the PPA to any lessees, subleases and successors in interest.

EPA has proposed entering into a PPA for the Riverfront Superfund Site, Operable Unit No. 1 ("OU1") located in the New Haven, Missouri. In 1986, the tetrachloroethene ("PCE") was detected in two public-supply groundwater wells in the northern part of New Haven. The contamination was traced to the Riverfront Superfund Site, consisting of six operable units. Although PCE was detected in the soil and groundwater of OU1, EPA determined that the plume did not affect the city's closed water supply wells. In exchange for a covenant not to sue and contribution protection, the local Industrial Development Authority ("IDA") agreed to implement a response action and impose certain use restrictions on OU1 through a grant of a restrictive covenant and easement to the State of Missouri to ensure that OU1 would be used for civic, park, and/or parking purposes as well as provide access and cooperate with EPA and the State. The IDA also agreed to provide a notice of contamination to any successors in interest, exercise due care with regard to contamination at OU1, and cooperate with EPA and the State.

EPA also proposed to enter into a PPA to facilitate the purchase of a 10-acre parcel of the Richmond Townhouse Apartments Site in Richmond, California. The site had served as a rail car maintenance facility from 1909 to 1959 and became heavily contaminated with lead. Residential apartments were constructed in the early 1970s. In 1998, soil investigations by the county health department revealed soil lead concentrations above 1,100 parts per million. EPA then conducted a series of removal actions that resulted in the removal of approximately 11,000 cubic yards of lead-contaminated soil. A deed restriction was recorded on May 14, 2002 that requires that any disturbance of the cap be done under an approved soil management plan. DTSC conducted a second preliminary assessment under an EPA grant and EPA determined that no further action was required in June 2002. In exchange for issuing a covenant not to sue and contribution protection, Carlson Boulevard, L.P ("Carlson") agreed to pay EPA $100,000 and provide access to EPA and the state Department Of Toxic Substances ("DTSC") to implement response actions. Carlson also agreed to exercise due care, conduct an annual cap inspection and repair consistent with the soil management plan, file a notice of the agreement in the local land records and provide a copy of the agreement to any subsequent owners or operators of the property. The covenant not to sue and contribution protection also extends to the general partners of the purchaser.

Commentary: The Richmond Townhouse PPA and two case studies in the next article once again illustrate the importance of doing comprehensive historical due diligence on properties that may not appear to currently pose significant environmental concerns. The investigation should not only include reviewing aerial photographs, city directors, local land records and government regulatory records but also interviewing local officials who may have institutional memories of prior uses that are not readily obtainable from the customary historical sources.

EPA Agrees to Defer NPL Listing In Lieu of State Approved Cleanup

EPA agreed to defer finalizing the listing of the Broad Brook Mill site on the National Priorities List ("NPL") in exchange for a commitment from United Technologies Corp. and its wholly owned subsidiary Hamilton Sundstrand Corp. ("Hamilton Sundstrand") to remediate the site pursuant to Connecticut DEP requirements.

Under this arrangement, EPA and DEP have entered into a "deferral agreement" with the state taking the lead in ensuring cleanup of the site and EPA providing oversight. DEP also entered into a "consent order" with Hamilton Sundstrand to develop and implement a cleanup plan. Finally, EPA and Hamilton Sundstrand have entered into a cost recovery agreement for recovery of past and future response costs to ensure EPA will be reimbursed for its future oversight costs.

Certain activities must still be completed before these activities can begin. The Millbrook condominium association must agree to convey the 21 residential units and surrounding property to a Hamilton Sundstrand entity so residents in the mill building can be relocated. Also, under the deferral plan, DEP will pay $3.9 million to help pay for cleanup. This amount represents the state's contribution to the cleanup of pollution caused by entities other than Hamilton Sundstrand. Hamilton Sundstrand will develop a cleanup plan after residential units are transferred. However, the cleanup will not occur until state funding for those activities is secured. If the cleanup does not proceed according to the agreements, the EPA can renew efforts to finalize the listing of Broad Brook Mill under the federal Superfund law.

