SCHNAPF ENVIRONMENTAL REPORT

A Newsletter Covering Recent Environmental Developments and Caselaw

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DUE DILIGENCE/ AUDITING/ DISCLOSURE/ ENFORCEMENT

New Jersey Proposes Self-Disclosure Rule

The New Jersey Department of Environmental Protection ("NJDEP") recently proposed a self-disclosure rule to provide incentives for facilities to voluntarily discover, report and promptly correct environmental violations. Facilities would be able to make the disclosure on NJDEP's website.

Under the proposed rule, a facility will be eligible for a 100% penalty waiver for self-discloses minor environmental violations that pose a minimal risk to public health, safety and natural resources within 21 days of discovery. Minor violations would include administrative and certain paperwork requirements.

For moderate violations, the penalty reduction would be 75%. The proposed rule defines a moderate violation as non-compliance that does not cause serious harm to public health or the environment.

Small businesses would be eligible for a 100% reduction for both types of violations. Facilities that are repeat violators will not qualify for self-disclosure incentives.

Innovest to Use EPA Performance Track Criteria

Innovest Strategic Value Advisors as announced that it will use the criteria used by the EPA Performance Track Program for rating the environmental compliance record of companies. Innovest is an investment advisory firm that issues investment reports for many industrial sectors including pharmaceuticals, auto parts and equipment, manufacturing, chemicals and forest products.

Companies that join the EPA Performance Track program make commitments to exceed regulatory requirements. Innovest has found that companies demonstrating strong environmental performance and a commitment to environmental improvement usually are well managed overall. Currently, 46 Performance Track members are rated in Innovest's reports.

Mustard Gas Agent May Exist Under Cleveland Parking Lot

The United States Army Corps of Engineers is conducting an investigation to determine if a mustard gas agent has contaminated the ground at a former World War I research facility in Cleveland.

The Cleveland facility developed processes for large-scale manufacturing of the mustard gas agent. Lab and other liquid waste was poured into drums and then poured out of the drums down trenches into the ground. While the mustard agent quickly breaks down into less toxic byproducts when it comes into contact with water, it is fairly stable in soil, especially in colder environments.

Meanwhile, 100 homebuyers are suing KB Homes involving environmental disclosures made in connection with a subdivision+. KB built the development on land used by the Navy in the 1940s as a practice-bombing range. Residents occasionally find ordnance in the area. The explosives are usually about eight inches long and resemble tiny torpedoes.

The lawsuits filed by the homeowner allege that KB failed to fully disclose the presence of the ordnance. KB maintains that the site was remediated by the U.S. Army Corps of Engineers and the homebuilder distributed a 1956 letter from the Corps as evidence that the site did not pose a safety hazard to residents. However, in November 2001, the Corps requested KB Homes that it was misrepresenting the government's position and requested that the homebuilder cease distributing the letter. The Corps advised KB that that the clearance letter that KB Homes had been circulating was issued by the Corps' bomb-removal group was limited to above-surface use to which the land is suited but that building homes was not an acceptable above-surface use. KB also maintains that before acquiring the land, it had thorough environmental testing done. KB adds that did not any explosives during earth moving activities or when it dug trenches at the site during construction.

Commentary: There are an estimated 9,000 sites nationwide that were formerly used by the Department of Defense and its predecessor agencies. This case illustrates the importance of developing historical information during environmental due diligence even where the current use of a site might not appear to pose significant risks to the environment. In this case, reviewing materials from the local historical society and interviewing former plant employees generated a great deal of information.

Citigroup Begins to Quantify Emissions Costs for EU Energy Companies

Banks have often served as surrogate regulators on environmental issues. Indeed, much of the early environmental due diligence was performed because of the insistence of lenders and pursuant to standards established by the individual financial institutions.

Now, it appears that banks are slowly beginning to slowly wade into the climate change arena. Citicorp recently announced that it has begun to evaluate the impact of the EU GHG allowance program on utilities and other energy intensive industries. According to the study, these industries may be required to cut emissions by 45 million metric tons per year ("mmt/y") by 2012. If the German energy giant RWE is required to slash its emissions by 15 mmt/y by 2012, the bank said the company might incur additional costs of approximately $168million assuming allowances are traded at 10 Euros per metric ton.

Commentary: With the regulation of GHG emissions becoming a reality in the EU and many states in the United States, publicly-traded companies are going to face increased pressure to disclose the impacts of the upcoming GHG regulatory programs in their SEC filings. See following related article.

Study Reports on Extent of GHG Disclosure by Publicly-Traded Companies

According to study commissioned by CERES and written by the Investor Responsibility Research Center (IRRC), America's largest generators of GHG emissions are not adequately disclosing the financial risks posed by climate change and also are failing to deal with global warming issues in other key corporate governance areas. CERES is a coalition of investor, environmental, and public interest groups working to improve corporate environmental responsibility worldwide.

The 20 companies profiled in "*Corporate Governance and Climate Change: Making the Connection*" include the top CO2 emitters in electric power, auto and petroleum industries as well as five other industry leaders. These companies are core holdings in most institutional investment portfolios. IRCC used a 14-point "Climate Change Governance Checklist" to analyze the companies' response actions in the areas of board oversight, management accountability, executive compensation, emissions reporting and material risk disclosure.

The report found that while all 20 profiled companies will measuring GHG emissions from their facilities by the end of 2003, only 11 companies have set historical emissions baselines (dating back at least 10 years) and only nine companies have made forward-looking emissions projections. According to IRRC, one of the more glaring deficiencies was the lack inventories or projections for GHG emissions resulting from the use of their products.

Slightly more than half of the companies discussed climate change in their 2001 Form 10-K filings but less than half mentioned the issue in the front section of their 2001 annual report. Eight companies did not mention climate change at all in their filings. For those companies that do mention climate change in their securities filings, IRRC said disclosure tended to be only a couple of sentences suggesting that the risks might be material but the precise impact could not be determined at the time. The study suggested that domestic companies were more likely to discount the climate change threat while companies located in Europe and Japan were more likely to report on the financial risks and undertake climate change mitigation strategies.

The boards of 17 of the profiled companies discussed climate change. All 20 companies link environmental performance to compensation, and 19 of the 20 companies have their top environmental officer reporting directly to the CEO or one level below. However, only three of the companies linked attainment of GHG targets to executive compensation.

According to IRCC, the electric power industry scored lowest on the checklist even though it was the largest source of domestic GHG emissions and most prone to potential regulation. The domestic auto industry also failed to adequately measure and disclose the emissions of its products. IRCC said the vehicle emissions accounted for more than 95% of the auto industry's GHG emissions. The widest disparity in corporate governance responses to climate change was in the oil industry. IRCC said that BP and Royal Dutch/Shell have pursued all 14 items listed on the Climate Change Governance Checklist while ChevronTexaco, ConocoPhillips and ExxonMobil have pursued only four or five actions.

The report also observed that U.S.-based oil companies are devoting virtually all of their development resources towards fossil fuels while European competitors are increasingly focusing on renewable energy technologies that are among the fastest-growing energy sources.

IRCC speculated that the new governance listing standards requiring corporations to have a majority of independent directors, the greater independence of research analysts at large investment firms, increasing pressure from shareholders and insurers concerned about growing legal and economic exposure for GHG emissions will lead to greater climate change disclosure.

The report recommends that corporations consider future financial risks from changing weather patterns, such as increased torrential rains.

District Court Limits Scope of EPCRA Disclosure Obligations

The federal District Court for the District of Columbia ruled that a Nevada mining company does not have to file Toxics Release Inventory ("TRI") forms under the Emergency Planning and Community Right-to-Know Act ("EPCRA") for trace amounts of naturally occurring metals embedded in waste rock released when the rock is moved

In *Barrick Goldstrike Mines Inc. v. EPA,* the court said that the waste rock fell within for the de minimis exemption that covers releases from mixtures containing less than 1% percent of extremely hazardous chemicals. However, court said the reporting exclusion does not apply to tailings because tailings are not a mixture. The ruling could dramatically reduce the TRI filings made by the mining industry because waste rock typically accounts for at least 85% of the toxic releases reported by mining operations on their TRIs each year. In 2000, approximately 47% of all toxic releases reported on TRIs were from the mining industry.

Commentary: In its 1999, EPA revised the TRI reporting requirements and added additional substances and industrial categories that were subject to the TRI requirements. EPA excluded waste rock and tailings from the TRI reporting obligations. EPA indicated that certain mining processes involving the movement of constituted manufacturing or processing of the materials. However, a federal District Court for the District of Colorado ruled that EPA had impermissibly stretched the definition of manufacture and process to include releases from waste rock in TRI reporting requirements.

Property Owners Fined For Failing to Promptly Disclose Contamination

Getty Properties Corp. agreed to pay $5,000 to the Connecticut Department of Environmental Protection ("CTDEP") year for failing to report evidence of a release of gasoline. A release of petroleum was discovered during the removal of a drywell at the property in 1998. Getty retained a licensed environmental professional ('LEP") to remove the contaminated soil and certify that the cleanup has been completed in accordance with state requirements. However, neither Getty nor the LEP notified CTDEP of the discovery of the contamination. CTDEP discovered the violation as part of an audit of remediation certifications filed by the LSP.

Meanwhile, Goodman Realty Trust agreed to pay $4125 to the Massachusetts Department of Environmental Protection ("MADEP") when its LEP did not disclose the presence of petroleum in a monitoring well. Since 1995, the property owner has been performing assessment and cleanup actions at a site in Springfield that was formerly used to process scrap metal. The MADEP regulations require contamination to be reported within 72 hours. However, the contamination was not disclosed for over 90 days. MADEP discovered the violation as part of its audit of cleanups certified by LEP.

Commentary: Both of these cases illustrate one of the drawbacks of using licensed environmental professionals. Some states with these LEP programs are now randomly auditing a certain percentage of sites remediated under an LEP and will closely scrutinize the documentation. Because property owners can be fined for improperly completed paperwork or failure to comply with environmental obligations, it is important for the owner or operator to have its environmental lawyer review the work of the LEP to ensure that all environmental compliance obligations are satisfied.

ENVIRONMENTAL INSURANCE

Update On California FAIR Program

In 2002, California enacted its Financial Assurance and Insurance for Redevelopment ("FAIR") program. The purpose of the FAIR was to facilitate brownfield development by making low-cost environmental insurance available for developers of brownfields.

The legislature contemplated that FAIR would be modeled after the Massachusetts environmental insurance program. CAL EPA was required to solicit proposals from insurance carriers, select a carrier to offer Cost Cap Coverage, Pollution Legal Liability and Secured Creditor policies, and negotiate a standard environmental insurance policy and premium schedule that would be used for brownfield sites. The legislation provided for minimum coverage terms for the cost cap and PLL polices. It was hoped that FAIR would also make low-cost policies available by subsidizing premiums by up to 50% and the last 80% of the self-insured retention ("SIR") or deductibles.

