# SCHNAPF ENVIRONMENTAL REPORT

**A Newsletter Covering Recent Environmental Developments and Caselaw**

*July 2003* Vol. 5 Issues 2/3

## Editor's Note

You may have been wondering if you missed an issue of the Schnapf Environmental Report. The May issue was inadvertently lost when our computer crashed during a move and all data was lost. We apologize for the inconvenience and have extended subscriptions by one issue to accommodate for the missing issue. We have included some of the important articles that were going to be in the May issue in the current issue.

## Contents

# DUE DILIGENCE/ AUDITING/ DISCLOSURE/ ENFORCEMENT

### *Update on EPA All Appropriate Inquiry Rulemaking*

For the past few months a number of other stakeholder groups, has participated in a EPA-led Negotiated Rulemaking, ("Reg-Neg") to develop the All Appropriate Inquiry ("AAI") standard for asserting the Innocent Purchaser, Bona Fide Prospective Purchaser and Contiguous Owner defenses under the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). Pursuant to the Small Business Liability Relief and Brownfields Revitalization Act ("2002 CERCLA Amendments"), EPA is required to promulgate the AAI standard by January 2004. The AAI standard will be added as a new Part 312 of title 40 of the Code of Federal Regulations.

The AAI Committee met in April and June to discuss the 10 AAI criteria specified by the 2002 CERCLA Amendments. The meetings have been marked by spirited debates. One of the first issues addressed was who would qualify as an "environmental professional". Some Committee members have preferred a restrictive definition that limited the term to those with professional engineering or geologist licenses to ensure a high level of professional competence. Others were concerned that the rule ensures an adequate pool of "environmental professionals" and have suggested a minimum educational and/or experience threshold. The most recent draft strikes a compromise, allowing professional engineers or geologists, persons certified or licensed by a state to perform environmental assessments or persons with a undergraduate degree in science, engineering or geology and at least six years of full-time experience.

The second contentious issues addressed by the AAI committee has been whether the AAI standard should require the environmental professional to interview or notify persons living near or adjacent to a site. Members of the Committee from the environmental justice community have suggested that nearby residents are likely to have a wealth of knowledge about a potentially contaminated site, particularly if the property was used for unregulated activities (e.g., midnight dumping, drug

manufacture, illegal auto repair, etc.). However, other committee members have argued that such a requirement would add considerably to the time and cost of Phase I site assessments without adding any new and valuable information about the site. Some members have argued that requiring interviews with local residents could disrupt the market for brownfields transactions. They contend that such a requirement might bring unwanted attention to the sites and jeopardize a developer's ability to assemble a sufficient amount of developable land since property owners of targeted properties would become aware of the potential development and demand higher prices for their properties. In addition, there was concern that the interview process might cause news of plant closings to leak out before management is prepared to discuss the matter with its employees.

As a compromise, the committee has issued a draft that would require the current owner and operator to be interviewed. Also, to the extent possible, non-residential past owners should be identified and interviewed for as far back that it can be shown there were structures on the property or from the time the property was used for residential, agricultural, commercial or industrial uses. The proposal also states that it may be necessary to interview a reasonable number of current owners or occupants of neighboring or adjacent properties to develop information about releases at the property. For abandoned properties where there is evidence of potential, unauthorized use or uncontrolled access, the proposal states that interviews with at least two owners or occupants of neighboring or adjacent land must be interviewed. The environmental professional would also be required to document attempts to interview such persons and contact local officials where the neighboring residents refuse to cooperate.

The proposal would also require environmental professionals to review two or more historical sources to obtain a comprehensive understanding of the past uses of the property since the property was first developed. The inquiry should include deeds, easements, leases, and covenants. The environmental professional will also be required to determine the existence of environmental liens, land use restrictions and institutional controls. The historical investigation will also have to include reasonably obtainable local records, visual inspections of the facility and adjoining properties, use their knowledge of the property and the condition of adjoining properties, and assess if the purchase price is accurately reflects the market value of the property in an uncontaminated state. If the environmental professional determines that the property value d0es not reflect its real value, they must determine if the differential is related to the contamination or other conditions.

Finally, some Committee members have suggested purchasers be required to take samples when the ESA is inconclusive to obtain liability relief. Not surprisingly, other Committee members strenuously object to this requirement and argue that sampling should remain confined to a Phase II ESA.

## *Bank Branch Office Property To Be Added to NPL*

EPA recently proposed to add a site owned by Fleet Bank to the National Priorities List (“NPL”). The White Swan Laundry and Cleaners had operated at the site located in Wall Township, New Jersey. Tetrachloroethylene (“PCE”) apparently was discharged from the site into two septic systems on the property where it subsequently migrated into the groundwater.

After Summit Bank acquired the property and converted the site to a branch location, the Monmouth County Health Department ("MCHD") was advised that ground water samples collected from three private irrigation wells had exhibited concentrations of up to 1,546 parts per billion (“ppb”) of PCE. After the MCHD verified the existence of PCE in the groundwater. The New Jersey Department of Environmental Protection ("NJDEP") then conducted its own investigation and detected PCE in one of the municipal wells used by Wall Township. NJDEP identified the former dry cleaning as a probable source of the PCE contamination and an investigation at the site detected concentrations up to 7,400 parts per million (“ppm”) in subsurface soil and up to 200,000 ug/L in ground water. Elevated levels of PCE vapors were also detected in the basements of several residential and

commercial properties. Ventilation systems have been installed at 24 homes and three commercial establishments. A treatment system has been installed at that well to ensure safe drinking water.

***Commentary:*** This case illustrates the importance of performing due diligence in transactions involving properties with fairly benign current uses. This property was acquired by Summit Bank when it purchased the property. Fleet Bank then took title to the property when it acquired Summit Bank. Apparently, neither bank appeared to perform the kind of environmental due diligence that they customarily expect from their borrowers. Had the banks examined the historical use of the property, they would have learned about the dry cleaner and also that the property had a septic system. Studies have indicated that dry cleaners from the era when the White Swan cleaner operated have suffered discharges of PCE into the environment 90% of the time. The combination of this highly risky past use combined with the existence of septic tanks which can serve as a pathway for soil and groundwater contamination should have put the purchasers on notice to conduct Phase II investigations.

## *EPA Issues New EMS Guidance*

During the past few years, EPA has been increasingly been requesting companies to perform Supplement Environmental Projects (“SEPS”) as part of settlements. Recently, the agency issued its "*Guidance on the Use of Environmental Management Systems as Injunctive Relief and Supplemental Environmental Projects*" (June 12, 2003).

The guidance indicates that EPA will seek injunctive relief in the form of the development of Environmental Management Systems ("EMS") when the agency determines after taking into account the company's size, compliance record and other characteristics that the root causes of the violations was an absence of a systematic approach to identifying , understanding and managing environmental compliance. The guidance clarifies that EMS may be eligible for the penalty mitigation credit under the agency's May 1, 1998 SEP policy. In the past, EPA's Office of Enforcement and Environmental Assurance ("OECA") required prior approval of the Multimedia Enforcement Division ("MED") within the Office of Regulatory Enforcement ("ORE") for an EMS to qualify for the penalty mitigation credit. Under the policy, EMS by state and local governments and small businesses will be eligible for penalty mitigation credit under the SEP policy without ORE-MED approval. While the EPA SEP policy does allow up to 100% penalty mitigation for state and local governments and small businesses, the guidance indicated that the maximum mitigation credit for EMS SEPs would be 80%. However, if the entity can show that the EMS is of outstanding quality, region offices could consider 100% mitigation credit. The guidance indicated that an EMS satisfying all 12 elements of the CFEMS (discussed below) would qualify as an EMS of outstanding quality. EMS by medium-sized and large companies may be proposed for SEP credit when the EMS is not appropriate as injunctive relief but will still require ORE-MED approval.

EPA indicated that the EMS must have a nexus to the violation to be eligible for the SEP credit. However, the guidance said that EMS should not be accepted as SEPs for CERCLA cleanups because the agency has not identified a nexus between EMS and CERCLA remediation actions.

The guidance also suggested that a violator who discovers, corrects, promptly discloses and prevents a recurrence of a violation through the implementation of an EMS would also qualify for the "due diligence" criterion of EPA's audit policy. Under this policy, companies may be eligible for 100% mitigation of gravity-based penalties.

EPA also indicated that the extent a violator has implemented an EMS may also play a role in the calculation of the degree of willfulness and/or negligence when penalty assessments are calculated under specific statutes. Thus, where a company implemented a good EMS but suffered isolated violations, EPA indicated it might be appropriate to adjust the penalty downward. In contrast, when an EMS is in place but violations occur because of a lack of management commitment to the process, the penalty might be adjusted upward to reflect willfulness or negligence. said it would work with the Department of Justice to implement EMS in appropriate criminal

plea agreements to achieve beneficial outcomes for the environment.

***Commentary:*** Since 1993, EPA has required EMS in compliance-focused settlements at 258 facilities. The National Enforcement Investigation Center ("NEIC") has established a Compliance-Focused EMS ("CFEMS") that describes 12 key elements that should be included in a CFEMS. Most EMS are built on what EPA calls a "plan, do, check, act" model. This includes identifying environmental aspects and establishing goals, implementing those goals, monitoring and taking corrective action, and reviewing to make necessary changes. The CFEMS is designed to supplement and not replace EMS standards such as the ISO 14001 that are developed by voluntary consensus standards bodies. The CFEMS may be of particular use where a facility has violations despite the existence of an EMS.

### *EPA Proposes to Increase Civil Penalties*

EPA has proposed to amend its Civil Monetary Penalty ("CMP") Inflation Adjustment Rule to increase the statutory maximum civil penalties that may be assessed for violations of environmental laws by 15% (68 FR 39882, July 3, 2003). The proposed increase is mandated by the Debt Collection Improvement Act of 1996 (31 U.S.C. 3701) which requires federal agencies to review penalties at least once every four years and to adjust them for inflation according to a formula specified in the statute. The purpose of these adjustments is to maintain the deterrent effect of CMPs Under the proposal, the maximum civil penalties for violations of the Clean Water Act ("CWA"), Clean Air Act ("CAA"), Resource Conservation and Recovery Act ("RCRA") and Toxic Substances Control Act ("TSCA") will increase from $27,500 to $32,500.

### *Homeland Security To Crack Down on Operators of Vulnerable Facilities*

Attorney General John Ashcroft recently announced that the Department of Justice ("DOJ") expects companies to take actions to protect against possible environment-damaging terrorist attacks on pipelines, storage tanks, transportation networks, and industrial plants. He said that the DOJ will bring civil enforcement actions to make operators of pipelines, fuel storage tanks, chemical plants, and drinking water facilities comply with environmental and safety laws. Operators of these facilities will be expected to ensure pipelines do not leak or explode. They must also properly handle hazardous wastes, ensure that water supplies are protected, and develop emergency response plans. In appropriate instances, DOJ may seek criminal penalties.

***Commentary:*** Many companies are conducting terrorism audits to evaluate potential vulnerabilities of their facilities and implementing best practices to guard against attacks and reduce their liability. The best practices often include identifying critical and non-critical facilities, conducting employee background checks, using visitor screening and badging procedures, developing mail and packaging handling practices, assessing freight and shipping security to control over materials in transit, establish strict controls over materials stored at facilities, protecting air intake and ventilation systems, tracking suspicious incidents and conducting incident trend analysis, developing procedures for employees to report suspicious activity, develop emergency response plans for terrorism attacks, conduct employee training and drills and develop protocols for communicating with facility managers, employees, first responders, utilities, local emergency planning organizations and other appropriate governmental agencies.

Businesses should also identify conditions and procedures for evacuations and shutdowns. When developing these procedures, business must ensure that they comply with OSHA and EEOC guidelines as well as local ordinances or laws for evacuation planning.

Organizations should document that they have adopted safety and security measures. This paper trail should include copies of the terrorism audits, contingency and evacuation plans. The board should periodically review emergency response and counterterrorism issues and minutes from board meetings should reflect these discussions.

### *EPA To Revise SIC Codes For EPCRA Compliance*

In April 1997, the Office of Management and Budget ("OMB") announced it would adopt the North

American Industry Classification System (“NAICS”) for the United States. NAICS is a new industry classification system that will replace the Standard Industrial Classification (SIC) system that has traditionally been used by government agencies for collecting statistical data and for other administrative and regulatory purposes.