The Broad Brook Mill site was formerly known as the Millbrook Condominiums site. The property had been used for a variety of industrial operations from 1835 to until a 1986 fire. The surviving mill building was then converted to a 21 residential unit condominium building. As part of the agreement, a Hamilton Sundstrand entity will buy out the owners of the 21 residential units.

Meanwhile, EPA completed demolition of 45 vacant homes near the Escambia Wood Treating Superfund site in Pensacola, Florida has begun. The demolition follows a National Relocation Evaluation Pilot that relocated approximately 361 households near the site. The removal of the remaining 116 residential structures and a 200-unit apartment complex is planned as part of a Phase Two demolition project to be conducted at a later date. The abandoned 26-acre site Escambia Wood Treating operated from 1942 until closing in 1982. The Escambia Wood Treating Company discharged spent creosote and PCP-laden waste into unlined holding ponds at the site during operation before the facility closed in 1982. In October 1991, EPA began a removal action to excavate contaminated materials. The excavated material is currently stockpiled under secure cover on-site

Commentary: Under EPA's deferral policy, EPA must determine that a cleanup under state authority would be at least as protective of human health and the environment as a response required under the Superfund program, the site must be addressed at least as quickly as EPA would address the site, there must be adequate public participation, and EPA will continue to oversee the project, and participate in all public meetings. A site will remain proposed to be added to the NPL until the cleanup is complete at which time EPA will consider withdrawing the proposed NPL listing.

EPA and the Pennsylvania DEP have agreed to enter into a memorandum of understanding ("MOU") allowing owners or developers of contaminated property to address their cleanup obligations liability under CERCLA, RCRA and TSCA by participating in the state's voluntary cleanup program. EPA has entered into MOUs with Illinois, Indiana, Michigan, Missouri and Wyoming to allow cleanups of RCRA-regulated facilities to proceed under state non-RCRA programs but this would be the first time that EPA would allow TSCA cleanups to proceed under state authority.

EPA Announces First Area-Wide Pilot Grants

On December 17th, EPA announced that Pinellas County, Florida was awarded a $38,000 grant under the agency's Area-Wide Pilot Project. The grant will be used to develop a Brownfield component within the Cross Bayou Watershed Management Plan. The Brownfield component will identify properties where real or perceived environmental contamination is hindering redevelopment. By identifying these properties, assessment and remediation strategies can be established to allow for redevelopment. The Cross Bayou Watershed that is located in the central portion of the county and encompasses approximately 7,800 acres. Local officials have recently initiated a watershed management plan to address redevelopment, storm water, and environmental restoration.

Commentary: Under its Once Cleanup Plan and Land Revitalization Agenda, EPA hopes to leverage grant resources across multiple federal cleanup programs to facilitate area-wide cleanup and reuse of multiple contaminated properties.

EPA Announces Funding For State Response Programs

EPA has begun accepting applications for the CERCLA section 128(a) noncompetitive $50 million grant program to establish and enhance state and tribal response programs (68 FR 68619,December 9, 2003). States and Indian tribes have until January 31, 2004 to submit their applications. For the first time, applicants are required to provide a Dun and Bradstreet Data Universal Numbering System ("DUNS") number with their final cooperative agreement package.

To be eligible for section 128(a) funding, a state or tribe must demonstrate that their response program includes, or is taking reasonable steps to include the four statutory elements of a response program or must be a party to voluntary response program Memorandum of Agreement ("MOA") with EPA, In addition, the applicants 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. Except for Section 128(a) funds a state or tribe uses to capitalize a Brownfields Revolving Loan Fund under CERCLA 104(k)(3), states and tribes are not required to provide matching funds for grants awarded under Section 128(a).