Cal EPA explored the possibility using multiple insurance providers instead of the single provider approach used by Massachusetts and also tried to incorporate other features to provide greater cost efficiencies. After an 18 months process, Cal EPA has decided to follow the single provider approach and selected AIG to provide the program's policies. Unfortunately, because of the state fiscal crisis, the FAIR program lost the $56 million that was to be used to subsidize the insurance premiums. As a result, the FAIR program is looking for other ways to reduce premiums.

New York Brownfield Legislation Contains Environmental Insurance Subsidy

On October 7th, Governor George Pataki signed comprehensive legislation that reforms the state Superfund law and established a statutory brownfield program. One of the features of the law is an Environmental Insurance Credits program that may be used for qualifying brownfield sites. Developers of these sites may be eligible for a tax credit of $30,000 or 50% of the premium, whichever is less. The premium must be paid after the execution of a brownfield cleanup agreement.

AIR POLLUTION DEVELOPMENTS

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EPA Issues Rule Clarifying NSR Exception

EPA issued the latest component of its New Source Review ("NSR") reforms on August 27th. The rule identifies what types of equipment replacements qualify as exempt routine maintenance, repair and replacement ("RMRR") and therefore are exempt from the NSR program of the Clean Air Act ("CAA"). RMRR rule is undergoing minor technical changes and will be published in the federal register in October. EPA proposed its revisions to the NSR program on December 31, 2002.

The NSR program applies to modifications of existing major sources. EPA has defined a modification as a physical change or change in method of operation of major stationary source but excluded from definition of modification any activity that constitutes RMRR. Prior to the new RMRR rule, EPA reviewed the exemption on a case-by-case basis. Under the new rule, EPA has identified activities that will automatically qualify as RMRR. Replacement activities that do not fall within the definition of RMRR will not necessarily trigger NSR but will have to be evaluated on a case-by-case basis by the permitting agency.

Under the new RMRR rule, owners or operators of major sources will not be required to install state-of-the-air pollution control equipment if the facility: replaces existing component of a "process unit" with an identical or "functionally equivalent" component, the fixed capital cost of the replaced component as well as the costs of any repair and maintenance activities that are part of the replacement activity (e.g. labor, contract services, major equipment rental, etc.) does not exceed 20% of the replacement value of the entire process unit, the replacement does not change the basic design parameters of the process unit, and the replacement does not cause the unit to exceed any emissions limits.

One of the key definitions of the RMRR is a "process unit". This term refers to any collection of structures and/or equipment that processes, assembles, applies, blends, or otherwise uses material inputs to produce or store a completed product. In most cases, boilers would not be considered part of a process unit and that pollution control equipment would also be excluded from the definition of the process unit unless except it serves a dual purpose in the process unit. A single facility may contain more than one process unit. The rule contains specific definitions of process units for some industries.

Another important definition is the “functionally equivalent” replacement. This term includes replacement of equipment with identical equipment with equipment that serves the same purpose or function but is different or improved in some ways in comparison with the equipment that is removed. However, equipment that allows a process unit to exceed its specified basic design parameters will not be considered a "functionally equivalent" replacement. The rule contains a non-exclusive list of "functionally equivalent" replacements.

In calculating the replacement value of the new process unit, EPA indicated that an owner or operator of a facility could use the replacement cost, invested cost, adjusted for inflation; the insurance value of the equipment where the insurance value covers complete replacement of the process unit or another accounting procedure based on Generally Accepted Accounting Principles.

Commentary: Even though the RMRR rule may allow facilities to avoid complying with the NSR program for the exempt activities, the facilities may still be required to reduce certain kinds of emissions under State Implementation Plans (“SIPs”) such as the NOx SIP Call that will be implemented in 2004. States may also restrict emissions under their Title V permits.

Federal Courts Issuing Conflicting Decisions on NSR Enforcement Initiative

On August 7th, federal District Court for the Southern District of Ohio ruled that Ohio Edison violated the Clean Air Act when it failed to add new pollution controls at one of its coal-fired electric power plants.

In *U.S. v. Ohio Edison* (2003 U.S. Dist. 13799), the defendant undertook 11 projects totaling approximately $136 million at its coal-powered power plant. The activities involved both pressure and non-pressurized components. The federal government alleged that the changes constituted modifications that triggered the NSR while the company argued that it was simply engaged in "routine maintenance".

The court found that the term modification was very broad and that EPA's narrow interpretation of the RMRR exemption was reasonable. The defendant asserted that "routine" should be determined on an industry basis. However, the court upheld EPA's approach of examining each project on a case-by-case basis. The court then evaluated the nature, extent, purpose, frequency and cost of the work to determine whether the individual projects fell within the RMRR exemption. The court found that the projects did not fall within the RMRR exemption because the purpose of the activities was not mere maintenance but to extend the operating life and reliability of the units, involved replacement of major components which had never before been replaced in the past, most of the project costs were treated as capital expenditures as opposed to maintenance expenses, most of the work was performed by outside contractors instead of maintenance workers increase operating hours by reducing the number and length of forced shutdown for repair or maintenance, increased emissions. Thus, the court concluded that the projects were not "routine" but were modifications that triggered the NSR program.

Later in the month, the federal district court for the middle district of North Carolina reached an opposite conclusion in *U.S. v. Duke Energy (2003 U.S. Dist. LEXIS 14957, August 26, 2003)*. In this case, ruled that EPA had not met its burden of establishing Duke Energy had engaged in activities that fell outside the RMRR exemption. The court said that EPA could not ignore the frequency that a component is repaired or replaced within an industry and that the changes did not trigger NSR under the Prevention of Significant Deterioration ("PSD") permit program because they did not result in an increase in the hourly emissions of the affected units.

The court also noted that EPA had previously recognized that not every activity at a facility triggers NSR. In light of this legislative intent and that agency representatives had indicated in prior applicability determinations the PSD NSR would only apply when there was an increase in hourly emission rates, the court said EPA's present NSR interpretation was not entitled to deference. The court also disagreed with the formula EPA used for calculating if there was a net increase in emissions from the physical change.

Meanwhile, Massachusetts DEP reached a record-setting settlement with

Waters Corp., of Taunton Mass. The settlement involved claims that Waters Co. made dozens of unpermitted modifications at its chromatography equipment manufacturing plant and that those modifications resulted in unreported VOC emissions during a 20-year period. Under the agreement, Waters Co. agreed to pay $5.9 million in civil penalties, and to cover $600,000 in costs for a DEP air pollution control pilot study.

EPA Announces Refinery Settlements

EPA announced that it had entered into comprehensive settlements with Coastal Eagle Point Oil Company ("CEPOC"), CHS Inc. ("Cenex"), Ergon-West Virginia Inc. and Ergon Refining Inc. ("Ergon") that have a collective refining capacity of approximately 285,000 barrels per day. The settlements will reduce emissions nitrogen oxide, sulfur dioxide, particulate as well as benzene and other hazardous air pollutants at refineries located in Mississippi, Montana, New Jersey and West Virginia.

The refiners will pay civil penalties totaling more than $2.9 million and implement supplemental environmental projects ("SEPs") valued at over $1.6 million to reduce idling truck emissions in New Jersey and provide improved equipment for first responders in Mississippi and West Virginia. The refineries will install and implement innovative control technologies to reduce emissions from their largest emitting units. These activities will reduce annual emissions of SO2 by approximately 2,800 tons and NOx by approximately 1,100 tons. In addition, each refinery will significantly upgrade its leak-detection and repair practices, implement programs to minimize flaring events and adopt new strategies for ensuring continued compliance with benzene waste requirements under the CAA National Emissions Standards for Hazardous Air Pollutants ("NESHAP").

EPA also entered into a narrowed settlement with National Cooperative Refinery Association ("NCRA") to resolve violations of the CAA that NCRA settlement voluntarily disclosed to EPA under the agency's audit policy. NCRA has agreed to $350,000 civil penalty, and spend more than $339 million to install pollution control equipment at its 80,000 barrels per day refinery to reduce emissions from its heaters and boilers and to implement a program for addressing flaring events. NCRA will also spend more than $1.5 million on a SEP to reduce particulate emissions from the refinery's cooling towers and mitigate chloride-contaminated ground water.

Commentary: These settlements are part of EPA's Petroleum Refinery Initiative. In the past three years, EPA has reached global settlements Koch Petroleum, BP Exploration & Oil, Motiva, Equilon and Deer Park Refining, Marathon Ashland Petroleum, Conoco, Navajo Refining and Lion Oil settlements affecting 35% percent of domestic refining capacity.

Study Finds Oil and Gas Wells Significant Sources of Smog

Researchers at the University of California have found that oil and gas wells located in parts of Oklahoma, Texas, and Kansas are significant sources of smog and greenhouse gases.

According to the scientists, ground level concentrations of hydrocarbon gases across the central and southwestern states in late 2001 and early 2002 were as high in Oklahoma City as in Los Angeles, Houston, New York, and Chicago Based on these findings, it appears that the United States is emitting 4 to 6 million tons more methane per year than previously estimated

Roundup of Federal and State Asbestos Enforcement Actions

The supervisor of an asbestos abatement project was sentenced to 68 months in prison for knowingly causing asbestos fibers to be released at an asbestos project conducted at a Denver-area high school. Daniel Argil pleaded guilty to knowingly directing employees to improperly remove asbestos by using a high-powered water sprayer. This process allowed water-laded asbestos to escape beyond the containment area into various areas of the school. The asbestos dried into a powdery film that easily became airborne. The contamination was not discovered until classes reopened in the fall. The school then had to be closed down for a substantial period of time while it was decontaminated.

The owner of an asbestos abatement company was sentenced to 14 years in prison and was ordered to forfeit $939,079 and pay $299,593 in restitution for illegal asbestos abatement and money laundering. (*U.S. v. Thorn*, No. 00-CR-88, N.D.N.Y. 9/2/3). The ruling came 9 months after the Second Circuit vacated a more lenient sentence. Joseph Thorn will also face three years of supervised release after his prison term ends. The contractor illegally removed asbestos at more than 1,100 facilities in central and upstate New York from 1990 to 1999. The facilities included elementary schools, churches, nursing homes, hospitals, police barracks, a state office building and numerous other public buildings and private residences. Witnesses testified at the trial that the asbestos operations caused "snow storms" of visible airborne asbestos and that workers were knowingly sent into asbestos "hot zones" without being directed to wear respirators.

The owner of an abandoned Houston warehouse was sentenced to 21 months in prison and fined $20,000 for improperly removing 40,000 square feet of asbestos-contained fireproofing (U.S. v. Ho, No. H-00CR-183, S.D. Tex., 8/2703). After purchasing the building in 1997, Eric Kung-Shou Ho obtained an asbestos abatement estimate but then decided to hire 10 undocumented immigrants to remove the ACM using only putty knives and paper respirators. Ho was convicted in 2001 and was sentenced to six months of community confinement. He then appealed the conviction on the grounds that the CAA was unconstitutional while the federal government argued that the judge had misapplied the federal sentencing guidelines. The Fifth Circuit affirmed the conviction but found that sentence should be increased because Ho played an aggravating role in the violation and was essentially the organizer of a criminal activity. The appeals court then remanded the case back to the district court with instructions to impose a more severe sentence.