EPA recently proposed to add the NAICS codes that correspond to the SIC codes that are currently subject to file Toxic Release Inventory ("TRI") forms under section 313 of the Emergency Planning and Community Right To Know Act ("EPCRA") and section 6607 of the Pollution Prevention Act (“PPA”). Facilities that are required to file TRIs will be required to report both their SIC and NAICS codes on their TRI forms for the first full reporting period after the effective date of the final rule. Thereafter, the facilities would only report their NAICS codes.

EPA also proposed to include the NAICS codes that will be subject to the exemption and notification requirements. In addition, EPA proposed to amend 40 CFR 372.38(e) to extend the exemption to owners of covered facilities who lease the facilities to operators of establishments that have covered SIC or NAICS codes.

***Commentary:*** Section 313 of EPCRA and section 6607 of the PPA require owners and operators of certain facilities called ``covered facilities'' to annually report releases and quantities of listed toxic chemicals. Covered facilities are those that manufacture, processes, or otherwise uses one or more listed toxic chemicals in excess of specified threshold quantities; have 10 or more full time employees or the equivalent 20,000 hours per year; and fall within the following SIC code major group codes: 10 (except 1011, 1081, and 1094), 12 (except 1241), 20 through 39; industry codes 4911, 4931, 4939 (limited to facilities that combust coal and/or oil for the purpose of generating power for distribution in commerce); 4953 (limited to facilities regulated under RCRA), 5169, 5171, and 7389 (limited to facilities primarily engaged in solvent recovery services on a contract or fee basis).

## *TRI Data Shows Mining Industry Now Accounts for Majority of Releases*

According to TRI reports filed for reporting year 2001, releases from hard-rock mining operations such as copper, silver, and gold accounted for 45% of pollution discharged into the environmental EPA indicated that the next largest source of pollution was electric utilities at 17% followed by chemical manufacturing at 9.5%

Total releases of toxic substances fell 15.5% from 2000. Since the TRI program was implemented in 1988, total releases have been slashed by 54.5%. Approximately 65% of the releases were onto land while 27% was released to the air, 4% into water and another 4% to underground injection

***Commentary:*** The news on the mining industry follows accounts that there are approximately 4,300 abandoned mines in the United States with 1,700 in Pennsylvania. These former mine sites not only pose risks of collapse but also fill with water and discharge millions of gallons of highly acidic water into destroy streams and rivers. Under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), a trust fund was created to address the health and safety hazards from abandoned mines. The fund has collected almost $7 billion over the years but only about 20% of the abandoned mine sites have been addressed. Disbursements are based on the volume of coal produced. Since the western states produce most of the nation's coal, they receive approximately 2/3 of the proceeds of the trust fund. However, 93% of the abandoned mine sites are located east of the Mississippi River

## *Top Banks Adopt Environmental Development Policy*

Ten of the world's leading banks representing 30% of the world's project loan syndication have announced they would follow a set of voluntary environmental and social guidelines when making decisions about financing development projects. The guidelines which are known as the "Equator Principles" are based on principles adopted by the World Bank and its private-sector lending arm, the International Finance Corporation ("IFC").

Under the "Equator Principles," each bank has agreed to issue loans only to projects that comply with requirements to develop "in a socially responsible manner according to sound environmental management practices." Borrowers will be

required to conduct environmental assessments to evaluate sustainable development, biodiversity, pollution prevention, human health, hazards, land use and socioeconomic impacts. They will also have to demonstrate compliance with country-specific laws as well as World Bank and IFC guidelines on pollution prevention and abatement, and IFC Safeguard Policies which regulate natural habitats, forestry and dam safety. Borrowers will also have to implement environmental management plans to address mitigation and monitoring issues.

The agreement comes in the wake of increasing criticism from environmentalists who have been especially critical of Citigroup. The bank recently came under attack for financing the OCP natural gas pipeline project in Ecuador . The pipeline cuts through seven national parks, including a World Bank-financed biodiversity reserve. Citibank and its partners have claimed the project complies with the World Bank environmental policy. However, World Bank officials have asked the bank to independently verify compliance with the World Bank's environmental policy or cease making those claims. The banks who have endorsed the Equator Principles are Citigroup Inc., WestLB AG, Barclays PLC, Credit Lyonnais, Credit Suisse Group, HVB Group, Rabobank, Royal Bank of Scotland, Westpac Banking Corp. and ABN AMRO Bank, N.V.

## *Contamination Uncovered at Residential Properties*

Contamination from prior land uses is continuing to plague residential developments. For example, the Army Corps of Engineers will conduct additional investigations at a subdivision after finding six World War II-era shells, including a bazooka round and hand grenade. Corps engineers found 66 pieces of exploded shells a five-week survey and six-inch dig last month in the modest subdivision next to Lake Butner. The 7-year-old subdivision is located on a former military range that was used by Camp Butner which housed and trained some 40,000 Army troops during World War II. When the Army turned the land back over to the state and to private residents, it disclosed the leftover shells in the deed. However, as the land was subdivided and sold over time, the original deed was not reviewed.

Construction of a residential development homes at the former Lowry air base was halted when workers digging foundations for new homes discovered fragments of steam pipes, water pipes and insulating materials containing asbestos. The asbestos is believed to have come from a hospital complex of some 20 buildings that were demolished in two phases from 1959 to 1968 and 1972 through 1979.

Approximately 60 people including many children currently live in 20 homes that have already been constructed at the site. Already, over 49 tons of fragments of asbestos-containing materials (ACM) have been removed from the surface of about 50 acres of the subdivision. 15 homeowners have been told not to disturb the soil on their property Children have played with their dump trucks in the hills composed of ACM debris, have used ACM to write on rocks, and rode dirt bikes through the high desert dusty areas that make up a large portion of the multi-acre lots. Some residents have reported rent raking equipment each spring to gather the ACM that has surfaced over the winter from the freeze-thaw cycle. Others have told of making many trips to the dump or disposing materials with their weekly garbage pickup.

Over 80 buildings were constructed in the 1940's. After the base was closed, the site was sold to private owners who demolished the buildings and disposed of the asbestos on-site. The property was then developed into a residential subdivision in the 1990's. Five disposal sites have also been identified at the site. Asbestos-wrapped pipe is also believed to exist below the property surface from the former steam plant at the military base.

The discovery came as a shock to Lowry officials because the property was required to pass health inspections before it was deeded to the authority. Lowry's Northwest neighborhood was evaluated and deemed safe by the Air Force, Environmental Protection Agency and Colorado Department of Public Health and Environment in February 1999 and February 2002. After pipes containing asbestos were discovered in June 2002, local officials reviewed aerial photographs and determined that the former hospital site was

the likely source of contamination. They were unaware of the site so they had not looked for asbestos before finding it in the soil.

In Klamath Falls, Oregon, EPA announced that it would begin an emergency removal of asbestos contamination in the North Ridge Estates neighborhood. The work will include removal of ACM laying on the surface around residences, sampling air and soil around residences, and removal or stabilization of buried materials containing asbestos.

The ACM originates from the demolition of over 80 old military barracks built at the site in 1944. After the military closed the facility, it became the campus for the Oregon Institute of Technology. MBK Partnership acquired the property in 1977. In 1979, the Oregon Department of Environmental Quality (DEQ) and EPA issued an order to MBK requiring abatement of asbestos at the site. In July 2001, DEQ supervised removal of 50-tons of asbestos containing material through a 2002 consent order with MBK. When it became evident that additional work was needed, the DEQ asked the EPA to take further action at the site under federal cleanup authority.

EPA will begin the fourth and likely final year of an estimated $5 million cleanup of outdoor properties in northeast Minneapolis that are contaminated with vermiculite. The source of the vermiculite is the former Western Minerals Products plant which manufactured home insulation products. For decades until the plant closed in the 1980s, local residents and business used byproducts from the plant as fill for gardens, potholes and alleys. A total of 208 properties have been cleaned since October 2000 and EPA expects to clean about 50 additional properties this summer.

Meanwhile, a federal district court allowed homeowners who purchased residential property containing contaminated fill dirt from a General Electric Co. manufacturing plant to pursue property damage claims against the company. (Lewis v. General Electric Co., D. Mass., No. 98-30057, 4/8/03). From 1946 until the 1980s, GE employees at the company's Pittston facility were able to receive free fill dirt delivered to their home if they lived within a certain distance from the plant. This fill dirt was later found to be contaminated with polychlorinated biphenyls. The federal District Court for the District of Massachusetts rejected arguments of GE that only those owners who held title to the property when the disposal occurred or whose claims prior owners assigned could recover.

***Commentary:*** These examples illustrate the importance of doing comprehensive historical due diligence on properties with current uses that do not appear to present a significant risk to human health or the environmental. In addition, these cases reaffirm the importance of reviewing deeds and other land records for evidence of use restrictions and other land use controls that may be imposed on property to protect areas where hazardous wastes have been previously deposited.

# ENVIRONMENTAL INSURANCE

## *AIG Drops Loan Balance Coverage*

For the past two years, we have been reviewing changing environment for lender liability policies. Since the middle of 2001, underwriting for these policies has been more stringent and the premiums have increased substantially.

In June, AIG decided to stop offering its loan balance coverage and is now only offering lessor of coverage. Under the loan balance policies, the insurer would pay the outstanding amount of the loan if there was an event of default and a pollution condition. Now, the company will pay the lessor of the cleanup costs or the outstanding loan balance.

The change was not based on current claims experience but after analyzing the premiums collected from these policies against the total balance sheet exposure the insurer had from these policies. The company feels it was taking on more credit risk than it had anticipated when it introduced the loan balance policy. The insurer also wanted to supplement a perception in the marketplace that these policies were essentially loan guarantees.

AIG will continue to honor current

loan balance policies on its books and in its warehouse programs until they expire. However, the company will not extend or renew any loan balance policies or programs.

***Commentary:*** Chubb and Zurich also offer loan balance policies but historically have not been as willing as AIG to provide coverage for property with existing pollution conditions. Sometimes, these companies have been willing to provide loan balance coverage for contaminated properties if the double trigger is modified to require a default and active remediation as opposed to the mere existence of a pollution condition (see related article).

### *Secured Creditor Policies Continue to Evolve*

Secured creditor policies typically require two conditions to take place for an insured to be able to make a claim under the policies. This so-called double trigger requires that the borrower default and that there be a pollution condition on or emanating from the insured property. During the more heady days of the stock market when insurers were chasing premiums, some insurers were willing to issue policies on properties that were known to be contaminated. This underwriting approach effectively eliminated one of the triggers for coverage.

However, faced with increasing claims and lower investment returns, insurers have retreated from this approach. For example, AIG recently changed the definition of pollution condition so that it only apply to releases of contaminants in concentrations or amounts that require a remediation under environmental laws applicable at the inception date of the policy or is required pursuant to a governmental or court order or directive. In addition, the contaminants may not be naturally present in the environment in the concentration or amounts discovered. Thus, the mere presence of contamination above soil or groundwater cleanup standards may not be sufficient, particularly where a site may allow the use of risk-based or land-use based cleanups. The change also appears to be directed at excluding from coverage cleanups performed under a voluntary cleanup program. It is unclear if historic fill that was contaminated when it was placed on the property and not from a release that has occurred on the property would qualify as a pollution condition under the new policy form. Mold is specifically excluded from the definition of pollution conditions.

# AIR POLLUTION DEVELOPMENTS

### *EU Parliament Adopts GHG Cap and Trade Program*

The European Parliament agreed to establish a cap and trade market for greenhouse gas emissions. The emissions trading program directive which must now be approved by the European Union ("EU") ministers is the centerpiece of the EU effort to reach the Kyoto Protocol target of reducing GHG emissions by 8% of 1990 levels by between 2008 and 2012.

Under the GHG directive, the EU will establish CO2 allowances in March 2004. Governments will award at least 95% of the allowances but could choose to auction the remaining 5%. The European Commission estimates that the CO2 allowances may trade for approximately 15 euros a ton. Companies that exceed their allowances will be fined 40 euros per ton which will rise to 100 euros after 2008.

Initially, the emissions trading market will be restricted to EU countries. However, it is hoped that the market could be extended to facilities outside the EU that are located in countries that have ratified the Kyoto Protocol.

Facilities could opt out of the cap and trade program if they can show they are making equivalent reductions in GHG emissions. It is believed that the opt-out measure will most likely be used by in Britain which already has a national emissions trading market in place and in Germany where may facilities have entered into voluntary agreements to reduce GHG emissions.