The funds may be used to develop legislation or administrative mechanisms (e.g. regulations, procedures, guidance) to establish or enhance the administrative and legal structure of their response programs. The funds may also be used to capitalize a revolving loan fund ("RLF") for brownfields cleanup. Recipients may also use the funds to purchase environmental insurance or develop a risk-sharing pool, indemnity pool, or insurance mechanism to provide financing for response actions under a state or tribal response program. The funds may also be used to establish and maintain required public record including activities related to maintaining and monitoring institutional controls. Finally, recipients may use the funds to conduct limited site-specific activities, such as assessment or cleanup, provided such activities are secondary to the primary use of the funds (i.e. to establish and enhance the response program).

For fiscal year 2004, EPA will consider funding requests up to a maximum of $1.5 million per State or tribe. EPA will target funding of at least $3 million for tribal response programs to ensure adequate funding for tribal response programs. Subject to the availability of funds, EPA regional enforcement and program staff will be available to provide technical assistance to States and tribes as they apply for and carry out these grants

EPA Accepting Applications for Targeted Brownfield Assessments

EPA announced it was accepting applications from states and Indian tribes for fiscal year 2004 Targeted Brownfields Assessment ("TBA") grants. The TBA grants provide supplemental funding for state and tribal voluntary cleanup programs, revolving loan funds, and insurance mechanisms. The TBA program is specifically designed to help communities without EPA Brownfields Assessment pilots/grants. TBA funds may also be used to supplement other brownfield assistance to promote cleanup and redevelopment of brownfields.

TBA assistance is available through two sources. One common source is direct assistance from the EPA regional office in the form of funding and/or technical assistance for environmental assessments. The other source of assistance is from state or tribal voluntary response program offices receiving funding under CERCLA section 128(a).

TBA assistance may be used to conduct screening or "all appropriate inquiry" assessment, including a background and historical investigation and a preliminary site inspection. In addition, TBAs may be used for sampling activities to identify the types and concentrations of contaminants and the areas of contamination to be cleaned as well as to establish cleanup options and cost estimates based on future uses and redevelopment plans.

EPA generally will not fund TBAs at properties where the owner is responsible for the contamination unless there is a clear means of recouping EPA expenditures. Furthermore, the TBA program does not provide resources to conduct cleanup or building demolition activities. Cleanup assistance is available, however, under EPA's cleanup or RLF grants.

Each EPA regional office is given an annual budget to spend on TBAs. The

region offices have discretion in selecting areas to target for environmental assessment assistance and typically prefer to target properties that: are abandoned or publicly owned, have low to moderate contamination, include issues of environmental justice, suffer from the stigma of liability, or have a prospective purchaser willing to buy and pay for the cleanup of the property. Each regional office develops selection criteria to help establish relative priorities among the properties located within a region's jurisdiction. State response programs may allocate TBA funding on a case-by-case basis.

Under the TBA Program, EPA will hire a contractor to perform site assessments, to develop cleanup options and cost estimates, and to ensure the community has access to the findings. EPA will consider funding requests of up to $1.5 million per state or tribe for FY 2004 grants.

EPA Announces Portfields Initiatives

Three communities received Portfields awards in October. The Portfields Initiative is an interagency project to revitalize brownfields in port and harbor areas. The three Portfields communities are New Bedford, Massachusetts; Tampa, Florida; and Bellingham, Washington. EPA will assess the needs of the port cities and provide technical support in the cleanup of any Brownfields site. EPA estimates that 15% of the nation's brownfield sites are located along the nation's waterways.

The five communities will use their $400,000 awards to incorporate smart growth into planning, revitalization, and redevelopment efforts. Allegan, Michigan; Toledo, Ohio; Lancaster County, Pennsylvania; Emeryville, California; and the Downriver Community Conference, Southgate, Michigan. These communities, selected from 35 applicants, were chosen because their proposed projects will result in smart growth redevelopment; link Brownfields redevelopment to open space preservation and improve redevelopment of specific Brownfields sites by application of smart growth principles.