The owner of a Chicago warehouse was indicted for illegally removing asbestos-containing materials in 1999. John D. Crededio was charged with failing to provide the Illinois EPA with the required ten days advance notice, failing to follow asbestos work practices and not using properly accredited individuals on the project.

A property owner in Portland, Oregon faces a possible maximum prison term of five years and a $250,000 fine for violating the asbestos work practice standards for asbestos abatement activity. According to a plea agreement, Jo McCulloch admitted that he hired unskilled laborers in 1998 to strip asbestos-containing floor tiles, did not provide the required 10-day advance notice, failed to control asbestos emissions, did not have an accredited supervisor at the site and improperly disposed of the asbestos-containing waste material.

The former Economic Development Director for the town of Plainfield, Connecticut was indicted on charges that he recommended the demolition of a building containing asbestos. According to the indictment, Michael Saad advised Edward Carroll to demolish portions of a building at the Inter-Royal Mill in Plainfield even though he knew that building contained asbestos that had not been properly abated.

A California real estate developer was indicted for not complying with the asbestos work practice standards during a hotel renovation. Aubrey Lewis Ritz allegedly hired uncertified workers to illegally remove asbestos-containing acoustical ceiling and siding material during a hotel renovation. The indictment also charged him with not providing the 10 day advance notice, failing to adequately wet asbestos debris, improperly packaged and labeled the asbestos debris, knowingly allowed asbestos fibers to be released into the air and improperly disposed RACM debris.

EPA is seeking a $51,700 penalty from JHNY, Inc. for violating asbestos workpractice rules at its gasket manufacturing facility in Erie, Pa. An EPA inspector found ACM caked in a roof vent, and on the floor and catwalk. The inspector also noted that a filter bag in an air cleaning system had collapsed, and asbestos dust was escaping from a roof vent. EPA also alleged that the company did not conduct required air monitoring and failed to comply with asbestos record-keeping requirements.

Montgomery Company, Inc. of Hadley, Pennsylvania agreed to pay $5,375 to the state Department of Environmental Protection ("DEP") to resolve allegations that the company failed to properly contain asbestos waste and notify the DEP before removing asbestos as part of a demolition of five greenhouses. During a site inspection, DEP observed that asbestos panels that made up the lower wall of the greenhouses, had been removed from several of the greenhouses and stacked in a garage while ACM around the windows of the greenhouses had not been removed prior to demolition and was co-mingled with the soil.

Butte-Silver Bow agreed to pay $7,850 to the Montana Department of Environmental Quality ("DEQ") for failing to conduct an asbestos inspection prior to demolishing three houses and failing to provide the DEQ with the required 10 day advance notice of the demolition activity. DEQ agreed to suspend all but $785 of the penalty provided the company complete an $11,000 Supplemental Environmental Project consisting of conducting an asbestos conference for demolition, remodeling, and general contractors.

EPA has charged the owners of the South Lake Tahoe Super Eight Motel, Mulligan's Irish Pub, and a contractor, Maintenance Plus with allegedly failing to properly remove and dispose of asbestos-containing materials from the ceiling of Mulligan's restaurant. Some of the materials were allegedly dumped in a parking lot adjacent to a boys and girls club.

The Puerto Rico Department of Education ("PRDOE") faces approximately $5.6 million in fines for violations of the Asbestos Hazard Emergency Response Act ("AHERA") at the five schools. Under AHERA, the penalties may be used to implement corrective actions at the schools. EPA conducted inspections at nearly 400 schools and identified damaged ACM. EPA and the Puerto Rico Environmental Quality Board then conducted 170 follow-up inspections and spot checks of the walk-throughs which revealed that inspection, training and awareness programs were not being implemented.

At Federico Degetau Elementary School, EPA found dust throughout the building school, collected asbestos-containing waste material had not been properly collected and maintenance staff were not trained. More than 20% of the stucco in most classrooms was damaged. The PRDOE did close the school and conducted cleanup work in two phases. Phase one of the work focused on hallways and shared spaces in the building while phase two involved removing and encapsulating ACM. EPA fined PRDOE $2.27 million for these violations.

PRDOE faces a $737,000 fine to be used to correct the violations at the Emilio Delgado School where EPA inspectors found damaged ACM that could be disturbed by wind or by student or teacher contact. Ceilings in several classrooms were damaged and the inspectors found pieces of stucco on a desk and the floor. Classrooms where damage was found were closed and PRDOE has scheduled the abatement.

At Ramon Mellado Parsons Elementary School in Carolina, EPA inspectors found damaged ACM stucco ceiling material in several areas of the school, which did not have an asbestos management plan and did not keep adequate records. Areas with visibly damaged ACM were closed and have been scheduled for abatement. EPA is proposing a $742,500 fine for these violations.

At the Manuel de la Pila Iglesias High School, EPA learned that a teacher and several students had removed about 2,000 square feet of ACM vinyl floor tiles from one classroom. The students and the teacher were not properly trained and did not wear protective gear. The school did not have an asbestos management plan and had not trained the appropriate employees for asbestos-related work. In addition, workers, students and their families were not informed about the asbestos-related activities at the school. The asbestos tile was cleaned up in July 2003 and a management plan was submitted to EPA. The PRDOE faces a $742,000 penalty for these violations Finally EPA has proposed a $731,500 penalty for asbestos violations at the Bernardino Cordero Vocational School. EPA inspectors were told that all asbestos had already been removed. However, the school had no asbestos management plan and could not demonstrate to EPA inspectors that its staff was properly trained. As part of this enforcement action, the Puerto Rico Public Building Authority ("PRDPA") and its asbestos abatement contractor an asbestos abatement were fined $22,000 for improperly removing asbestos from one of the five schools.

Asbestos Cleanup At Denver-Area Development Estimated at $15 Million

In our last issue, we reported that asbestos had been discovered soil where a residential development was being constructed on the site of a former hospital of the Lowry Air Base.

The Lowry Redevelopment Authority ("LRA") now estimated that the cost to remove the asbestos could run as high as $15 million. Thus far, the LRA and the developer have spent more than $4 million sampling for asbestos and removing soil with concentrations of asbestos that exceed state health standards. According to an LRA, 15,000 soil samples have been collected to date and 94% did not detect any asbestos. In addition, no asbestos dust or airborne fibers have been detected contamination inside the new homes.

Bakeries to Pay $5.25 Million to Settle CFC Enforcement Action

Four bakeries owned by the Sara Lee Corporation have entered into the largest settlement involving violations of the Title VI Ozone Depleting Substances (‘ODS”) provisions of the CAA.

Earthgrains Baking Companies, Metz Baking Company, Earthgrains Refrigerated Dough Products, L.P., and Coopersmith, Inc. (collectively Earthgrains) agreed to pay $5.25 million in civil penalties and to convert all of its industrial process refrigeration appliances to non-ODS refrigerant systems. EPA estimates that the cost of the conversion will exceed $5 million dollars.

EPA had alleged that 300 large refrigerant-containing appliances at 57 of the 67 facilities owned or operated by Earthgrains leaked chlorofluorocarbons (CFCs) in excess of the 35% annualized leak rate permitted by the ODS regulations. Each of the appliances contained more than 1000 pounds of refrigerant. EPA also claimed that Earthgrains failed to promptly repair the leaks.

The bakeries comprising Earthgrains were acquired by Sara Lee Corporation and incorporated into the Sara Lee Bakery Group during the government’s investigation. This was the second settlement involving industrial bakeries. In the fall of 2000, Meyer’s Bakeries, Inc. agreed to pay $3.5 million and convert all its appliances to non-ozone-depleting refrigerants. In the summer of 2001, a producer of industrial gases agreed to resolve allegations that it failed to detect and repair ODS leaks by paying a $4.5 million penalty and spending $500,000 on environmentally beneficial projects, in addition to converting its refrigerant systems to non-ozone-depleting systems.

Commentary: Many commercial and residential buildings use refrigeration systems that still contain ODS. This equipment may continue to be used for the balance of its useful but any repairs have to be performed by certified individuals. Since a purchaser of businesses or properties containing refrigeration equipment can be liable for continuing leaks of ODS, it is important to review compliance with ODS regulations during environmental due diligence even where the establishments do not use the kind of industrial refrigerant systems used by the bakeries in this enforcement action. Hotels have been fined for improperly repairing air conditioners containing ODS.

EPA Declines to Regulate CO2 under the CAA

EPA recently denied a petition to regulate GHG emissions from motor vehicles under the CAA. The petition had claimed that CO2 should be identified as a pollutant under the CAA because of the impact that CO2 and other GHG had on human health and the environment. However, the agency concluded that Congress has not granted EPA authority under the CAA to regulate CO_2 and other greenhouse gases for climate change purposes. EPA said that even if CO2 was an air pollutant generally subject to regulation under the CAA, Congress has not authorized the Agency to regulate carbon dioxide emissions from motor vehicles to the extent such standards would effectively regulate car and light truck fuel economy.

In response to the decision, Connecticut, Massachusetts and California have announced that they would file lawsuits requiring EPA to regulate CO2 and other GHG emissions.

More States Agree Address GHG Emissions

In the absence of federal regulatory action on GHG, more than a dozen states have decided to address GHG emissions. The governors of Connecticut, Vermont, New Hampshire, Delaware, Maine, New Jersey, Pennsylvania, Massachusetts, and Rhode Island recently announced that they will establish a cap and trade program for CO2 emissions from power plants. The nine northeastern states hope to reach an agreement by April 2005 on a flexible, market-based cap and trade program.

California, Oregon and Washington also have announced that they intend to launch a tri-state effort to curb greenhouse gas emissions. The three states hope to use their combined purchasing power to establish uniform efficiency standards for appliances and uniform specification for the purchase of hybrid vehicles. They also will try lower emissions associated with diesel fuel in transportation by reducing the use of diesel generators on ships in west coast ports and creating a system of emission-free truck stops along the Interstate 5 corridor all the way from Mexico to Canada. The states also plan to remove barriers to developing renewable electricity generation resources, and to develop protocols for reporting and accounting methods for GHG emissions, and collaborate on improved scientific tools to more precisely measure the impact of climate change.

Meanwhile, more than 35 organizations and companies are participating in California's existing program for registering reductions in GHG gas emissions. To join the registry, participants must agree to inventory and report their greenhouse gas emissions as first steps toward reducing those emissions. The registry has developed protocols and software tools for helping companies document their greenhouse gases accurately and simply. Organizations that register GHG emission reductions may receive "credits" that can be sold or traded to others. Recently, the registry announced that it had been approached by a potential buyer of 500,000 tons of CO2 reductions.