### *Three States Sue EPA to Regulate CO2*

Last year, we reported that seven states were considering filing a lawsuit against EPA for failing to regulate carbon dioxide emissions. In June, Connecticut,

Massachusetts, and Maine filed a complaint in the federal district court of Connecticut seeking an order requiring EPA to identify CO2 as a criteria pollutant under section 108 of the Clean Air Act ("CAA"). The three states argued that EPA is required to air pollutants that may reasonably be anticipated to endanger public health or welfare. The states said that EPA representatives have concluded that CO2 is an "air pollutant" in memorandum or testimony provided to Congress. They also contend that the conclusions of the U.S. Climate Action Report 2002 which discussed the adverse impacts of global warming attributable to greenhouse gas emissions triggered EPA's obligation to regulate CO2.

The current list of "criteria pollutants for which EPA has developed NAAQS are lead, carbon monoxide ("CO"), sulfur dioxide ("SO2"), nitrogen oxides ("NOx"), ozone, and particulate matter ("PM"). If the court granted the states' relief, EPA would be forced to national ambient air quality standards ("NAAQS") for CO2 and states would have to amend their State Implementation Plans to include measures for controlling CO2 emissions.

***Commentary:*** Maine enacted legislation that will require the state to reduce GHG emissions below 1990 levels by 2020. Under the law, the state Department of Environmental Protection develop a "climate change action plan" by next July that will establish a roadmap for cutting GHG emissions to 1990 levels by the end of the decade and an additional 10% by 2020. The long-term objective is to reduce emissions as much as 80% . Because Maine does not have any coal-fired power plants, all of the GHG emission reductions will have to come from smaller businesses and discrete sources such as motor vehicles.

Meanwhile, preliminary data complied by the Energy Information Administration ("EIA") indicates that U.S. emissions of CO2 dropped 17.6% between 1990 and 2002 when measured against growth in gross domestic product. The Bush Administration has proposed to use this "intensity" measure as the yardstick for addressing U.S. GHG emissions. While the CO2 intensity dropped 17.6% which is within of the 18% goal of the Administration, EIA said total CO2 emissions from fossil fuel combustion increased last year by 1.3 % due to a 2.4% increase in U.S. economic growth. EIA indicated that power plant emissions rose because of a 1.2% increase in the use of coal and 8.2% increase in gas combustion. However, this increase was offset by a growing reliance on non-CO2 emitting energy sources such as nuclear, hydropower and renewables. As a result, CO2 intensity from electricity generation was limited to an overall .8% increase. Since 1990, CO2 emissions have grown on average of 1.2 percent every year. EIA said that CO2 emissions are affected by economic growth, weather, power generation fuel mix, manufacturing activities and travel demand.

### *Study Finds Land Use Plays Important Role In Climate Change*

Over the past century, the average mean temperature of the Earth's surface has increased warmed by about one degree Fahrenheit ("F"). Most scientists have attributed this increase to human activities such as the greenhouse gas emissions from power plants and vehicles. However, a study by the University of Maryland has concluded that the spread of urbanization and industrial agriculture is responsible for a larger increase in temperature in the United States than previously believed.

The study found that land use changes in the United States since the 1960s have resulted in a rise of over 0.2 degrees F in the mean surface temperature which is twice as high as expected.

One of the interesting findings of the report involved the so-called "urban heat island" effect. The authors found that the greatest heating in urban areas takes place at night when buildings and streets release the solar heating absorbed during the day. In contrast, the study found that urban areas have a slight cooling effect during the day due to shading, aerosols and thermal inertia differences between city and country that are not currently well understood.

The report also noted that while agricultural development tends to decrease maximum temperatures during the day due to increased evaporation, irrigation increases the heat capacity of the soil, thus increasing the minimum temperature.

### *NOx Allowance Prices Tumble*

The wet spring has put a damper on

NOx allowance prices for 2003 vintage. The price for a NOx allowance dropped to $4300 per ton which is the lowest level since 2001. In February, the price if a NOx allowance topped $8,000 per ton with the price spread between 2003 and 2004 vintages almost $3000. By the middle of June, the price difference had narrowed to $400 ($4300/ton for vintage 2003 compared to $3900/ton for vintage 2004). Meanwhile prices for 2004-2005 vintage have remained rather stable, trading in a range of $4400 to $4700 per ton. The 2006 vintage is also trading in a narrow range of $2,600-$2,900.

The sharp drop in NOx 2003 vintage is attributable to the low electrical demand resulting from the cool weather. Because the depressed electrical demand means that power producers generated less NOx emissions, there were less buyers for NOx allowances. Usually, the price of NOx allowances rise during the ozone season

Because of the dramatic price swings in NOx emissions, many companies are engaging in price hedging. to help the price.

### *EPA Announces New Source Review Settlements*

Wisconsin Electric Power Company ("WEPCO") agreed to spend $600 million to install state-of-the art air pollution control equipment or retire certain electrical-generating units to resolve claims that it had failed to comply with the New Source Review ("NSR") program of the CAA. Under the settlement, the company is expected to reduce 72,300 tons per year of SO2 and 32,600 tons per year of NOx and improve its control of PM from five coal-fired plants consisting of 23 electrical-generating units in Michigan and Wisconsin. The company also will pay a $3.2 million civil penalty and spend at least $20 million to finance an environmental mitigation project demonstrating a new technology to significantly reduce mercury emissions from coal-fired power plants.

Meanwhile, Alcoa, Inc. has agreed to spend approximately $330 million to install state-of-the-art pollution controls at an aluminum production facility in Rockdale, Texas which is the largest non-utility source of NOx and SO2 emissions in the country. The settlement resolved allegations that the company failed to undergo NSR when it embarked on a $63 million modernization program in 1980s that extended the life of the Rockdale power plant. After the completion of the four-year program, emissions from the Rockdale facility increased by over 13,000 tons annually. After pollution controls are installed, SO2 and NOx emissions will be reduced by approximately 90%. Alcoa has agreed to pay a civil penalty of $1.5 million, and spend at least $2.5 million on SEPs to purchase conservation easements and retrofit school buses.

Virginia Electric Power Co. ("VEPPCO") has agreed to pay a $5.3 million fine and spend $1.2 billion to install air pollution control equipment at eight coal-fired power plants in Virginia and West Virginia. EPA estimated that the settlement would reduce SO2 and NOx emissions by approximately 67% by 2013. The company will also spend at least $13.9 million on SEPs in five states. The SEPs will include retrofitting school buses, installing photovoltaic cells on municipal buildings, purchasing conservation easements to preserve environmentally sensitive areas, and providing alternative-fueled vehicles for use in the Shenandoah National Park.

Finally, Rocky Mountain Steel Mills has agreed to spend $25 million on pollution control equipment and pay a $450,000 penalty to resolve allegations that it failed to comply with the NSR PSD program at its Pueblo, Colorado facility. Under the settlement agreement, the company will spend another $435,000 on SEPs. EPA estimates that the settlement will reduce PM emissions by approximately 100 tons per year, cut CO emissions by 750 tons, slash SO2 emissions by 200 tons and lower NOx emissions by 130 tons.

***Commentary:*** The California state Senate recently has approved legislation that would allow the state to retain the old NSR program. The New Source Review Restoration Act of 2003 would require the California Air Resources Board to adopt regulations that implement specified NSR provisions as they existed on Dec. 30, 2002. The measure is under consideration by the state Assembly.

### *EPA Announces CFC Settlements*

3M Company agreed to pay a $16,170 penalty to resolve claims that the

company failed to properly control chlorofluorocarbon ("CFCs") leaks at an industrial process refrigerant unit located at its St. Paul, Minnesota facility. The company also agreed to spend $62,225 on SEPS to retrofit school buses

The University of Washington agreed to pay $29,975 in penalties and spend at least $105,794 on SEPS to settle EPA complaints that the university failed to adequately repair a leak in one its refrigeration systems and failed to keep adequate records of maintenance and repair work done on several other campus refrigeration systems. The SEPs include educating other four-year colleges and universities about the ozone-depleting substance rules, replacing an Art Spray Booth wet scrubber with a dry filter system, retrofitting refrigeration equipment

Meanwhile, two individuals have been indicted for conspiring to evade approximately $1.9 million in excise taxes involving the sales of an ozone-depleting chemical called thichlorotrifluoroethane, or CFC-113.

The indictment alleges that Dov Shellef controlled two businesses involved in the purchase and sale of CFC-113 while William Rubenstein controlled two businesses operating out of the same warehouse that were involved in the purchase, packaging, warehousing, shipping and sale of CFC-113.

According to the indictment, the defendants purchased large quantities of CFC-113 from two domestic manufacturers and represented that they intended to export the product. Based on those representations, the manufacturers did not collect or pay any excise tax on the product. The men then illegally diverted the product to a number of domestic customers. The indictment further alleges that the defendants removed references to the original manufacturers on the drums of CFC-113 and created false shipping documents stating that the product was being sold "For Export Only." The total unpaid excise taxes were approximately $1.9 million.

Shellef is charged with money laundering for diverting over $700,000 in proceeds from the domestic sales of CFC-113 in 1999 into undisclosed bank accounts, and then wiring the money to personal bank accounts overseas. He was charged with subscribing to two corporate tax returns that omitted a substantial amount of his business' revenue from the sale of CFC-113 as well as personal income tax evasion.

If convicted on the conspiracy and fraud charges, Shellef and Rubenstein each face maximum sentences of 25 years in prison and $500,000 in fines. Shellef also faces a maximum sentence of 20 years if convicted of the money laundering charges, and a fine of $500,000 or twice the property involved in the offenses. The indictment also seeks the forfeiture from Shellef of over $1 million of funds involved in the money laundering offenses. In addition, the false corporate tax return charges each carry maximum sentences of 3 years and fines of $250,000, and the personal income tax evasion charge carries a maximum sentence of 5 years and a fine of $250,000.

***Commentary:*** While the CAA banned the continued importation and production of CFCs in the United States as of January 1, 1996, manufacturers were permitted to sell and export CFC that had been stockpiled prior to the ban. The excise tax applied to domestic sales of stockpiled CFCs but not sales for export. This is the first criminal action involving CFC-113 which was once widely used as an industrial solvent and as a refrigerant in centrifugal chillers for large buildings. CFC-113 now has a limited domestic market and is used in relatively small quantities for laboratory and analytical purposes.

## *Study Finds Unhealthy Indoor Air At California Portable Classrooms*

Approximately one-third of the classrooms in California are prefabricated portable classrooms. According to a recent study by the California Department of Health Services and the Air Resources Board, two million students who use these classrooms as well as their teachers are being exposed to unhealthy levels of formaldehyde and other chemicals.

The study found that air in portable classrooms was 10 times more likely to exceed health guidelines for one-hour exposures to formaldehyde than permanent classrooms. Indoor air quality also exceeded health guidelines for eight-hour indoor exposure to formaldehyde. The one-hour and eight-hour guidelines or reference

exposure levels are defined as levels that will protect sensitive individuals against eye irritation and effects on the respiratory and immune systems resulting from acute, short term exposures.

In 2000, a non-profit organization sued the manufacturers of portable classrooms sold in California under Proposition 65 which requires warning labels for products that contain chemicals known to cause cancer or reproductive harm. To avoid having to post warning labels on the portable classrooms, the manufacturers agreed to use a less toxic form of formaldehyde in their building materials, improve ventilation systems and ensure that school districts know how to air out the units before use. The state report says that it may take three to five years for formaldehyde levels in new portables to drop to relatively low levels.

### *Connecticut Law Limits Mercury Emissions*

Connecticut became the first state to adopt legislation regulating mercury emissions from power plants. Under the new legislation, Connecticut's coal-fired power plants must limit mercury emissions to 0.6 pounds per trillion British thermal units beginning in July 2008 which would represent a 90% reduction mercury emissions. The Connecticut Department of Environmental Protection would be required to consider even stricter emissions limits in 2012.

EPA is required to promulgate "maximum achievable control technology" ("MACT") standards for coal fired power plants by the end of 2007. In December 2001, EPA said the MACT standard could reduce mercury emissions from power plants by 90% to five tons by 2007. Under President Bush's Clear Skies initiative, mercury emissions from coal-fired power plants would be capped at 26 tons in 2010 and 15 tons through 2018.