ENVIRONMENTAL CASES INVOLVING CORPORATE AND REAL ESTATE TRANSACTIONS

Death Knell of the "Substantial Continuity" Test?

During the 1980s and 1990s, federal courts ignored traditional state law tests for determining the liability of parent corporations and successor corporations and, instead, adopted more liberal federal common law approach that expanded the liability of corporations under CERCLA.

In 1998, United States Supreme Court indicated in *United States v. Bestfoods (*524 U.S. 51) that the a parent corporations could only be liable as a CERCLA operator if the state common law rules for piercing the corporate veil were satisfied or if the corporation could be shown to have directly operated the facility.

While Bestfoods only addressed the liability of parent corporations, it is slowly but surely serving as the impetus for reversing the line of cases that imposed liability on successor corporations under a federal common law analysis. The latest example of this trend occurred earlier this month when the United States Court of Appeals for the Second Circuit ruled that the substantial continuity test was no longer valid for determining successor liability under CERCLA (*New York v. National Service Industries Inc*., No. 02-9227, 12/17/03). Both the First and Ninth Circuits have rejected the substantial continuity test in the wake of *Bestfoods*.

In this case, Serv-All Uniform Rental Corporation Inc. ("Serv-All") disposed of several 55-gallon drums of liquid waste containing perchloroethylene at the Blydenburg Landfill in Islip, New York in 1978. The landfill was subsequently added to the New York Registry of Hazardous Waste Sites as well as the NPL and the New York Department of Environmental Conservation ("NYDEC") spent at least $10 million to clean up the landfill. In 1988,

National Service Industries Inc ("NSI") purchased all of the assets of Serv-All and took over Serv-All's garment rental service. The owners of Serv-All covenanted not to compete with NSI for seven years and liquidated the company. NSI employed the same Serv-All drivers who wore insulated jackets and drove trucks that continued to bear the name of Serv-All, and used Serv-All letterhead and telephone number, serviced the same customers. However, the two corporations did not have the same shareholders.

The NYDEC filed a cost recovery action against NSI as a successor corporation. The District Court for the Eastern District of New York held NSI liable as CERCLA generator under the substantial continuity test adopted by the Second Circuit in *B.F. Goodrich v. Betkoski*, 112 F.3d 88 (2d Cir. 1997). NSI appealed, arguing that *Bestfoods* invalidated the substantial continuity test.

The Second Circuit acknowledged that the Supreme Court expressly declined to determine if courts should apply state or federal common law when deciding liability under CERCLA. However, the court also said that Bestfoods stood for the proposition that corporate liability should be determined by common law unless a statute expressly states that it is abrogating common law. The court said that the substantial continuity test was well established in labor law cases but not to impose general corporate liability but to impose a duty to bargain with the workforce. The court also noted that the doctrine had been applied in a few product liability cases where states had adopted the principle. Because only a handful of states have adopted the doctrine, the court said it is not a part of the federal common law. Because it had essentially created a special rule in Betkoski for use in CERCLA cases, the court said its decision was no longer good law.

The court noted that it had adopted the federal common law approach in Betkoski using the analysis set forth in *U.S. v. Kimball Foods*, 440 U.S. 715 (1979) because of a concern that using state law could frustrate the goals of CERCLA. However, the court that analysis would come out different now because the substantial continuity test was not a part of federal common law. As a result, the court said state law would not likely frustrate the objectives of CERCLA since it would likely be the same as the federal rule. The court remanded the case back to the district court for a determination of liability using the mere continuation test.

A concurring opinion indicated that it agreed that the substantial continuity test may not be used to impose liability on asset purchasers but that even if the test was valid, it would vacated the district court opinion on the basis that it misinterpreted the doctrine. The concurring opinion said the test required more that establishing the factors for showing there was a continuity of the basis. In addition, the opinion said that a plaintiff would have to present evidence of conduct that improperly circumvents CERCLA.