Cincinnati-based Cinergy Corp. recently announced that it will spend $21 million to reduce GHG emissions by an average of 5% below 2000 levels from 2010 through 2012. The company said it will report emissions CO2, methane, NOx, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride for each of those years. It will also assess its emissions goal in 2010 and determine an appropriate goal for 2013 through 2015.

The WWF recently announced that Lafarge had joined its "Climate Savers" program. Members of this program must commit to reduce their CO2 emissions by 10%. Lafarge plans to reduce its CO2 emissions by 20% per ton of cement produced worldwide for the period 1990-2010. The company said at by 2010, it will have reduced its total CO2 emissions by 15% below 1990 levels.

Lafarge hopes to achieve these goals by improved energy efficiency, using waste fuels such as steel slag and fly ash from coal-fired power stations. Lafarge also agreed to create a joint technical program with WWF to develop best practices to ensure that waste fuels are always used safely as well as to explore ways of increasing the use of renewable energy in Lafarge's global operations.

CCX Begins Trading

The Chicago Climate Exchange ("CCX") began trading September 30th. The first auction consisted of 100,000 metric tons allowances for the 2003 Vintage and 25,000 metric tons of allowances for 2005 Vintage.

Members of the CCX have committed to reduce their GHG emissions by 1% each year for the next four years and will be allowed to trade emissions allowances to help them meet their targets. Members may also obtain emissions offsets generated by agriculture and forestry projects. Electronic trading of allowances will begin on October 10th.

Commentary: The World Resources Institute ("WRI") became a charter member of the CCX. WRI will be able to use the Exchange's standard mitigation tools to meet its commitment to zero net emissions target. WRI's commitment covers CO2 emissions arising from electricity use, employee business travel, and employee commuting. The last two components are not required under CCX rules, but they will enable the Exchange to experiment with how carbon commitments may be expanded. WRI developed the first internationally accepted standard of measuring and reporting greenhouse gas emissions known as the GHG Protocol. This standard has been accepted by various industries, including pulp and paper, and aluminum. CCX members will be using the GHG Protocol guidelines.

In a related development, WRI announced that a coalition of domestic companies known as the Green Power Market Development Group have d pledged to obtain at least 1,000 megawatts of their power needs from renewable sources by 2010. The program will cover 250 facilities in 22 states. Some members of the Green Power Market Development Group have agreed to obtain at least 10% of their electricity from non-fossil renewable energy. Companies in the WRI program include General Motors Corp., Dow Chemical Co., Dupont, Johnson & Johnson, IBM, Kinko's, and Staples Inc.

The electricity will be generated from a variety of sources including on-site solar power panels, landfill gas and wind farms. Some retailers such as Staples will satisfy their commitments by purchasing “green tag” certificates. The “green tags” help to provide financial support to renewable energy projects in another part of the country while allowing the purchaser to claim a credit for the CO2 emissions avoided as a result of that renewable energy project. In another type of transaction, Dow Chemical will obtain 35 megawatts of power from 500 fuel cell units manufactured by General Motors at the Dow plant in Freeport, Texas. Dow will use hydrogen that already is produced as a byproduct of its operations at the plant to power the fuel cells.

NJ Proposes to Jettison Emissions Trading Program

The New Jersey Department of Environmental Protection ("NJDEP") has proposed to terminate its seven-year-old emissions trading program. The Open Market Emissions Trading ("OMET") program established a mechanism for sources of volatile organic compound (VOC) and oxides of nitrogen (NO_x) to comply with state air quality requirements by generating, banking, transferring, using, and retiring discrete emission reduction (DER) credits.

The OMET allowed facilities to register emissions credits with a central registry and then either trade or reserve any unused credits. In May 2000, NJDEP amended OMET rules to allow sources to generate and bank DER credits for reductions of greenhouse gas (GHG) though the sources could not use the GHG based-credits. NJDEP determined that it would not verify the validity of DER credits itself but would instead allow credits to be verified by a professional engineer or certified public accountant licensed to practice in New Jersey. In addition, NJDEP retained a private company to operate the DER registry and a telephone hotline that was to be funded by fees from credit transactions.

However, problems soon began to surface and an investigation found that DER credits were not consistently verified. In some cases, the number of credits generated as a result of a particular emission reduction strategy may have been overstated. In at least one case, the registry accepted a filing that purported to use non-ozone season DER credits for compliance during the ozone season. In addition, the program allowed credits to be based on emission reductions that occurred many years before the credits were actually used so that the emissions reductions would not achieve a contemporaneous air quality benefit. Finally, the investigations revealed that some facilities may have built a portion of their air compliance strategy entirely on the prospect of using emission credits even though there was no assurance that purchase or generate all of the credits needed for compliance.

NJDEP will allow holders of DER credits 12 months to come into compliance with the state NO_x Reasonably Available Control Technologies ("RACT") emission limits. If the facilities cannot attain compliance within the 12-month period, they may buy and use NOx allowances issued under the cap and trade program of Ozone Transport Commission's ("OTC").

Heating Oil Boilers Coming Under Greater Regulatory Scrutiny

Faced with increasingly stringent air emission standards, state and local governments are beginning to focus on improper operation of waste oil heaters. For example, the NJDEP has launched an enforcement initiative to ensure that facilities have properly registered their waste oil heaters and complying with state air pollution control requirements.

A waste oil heater is a combustion device that burns fuel oil that has been contaminated by physical or chemical impurities (either through the use of the oil or through the storage or handling of such oil) for the purpose of warming a non-residential area or for other energy recovery.

The burning of waste oil produces a greater variety and concentration of pollutants than those produced from commercial fuels. These pollutants include carbon monoxide, carbon dioxide, nitrogen oxides, hydrocarbons and particulate matter pollutants.

Commentary: Purchasers of buildings and their lenders should review the regulatory status of fuel oil heaters or boilers during environmental due diligence. This review can include verifying that the device was properly permitted prior to construction and is now properly registered, that the facility only burns "on specification used oil", and review manufacturer's documentation to ensure that the waste oil heater has been listed and tested by a nationally recognized laboratory.

WATER POLLUTION/ENDANGERED SPECIES

EPA Issues Draft Guidance on Watershed-Based CWA Permits

EPA published a draft of its "Draft Guidance On Watershed-Based National Pollutant Discharge Elimination System (NPDES) Permitting Implementation" in August (68 F.R. 51,011, August 25, 2003). Under the watershed-based NPDES permitting approach, EPA will consider the water quality goals of an entire watershed area. The agency will evaluate impacts from multiple point sources and non-point sources located within the watershed boundary.

EPA believes that the watershed approach is more efficient than issuing permits to the individual pollutant sources and will help permitting agencies achieve better environmental results since the approach considers all sources of pollution within a hydrologically defined drainage basin or other geographic area. In addition, the agency believes it will enhance opportunities for water quality trading. However, the approach can be difficult to implement because permits will need to be synchronized and there may be different implementation schedules for certain programs like stormwater or combined sewer overflows.

The guidance suggests that a permitting authority may consider four types of watershed permits. A general permit may be issued to a category of point sources within a watershed such as all publicly owned treatment works ("POTWs") or all confined animal feeding operations ("CAFOs") or all storm water discharges from municipal separate storm sewer systems. The most significant difference between a traditional general permit and the watershed-based general permit for common sources would be permit requirements that reflect watershed-specific water quality standards.

A permitting agency may also issue general permit for collective sources that would address all point sources within the watershed or alternatively, several subcategories of point sources within the watershed. This type of permit would be similar to the multi-sector general permit for storm water discharges associated with industrial activity with requirements being tied to categories and subcategories of discharges. Again, the distinguishing feature of this type of permit would be geographic coverage based on the watershed boundaries and the permit requirements reflecting watershed-specific water quality standards. The third type of watershed-based permit would be an individual Permit for multiple permittees that would allow several point sources within a watershed to apply for and obtain permit coverage under an individual permit. Finally, a permitting authority may consider issuing an integrated municipal NPDES permit that would bundle all NPDES permit requirements for a municipality (e.g., storm water, combined sewer overflows, biosolids, pretreatment, etc.) into a single municipal permit. While this type of permit would focus on municipal boundaries rather than watershed boundaries, the analysis in developing permit requirements would reflect watershed-specific water quality standards. EPA did indicate that there might be other possible mechanisms that states could use provided they are consistent with the NPDES regulations and the CWA.

Electronic Trading Pilot Program Established for Water Quality Trades

Now that EPA has released its Water Quality Trading Policy, the World Resources Institute ("WRI") has launched a market-based electronic platform to establish, register and facilitate trades of nutrient credits within watersheds.

WRI's NutrientNet trading website is currently being used in a number of pilot trading programs. For example, it is being used in the Kalamazoo watershed in Michigan for trading phosphorous and is about to become operational for trading nitrogen in the Potomac Watershed of the Chesapeake Bay.

The NutrientNet is designed to provide potential market participants and other stakeholders with background information on nutrient trading. It can also help market participants identify potential trading partners, track the volume and type of trades within a watershed as well as provide information on water quality problems and trading as a possible means to address them

The NutrientNet website can also provide farmers, municipal sewer treatment plants, and industrial facilities with tools to estimate the volume of nutrients they release to surface waters from their operations, explore reduction options, and estimate the costs of achieving reductions. For example, the website has a worksheets that allows the source to take a first-cut look at the quantity of reductions that it could achieve and the likely costs of making the reductions. NutrientNet does emphasize that the worksheet is only a scooping tool and that the source will need to verify the results with an expert before the nutrient reduction credits could be registered.

The website also has a market section where sources can review and post offers to buy and sell nutrient reductions. The section also provides the trading rules, a standard contract, and a summary of market activity for each watershed.

Commentary: A nutrient trading program involves two basic steps. The first step is the allocation phase. This is accomplished by regulators establishing a goal for the total amount of nutrients that in a particular watershed which can be in the form of a mandatory cap on the total quantity of nutrients entering the water or a percentage reduction goal that may be achieved through a voluntary program. The total amount of allowable pollution is then allocated among the sources that will participate in the trading program.

After allowances are established, nutrient can then engage in trades to meet local and watershed-wide water quality goals. Sources with low-cost pollution reduction options may have an incentive to reduce nutrient loadings beyond what is required and sell the excess credits to sources with higher control costs. This trading process can result in improve water quality in a cost-effective manner since pollution reduction is effectively achieved by those sources that have the lowest-cost opportunities.

One limitation to the nutrient trading program is that it will have to be designed for the needs of a particular watershed and will probably not be able to be nationally traded like air pollutants. For example, trades might have to be restricted in certain areas of a watershed to ensure that water quality goals are met all along the waterway.

In addition, the types of industries and sources that can trade might vary from one watershed to another. In some watersheds, only point sources might be able to trade while other areas might allow point and non-point sources to trade. The trading groups could include municipalities, irrigation districts, farmers, wastewater treatment plants, food processing plants, and livestock operations.