***Commentary:*** Mercury is becoming to the first decade of this century what lead was to the 1990s and asbestos was to the 1980s. Wisconsin recently approved new rules requiring utilities to reduce mercury emissions by 80% by 2015 and Massachusetts is working to enact legislation similar to Connecticut's. 43 states currently have advisories warning citizens to reduce or avoid fish consumption because of mercury contamination. In 1993, only 27 states had such advisories.

The trend toward more stringent regulation of Mercury is likely to intensify because of recent studies. the Joint Expert Committee for Food Additives and Contaminants recommended a few weeks ago that pregnant women should limit their weekly consumption of methylmercury by 50% to 1.6 micrograms (about one-millionth of a teaspoon) per kilogram of body weight. According to the World Health Organization, a woman who weighs 132 pounds and eats 12 ounces of canned white albacore tuna per week would still exceed WHO recommendations by nearly two times. A recent EPA report found that about 5 million women representing 8% of those between the childbearing ages of 16 and 49 had at least 5.8 parts per billion ("ppb") of mercury in their blood in 2000.

The primary health risk from mercury emerges when airborne mercury falls into surface waters where it can accumulate in streams and oceans. Bacteria in the water transform mercury into methylmercury, which is a known neurotoxin and development inhibitor in unborn babies. Methylmercury is bio-accumulated by large saltwater fish such as swordfish, shark, kingfish and tilefish and can be absorbed by humans who eat the fish.

# WATER POLLUTION/ENDANGERED SPECIES

### *Corps May Assert Jurisdiction Over Wetlands Adjacent to Ditch*

The Court of Appeals for the Fourth Circuit ruled that Army Corps of Engineers ("Corps") did not exceed its authority when it told property owners that they would have to obtain a permit to drain wetlands located on their property.

In *U.S. v. Deaton* (No. 02-1442, 6/12/03), James and Rebecca Deaton

wanted to build five houses on a 12-acre plot of land they owned in Maryland's Eastern Shore. The Deatons had planned on digging a ditch across their property to drain the wetlands but the Corps told them they needed to obtain a wetlands permit because their land contained non-tidal wetlands and the sidecast dirt from the ditching would be a regulated discharge. The Corps asserted that the wetlands were adjacent to roadside ditch which was part of a tributary system.

Deatons had argued that the wetlands on their property were not subject to the wetlands program because they were not associated with any navigable waters. They pointed out that water flowing from the ditch had to pass through several other non-navigable waterways before reaching a river. Since their property was not adjacent to a navigable water, the Deatons said their property did not have any "jurisdictional wetlands".

### *EPA Wetlands Enforcement Actions*

EPA ordered a developer and a construction company to halt construction and remove fill material that was placed in a portion of a 1,236-acre marsh in Puerto Rico. According to EPA, Mac Development Corporation and its contractor, Desuja Construction Corporation, had applied for wetlands permit in 1999 to fill seven acres of wetlands to build an industrial park. The Corps requested more information and asked why the companies had not applied for a stormwater permit but never received any further information. Then in June 2002, the Corps discovered that the developer and the contractor had placed construction material into the wetlands. The order requires the companies to remove pieces of cement that had been placed in the wetlands, remove 400 feet of a 24" cement pipe that funneled stormwater runoff from a neighboring residential community and to allow vegetation to naturally re-establish itself. The companies must submit color photos to EPA showing that the work was done and submit progress reports and photos to EPA every six months for two years showing the vegetation's growth and the wetland's water levels.

EPA filed a complaint seeking $137,500 against Alexander Kozned and Aurora Communications International, Inc. The complaint alleges that Kozned engaged in mechanized land-clearing and road-building activities that filled in three and one-half acres of wetlands, a stream and an inter-tidal area of adjacent to the stream. EPA had issued an order in October 2002 requiring Kozned to remove fill material and restore a ½ acre of wetlands that he had filled to build roads and antenna pads on his property. The 2002 order also required him to restore wetlands that he had filled in 1999, had restored pursuant to the July 1999 order but had subsequently filled again.

Union Pacific Railroad recently agreed to pay $125,000 for dumping dredged materials into two waterways in Santa Barbara, California in the late 1990s. Union Pacific Railroad has already restored the damaged wetlands and has adopted measures to prevent similar events from occurring in the future.

EPA's is seeking $16,000 from Meadville Real Estate L.P., Meadville Associates, Inc. and three individuals for filling in 2.2 acres of wetlands near a tributary of Van Horn Creek. According to the complaint, the parties applied for a permit as part of the Vernon Town Square commercial development project but began filling in the wetlands before a permit could be issued.

A Washington couple agreed to pay $9,500 in penalties and restore wetlands to resolve claims that they excavated a drainage ditch and deposited the excavated soil into wetlands located on their property on Camano Island. The work continued even after EPA issued a cease and desist order.

### *EPA Issues New Stormwater Construction General Permits*

EPA published new Construction General Permit implementing Phase II of the NPDES Stormwater Regulations for construction sites between one and five acres. The permit covers construction activity on sites one acre or larger in states, territories and Indian country where EPA is the permitting authority.

Under the general permit, construction site operators will need to develop and implement stormwater pollution prevention plans ("SPPPs") and file a Notice of Intent ("NOI") form at least seven days prior to initiation of land-disturbing activities

***Commentary:*** EPA exempted the oil and gas drilling sites from the Phase II stormwater regulations. According to EPA, the proposed rule greatly underestimated the number of oil and gas exploration, production, processing and treatment operations and transmission facilities that would be affected. The exemption will go into effect on March 10, 2005. The two-year postponement EPA will evaluate the appropriate best management practices for preventing contamination of storm water runoff from these sites.

### *Stormwater Enforcement Actions*

V&G Development Corp. agreed to pay $50,000 for failing to file a NOI and implement an SPPP at a 164-acre residential subdivision in Massachusetts. Meanwhile, PREIT-Rubin Inc. of Philadelphia and its demolition contractor agreed to pay $42,000 for failing to file an NOI and a SPPP at the 35-acre Fairfield Mall redevelopment site. In both cases, EPA inspections observed silt discharges to nearby wetlands and waters because the companies failed to maintain or implement all necessary erosion controls.

Bell Engineering Corp. of Buffalo N.Y., agreed to pay a $150,000 to resolve allegations by the Pennsylvania Department of Environmental Protection ("DEP") that the company failed to properly control runoff in connection with the construction of a federal prison. In July 2000, the federal Bureau of Prisons had obtained a stormwater construction permit for earth movement activities. However, inspectors from the DEP and the county conservation district in 2001 found the contractor had failed to properly maintain erosion controls and did not follow the construction sequence included in the approved erosion and sedimentation plan set forth in the permit. Construction activities were halted on two occasions during 2001 until corrective action was taken.

In Virginia, two developers agreed to settle charges that they failed to properly control runoff at two residential developments in Fairfax County. Centex Homes agreed to pay a $16,000 penalty for violations at the Avondale Glen development and KSI Services Inc. agreed to pay a $14,805 penalty for violations at two development projects in Lorton, Virginia. In May 2002, EPA and Fairfax County inspectors discovered several permit violations at the Centex construction site, including failing to install required diversion dikes and conveyance piping, and failing to limit clearing and grading near a stream channel. Storm water runoff from this site flows into a stream that ultimately discharges to the Potomac River. At the KSI sites, inspectors discovered the company had failed to file an NOI and did not install proper storm water management controls, allowing silt discharges into a tributary of a creek that flows into the Potomac River.

EPA ordered Shapell Monteverde Partnership to comply with stormwater runoff regulations at two development sites in Los Angeles County. Inspectors from EPA and the Los Angeles Regional Water Quality Control Board ("LARQCB") observed found insufficient erosion and sediment control measures at both sites in 2002 and 2003.

### *EPA Issues Septic Tank Guidelines*

EPA recently issued voluntary guidelines to help local governments strengthen their management of individual septic systems and small, privately owned wastewater treatment systems. The "*Voluntary Guidelines for Management of Onsite and Clustered (Decentralized) Wastewater Treatment Systems*" provides local governments with a risk-based model for evaluating local conditions and a five-tier system for developing an appropriate management program to address these conditions.

***Commentary:*** Septic systems serve approximately 25% of U.S. households, and one in every three new homes built today uses a septic system. According to EPA, failing and improperly managed septic systems are a significant source of water pollution. Septic effluent is the most frequently reported cause of groundwater contamination in the United States. From 1971 to 1980, septic effluent was responsible for 58% of the cases of waterborne disease in the United States caused by the consumption of contaminated, untreated well water

Septic systems were first widely used when plumbing was installed in rural areas the 1930's and 1940's. Back then, a family used about 50 gallons per day ("gpd") of water, and only a limited number of household chemicals such as Borax, vinegar, baking soda, lye soap, etc. Baths were a Saturday night luxury and neighbors

usually lived ½ mile away.

Today, though, septic systems place considerably more demands on the environment. A typical family uses 200-300+ gpd of water, the use of household chemicals has increased dramatically, and daily baths are the norm. In addition, 50-100 neighbors with their own septics may live within ¼ mile.

In the typical septic system, solids settle into a tank and the liquid is allowed to discharge into a relatively confined area called an absorption or leach field. In theory, bacteria in the soil breakdown the contaminants as the wastewater migrates down through the soil. However, with 200-300 gpd of highly contaminated wastewater being disposed in the leach fields every day from numerous homes in a small area, there is growing concern that septic systems cannot provide the level of sewage treatment required to protect the public health.

In one study, high concentrations of volatile and semi-volatile organic compounds were detected in samples obtained from 109 of 120 commercial septic tanks and commercially used septic systems have been identified as a source of chemical contamination at several Superfund sites. Many industrial or commercial properties that are now connected to public sewer systems may have used septic systems as late as the mid-1980s. As a result, it is important to determine if septic systems exist or were used in the past while performing environmental due diligence on commercial properties.

### *Interior Department Issues Conservation Bank Guidance*

The Interior Department recently released new guidelines to promote the use of conservation banks. The conservation banks are properties that are acquired by third parties and managed dedicated to protect endangered species or their habitats.

The new guidance is designed to ensure that banks operate with consistency, providing both the Fish and Wildlife Service and those managing the bank a common set of rules and directions and a higher level of market predictability and stability. The guidance covers a dozen and a half areas of bank operations, including design and function of a conservation bank, definition of service areas in which they can operate, the relation of banks to species recovery plans, criteria for use of conservation banks, issuance of bank credits and the use of bank credits to meet mitigation requirements.

***Commentary:*** Conservation banks were first authorized by California in 1995. Conservation bank owners receive credits for the conservation commitments that can be used or sold to third parties to mitigate the impact of future development projects elsewhere. Banking also presents opportunities for private landowners to get economic value for property with endangered species habitat.

# HAZARDOUS WASTES/USTS

### *EPA Region 10 Enters Into RCRA PPA*

EPA and the California Department of Toxic Substances Control ("DTSC") have proposed to enter into a prospective purchaser agreement ("PPA") with the city of West Covina, California. The PPAs are the first time that EPA Region 10 has entered into a PPA under RCRA and is only the fourth RCRA PPA to take place nationwide.

The PPA paves the way for the city's redevelopment agency to purchase approximately 158 acres of the 583 acre BKK Landfill from the former operator of the landfills. The purchase price for the land is $6.242 million with net proceeds of $2.8 million from the sale to be used to remediate the property. The city may sell a part of the land for commercial development and build a sports complex and a municipal golf course on the rest of the parcel.

Under a separate agreement among Covina, BKK Corporation and Wells Fargo Bank, approximately $2.38 million of the net sale proceeds will go into an account to be used by BKK to conduct environmental work at the BKK Landfill site. BKK will use the remaining $420,000 of the net sale proceeds to monitor soil, soil vapors, indoor and ambient air at the portion of the site that will be used for the Big League Dreams

sports park development.

Between 1972 and 1984, 3.4 million tons of liquid and solid hazardous wastes were disposed in an unlined cells comprising 190 acres of the landfill. From 1987 to September 1996, BKK operated a lined solid waste landfill on another 170 acres at the property. During the 1980s, a series of investigations found groundwater contamination both on and off the BKK property. In March 1989, EPA ordered BKK to investigate the nature and extent of groundwater contamination and evaluate cleanup alternatives. Studies showed that contaminated groundwater had moved under nearby residential neighborhoods and contained mainly volatile organic compounds. In September 2000, EPA ordered BKK to implement a groundwater remedy.