Earlier this year, the Tenth Circuit refused to impose successor liability in *Raytheon Construction, Inc. v. Asarco* (2003 U.S. App. LEXIS 4220, 03/11/2003). The issue before the court was whether the plaintiff could be liable as a CERCLA operator or generator as the successor of a company that held a 20% minority interest in a mining company. In this case, three creditors of the Colorado Corporation created Rawley Mine, Inc. ("RMI") in 1925 as part of a reorganization plan. The three shareholders (ASARCO, Metals Exploration and Stearns-Rogers) invested funds in RMI and received stock corresponding to their liens against Colorado Corporation. The president of Stearns-Roger, Thomas Stearns, was elected president and chairman of RMI, and served in that capacity until 1929. He negotiated the purchase of land used to store mine tailings, negotiated an ore smelting contract with ASARCO, he negotiated various contracts, supervised and replaced the on-site manager, communicated with the other shareholders and was authorized by the board to execute demand note.

After ASARCO demanded that Raytheon contribute to the cleanup of the mining site in 1996 as the successor of Stearns-Rogers, Raytheon filed a declaratory judgment action. After a trial, the United States District Court for the District of Colorado ruled that Raytheon was liable as an arranger and operator of the site because of the actions of Thomas Stearns. The Tenth Circuit reversed, holding that the

district court had mistakenly attributed the actions of Thomas Stearns to Stearns-Rogers. The court said that Bestfoods created a presumption that officers and directors "wearing two acts" act in their respective corporate roles. In the absence of evidence to the contrary, the court said it was required under *Bestfoods* to presume that Mr. Stearns' actions in helping the mine to function were taken in his role as the president of RMI and not as president of Stearns-Rogers. Accordingly, Raytheon was not liable to ASARCO either as a CERCLA operator or generator.

Commentary: The traditional common law rule is that asset purchasers are not liable for the acts or omissions of the seller unless the purchaser expressly or impliedly agrees to assume liability, the transaction amounts to a de facto merger, the purchaser is a "mere continuation" of the predecessor, or that the transaction was fraudulent. Plaintiffs have had difficulty prevailing under the "mere continuity" test because it requires a commonality of ownership (similar shareholders). The substantial continuity test is a much broader test because it does not focus on the corporate form but requires continuity of the business.

Bankruptcy Settlement Facilitates Cleanup

Philip Services Corporation and its affiliated Debtors ("PSC") entered into a series of settlement agreements with the United States, and the States of Michigan, South Carolina, Alabama, and Washington as part of its plan of reorganization to resolve claims under RCRA and CERCLA. In In *re Philip Services Corporation*, No. 03-37718-H2-11 (Bankr. S.D. Tex.), PSC filed for Chapter 11 bankruptcy reorganization in June 2003. The bankruptcy court approved the sale of the company in September. As a condition of the sale, the buyer required that PSC eliminate at least $30 million of environmental liability, either by abandoning contaminated properties or by discharging environmental claims liability. Under the Michigan Settlement Agreement, the governmental parties will receive the benefit of $559,126 from financial assurance and $823,000 to be paid over five years. Under the South Carolina Settlement Agreement, the governmental parties will receive the benefit of $2,981,934 in financial assurance and $1.3 million to be paid over five years. Under the Alabama Settlement Agreement, the governmental parties will receive the benefit of $500,000 over five years. Under the Washington Agreement, Debtors are paying $1,000,050 and providing an additional allowed general unsecured claim of $45,000,000 for the Pasco Sanitary Landfill site, paying $740,000 for the Pier 91 Site, and paying $150,000 towards the Landsberg Mine Site. As a result of its experience with the PSC bankruptcy, the Washington Department of Ecology has proposed revising its RCRA financial responsibility requirements.