Federal Courts Protect Adjacent Wetlands

In *Treacy v. Newdunn Associates LLP*, No. 02-1480 (9/10/03), the Fourth Circuit reversed a lower court ruling and held that the Corps did have jurisdiction to bring an enforcement action against a developer who had drained and filled wetlands on property near Newport News, Virginia. In this case, wetlands on the property had previously been hydrologically connected to a tributary of the Chesapeake Bay. However, after the construction of I-64, the only connection of the wetlands to navigable waters was through a man-made ditch that ran alongside and under the highway. The Virginia State Water Board issued an order to the developer in 2001 instructing it to cease development of the wetlands. The developer ignored the order, contending that the wetlands were not subject to regulation under the U.S. Supreme Court's 2001 decision in *Solid Waste Agency of Northern Cook County v. Corps of Engineers* (531 U.S. 159) ("SWANCC")because they were now isolated wetlands. The district court agreed with the developer but the Fourth Circuit said the roadside ditch was man-made did not change the fact that it was a tributary that could convey pollutants to the navigable water.

The Seventh Circuit upheld a $4,018,500 fine against developer was failed to comply with a consent decree requiring him to restore wetlands that he had filled in 1991 (*U.S. v. Rueth Development Co*., No. 02-2045, 7/10/03). EPA had issued an administrative compliance order to the defendant for discharging fill materials into 4 acres of wetlands that were adjacent to a tributary of a navigable water. The defendant did not comply with the order but entered into a consent decree in 1999. When he failed to meet the deadlines set forth in the consent order, the federal government moved to enforce the order. The defendant then argued that SWANCC invalidated the consent decree. A district court found that the property did contain jurisdictional wetlands because of the adjacent tributary and imposed the stipulated penalties set forth in the consent decree.

The federal Court of Appeals for the Fifth Circuit reinstated the conviction of a developer in *United States v. Rapanos, No. 02-1377(8/5/03).* The defendant had been indicted in 1994 for illegally filling 50 acres of wetlands. His conviction was vacated by the United States Supreme Court and remanded to the federal district court for reconsideration in light SWANCC. The federal District Court for the Eastern District of Michigan then dismissed the conviction, finding the wetlands were no longer subject to the jurisdiction of the Corps under the federal Clean Water Act. However, the Sixth Circuit reversed finding that there was a sufficient hydrological connection with navigable waters and, therefore, the adjacent wetlands were subject to the CWA wetlands permit program.

In *North Carolina Shellfish Growers Association v. Holly Ridge Associates,* No. 7:01-CV-36 (07/25/03), the federal District Court for the Eastern District of North Carolina ruled that wetlands adjacent to an intermittent stream were subject to the CWA . In this case the defendant had constructed ditches that flowed into the stream and "check" dams that trapped sediment. The plaintiffs argued that the ditches transported stormwater that eventually contaminated navigable waters and therefore the defendant was required to obtain a general construction permit. The defendant said the land was exempt under the CWA because it had been used for forestry operations for over 40 years and that the ditching activities were exempt because they were trying to salvage storm damaged trees. The defendant also argued that the property was not a construction site and was not subject to the stormwater regulations. However, the court ruled that the intermittent stream was capable of moving pollutants to navigable waters, draining of the wetlands required a permit. Relying on *U.S. v. Deaton,* No. 02-1442 (4th Cir. 6/12/03), the court also found that the ditches were waters of the United States for purposes of the wetlands program.

Wetlands Enforcement Roundup

EPA filed an administrative complaint a seeking a $50,000 penalty from the owner of the Blue Mountain Ski Area for allegedly discharging fill materials in 1100 feet of a tributary of the Lehigh River. The complaint also requires the owner to remove the fill material and restore the creek and wetlands.

A sand and gravel operator has agreed to pay $44,000 for illegal mining operations in northern San Diego County. EPA had alleged that Mountain Development Trust, and Al Julian had discharged of pollutants into the San Luis Rey River that damaged approximately three acres of the river bottom, resulted in increased erosion and degradation of the river's water quality, and harmed a local population of an endangered species. As part of the settlement, the parties will complete restoration and monitoring activities that will allow the river to recover over time through natural floodplain processes.

A federal district court ordered a construction company to remove fill material that had been discharged into more than 10 acres of wetlands and a salmon-bearing stream in Alaska during the construction of a road crossing and three subdivisions. The fill prevents juvenile coho salmon from accessing approximately two miles of river habitat. The defendant previously was jailed in 1996 after being convicted in state court for discharging fill materials into a local creek, settled a subsequent enforcement action for illegal road-building activities, and he has ignored a variety of cease-and-desist orders, information requests, and EPA orders. He is currently in contempt of a court order to comply with various information discovery requests made by the United States in this case.

A Michigan development company was sentenced to pay $2,500 to the Macomb County Environmental Fund and $1,500 in restitution to the state of Michigan for failing to construct 0.77 acre of wetlands to satisfy its wetlands mitigation obligations under a state-issued wetlands permit. Shelby Land Development, LLC was also placed on one-year probation and was required to provide three years of wetland mitigation monitoring by a qualified wetland consultant and submittal of an annual monitoring report to the state Department of Environmental Quality ("DEQ"). At the end of the monitoring period, the DEQ will determine if the wetlands mitigation was successfully implemented.

A Florida phosphate company was ordered to pay $400,00 in restitution, a $50,000 fine and restore approximately 150 acres of wetlands at a cost of approximately $350,000. In *U.S. v. IMC Phosphates Co,* No. 8:03-CV-I814-T-17 (M.D.Fla.,08/27/03), the company had been issued permits by the Corps to place fill materials in four wetland areas at four of its phosphate mines. However, the company ended up placing fill material beyond the areas authorized by the permit. The penalty was relatively low because the company voluntarily disclosed the violation.

*New York Imposes Wetlands Moratorium in Staten Isl*and

Governor George E. Pataki signed legislation establishing a one-year moratorium on any development of wetlands in the mid-Island section of Staten Island. The moratorium will provide New York City with additional time to develop a program to protect the environmentally sensitive "Bluebelt" area and to provide for effective storm-water management in the area. Without the moratorium, the City would have to spend millions of dollars in construction costs on new sewers in southern Staten Island to keep pace with residential and commercial development.

However, a subsequent amendment that is expected to reach the Governor's desk soon would authorize the state Department of Environmental Conservation ("NYDEC") to process existing wetland construction permit applications during the one-year moratorium.

DOT Issues Wetlands Guidance for Highway Projects

The U.S. Department of Transportation's Federal Highway Administration ("FHWA"), EPA, and the Corps issued guidance to implement the wetlands mitigation provisions of the Transportation Equity Act for the 21st Century ("TEA-21").

TEA-21 established a preference for "mitigation banking" to compensate for unavoidable losses to wetlands or other natural habitat caused by transportation projects receiving federal assistance under both the National Highway System and the Surface Transportation Program. The "Federal Guidance on the Use of the TEA_21 Preference for Mitigation Banking to Fulfill Mitigation Requirements under Section 404 of the Clean Water Act" is designed to will assist agency field personnel and the sponsors of highway projects to clarify the factors that must be considered in implementing that mitigation preference. The agencies plan to develop additional guidance to provide better mitigation decisions, such as considerations for on-site versus off-site mitigation as well as in-kind mitigation by the end of 2003. The agencies also hope to develop guidance for the appropriate use of vegetated buffers and preservation by 2004.

Stormwater Enforcement Actions

EPA is seeking penalties totaling $928,500 against 12 construction companies that are building nine major projects in the greater Denver-metro area for violations of federal storm water regulations. Two of the companies were constructing residential developments and the rest were constructing shopping centers. EPA alleges that the companies have failed to obtain storm water permits, did not develop or implement storm water management plans, failed to implement or maintain appropriate practices to minimize runoff of sediment, and failure to conduct site inspections. Not complying with these requirements may result in runoff from the construction site clogging water bodies.

In a state stormwater criminal enforcement matter, a California vineyard owner reached a $1 million settlement with the Sonoma County prosecutor for illegally discharging 50,000 cubic yards of soil two creeks during earth moving activities (California v Alden, No. MCR-409143, Cal. Super. Ct., Sonoma Cty., 8/13/03). The agreement requires Ellis Alden to spend $750,000 to restore creek beds and $250,00 in restitution and other costs to state and local agencies.

Commentary: As reported in our last issue, EPA issued its Phase II construction general permits in July that apply to sites that disturb one or more acres. Several organizations representing homebuilders and general contractors have filed petitions challenging the new requirements.

NJ Enters Into Open Space Agreement With Developer

The NJDEP announced a conceptual development agreement for the Heritage Minerals property in Manchester Township that will settle outstanding litigation brought by H. Hovnanian developers. The agreement will allow clustered construction of 2,450 units on 1,000 previously disturbed acres while protecting over 6,300 acres from future development including sensitive endangered species habitat -.

The property includes a former mining site and straddles the Pinelands management area and the area regulated under Coastal Area Facility Review Act (CAFRA). Hovnanian originally proposed a six-phase development on the 7,000-acre site including as many as 15,000 residential units, 2,000,000 square feet of commercial development and a 160-acre golf course. Over the past fourteen years, DEP has reviewed permit applications for the first two phases, denying them for failure to be consistent with Pinelands rules and with DEP's coastal zone management rules.

After an administrative law judge upheld NJDEP's permit denial, NJDEP provided the company another opportunity to prove that its application was consistent with Pinelands rules. When DEP denied that application, Hovnanian requested an administrative hearing and filed an action in federal court.

As part of the proposed settlement, Hovnanian has agreed to retain all stormwater onsite, discharging it into the ground to help recharge natural aquifers and to eliminate harmful runoff that can pollute surface water and wetlands. The company also has agreed to connect to existing wastewater infrastructure, thereby avoiding discharge of residential sewage into groundwater or surrounding surface water.

In addition, H. Hovnanian will develop habitat conservation plans to protect endangered species during and after construction through a combination of habitat enhancement and preservation. To help minimize impacts to the pine snake, a threatened species in New Jersey, Hovnanian will build a bridge and a series of culverts along the site's main access road to allow the snakes to travel between preserved forested areas.

The company has agreed to maintain buffers ranging from 150 to 300 feet around existing wetlands to minimize impacts to these sensitive areas. Lakes located on the property will have minimum development buffers of 75 feet and the use of the lakes will be limited to passive forms of recreation that do not use gas-powered boats.

6,000 acres of the site will be protected through a conservation restriction on the deed and conveyance of the property to the state and/or a conservation group.

In addition to the Heritage tract, Hovnanian also agreed to protect 360 acres on another property in Berkeley Township from future development. This 360-acre parcel is the last unprotected part of the 3,000-acre "Berkeley Triangle" area that is an undeveloped, significant pine snake habitat, which the state has been working to preserve.

All of the development on the Heritage tract will be limited to the approximately 1,000-acre brownfield area previously disturbed by mining. This area has radioactive sand and groundwater contamination that will require Hovnanian to perform all DEP-required remediation prior to the commencement of any new construction. Except for needed access roads, none of the development will occur in the Pinelands portion of the site or in forested areas. However, the settlement does not authorize any development nor provide guaranteed approvals of any permits.