### *EPA Enters Into Prospective Lessee Agreement*

To facilitate redevelopment of a brownfield site in Baltimore, EPA recently agreed to enter into a Prospective Lessee Agreement ("PLA"). Chromium- processing activities had been conducted at the 27-acre parcel by Allied-Signal. In June 1989, Allied-Signal entered into a RCRA Consent Decree to conduct on-site and off-site investigations. Allied-Signal eventually agreed to implement a remedy that involved constructing a hydraulic barrier to contain the contaminated groundwater and conduct perpetual monitoring. Under the PLA, the current owner of the site, will be required to maintain the remedy.

***Commentary***: Under its Land Revitalization Agenda, EPA plans to make greater use of PLAs. The agency also recently issued two guidance documents on using PPAs at RCRA sites. "Prospective Purchaser Agreements and Other Tools to Facilitate Cleanup and Reuse of RCRA Sites" was issued on May 9, 2003 and "Prospective Purchaser Agreements and Other Tools to Facilitate Cleanup and Reuse of RCRA Sites" was issued on April 8, 2003.

### *EPA Continues RCRA Hospital Enforcement Initiative*

North Shore University Hospital in Manhasset, Long Island has agreed to pay $40,000 in penalties to resolve violations of the RCRA hazardous waste management rules. EPA issued a complaint last year alleging that the hospital failed to determine if spent fluorescent bulbs and chemotherapy waste were hazardous prior to disposal, and had improperly documented the transport of hazardous waste. The hospital was also cited for failing to properly label storage drums containing hazardous waste.

### *EPA Changes Definition of UST Corrective Action Completion*

EPA has issued new guidance that will help states reduce the backlog of UST sites they must report as still requiring cleanup. State UST administrators and EPA regional offices had requested the policy change because of a large number of confirmed UST releases that did not require any further corrective action.

Under the guidance document, state UST programs may identify certain sites as being cleaned up even though no remediation has occurred where the releases were small and no cleanup was required.

***Commentary:*** Since the inception of the UST program, 277,000 cleanups have been completed but corrective actions for 145,000 confirmed releases need to be completed. EPA has established a goal of completing 18,000 to 23,000 UST corrective actions annually from 2003-2007 to reduce this backlog in half.

However, a recent GAO report indicated that these statistics might underestimate the actual cleanup workload that states may face. The report indicated that there may be as many as 200,000 unregistered or abandoned not have not been assessed, and tens of thousands of empty or inactive tanks have not been permanently closed. As a result, there may be leaks from these tanks that have not yet been identified. GAO also reported that an EPA survey found that 10 states are reopening completed cleanups in locations where MTBE was subsequently detected. An earlier GAO report had found that half of the states are finding MTBE at sites where there was no documented release. The earlier report had disclosed that 35 states detected MTBE at least 20% of the time they sampled for it and 24 states detected it 60% of the time.

These statistics illustrate the importance of investigating for historical USTs prior to purchasing or leasing property

even if the current use does not suggest that USTs may be present. For example, fast food restaurants at many shopping centers were previously gasoline stations and some retail locations may have operated auto repair businesses. In the Northeast, many buildings may have abandoned diesel or fuel oil tanks that were simply filled with cement or water not thoroughly investigated because they were taken out of service prior to implementation of state underground storage programs.

### *Oregon Establishes Additional Requirements UST Operators*

Last year, we reported on a GAO study indicating that many new or upgraded UST systems were leaking because of improper operation or malfunction equipment. To address these concerns, the Oregon Environmental Quality Commission recently revised its UST program to require mandatory training program for UST operators.

Tank owners must now pass a national examination to install or decommission their own tank. Operators are required to complete the one time training by March 2004. DEQ is in the process of producing a training manual for tank system operators and expects vendors to sign up to conduct training sessions beginning this summer.

In addition, new tank systems installed after March 1, 2003 must also be accessible for inspection of overfill equipment. This proposal allows verification that equipment is in place and working properly.

The DEQ is starting a pilot program to streamline the enforcement of environmental violations associated with underground storage tanks. The new program uses "tickets" issued at fixed penalty amounts for violations discovered in the field by DEQ inspectors. The expedited enforcement process does not deny a tank owners' right to appeal any violation, but people who wish to appeal are not eligible for the expedited track.

***Commentary:*** In May 2001, the GAO reported that 89% of the 693,107 tanks subject to the UST program complied with the 1998 UST performance standards but that more than 200,000 or about 29% of those tanks were not being properly operated or maintained, thus increasing the risk of releases. (*Environmental Protection: Improved Inspections and Enforcement Would Better Ensure the Safety of Underground Storage Tanks,* GAO-01-464 May 4, 2001). In December 2002, EPA reported that the number of malfunction new or upgraded systems has declined to approximately 19% to 26%.

### *EPA and State UST Enforcement Actions*

EPA issued an administrative order to a Pocatello-based gasoline retailer and distributor seeking $118,291 in fines involving leaking USTs that had been placed into temporary closure on October 11, 2002. The complaint alleged that the retailer failed to maintain financial assurances for the USTs and failed to upgrade the tanks to comply with the 1998 UST performance standards.

The Pennsylvania DEP fined a former lessee of a Phoenixville gasoline station $24,250 for failing to comply with the UST performance requirements and refusing to close the station when requested. After an October 2001 inspection identified the violations, the operator was given five days to demonstrate compliance. When that deadline passed, the operator was asked to close the station and pump out remaining gasoline from the tanks. In January 2002 the station owner agreed to close station and the lessee terminated its lease. The station is still closed and the department ordered the owner not to refill the tanks until the violations are corrected. The owner is also implementing corrective action to address soil contamination at the site.

The Pa DEP also fined Hrivnak Motor Co. $108,750 for refusing to comply with a state administrative order requiring the company to implement corrective actions. DEP had issued an administrative order in 1999 requiring the company to pay a $163,000 penalty for failing to comply with the 1998 UST standards and to investigate the extent of contamination at the site. Hrivnak appealed the 1999 order to the state Environmental Hearing Board ("EHB") which upheld the order. However, the company did not pay the original fine, conduct any of the required off-site groundwater contamination investigation or

the required corrective actions. In the meantime, some of the adjacent properties were connected to a public water line using money from the state Underground Storage Tank Indemnification Fund.

# TOXIC SUBSTANCES

## *EPA Issues LBP Waste Disposal Rule*

EPA published a final rule will allow lead-based paint ("LBP") waste generated from residential properties to be disposed of in construction and demolition ("C&D")landfills that does not qualify as a municipal solid waste landfill ("MSWLFs"). The rule became effective on June 18th (68 FR 36487).

EPA has originally proposed a LBP debris rule and published a direct final rule in October 2001 (66 FR 53535 (Oct. 23,2001). However, the agency had received several adverse comments and withdrew the final rule later that year (66 FR 67108 Dec. 28, 2001).

The rule applies to residential lead-based paint wastes since they qualify for the "household waste" exclusion of RCRA. However, the rule will not apply to lead-based paint wastes from commercial and industrial structures because lead-based paint waste from commercial and industrial structures. Such LBP wastes would have to be disposed in a facility licensed to receive hazardous wastes unless the particular LBP debris does not qualify as a hazardous waste.

The rule applies to LBP activities that generate residential LBP waste. EPA clarified that eligible LBP activities are abatement, rehabilitation, renovation, and remodeling in homes and other residences. Residential LBP wastes may include LBP debris, chips, dust, and sludges but does not address disposal of lead-contaminated soils. Demolition and deconstruction activities will not fall within the residential LBP waste definition because these latter activities result in the elimination of the residential structure. However, deconstruction and demolition wastes that do not exhibit any of the hazardous waste characteristics can continue to be placed in C&D landfills.

One of the objections to the proposed rule was that it would have allowed LBP dust, chips and sludges to be placed in C&D landfills. Since these landfills do not apply daily covers, there was a concern that lead-containing materials could be carried away from the landfill by the wind or in stormwater runoff. However, EPA concluded that LBP waste is in the form of chips, dust, or sludge is placed in plastic bags on site prior to transport to disposal and that this would serve to mitigate against potential impacts of water or wind transport. EPA indicated in the final rule that it believes that residential LBP waste generators in the Midwest, Northeast, and South regions will shift probably disposal from MSWLFs to C&D landfills

***Commentary:*** Since states are free to regulate LBP waste more stringently than EPA, generators of residential LBP waste should determine if their state environmental agency has additional or more stringent disposal requirements for residential LBP waste. Generators should also remember that they may be subject to HUD and/or TSCA regulations when addressing residential LBP hazards.

## *Ohio Court Rules on Adequacy of LBP Disclosure*

In *Nunez v. J. L. Sims Company ( 2003 Ohio App. LEXIS 3075*), the plaintiffs claimed that the defendant failed to comply with the LBP disclosure requirements. The Home Equity Services, Inc had acquired a residence at foreclosure and listed it for sale "as is" except for certain roof repairs. Both the seller and the broker advised the plaintiffs that they did not have any inspection reports regarding the presence of LBP and the plaintiffs agreed that the defendants had never represented the home was lead-free. The plaintiffs also waived its right to have the home inspected. Prior to the closing, the broker provided the plaintiffs with a HUD notice warning buyers and renters of the dangers of LBP in housing built before 1978. The plaintiffs also signed the required LBP disclosure statement. However, the broker did not provide the plaintiffs with a copy of the EPA LBP brochure because she did not have one

available. Six months after the closing, the plaintiffs discovered their children had elevated lead levels in the blood. The Cincinnati health department investigated the plaintiffs' current residence and the former home that they still owned and discovered that both structures had deteriorated LBP that constituted a lead hazard that had to be abated. The plaintiffs then sued the seller and the broker on a variety of theories, including misrepresentation, negligence , breach of contract and fraud.

A state trial court granted summary judgment to the defendants and the Ohio Court of Appeal affirmed. The Court said that the plaintiffs had inspected the house and was charged with knowledge of the conditions that a reasonable inspection would have disclosed. The court noted that the plaintiff wife testified that when they inspected the house, every room had peeling paint. The court also found that the neither the seller or the brokers had a breached any duty of care because they had no common law or statutory duty to inspect the house and that the federal LBP disclosure rules also did not impose an inspection obligation on a seller. Sellers are only required to disclose what they actually know about the presence of LBP, the court explained, and none of the defendants had any actual knowledge about the LBP. The court also found that while the seller did not provide the plaintiffs with the mandated EPA brochure, the plaintiffs were given information about the hazards of LBP prior to executing the contract and chose to ignore the information and waive their right to a LBP inspection.

### *EPA LBP Enforcement Actions*

EPA has proposed a $102,410 penalty against a Pepperell, Massachusetts property management company for failing to notify tenants in the Pepperell area about possible lead paint hazards in rental units. The EPA complaint states that the Nissitissit Group, which manages about 98 commercial and residential units in the Pepperell area failed to comply with the LBP disclosure rules for eight leases in 2000 and 2001. Two of the eight leases involved tenants with children less than six years of age. One of the eight leases involved tenants with children between six and 18.

A New Hampshire landlord has agreed to pay $2500 fine for failing to comply with the LBP disclosure rules. The settlement resolves an EPA complaint alleging that Senecal Properties leased a rental unit in Manchester in 1998 to a family with four children under the age of six without notifying them of the presence of lead in the unit or the existence of a lead abatement order from the state. EPA also alleged that Senecal failed to obtain the dates of tenant signatures for five lease transactions and sold the building without disclosing the presence of lead or the existence of a 1997 LBP abatement order. Another Manchester realtor, Lacerte Realty, agreed to pay a $9,240 penalty for failing to provide LBP disclosure forms to three homebuyers.

EPA has filed a complaint against Portland landlords for failing to comply with the LBP disclosure rule on 16 occasions for four properties owned by the defendants.

Meanwhile, two Missouri-based individuals were indicted for failing to comply with the LBP disclosure requirements and falsification of the LBP disclosure forms. If convicted on all counts, each defendant faces a maximum sentence of up to six years in prison and/or a potential fine of more than $250,000.

A landlord in York, Pa. pled guilty to criminal obstruction for forging tenants' signatures on LBP hazard notification forms and submitting the falsified documents to EPA civil inspectors.