Ninth Circuit Suggests Bankruptcy Code May Pre-empt State Environmental Laws

One form of leverage that states have with debtors seeking to reorganize under chapter 11 of the Bankruptcy Code is the authority to approve transfers of environmental permits to the reorganized entity. In Pacific Gas and Electric Company v. California, the federal Court of Appeals for the Ninth Circuit held that section 1123(a)(5) of the expressly preempts otherwise applicable non-bankruptcy laws to the extent that such law relates to financial condition (No. 02-80113 11/19/03).

In this case, PG&E filed a voluntary petition under chapter 11 of the Bankruptcy Code in 2001 following the California energy crisis. The plan of reorganization called for the debtor to be disaggregated into four new corporations and required that various environmental permits be transferred to effectuate the transfer of various power generating plants to the new entities. Various California regulatory agencies objected to the plan on the grounds that it violated various state laws and the bankruptcy court issued order disapproving of the disclosure statement and proposed plan. The court said that §1123(a) was merely a directive specifying what must be included in a plan so that creditors were provided with adequate information. However, the district court reversed, ruling that §1123(a)(5) was a substantive provision empowering debtors to take certain actions unfettered by otherwise applicable nonbankruptcy law. The court noted that §1123(a)(5) provided, in part, that "notwithstanding any otherwise applicable

nonbankruptcy law a [reorganization] plan shall…provide adequate means for the plan's implementation". The court said that PG&E's interpretation was consistent with every court that has addressed the issue and the legislative history. Thus, the court ruled that s§1123(a)(5) was expressly preempted state law and that state regulator could not take actions that would be an impediment to the implementing the plan of reorganization. The court did emphasize that its ruling was limited to restructuring transactions necessary to implement the plan of reorganization and not the ongoing operations of the reorganized company. Failing to temporarily suspend environmental review requirements, the court said, would effectively provide state regulators with a veto over the restructuring transactions when, in fact, there would not be any change in operations. Because the four entities would be required to comply with environmental laws after emerging from bankruptcy and the plan expressly provided that they would comply with all legal requirements, the court felt there was minimal risk to the environment.

The Ninth Circuit agreed with the district court that a reorganization plan expressly pre-empts otherwise applicable nonbankruptcy law. However, the court said that §1123(a)(5) must be read together with §1142(a) that limits the scope of the express preemption only to the extent such law relates to financial condition. The court did note that the United States Supreme Court held in Midlantic National Bank v. NJDEP, 474 U.S. 494 (1986) held that there was no express preemption of state environmental laws under the abandonment power of §554 of the Code and chose not to find an implied preemption as well because there was a presumption against displacing state laws through the Code. As a result, the court remanded to the bankruptcy court to determine if the state laws potentially effected by the proposed plan of reorganization were either expressly or impliedly preempted by §1125(a)(5).

Commentary: Compliance with environmental laws will almost always involve financial issues so it is unclear to what extent the Ninth Circuit's decision may be used to supplant state environmental law, particularly state financial assurance requirements.

Contract Overrides State Transfer Law

A Connecticut state court ruled that parties to a contract altered the responsibilities under the Connecticut Transfer Act ("CTA").

In *Alcoa Composites, Inc. v. BTI Technology et al*, 2003 Conn. Super. LEXIS 2571, the plaintiff had purchased a business in 1990 from one of the defendants who owned the property where the business operated. In 1993, the plaintiff sold the business back to the property owner. The 1993 contract provided that the property owner would execute the CTA Form III as the certifying party who would be responsible for remediating the property except for liabilities assumed by the plaintiff in the 1990 sale.

After the state DEP issued an order to the plaintiff and defendants as well as other companies that had operated at the site, the plaintiff filed a complaint against the defendant for breach of contract and failing to comply with the CTA. The plaintiff claimed that the defendants agreed to be solely responsible for the cleanup by signing the CTA Form III. The court ruled that the CTA does not preempt state contract law. While Form III provides that the certifying party will take responsibility for remediating the property that is being transferred, the court said that the contract unambiguously shifted the responsibilities, and that the plaintiff agreed that it would be remediate contamination resulting from its operation of the business.

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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.

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