FWS Issues Guidance for Establishing Conservation Banks for Endangered Species

The United States Fish and Wildlife Service ("FWS") recently issued its "Guidance for Establishment, Use and Operation of Conservation Banks" to mitigate adverse impacts to species listed as threatened or endangered under the Endangered Species Act ("ESA".)The document discusses requirements for creating conservation and the factors that FWS will examine for approving conservation banks.

A conservation bank is a parcel of land that has natural resource values that can be used as habitat for listed species. The conservation bank can be created by acquiring existing habitat, protecting of existing habitat through conservation easements, restoring or enhancing disturbed habitat, creating new habitat in some situations, and prescriptive management of habitats for certain biological characteristics. The conservation banks may be public conservation banks, privately sponsored conservation banks, or third party banks.

Land used for conservation purposes under other environmental programs may not be designated as a ESA conservation bank unless the bank would add an additional conservation benefit. If conservation values have already been permanently protected to protected listed species under another environmental program, FWS will not support the use of that land for a conservation bank. For example, land already conserved to establish a habitat conservation plan ("HCP") under the ESA may not be used to establish a conservation bank. However, conservation banks may be used to offset impacts authorized under other programs.

FWS indicated that the principal threat to the majority of list species is habitat loss and fragmentation of remaining habitat. To reduce this threat, FWS said that a conservation bank must be large enough to maintain viable populations within its boundary. Bank boundaries must encompass all areas that are necessary to maintain the habitat function specific to the species covered by the bank and may include an appropriate buffer to guard against edge effects from adjacent land use.

Another important issue is location. The FWS indicated that individual conservation banks are seldom large enough, by themselves, to support a viable population of a threatened or endangered species over the long term. The banks should be located in species recovery areas. If the project falls within a service area of a particular bank, the project developers should obtain credits from that particular bank. The service area of the bank will be defined in the conservation bank agreement. The conservation bank may also be sub-divided into sub-areas or implemented in phases when there is concern about sufficient need for the bank or uncertainty about the future biological need for the bank.. For species with limited geographic habitats, FWS cautioned that off-site conservation banks may not be an appropriate form of mitigation.

The FWS will assign conservation credits to a conservation bank that may be bought, sold or traded for offsetting impacts of private, local, state or federal projects. The credits will based on biological criteria. The credits will be measured in terms of the kind of impacts of the development project such as acres of lost habitat or lost pairs of species, lost family groups, etc. Generally, one credit will equal an acre of habitat, or the area supporting a nest site or family group. A credit can only be sold once so that if a conservation bank contains habitat for more than one listed species and a project buys a credit for one species the credit cannot be sold again for another specie. If the proposed project impacts multiple species and the bank contains the same multiple species, then the credits can be sold for in-kind replacement. As a general rule, overlapping multiple species credits can overlap for a single project, but not multiple projects. In addition, if federal money is used to establish the bank, credits will be allocated based on the proportion of non-federal money. Thus, if a bank is capable of sustaining 10 credits but was created using a 50% federal contribution, the bank could only offer 5 credits.

The FWS may use mitigation ratios

depending on the nature of the project, the particular conservation strategy used by the bank, the species involved, the quality of the habitat that is lost, etc. Any mitigation ratio less than or equal to a 1:1 ration will have to be based on sound biological principles.

When a bank sells its first credit, the land within the bank must be permanently protected through a fee title or conservation easement to eliminate the possibility of fragmentation in the future.

The bank owner will have to enter into a conservation bank agreement with the FWS or other participating State and/or Federal agency that identifies the conditions and criteria under which the bank will be established and operated. The agreement will contain information on the exact legal location of the bank, its service area, how credits will be established and managed, and how the bank will be funded, managed, and protected in perpetuity. The agreement will also address with issues such as allowable activities and access, and it will identify requirements such as environmental contaminants surveys and appropriate monitoring programs

The bank owner will have to identify an acceptable form of financial assurance in the bank agreement to ensure the long-term viability of the conservation bank. FWS said the bank agreement should discuss the funding assurances for activities, including habitat management, that will occur before, during, and after the sale of credits. The agency indicated that a management plan must be prepared to help determine the appropriate amount of funding. The management plan should include the activities necessary to implement the biological goals and objectives of the bank. Start-up costs such as habitat acquisition, any enhancements or necessary, property taxes as well as consultant and legal fees must be separate from the funding source for ongoing actions.

FWS suggested that a good long term funding source was a non-wasting management endowment (i.e., a fund that generates enough interest each year to cover the costs of the yearly management). This endowment could be established by including management costs into the credit price. As credits are sold, an agreed-upon portion of the proceeds could be deposited into the non-wasting endowment fund or escrow. The size of the required endowment will depend on certain factors that could include the amount of habitat associated with each credit, the land management activities, the amount or degree of habitat restoration needed, the "risk" of such restoration failing over time, the rate of inflation, and the interest rate. For example, low interest rates and a significant active management of the bank lands will require a larger endowment. As a contingency, FWS recommends that a time limit be established for full funding of the non-wasting endowment. The bank owner may have to supplement the endowment at the end of the time limit, if all of the credits have not been sold.

FWS also indicated that a conservation bank may be generate revenue from certain activities such as bird watching, hiking and grazing if these activities do not conflict with the conservation goals of the bank or the intent of the compensation for impacts (e.g., in certain ecological situations, grazing may be a needed management tool). Revenue from these activities could be held in escrow or other long-term money management accounts to insure they are available when needed.

Commentary: Conservation banking can be an attractive option to landowners and land managers because it allows conservation to be implemented within a market framework so that habitat for listed species is treated as a benefit rather than a liability. Project applicant may also find conservation banking as a cost-effective tool that can save time by helping to identify acceptable conservation areas, finding willing sellers, and simplifying the regulatory compliance process. Landowners may also will find this approach attractive because it can provide an opportunity to generate income from what may have previously been considered a liability. Indeed, a recent study by the FWS found that 35.5 million people visited the nation's 542 refuges in 2002. These trips boosted the local economy as the tourists spent $809 million at establishments located near the National Wildlife Refuge System. According to the FWS, 18,728 non-federal jobs were in 2002 created in the local economies near the public lands.

Farm and Food Processor Fined for

Oil Spills

EPA has the owner and the operator of an Arizona farm $11,000 for a diesel oil spill that reached the Colorado River in 2002. The Wayne Sprawls Family Trust and Red River Farms estimated that approximately 564 gallons of diesel oil leaked from an aboveground storage tank and reached the Colorado River 30 feet away. The facility also has three storage tanks that hold a total capacity of 11,000 gallons of diesel oil that are used for an irrigation pumping facility. The tanks were not equipped with secondary containment and the farm did not have an spill prevention control and countermeasure plan ("SPCC"). EPA responded to the spill to protect the local drinking water supplies and the Cibola Wildlife Refuge downstream.

Meanwhile, Mission Foods Corporation agreed to pay $60,000 for 7,000-gallon soybean oil from its Rancho Cucamonga plant. EPA estimated that 1,500 gallons reached a nearby storm drain that flows into the Santa Ana River. The company also suffered release of 167 barrels of soybean oil a holding tank that reached storm drain. The Rancho Cucamonga facility manufactures corn and flour tortillas and corn chips and stores 57,000 gallons of cooking oil in four aboveground tanks. According to the company, a tank level indicator on one of its three tanks failed causing the tank to overfill and excess oil to flow to a secondary container. The oil flowed through an improperly grouted hole in the secondary container and then into the sewer. This plant and three other Mission Foods facilities in Los Angeles, Fresno and Tempe, Arizona all lacked SPCC plans.

Commentary: The CWA not only addresses spills of refined petroleum but also vegetable based oil. Facilities storing vegetable only must comply with many of the same requirements as those storing or using petroleum-based oil .

HAZARDOUS WASTES/USTS

MTBE Litigation Review

Vermont has file a lawsuit against 22 major oil companies to remediate drinking water supplies contaminated with methyl tertiary butyl ether ("MTBE") caused by leaking USTs. The complaint that was filed in the state Superior Court alleges that the oil companies have added increasing amounts of the additive to gasoline even though they knew years ago it would contaminate water supplies.

According to the state Department of Environmental Quality, MTBE was detected in 15% of public water supplies in 2002, including 33% of public water supplies in Strafford County and 40% of public water supplies in Rockingham County.

In another MTBE case, ChevronTexaco Corp. agreed to pay $9.1 million to remediate contamination caused by a owned gasoline station in Cambria, California that forced the closure of water supply wells serving 7,000 residents. (Cambria Community Services District v. ChevronTexaco Corp., No. CV-01-0899, San Luis Obispo Cty., 9/12/03). Under the settlement, the company also agreed to repay $1.5 million loan from the Department of Health Services that the local utility used to drill a new well, $1.2 million in direct expenses, $3.7 million for long-term water supply projects, $2 million in attorney fees and $700,000 to develop a bike and pedestrian trail.

Commentary: New Hampshire is the first state to sue oil companies over MTBE. However, a number of municipal utilities have filed MTBE lawsuits including 10 Sacramento County water utilities and the Orange County Water District. filed a lawsuit against major companies over potential MTBE contamination. Last year, Atlantic Richfield agreed to pay $8 million for legal fees and monitoring costs to Orange County and to remediate 143 gasoline stations. (*California v. Atlantic Richfield*, Cal. No. 804030, Super. Ct., Orange Cty., 12/17/03). Earlier in 2002, the South Tahoe Public Utility District received $69 million in a settlement a number of major oil companies (*South Tahoe Public Utility District v. Atlantic Richfield*, No. 999128, Cal. Super. Ct., San Francisco Cty., 8/9/02).

The energy legislation that was passed by the House of Representatives (H.R.6) provides that any fuel containing

MTBE or ethanol would cutoff product liability for MTBE manufacturers so long as the fuel complied with EPA requirements. It would appear that the liability immunity would not apply to traditional negligence actions or for liability as an owner or operator of leaking USTs.

A four-year study by the U.S. Geological Survey found low levels of MTBE in 9% of the nation's drinking water. A first part of the assessment was a random study that examined 579 groundwater sources and 375 surface sources of drinking water. MTBE was detected 23% of the drinking water sources where the additive is used compared to 4.4% where it was not included in fuel.

The second part of the investigation was a "focused" study that involved samples from drinking water sources that were known or were suspected to be contaminated with MTBE. The focused survey collected samples from 134 water utilities. MTBE was detected in 55.5% of the sources sampled with 6.6% of the groundwater sources and 14% of surface water sources containing MTBE. The highest concentrations were found in areas where more that 60% of the land was developed or with population densities of more than 1,000 per square mile. The existence of MTBE did not appear to be related to the number of USTs though the surface water contamination appeared to associated with the use of motorized watercraft.