A group of related Los Angeles-based property management companies agreed to pay $100,000 in civil penalties and perform LBP abatement in more than 4,500 apartments nationwide. EPA had alleged that Westside Rehab Corporation, Alpha Property Management, Inc. and SK Management Company, LLC along with 42 related-entities failed to comply with the LBP disclosure requirements for apartments located in Los Angeles, Arkansas, Washington, DC, Kentucky, Maryland, Tennessee and Texas. The companies are required to inspect all of their apartments for LBP within 120 days of the consent order with apartments containing children under the age of six scheduled. The defendants are also required to implement interim controls at properties with LBP hazards while preparing and implementing LBP abatement plans. The defendants are also

required to implement LBP O & M plans acceptable to HUD for all buildings that are not certified as free of LBP. Westside and Alpha will also donate $35,000 to the Environmental Research Center at Martin Luther King, Jr./Charles R. Drew Medical Center and SK Management Company will contribute $25,000 to the Cedars-Sinai Medical Center. The companies also agreed not to take tax deductions for these Child Health Improvement Projects. The defendants are also required to notify HUD and EPA if they are no longer managing the buildings covered by the settlement.

### *Study Finds Greater Risks Posed By Lead in Blood*

A recent EPA study has reported that higher blood lead concentrations are associated with delayed puberty in girls and are different among race-ethnic groups. While the authors of the study concede that the findings do not prove a causal relationship between elevated lead levels and delayed puberty, they said the findings suggest that even relatively low level lead exposure may influence growth and development in girls.

**Commentary:** EPA, the Centers for Disease Control ("CDC") and other federal agencies have committed to eliminating childhood lead poisoning by 2010. The federal government has phased out lead in gasoline, reduced lead in drinking water, reduced lead in industrial air pollution, and banned or limited lead used in consumer products, including residential paint. EPA plans new lead regulations for home renovation and remodeling work and bridges and structures. Blood lead levels in U.S. children age one to five years have decreased from 14.9 micrograms per deciliter (ug/dL) in the late 1970's to 2.2 ug/dL in recent years.

### *CPSC Bans Sale of Candles With Lead Wicks*

The Consumer Product Safety Commission (CPSC) voted unanimously to ban the manufacture and sale of lead cored wicks and candles with lead cored wicks. The ban against manufacturing, importing, or selling candles with lead wicks will become effective in October 2003.

A petition asking CPSC to ban lead candlewick had been filed in 2001 by Public Citizen, the National Apartment Association, and National Multi Housing Council. The CPSC staff found that some lead-cored wicks could emit relatively large amounts of lead into the air during burning and some of the tested candles emitted lead levels some seven times above the rate that could lead to elevated levels of lead in a child. The Commission also determined that some manufacturers had not complied with a voluntary industry agreement in the 1970s to remove lead from candlewicks. Recent studies have indicated that children may be more susceptible to lead than previously thought. Lead in the blood can damage the nervous system, kidneys, and reproductive system.

### *EPA Proposes PCB Cleanup Plan For Residential Properties*

EPA has proposed a cleanup plan to remove 2100 cubic yards of soil contaminated with polychlorinated biphenyls (PCB) and interior dust at properties near a former electronic component manufacturing facility in South Plainfield, New Jersey.

PCBs are alleged to have been dumped or buried by Cornell-Dubilier Electronics ("CDE") at the Hamilton Industrial Park during its operations between 1936 and 1962. In 1997, the current owner of Hamilton Industrial Park was ordered to immediately reduce the risks associated with contaminated soil and surface water runoff from the facility. Actions included paving driveways and parking areas, installing a security fence and implementing drainage controls. After samples of soil and indoor dust at residential properties near the CDE facility showed elevated levels of PCBs, the site was added to the Superfund list in July1998. EPA then ordered responsible parties to remove contaminated soil from a total of 13 properties over the course of three years. Additionally, EPA removed PCB-contaminated dust from the interiors of 15 homes.

Under the proposed cleanup plan, further soil remediation will be performed at four residential and 12 commercial properties while contaminated dust will have to be removed from seven more homes. EPA will also conduct further investigations at another 59 properties. The residents of these homes will be temporarily relocated during the cleaning process. The plan will cost approximately $760,000, and the

cleanup is expected to take about one year.

# SUPERFUND/BROWNFIELDS

### *EPA Issues Common Elements Guidance*

EPA recently issued an interim document that was intended to clarify the obligations that landowners must satisfy to qualify for the Innocent Purchaser, Bona Fide Prospective Purchaser ("BFPP") and Contiguous Property Owner defenses.

The guidance identifies two initial "threshold criteria" that a party must satisfy at the time it takes title or possession of the property. The guidance then discussed five "Continuing Obligations" that landowners or occupiers must continue to satisfy to maintain their immunity from liability.

The first threshold criterion is that the landowner conducts "appropriate inquiry". The Small Business Liability Relief and Brownfield Redevelopment Act ("2002 CERCLA Amendments") established interim standards for satisfying the appropriate inquiry" of the three landowner defenses. EPA is required to promulgate permanent standards by January 11, 2004. The Common Elements Guidance emphasizes that potential purchasers or occupiers of property who wish to avail themselves of the landowner defenses must perform all of their "appropriate inquiry" prior to taking title or possession of the property. The guidance also reaffirms that while a BFPP may acquire contaminated property with knowledge of the contamination, it must still perform an appropriate inquiry. Of course, a party who knows or has reason to know of contamination will not be eligible for the contiguous property owner or innocent landowner liability protections

The second threshold criteria is that a party must not be potentially liable or affiliated with a potentially responsible party any other person who is potentially liable for response costs. The guidance acknowledged that 2002 CERCLA Amendments did not define the phrase "affiliated with" but that it appears that Congress intended the affiliation language to prevent a potentially responsible party from contracting away its CERCLA liability through a transaction to a family member or related corporate entity. EPA suggested that "affiliation" could be broadly interpreted but suggested that Congress intended to prevent a party from contracting away its liability through a transaction with a family member or related corporate entity. However, a high-ranking EPA official who was involved in the drafting of the document indicated at a conference chaired by the editor that a post-enactment tenant would not be able to avail itself of the BFPP defense if it was leasing the property from a pre-enactment owner who was a PRP

If a party satisfies the Threshold Criteria, it must then comply with the "Continuing Obligations" to maintain its immunity from liability. The Common Elements Guidance only addresses 5 of the criteria that a landowner must meet to qualify for these defenses.

The first Continuing Obligation is complying with land use and institutional controls. The Common Elements Guidance indicated that the 2002 CERCLA Amendments require a BFPP, contiguous property owner, and innocent landowner to comply with land use restrictions relied on in connection with the response action even if the institutional controls were not in place at the time the person purchased the property or have not been properly implemented. According to the Common Elements Guidance, a land use restriction may be considered "relied on" when the restriction is identified as a component of the remedy. EPA noted that an institutional control may not serve the purpose of implementing a land use restriction if it was not implemented, the party responsible for enforcement of the institutional controls neglects to take sufficient measures to bring those persons into compliance; or a court finds the controls to be unenforceable. For example, a remedy might rely on an ordinance that prevents groundwater from being used as drinking water but the local government may fail to enact the ordinance, change the ordinance to allow a use prohibited by the remedy (e.g., drinking water use), or failed to enforce the ordinance. In such circumstances, the guidance indicates that a landowner or person using the property will still be required to comply with the groundwater use

restriction to maintain its liability protection. If the owner/operator fails to comply with a land use restriction relied on in connection with a response action, the EPA indicated that it might use its CERCLA authority to order the owner to remedy the violation or may remedy the violation itself and seek cost recovery from the owner/operator. The guidance suggests that a party could be deemed to be "impeding the effectiveness or integrity of an institutional control "without actually physically disturbing the land. Examples cited by EPA included removing a notice that was recorded in the land records, by failing to provide a required notice of the existence of institutional controls to a future purchaser of the property, and by applying for a zoning change or variance when the current designated use of the property was intended to act as an institutional control. However, EPA acknowledge that some institutional controls may not need to remain in place in perpetuity, and that an owner may seek to change land use restrictions and institutional controls provided it follows procedures required by the applicable regulatory agency.

The 2002 CERCLA Amendments require BFPPs to exercise appropriate care (which includes taking reasonable steps) while the contiguous owner is required to take reasonable steps and the innocent landowners is required to exercise due care regarding hazardous substances at a site. Given the inconsistent language, EPA simply rephrased the obligation as requiring landowners or occupiers to take reasonable steps with respect to hazardous substance releases to stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental, or natural resource exposure to hazardous substance releases. Not surprisingly, the guidance states that a reasonable steps determination will be a site-specific, fact-based inquiry that will have to take into account the different elements of the landowner liability protections. The guidance also indicated the obligations may differ for landowners depending on the defense they are relying on because of the differences among the three statutory provisions. For example, while each defense requires the owner/operator to conduct an "appropriate inquiry", only a BFPP may purchase with knowledge. Thus, the reasonable steps required of a BFPP may differ from those of the other protected landowner categories who did not have knowledge or an opportunity to plan prior to purchase. Indeed, a senior official of EPA suggested at a recent conference that the BFPP arguably has greater responsibility than an Innocent Purchaser because the BFPP knows about the contamination. EPA also indicated that while a protected party discovering contamination may not be required to undertake a full environmental investigation, doing nothing in the face of a known or suspected environmental hazard would likely be insufficient. EPA did state that there were some circumstances where the reasonable steps required of a party may be akin to those of a PRP such as when the only remaining response action is implementation and maintenance of institutional or engineering controls.

The 2002 CERCLA Amendments also require that BFPPs, contiguous property owners, and innocent landowners provide full cooperation, assistance, and access to persons who are authorized to conduct response actions or natural resource restoration at the vessel or facility from which there has been a release or threatened release, including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the vessel or facility. The guidance simply repeats the statutory provision without providing any further clarification.

The 2002 CERCLA Amendments also require a BFPP and contiguous property owners to be in compliance with, or comply with, any request for information or administrative subpoena issued by the President under CERCLA. In particular, EPA expects timely, accurate, and complete responses from all recipients of section 104(e) information requests. As an exercise of its enforcement discretion, EPA may consider a person who has made an inconsequential error in responding (e.g., the person sent the response to the wrong EPA address and missed the response deadline by a day), a BFPP or contiguous property owner, as long as the landowner also meets the other conditions of the applicable landowner liability protection.

A BFPP and contiguous property owner are required to provide all legally required notices involving the discovery or release of any hazardous substances at the facility. The agency indicated that "legally required notices" might include those required under federal, state, and local laws. Thus, a landowner would not only have to make individual federal notifications for each response program having jurisdiction over the release but also complying with all individual state and local reporting requirements. The BFPP and contiguous property owner will have the burden of ascertaining what notices are legally required in a given instance and of complying with those notice requirements. However, to try to ease the reporting burden obligation, the guidance indicated that regional offices may allow landowners to self-certify that they *have provided* (in the case of contiguous property owners), or *will provide* within a certain number of days of purchasing the property (in the case of BFPPs), all legally required notices. Such self-certifications may be in the form of a letter signed by the landowner as long as the letter is sufficient to satisfy EPA that applicable notice requirements have been met.

### *EPA Announces One Cleanup Program*

EPA cleanup programs often have overlapping authority for remediating contaminated sites. Because these programs can have different goals and procedures, parties trying to redevelop land are often confronted with frustrating delays and inconsistent requirements as the various program managers duel with each other over the appropriate cleanup path to follow.

For example, cost effectiveness is one of the factors that EPA is required to take into consideration when approving a remedy but RCRA cleanups tend to be technology-based. As a result, a RCRA regulated unit might have to undergo clean closure whereas a site-wide remediation under CERCLA might allow for higher, risk-based levels of contaminants.

Further exacerbating the problem is that some of the programs may be delegated to state regulators so that a site may be subject to both federal and state oversight. For example, while all states have been delegated authority to oversee closure and post-closure of RCRA units, not all states have been delegated corrective action authority. As a result, there can be inconsistent standards applied for closure and corrective action.

To try to add more consistency across its cleanup programs and expedite the reuse of contaminated sites, EPA recently launched its "One Cleanup Program" or "OCP". Under this initiative, EPA will establish clearer program goals and establish four measures for evaluating the effectiveness of the cleanup programs. The OCP will not merge the individual cleanup programs but support planning and promote coordination among federal and state cleanup managers.

One way EPA hopes to accomplish this goal is to establish new measures by which the cleanup programs will be evaluated. Instead of counting the number of enforcement action brought or the number of cleanups commenced, the agency will use four new mileposts. These will be the number of people protected through cleanup activities, the amount or degree to which the environment is protected through cleanup, the amount of land made available through cleanup activities for productive uses, and the economic impact of cleanup activities.

To achieve more consistent and efficient cleanups, the agency plans to implement area-wide projects to address clusters of sites within geographic proximity of each other; establish a cross-program task force that initially be responsible for reviewing groundwater cleanup, site characterization decision-making and long-term stewardship issues; formation of a OCP council consisting of high level EPA representatives that will meet regularly to address critical cleanup issues, and a federal facilities policy steering committee.

The agency will also establish better integrated and accessible web-based data systems where information can be easily retrieved on sites in a community, provide information on long-term monitoring and maintenance requirements as well as links to institutional control tracking systems, and provide information cleanup technologies.

***Commentary:*** EPA has identified policy and guidance documents that can be used to further the OCP. These documents may be accessed from the EPA web site at:

http://www.epa.gov/swerrims/onecleanupprogram/ocp-policies.htm. Given the extent that states have been delegated RCRA authority and the number of sites that will be subject to state jurisdiction, the success of OCP will largely depend on how states embrace these concepts. For example, EPA has issued RCRA guidance intended to provide RCRA managers with more flexibility on using groundwater standards. However, if states do not take advantage of this flexibility or continue to use rigid groundwater cleanup goals as the Applicable or Relevant and Appropriate Requirements ("ARARs") that are used for establishing cleanups under CERCLA, the OCP program will be hard-pressed to achieve its laudable goals.

### *EPA Announces Land Revitalization Initiative*

In a related development, EPA also launched its Land Revitalization Agenda ("LRA") to make land reuse an integral component of Superfund, RCRA, brownfield, and UST cleanup programs.

As part of the LRA, EPA will develop performance measures that will report on the acreage that is brought back into productive use. The agency also hopes to build on ready for reuse pilot programs established by some EPA regional offices. EPA hopes to develop a process for determine when a property is safe for a designated reuse and issue “ready for reuse” technical determinations

The agency also plans to develop guidance on how to make portions of sites subject to cleanup under RCRA and CERCLA to available for reuse before the entire site has been remediated. Under this approach known as “parceling", EPA could allow uncontaminated or remediated portions of sites to be released from the RCRA program. The agency is also considering increased use of partial deletion for sites being remediated under CERCLA. Other possible options for addressing liability concerns may be comfort letters and RCRA prospective purchaser agreements.

To speed up cleanups, EPA hopes to make use of technology that can provide more rapid site characterization. For example, instead of requiring environmental engineers to follow the time-consuming and costly approach of taking samples in the field and having the samples analyzed in distant labs, EPA hopes to encourage the use of innovative field-based analytical methods ("FAMs") that provide real time data. The FAMs will enable engineers and regulators to respond to information in the field to make more rapid decisions about where to sample and what to cleanup. To accomplish this goal, the agency will have to identify acceptable FAMs and encourage state regulators to accept the validity of the FAM results. Some of the most common FAMs are portable gas chromatography ("GC"), immunoassay test kits ("IA"), x-ray fluorescence ("XRF"), and gas chromatography/mass spectrometry ("GC/MS"). EPA has estimated that using FAMs can result in cost savings of 15%-50% and reduce the time to perform site investigations by 30%-60%.

EPA also said it would explore options for accommodating reuse assessment and consideration of future land use at PRP-lead sites. The agency plans to promote use of SEPs in lieu of penalty assessments to facilitate reuse.

The agency will also consider targeting grants at clusters of brownfield sites to encourage area-wide cleanup and reuse of multiple contaminated properties. As part of this approach, EPA hopes to partner with responsible parties to foster reuse opportunities. For example, EPA said it may want to partner with the petroleum industry to explore reuse opportunities for sites associated with industry mergers and divestiture of assets.

The agency also plans to explore innovative public and private stewardship mechanisms to support management of institutional controls and long-term property care.

EPA also wants to Integrate property cleanup with local "smart growth" land use planning to minimize environmental impacts of development. As part of this approach, the agency would look to promote pollution prevention in waste cleanup projects such as using recycled, bio-based or environmentally preferable products as well as the use of "green buildings" and "green energy" design.

***Commentary:*** EPA has appointed a revitalization coordinator for each regional office who will be responsible for facilitating cooperation and communication among

federal and state cleanup managers. Attorneys and environmental consultants representing parties who want to take advantage of the LRA should consult with these regional contacts.

The initiative does not plan to formally amend the National Contingency Plan ("NCP") as part of its revitalization program. However, parties performing cleanups should propose reuse alternatives early in RI stage of the cleanup to maximize the benefits that could be achieved by the LRA. In June 2001, EPA issued its "Reuse Assessments: A Tool To Implement The Superfund Land Use Directive" that discusses how to develop information for making future land use assumptions when selecting cleanup remedies. The guidance builds on the experience obtained from the Superfund Reuse Initiative and is meant to be used during the RI/FS stage for CERCLA remedial actions or during the engineering evaluation/cost analysis ("EE/CA") for non-time critical removal actions. For large sites or sites with several operable units and potentially different future use scenarios, the guidance suggests that multiple reuse assessments may be appropriate. For example, when information gathered for the reuse assessment suggests the site could be used either for recreational purposes or for commercial/light industrial activity, the reuse assessment should consider input from stakeholders on which scenario they believe is most likely. In other cases, alternative future land use scenarios can be reflected by developing a range of remedial alternatives for detailed evaluation that could achieve different land use potentials. The guidance also suggests that the reuse assessment should be use primarily to address soil contamination. While round water use is determined independently from land use, the guidance did indicate it is important to consider the current and future ground water uses when developing future land use assumptions since portions of surface or sub-surface contamination that present a threat to ground water may require a greater degree of cleanup over a larger area than might be needed if only soils were impacted.

Another important innovation that EPA will consider is to build on its experience with the Remedy Review Board. This body which was one of the innovations that EPA introduced in 1995 as part of its Superfund Reform Initiative would examine old Records of Decisions ("RODs") to determine if EPA was using consistent cleanup approaches for similarly situated sites. Under the LRA, EPA is considering reopening previously issued RODs for sites where a new reuse is proposed or where the ROD did not take reuse into account when it was originally issued

### *EPA Issues CERCLA Ready for Reuse Certificate*

As an example of its LRA initiative, EPA recently issued its first "Ready for Reuse" designation under the Superfund program for the for Tex Tin copper and tin smelter site in Texas City. The Tex Tin facility was an emergency tin supply plant during World War II and was later used as a copper smelter until it closed in 1991. EPA and Texas performed response actions after the owner became insolvent. Under an innovative bankruptcy settlement, the property was placed in a custodial trust and the debtor made certain payments to the trust in satisfaction of claims by EPA and Texas. The trustee was responsible for implementing the remedy and the consent decree acknowledged that the trustee was eligible for the fiduciary liability exemption of CERCLA.

### *EPA Enters Into Prospective Purchaser Agreements*

EPA agreed to enter into a handful of Prospective Purchaser Agreements ("PPAs") during the past few months. While the agency indicated in its guidance last year that PPAs are no longer necessary, it appears that EPA is willing to enter into these agreements for certain publicly-supported projects.

For example, Habitat for Humanity of Calhoun County, Inc. ("Habitat") entered into a PPA to purchase a three-city block portion of Anniston Lead Superfund Site. Habitat intends to build 50 homes on the site and sell them to low-income individuals. Soils at the site are contaminated with lead and PCBs. Since April 2002, EPA has conducted time-critical removal actions at residential properties with soil contamination greater than 1200 ppm of lead and between 400 to 1200 ppm of lead at properties with children below six years old or pregnant women. In exchange for a covenant not to

sue, Habitat has agreed to perform sampling at the site and remove soils with lead concentrations of 400 ppm or higher and PCBs of 1 ppm of higher for properties where there will be gardens, play areas and open yards that provide unrestricted access. The emergency removal action will not be required for portions of the site that will be improved with gravel, concrete or asphalt surfacing. EPA also agreed to waive its non-priority superlien and any windfall lien that it could assert.

The Chester Parking Authority (the "CPA") has entered into a PPA to purchase approximately 2 acres of the Wade/ABM Superfund Site in Chester City, Delaware. The CPA plans to acquire the site for a parking lot. During the 1980s, EPA removed over 150,000 gallons PCBs and other drummed hazardous substances from the former rubber-recycling facility that had burned down in 1978. Contaminated debris and soil was also removed. The site was then graded, covered with topsoil and seeded to protect the cap. EPA then deleted the site from the NPL in 1989. In exchange for a covenant not to sue, the purchaser agreed to pay $1,000 to defray the EPA's costs for negotiating the PPA, record a notice of the PPA and deed restrictions creating institutional controls, agreed to upgrade the existing containment and storm water management controls, maintain the cap and comply with institutional controls. Prior to any redevelopment that will disturb the cap, the CPA must provide notice to EPA and develop a Health & Safety Plan. Immediately following such activities, the CPA must restore the cap so preserve its protectiveness.

The City of Des Moines entered into a PPA to acquire a road easement over a portion of the Des Moines TCE Superfund Site. The portion of the property where the road was to be built was capped with asphalt to prevent exposure to TCE-contaminated soils. Groundwater monitoring and recovery wells were also located in the parcel. In exchange for a covenant not to sue which will take effect when the City acquires the easement, the City agreed to maintain the roadway was an engineering cap and changed the course of the roadway to minimize destruction of the groundwater wells. The City also agreed to reimburse the responsible party in the event that the wells had to be moved or repaired.

Although not styled as a PPA, EPA entered into a covenant not to sue with AAA Diversified Services ("Diversified") to purchase a former dry cleaning and solvents storage facility known as the Southern Solvents Superfund site. Diversified is a tenant at the site and plans to continue to operate its pressure cleaning and painting company. In exchange for the covenant not to sue and EPA's agreement not to perfect a windfall lien, Diversified agreed to reimburse EPA $80,000 in past response costs. Diversified also agreed to exercise due care, file institutional controls, provide access to EPA to conduct response actions and acknowledged that future response actions might require it to close a portion of its operation.

### *EPA Issues New Guidance on Institutional Controls*

With institutional controls playing an increasingly important role in cleanups, EPA recently issued a new guidance for Superfund and Brownfield cleanups, RCRA and UST corrective action sites and cleanups at federal facilities. In "Institutional Controls: A Guide to Implementing, Monitoring, and Enforcing Institutional Controls at Superfund, Brownfields, Federal Facility, UST and RCRA Corrective Action Cleanups", EPA indicates that land use controls ("LUCs") are to be used when the site cleanup will not support unlimited use and unrestricted exposure regardless of the reasonably anticipated future use of the land. EPA indicated that these terms are often confused with "residential cleanups". According to the guidance, residential cleanups could be appropriate when they are located over contaminated groundwater but a LUC in the form of a drilling prohibition is in place. Another example might be where contaminated soil is capped with a sufficient layer and combined with a LUC that prohibits soil excavation. In both instances, EPA said the cleanup does not support unrestricted use but the LUCs will permit the property to be used for residential purposes.

The draft guidance indicates that LUCs should considered early in the cleanup process. EPA suggests that LUCs should be evaluated during the RI/FS or the EE/CA for sites address through non-time critical removals. For RCRA sites, the LUCs

should be studied during the Corrective Measures Stage ("CMS") and comparable stages for brownfield and UST sites.

The guidance also indicates drafting appropriate language is critical to establish the effectives of LUCs. EPA suggests that draft language should be included in decision documents such as RODs, action memos, orders and consent decrees for CERCLA sites and the Statement of Basis ("SBs"), Final Decisions ("FDs"), Responses to Comments ("RTCs"), permits and orders under RCRA. EPA indicated that in some instances it might be appropriate to include alternative or contingent remedies in the event the LUC is not implemented, fails or is terminated prematurely. The document also indicates that LUC requirements should be specified in O & M plans and be included in the five-year or other periodic remedy reviews. While the CERCLA decision document such as ROD could be amended in the event that an LUC needs to be modified, the guidance indicated that a permit modification will likely be required for RCRA sites.

The guidance also includes some interesting references to the new landowner defenses added by the 2002 CERCLA Amendments. The guidance indicates that landowners will be required to implement and maintain LUCs to maintain their liability protection and that those obligations will also play a role in determining if the landowner exercised due care.