Overall, MTBE was detected in drinking water supplies of 36 states at concentrations ranging from 0.1 ppb to 17,800 ppb. However, most samples had less than 20 ppb and the median concentration was below 5 ppb. EPA has not established a regulatory limit for MTBE but issued non-enforceable guidance in 1997 that suggested a range of 20 to 40 ppb based on taste and odor. Many states have established MTBE cleanup levels at 10 ppb or less. Some estimates place the potential MTBE liability at $29 billion.

Underground Storage Tank Enforcement Roundup

EPA issued an administrative penalty order complaint seeking a $260,264 penalty from Wholesale Distributor, Inc. for failing to comply with the December 1988 UST upgrade deadline. The company owns 18 USTs at five facilities in Arkansas.

Beaverhead County has agreed to pay $2,000 to the Montana DEQ to resolve charges that it failed to properly close USTs located at the Dillon Municipal Airport located in Dillon, Montana. The penalty assessment includes a fine for continuing to dispense petroleum products from the airport UST systems that did not have current operating permits or operating tags or a DEQ approved compliance plan.

A Michigan state court imposed a $1,090,000 penalty against an owner of a gasoline station for failing to properly investigate and remediate a gasoline leak from its USTs. In awarding the penalty, the court noted that Bulk Petroleum Inc. had failed to submit a complete Final Assessment Report in August 2000 and ignored subsequent orders issued by the state DEQ.. The court applied the maximum penalty of $1,000 per day for each of the 1,090 days from August 2000 to August 2003. The Michigan DEQ is seeking a total of $3,364,400 in fines and penalties from Bulk Petroleum, Inc. for multiple violations of the state UST regulations. The court indicated it would monitor Bulk Petroleum's progress in cleaning up approximately a dozen other sites that owns in the state. If the company fails to properly remediate the sites in a timely manner, the court may order the company to pay the remaining $2.274 million of the total penalty.

The owner of USTs in Old Lyme, Connecticut agreed to pay $500 and cease using all USTs that do not comply with the December 1998 UST standards. Under the terms of the Stipulated Judgement, the owner is also required to permanently close the USTs and remediate any impacts to the environment.

Sunoco, Inc. agreed to pay $968,000 to the Massachusetts DEP for failing to construct and operate a groundwater treatment system at a company-owned gasoline station. Sunoco had originally agreed to install a High Vacuum Extraction (HVE) system when it entered into a consent order in August 2001. However, the system has experienced repeated operational and maintenance problems. In addition to the penalty, Sunoco will be required to implement modifications to ensure that the HVE system utilized at the site properly operates correctly.

Heating Oil Tanks Enforcement Actions

The Kushi Institute, an education facility located in Becket, fined $2,000 by the DEP for failure to undertake and complete cleanup actions in a timely manner after a heating oil release from a tank at the property. The initial oil release occurred during March 1998. However, despite repeated attempts by the DEP to expedite the cleanup, Kushi did not complete response actions until October 9, 2002.

Helen Chunglo was fined $7,000 for failure to undertake and complete cleanup actions at her residence in Hadley, for an oil release that occurred in October 1993. The state DEP has also ordered her to complete response actions at the site. The release of more than 250 gallons of heating oil from a basement tank had seeped through cracks in the basement floor to the soil beneath, necessitating prompt action. DEP expended in excess of $25,000 on response actions to prevent impacts to nearby residents as well as to prevent migration of oil in soil and groundwater. These actions included removal of contaminated soil and installing and operating a venting system. The owner has not assumed nor taken any response actions to-date. DEP is seeking reimbursement of the incurred expense in a separate action.

EPA Revised Used Oil Management Rule

EPA recently issued three modifications to its Recycled Used Oil Management Standards Final Rule. (68 FR 44659, July 30, 2003). The revision clarifies when used oil containing polychlorinated biphenyls (“PCBs”) is regulated under the Resource Conservation and Recovery Act (“RCRA”) used oil management standards or when it is regulated under the Toxic Substances Control Act (“TSCA”).

The amendment clarifies that used oil that will be recycled and contains less than 50 ppm of PCBs may generally be managed in accordance with RCRA used oil management standards. However, if the used oil contains less than 50 ppm of PCBs because of dilution, it will have to managed under the TSCA PCB regulations.

If the used oil is to be burned for energy recovery and contains PCB concentrations of 2 ppm or greater but less than 50 ppm, the used oil will also be subject to the TSCA PCB regulations of 40 CFR 761.20(e). Since the TSCA PCB rules reference the RCRA “off-specification" used oil requirements, the used oil may also have to meet those requirements as well. The RCRA “off-specification” used oil rule determines when used oil fuels may be burned in non-industrial burners. The used oil fuel specification sets maximum allowable limits for arsenic, cadmium, chromium, lead, and total halogens as well as a minimum flash point.

RCRA Targeted Site Efforts Help RCRA Brownfield Sites

EPA has established a RCRA Targeted Site Effort (“TSE”) as part of its RCRA Brownfield Program. The TSE Initiative is designed to provide short-term, focused, attention for that are close to meeting their potential for cleanup and redevelopment, but that are unable to reach that goal for a variety of reasons. TSE goal is to help move RCRA properties from contamination to cleanup and reuse. TSE candidate sites should have redevelopment and reuse potential.

The first round of TSEs was funded at about $10,000 per site. This initial round focused primarily on providing additional site characterization and community outreach support. Future rounds may receive between $25,000 and $35,000 in EPA contractor support and may focus on development options for sites that face obstacles to cleanup and redevelopment. TSE contractor support or money may not be used by a facility to conduct or perform a particular function that is currently required for the facility under any RCRA obligation. However, it may be appropriate to use TSE contractor support or money to complement or supplement such obligations. Eligible sites include high, medium, and low priority RCRA sites as well as RCRA Showcase Pilots.

New Concerns Over Medical Waste

Last spring, the U.S. Geological Survey found traces of numerous drugs, hormones and other medicines in water samples from 30 states. Because EPA is concerned that tiny amounts of these substances could cause harm to fish and accelerate the development of drug-resistant germs, the agency is considering developing a regulatory program for disposal of old and unused pharmaceutical and personal care pollutants. The FDA is considering asking pharmacies to take back expired drugs which is a common practice in Canada and Australia. Pharmacies have programs to incinerate or otherwise dispose of inventory they cannot sell.

TOXIC SUBSTANCES

EPA Alters Policy on Transfers of PCB-Contaminated Property

The Toxic Substance Control Act ("TSCA") prohibits the sale of PCBs in commerce. Under an obscure 20-year old policy, EPA had applied the PCB ban to transfers of PCB-contaminated land. Transfers have been occasionally allowed on a case-by-case basis by the EPA's regional offices provided there was an approved cleanup plan in place at the time of the sale.

In August, EPA announced that it had reinterpreted its policy and would no longer categorically prohibit the sale of property contaminated with polychlorinated biphenyls for cleanup and redevelopment. In announcing the policy change, EPA said that limits on land sales were not necessary to advance the statutory goal of limiting exposure to PCBs. In addition, the agency concluded the policy was not only acting as a barrier for redeveloping property contaminated with PCBs but that in many cases the limitation on conveyance of real property only delayed the cleanup of contaminated properties. EPA reaffirmed that the policy change would not alter any cleanup liabilities associated with PCB contamination.

Florida Expands Dry Cleaner Liability Immunity For Property Owners

Governor Jeb Bush signed legislation that expands the liability protection provided to property owners who voluntarily remediate sites contaminated by dry cleaning solvents. The legislation took effect On July 11th and retroactively for property owners or operators who have not yet been named in a lawsuit.

Under Senate Bill 956, property owners who voluntarily cleanup contamination related to dry cleaning operations will not be liable for property damage claims filed by third parties who may have become exposed to the contamination. The liability exemption also applies to owners and operators of wholesale dry cleaning supply facilities who perform voluntary cleanups as well as owners of property where dry cleaning solvents have migrated.

Previously, owners and operators of site enrolled in the state Drycleaner Solvent Cleanup Program ("DSCP") could not be compelled by local governments to cleanup contamination or pay for the remediation costs. However, there was no protection from third party claims. The legislation was enacted in response to *Courtney Enterprises Inc. v. Publix Super Markets*, No. 2D00-1485 (Fla. Ct. App., 2d Dist., 4/18/01) where a property owner was allowed to file a claim for property damage even though its site was slated for cleanup by the DCSP.

Study Finds Lead Migrates Slowly Through Soil

A 17-year study by three Dartmouth scientists has found that lead moves very slowly through the soil in northern forests. The researchers found that that lead deposited into soil from car emissions 30 to 40 years ago will not contaminate drinking water. The Dartmouth team is studying why soil retains pollutants such as lead and why the lead moves so slowly through the soil.

The researchers applied a trace amount of to soil in 1984. During the next seventeen years, the lead had only migrated seven centimeters into the soil. The authors of the study believe the lead will move even slower in the future because the soil becomes denser

Commentary: Another recent study issued by Environmental Defense and the Ecology Center concluded that automobiles are responsible for the majority of lead currently used in the world. The report "*Getting the Lead Out: Impacts of and Alternatives for Automotive Lead Uses*" found that the were responsible for a majority of lead pollution in North America and that the North American automobile industry was responsible for releasing more than 300 million pounds of lead each year through mining, smelting, manufacturing, recycling and disposing of lead-containing automotive components.

The study said that auto manufacturers used lead wheel weights, solder in electronics, and lead car batteries even though lead-free alternatives are available. The study called on the automotive industry to phase out lead use in cars.

Lead Paint Enforcement Roundup

EPA fined a former Maine landlord $5,720 for failing to comply with the lead-based paint ("LBP") disclosure requirements. The complaint alleges that Jason Dresser of South Portland failed to provide information on the hazards of LBP to tenants who rented a property in 2001. EPA launched an investigation after two children living in the rental unit were hospitalized and tests showed high levels of lead in their blood.

A Philadelphia landlord was ordered to pay $7,600 and sentenced to 12 months probation including six months of home confinement for forging tenant signatures on LBP hazard notification forms. (*U.S. v. Grove,* No. 1:03-CR-60, M.D. Pa., 9/12/03). Earlier this year, Kurvin Grove had pleaded guilty to criminal obstruction for submitting forged documents to EPA inspectors when they investigated rental units he owned in York, Pa.

In another LBP enforcement action, EPA proposed to fine the U.S. Department of Veterans Affairs (VA) $57,530 for failing to provide LPB hazard information in connection with employee housing at VA medical centers in Northampton and Bedford, Massachusetts and Togus, Maine. The three medical centers contain 61 units of on-site housing that the VA leases to employees and their families.

The former president of Graves Environmental Safety Inc. was indicted on Sept. 26 for allegedly falsifying lead hazard assessments conducted at the U.S. Army's installation in Rock Island, Ill. Carol Graves allegedly submitted letters to the Army indicating that the housing units were free of lead hazards. In fact, lead was detected at 12 of the units in concentrations substantially above EPA's threshold levels for lead in dust. If convicted, Graves faces a maximum sentence of up to five years in prison and/or a maximum fine of up to $250,000.