On the issue of compensation, the guidance said that responsible will be required to use their best efforts to implement LUCs and that this would likely require the responsible party to compensate the landowner. The responsible party may be required to retain an appraiser to evaluate the value of the interest that is being sought. If the party cannot acquire the required interest, the guidance indicates that EPA or a state may have to acquire the interest and the responsible party would have to reimburse the agency for its costs. Prior to such negotiations, the agency would be required to establish what it believes is just compensation or seek a donation of the property. If the owner is also a responsible party, the compensation would be calculated by offsetting the value of the interest with the liability for the response action. If a voluntary conveyance cannot be arranged, the lead agency may initiate condemnation proceedings.

The guidance does state that EPA cannot obtain property interests perform cleanups under its RCRA , UST or brownfield authority so the state would probably have to act under state law. In addition, EPA would not have authority to become a grantee for purposes of enforcing the LUC at a RCRA, brownfield or UST site.

The guidance indicates that the O & M plan will be the primary tool for site managers monitor LUCs. The secondary tool would be the five-year remedy reviews under CERCLA. For RCRA sites, the monitoring and reporting obligations would probably have to be specified in separate document or the permit or corrective action order itself. may The document indicated that the frequency of monitoring of institutional controls may vary depending upon site-specific circumstances but recommends that the land controls be reviewed at least annually as part of a operation and maintenance program.

EPA said it is not its practice to be a grantee for enforcement of LUCs once the remedial action is complete. While local governments and states have customarily had responsibility for enforcing institutional controls, the guidance indicates that other entities such as nonprofits, third parties may serve as grantees for enforcing the LUC. If a third party is to be the enforcer, the guidance says that it will have to be holder of the property interest. If the third party will be selling the property, it would have to retain a limited interest to allow it to enforce the LUCs. If the cleanup is being performed under an order, the order can require the selling party to effectively enforce the LUC. However, it is being done under a permit, steps would have to be taken to ensure that long-term enforcement is not lost upon expiration of the permit. However, the might be given the responsibility for monitoring controls if they have adequate resources.

## *EPA Announces New Brownfield Grants and Loans*

EPA announced the first series of $73.1 million funding under the Small Business Liability Relief and Brownfield Revitalization Act. The awards will provide 117 assessment grants totaling $30.7 million, 69 cleanup grants totaling $12 million, and 28

revolving loan fund grants totaling $30.4 million. 176 applicants 37 states and seven tribes were selected to receive awards.

$4.83 million in funding was awarded to New York counties, municipalities and other partners. New York City and Oswego County were awarded $400,000 for site assessments and Rochester will receive $280,000 for site assessments. Babylon, Glen Cove, Glens Falls, Nassau County and Oneonta were awarded $200,000 for site assessments while Ulster County will receive $75,000 for site assessments.

A cleanup grant of $200,000 was awarded to Development Downtown Inc. of Buffalo while Port Jervis will receive two $200,000 cleanups grants for two sites and $125,000 to cleanup a petroleum contaminated site.

New York City also received $1 million to capitalize a revolving loan fund and Nassau County was awarded $750,000 to establish a revolving loan fund. With these awards, EPA has provided over $9 million in grants and loans in New York for brownfield assessments and cleanup programs. EPA also awarded $4.95 in assessment and cleanup grants to New Jersey counties and communities bringing the total brownfield grants and loans awarded to New Jersey to $8 million. Since the beginning of the Brownfield program, EPA has awarded 436 assessment grants totaling over $120 million. EPA has announced 143 revolving loan fund grants totaling over $115 million.

***Commentary***: EPA recently announced that it has expanded the eligibility requirements for its Brownfield/Smart Growth Grants program. Applicants who may apply for the $50,000 grants will include Brownfield Showcase Communities and Brownfield Assessment Demonstration Pilots. EPA expects to award a total of $400,000.

### *HUD Announces New Brownfield Grants*

HUD announced it plans to award $29.5 million in Brownfield Economic Development Initiative ("BEDI") grants. The BEDI grants can be used in conjunction with Section 108 loan guarantees to finance redevelopment of brownfield sites. BEDI grant funds and the 108 proceeds must be used to support the same eligible BEDI project. Proposals are due July 16, 2003.

***Commentary:*** The section 108 loan guarantee proceeds and BEDI grant funds are initially made to units of general local government. The public entities may either use the funds themselves or re-loan the section 108 loan proceeds and provide the BEDI funds to businesses or other eligible entities to carry out approved brownfield economic development project.

Local governments may use BEDI funds in any of several ways to address site remediation costs. If the local government proposes to use Section 108 funds to acquire real property, BEDI funds could be used to address assessment and site remediation costs as part of eligible demolition, clearance, or site preparation activities. If the local government uses Section 108 funds to make a loan to a developer, BEDI funds could be granted or loaned to the developer for the purpose of addressing remediation costs as part of an economic development activity.

Local governments may use a combination of Section 108 and BEDI funds to acquire a brownfield site to convey to a private developer at a discount from its purchase price. This approach provides the developer with an asset of enhanced value that could be used as collateral for other sources of funding and those other sources of financing could then be used to finance environmental remediation or other development costs. In such a circumstance, the level of BEDI assistance could approximate the difference between the original cost of the site and its remediation in comparison to the market value of the remediated property.

### *Maryland Amends Brownfield Law*

A number of states are considering amending their brownfield or superfund laws to reflect the new liability exemptions that were added by the 2002 CERCLA Amendments. For example, Maryland recently amended its brownfield restoration statute to add a liability exemption for contiguous property owners and will establish a task force to consider adopting other elements of the 2002 CERCLA Amendments. The legislation also provides that NFA letters can be transferred to subsequent purchasers of the property provided the purchaser did not cause or contribute to the contamination.

# ENVIRONMENTAL CASES INVOLVING CORPORATE AND REAL ESTATE TRANSACTIONS

### *DOJ Announces Bankruptcy Settlements*

The past few years have witnessed a record number of bankruptcy filings. With the federal Superfund running out of money, EPA is tracking these filings and is filing proofs of claims to ensure that the federal government participates in distributions from the bankruptcy estates.

For example, EPA will be given an allowed general unsecured claim totaling $2,693,882.60 in a settlement with Farmland Industries, Inc. The settlement resolves EPA claims for civil penalties in three oil spills from pipelines owned and operated by Farmland as well as cost recovery at six CERCLA sites where Farmland has been identified as a PRP. EPA reserved its right to for violations of the Clean Air Act at the Debtor's Coffeyville, Kansas refinery.

Under a proposed Settlement Agreement in the Owens Corning bankruptcy, the federal government would receive allowed general unsecured claims of $1,749,206. The agreement resolves CERCLA claims against the Owens Corning (the "Debtor") involving certain disposal sites (“Liquidated Sites”). Insurance proceeds that the Debtor receives in excess of 60% of the costs to recover the insurance will be paid to EPA. Claims involving other disposal sites (“Additional Sites”) where the Debtor may be identified as a generator because of pre-petition conduct will be discharged and EPA will not receive any distributions in the Chapter 11 case. However, EPA reserved its right to seek payments from the reorganized Debtor and, if successful, would receive payment equal to the amount that would have been distributed as an Allowed General Unsecured Claim under the plan of reorganization. However, in pursuing any claims involving the Additional Sites, the federal government is precluded from pursuing injunctive relief under sections 106 of CERCLA or 7003 of RCRA. The Debtor will also be required to complete its cleanup obligations at sites its owns or where it has already committed to performing remedial actions.

A proposed consent decree was lodged in connection with National Steel’s Chapter 11 bankruptcy proceeding to facilitate a court-approved transfer of the assets of the National Steel Corporation to the United States Steel Corporation. EPA had sought civil penalties and injunctive relief arising from National Steel Corporation's improper characterization and disposal of hazardous wastes in an on-site landfill at its Granite City, Illinois facility. The consent decree provides a procedure for United States Steel to assume the obligations of National Steel once the Bankruptcy Court has approved the final transfer of assets. The consent decree provides that National Steel will close its on-site landfill and perform post-closure care. In addition, the consent decree requires payment of a $500,000 civil penalty.

In the Kmart bankruptcy, EPA will receive an allowed secured claim totaling $579,151 for five superfund sites and an allowed unsecured claim totaling $171,744 for an additional five superfund sites. EPA also reserved its right to seek cost recovery for Operable Unit 2 of the Peterson Puritan site with up to $506,500 of such cost recovery payable as an allowed secured claim and any amount over that payable as an allowed unsecured claim. The agreement also provides that EPA’s claims for debtor-owned sites are not discharged. For all other sites, EPA may not issue or seek environmental orders for liabilities arising out of pre-petition conduct but may recover response costs and natural resource damages based on such conduct as if the United States' claims had been allowed unsecured claims under the reorganization

plan.

***Commentary:*** These settlements reflect a recent trend where the federal government is requiring language in that provides that it is not waiving any rights to bring additional claims in the future against the successor of the debtor for CERCLA sites where the debtor may subsequently be identified as a PRP. Some recent case law has suggested that if the claim had not arose at the time of the bankruptcy court has issued its order confirming the plan, the discharge will not be effective against those unripe causes of actions. The federal government is trying to incorporate those favorable rulings in bankruptcy settlements.

In the past, purchasers of assets have tried to use the "free and clear of liens and interests" provision of section 363 of the Bankruptcy Code or the discharge issued pursuant to a plan of reorganization to avoid succeeding to historical environmental liabilities. However, because the purchasers could be liable as a current owner of a facility, the value of such an order was of dubious value. Now that these parties could arguable qualify for the new Bona Fide Prospective Purchaser defense, this option has become a more viable strategy and the government can be expected to object to any language proposed to be included in a confirming order that purports to waive its ability to pursue asset purchasers or successors of the debtors.

## *Settlement Resolves Liability of Parent Corporation*

Kayser-Roth Corporation ("Kayser-Roth") has agreed to reimburse EPA approximately $7.2 million for past unreimbursed costs and prejudgment interest incurred at the Stamina Mills, Inc. Superfund Site in North Smithfield, Rhode Island (the ``Site''). In exchange for the payment, EPA agreed to provide a covenant not to sue to Kayser-Roth and Collins & Aikman Products Co., Inc., which has provided an indemnity to Kayser-Roth in connection with the Site.

***Commentary:*** The United States first sued Kayser-Roth in 1988 to recover the costs incurred to connect certain residents located near the Stamina Mills Site to the public water supply. After a trial, the United States District Court for the District Court of Rhode Island, in 1990, entered a judgment against Kayser-Roth in the amount of about $958,420 and issued a declaratory judgment of Kayser-Roth's liability for the Stamina Mills Site.

The U.S. Court of Appeals for the First Circuit affirmed the judgment, holding the parent corporation liable as an operator because it had exercised pervasive control over its subsidiary. The court also found the parent liable as an owner of the subsidiary's facility without piercing the corporate veil because of the control the parent had exercised over the subsidiary. The court entered a judgment against the parent for EPA's past response costs as well as a declaratory judgment for all future response costs. In 1991, EPA issued an administrative order to Kayser-Roth requiring it to implement the 1990 remedy. In 1994, Collins & Aikman Products Co., Inc. provided an indemnity to Kayser-Roth in connection with the Stamina Mills Site.

In 1998, the United States again sued Kayser-Roth seeking to recover costs EPA had incurred at the Site that were not recovered in connection with the 1988 litigation. Shortly after EPA filed a motion to recover those additional costs, the Supreme Court issued its decision in *U.S. v. Bestfoods*. In that decision, the Court ruled to find a parent liable as an owner a court must use a corporate veil-piercing analysis which requires some showing that the corporate form was abused to accomplish fraud or some other wrongful conduct. In addition, the Court held that the focus for parent "operator" liability is not the relationship between the parent and the subsidiary but whether the parent exercised control over the operations of the facility.

As a result, Kayser-Roth filed a motion seeking relief from the declaratory judgment, arguing that the earlier decision had improperly focused on the relationship between the parent and the subsidiary in determining operator liability. Kayser-Roth also claimed that there was no basis for piercing the corporate veil because corporation was not used to accomplish fraud or wrongful purpose.

However, the court said that Best Foods did not hold that fraud was the only ground for piercing the corporate veil and that the factors used in the 1990 were not

improper. The district court ruled the 1990 decision was correct because it had found that Kayser-Roth was essentially in charge of all operational aspects of the facility including those involving environmental matters. The U.S. Court of Appeals for the First Circuit affirmed the district court's ruling.

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

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