EPA has also commenced an enforcement action against the owners and the management company of four residential apartment buildings in Richmond, Va. for failing to provide adequate LBP disclosure to 10 groups of tenants over a three-year period. Five of the 10 apartments had children under the age of six, and the other five had children ranging from seven to 15 years old at the time they entered into the lease.

EPA finds High Levels of Lead at Ohio School and Residential Development

Soil samples collected from King Mills high school football stadium in the Cincinnati area detected lead concentrations as high as 4,187 parts per million ("ppm") As a result, the stadium has been closed and signs restricting access have been posted. Lead at concentrations of 805 ppm was also found at the school's baseball field. The school was apparently built on the grounds of a private shooting range that operated from the 1890s until the 1960s. The 63-acre campus is also located less than two miles from the former Peters Cartridge Co that produced ammunition for World War I.

Meanwhile, a Cincinnati-area housing development was also found to have high levels of lead contamination in the soils. This development, like the high school, was also constructed on a former skeet shooting range.

Commentary: Many developers still prefer not to perform due diligence when purchasing non-industrial property. However, these cases highlight the importance of performing thorough historical environmental due diligence especially where if children are likely to be present at the future development.

EPA Says FIFRA Pre-empts State Pesticide Labeling Laws

EPA has reinterpreted the scope of the federal labeling requirements for pesticides under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"). Under this new interpretation, plaintiffs will not be able to bring lawsuits against pesticide manufacturers under state pesticide laws when a product fails to do comply with its labeling. The approach reverses a 1999 position taken by the Clinton administration in a California case where the agency said FIFRA did not prevent walnut farmers who suffered crop damage from suing pesticide makers because the product labeling that did not warn of the risks of mixing chemicals.

Instead, EPA said that that while states were free to regulate pesticide use, they could not prescribe labeling requirements. This position is consistent with the argument advanced by the federal government before the United States Supreme Court in *Bates v. Dow Agrosciences* (No. 03-388, 9/9/03). In that case, peanut farmers have appealed a decision by the Fifth Circuit that held that FIFRA pre-empted state tort claims relating to pesticide labeling. The farmers had used a herbicide that resulted in stunted growth of peanut plants and reduced peanut production. The court ruled that the state claims were barred because they constituted requirements that exceeded the packaging and labeling requirements of FIFRA. The farmers had relied on *American Cyanamid Co. v. Geye*, 79 S.W. 3d 21 (2002) where the Texas Supreme Court that held FIFRA did not pre-empt state common law claims because EPA did not regulate product labeling with respect to how well a product worked.

SUPERFUND/BROWNFIELDS

EPA Announces Listing Policy Mixed Ownership Sites

EPA recently announced that it will not include most mixed ownership mine and mill sites on the federal facilities portion of the National Priorities List (“NPL”). Instead, the sites will be placed on the CERCLIS, the federal database of sites that are contaminated or potentially contaminated with releases of hazardous substances.

Mixed ownership mine or mill sites have both federal and private owners because of the complex operation of the two laws. Under the General Mining Law of 1872 (“GML”), a person could establish the right to mine certain minerals on federal-owned properties by filing a claim. While the claimant had the right to mine the land, the federal government retained the title. The claim is private property that is subject to taxes and can be sold, leased, or bequeathed. By "patenting their claims," holders of claims could purchase title to property containing the minerals. For abandoned claims, property rights were restored to the controlling Federal Land Managing Agency (“FLMA”), typically the Forest Service, or Bureau of Land Management. When abandoned, patented properties remain private property rather than reverting to federal control.

The effect of the GML is that there are thousands of abandoned mine or mill sites within the boundaries of federal land. Most FLMA’s have not maintained inventories of these private sites that may have in the past or may be currently leaching hazardous substances into the environment. Many of these former mine or mill sites were located in “mining districts” that could have had involved hundreds of private owners or operators.

Where there has been a release of hazardous substances at these sites, EPA will work with the FLMA to determine the appropriate response action to take. The policy is not intended to limit ability of EPA to require private claimants or FLMA’s to address the releases at these sites.

EPA Prospective Purchaser Agreements

EPA entered into a prospective purchaser agreement (“PPA”) involving the Sand Creek Superfund Site located in Commerce City, Colorado. NDSC, LLC. Plans to acquire the site for its landscaping business. In exchange for a covenant not to sue and contribution protection, the purchaser agreed to pay $290,000.00, grant EPA and the State of Colorado an irrevocable right of access, and implement land use controls on the site.

Home Depot entered into a PPA to acquire two contiguous parcels located in the Glendale Operable Units of the San Fernando Valley Crystal Springs Superfund Site to construct a new retail operation. In exchange for a covenant not to sue and contribution protection, Home Depot agreed to pay EPA a one-time payment of $10,000.

PRPs Transfer Liability to TRC in Glen Cove Site Settlement

84 PRPs participated in a $15 million settlement for the Mattiace Petrochemical Co. superfund site in Glen Cove, N.Y. (*United States v. Mattiace Industries Inc.*, E.D.N.Y., NO. 03-CV-1011). Under this unique settlement, the PRPs made a one-time payment to a fund in exchange for a covenant not to sue and contribution protection from EPA. The TRC Companies will use the fund to finance the cleanup. TRC also obtained an environmental insurance policy that effectively transferred liability from the PRPs to TRC.

EPA Enters Into Limited Ability to Pay Settlements

EPA entered into a settlement with the owner of the East 7th Street Drum Site in Wilmington, Delaware (*U.S. v. Eagle Construction Inc*., No. 03-620, D.Del.). The consent decree requires Eagle Construction to pay $10,000 based on its limited ability to pay. In addition, Eagle agreed to sell the site and to turnover the net proceeds of the sale.

For the Asbestos Dump Superfund Site located in Long Hill Township, New Jersey, a property owner agreed to $965,000 based on its limited ability to pay (*U.S. v. Tifa Realty, Inc. and Tifa Ltd.*, No. 03-3056, D.NJ). The settlement also provided that the U.S. Navy and the Army Corps of Engineers pay $1 million to resolve a contribution claim.

New Jersey Launches NRD Initiative

In September, the NJDEP issued directives under the state Spill Compensation and Control Act (“Spill Act”) to 66 responsible parties ordering them to assess and restore natural resources damages (‘NRD”) to the lower Passaic River. In addition, the ordered responsible parties must initiate an interim restoration of natural resources that will focus on the ecological and economic services such as recreational and commercial fishing, wetlands, sediment functions and services, boat access points and increased costs to commerce and the maritime industry due to dredging of contaminated sediments.

Under the Spill Act, any entity that has discharged hazardous substances onto the land or into the waters of the state is liable for cleanup and removal costs, as well as the cost of restoring or replacing natural resources injured by the discharge. According to the NJDEP, 18 sites in the lower Passaic River Lower watershed are responsible for releases of hazardous substances including dioxin, PCBs, DDT, heavy metals and polyaromatic hydrocarbons. Both the NJDEP and the Department of Health and Senior Services have issued public consumption advisories due to mercury, dioxin and PCB contamination in fish, and have prohibited anyone to eat or harvest fish or shellfish from the Passaic River. In addition to a recreational and commercial fishing ban, the river does not support recreational swimming.

Under the Spill Act, NRD is the dollar value of the total restoration that is necessary to compensate the residents of New Jersey for the injury to natural resources. Injuries can include ecological injuries to wetlands, wildlife, ground water or surface water and human use injuries such as the closure of a waterway to fishing, a beach to swimming or an aquifer to drinking water supply. NRD costs are calculated from the beginning of the injury through the full recovery of the resource. Groundwater injuries are calculated with a formula that estimates the volume of contaminated groundwater, the value of the water and duration of the injury to arrive at a settlement amount

The action is part of the NJDEP initiative covering more than 4,000 potential claims for NRD statewide that is being implemented under policy directive 2003-07. During the past 18 months, NJDEP has been screening potential NRD claims. Sites or claims for which the only responsible parties are residential homeowners residing at the site at which the claim arises, where the only responsible parties are small businesses with a limited ability to pay, or that meet the qualifying criteria for DEP's "Cleanup Star" Program are not subject to the NRD initiative. Responsible for these types of sites may request written assurance from NJDEP that they are not subject to an NRD claim.

The ordered parties have 45 calendar days upon the receipt of individual directives to respond to the department and execute a single administrative consent order that provides assurance that the assessment and restoration actions will be performed in a timely and proper fashion. If any ordered party named fails to comply with the directive, NJDEP will implement the NRD assessment using public funds. Ordered parties that fail to comply with a Spill Act Directive without good cause may not only be strictly liable for all costs incurred by NJDEP but will also be subject to including treble damages) for all costs the state assumes in implementing the assessment.

In its policy directive, NJDEP indicated a preference for the parties to perform the restoration work and resource protection in lieu of payment of money damages. In some cases, the agency will accept substitute resources or resource services where this approach may be a more cost-effective means to compensate the public for natural resource injuries. For groundwater resources, the NJDEP will consider acquisition of aquifer recharge areas, water re-use or recycling projects, infrastructure improvements to control stormwater or improve recharge, reforestation efforts to improve infiltration and water retention, or any other measure that enhances the water resource base in the affected area. For lost recreational uses, the agency will consider enhancements to public access, creation of or improvements to state or local parks, or the provision of other alternate recreational opportunities.

In general, NJDEP said that it will not issue no further action letters for site cleanups until an NRD assessment is completed and addressed. However, the agency also said that it will coordinate the NRD initiative with the brownfield program to ensure that incentives for brownfield redevelopment are maintained. Thus, the agency will not assert NRD claims against brownfields developers that qualify for the innocent purchaser defense at sites at which there is a historical natural resource injury.

Commentary: The concept behind NRD is that society should be compensated for losses to natural resources caused by releases of hazardous substances. However, PRPs have usually viewed NRD as punitive and unnecessarily added to their already burdensome remediation liability.

EPA and trustees designated by states have been authorized to recovery NRD since CERCLA was enacted in 1980. However, there were relatively few NRD settlements until the 1990s. According to a study by Conestoga-Rovers & Associates ("CRA"), the total number of NRD settlements increased during the 1990s and now averages 15-20 settlements per year.

CRA also found that the amount of the NRD settlements doubled every three to four years since 1990 with the average settlement around $100 million from 1998 to 2001. By comparison, total PRP remediation costs for this time period have ranged between $1-$2 billion per year. The average NRD cost estimate does not include NRD payouts to state or other non-federal trustees.

NRD costs can vary significantly depending on the type of site with mining/smelter sites and river systems or bays having the largest damages. Indeed, CRA indicated that half of the total NRD settlements to date were associated with five sites. With EPA now turning its attention to the so-called mega-sites, NRD costs are only likely to increase.

EPA Issues Windfall Lien Guidance

EPA issued another guidance document that clarified when and how the agency plans to exercise its authority to impose a windfall lien under CERCLA. The windfall lien is part of the Bona Fide Prospective Purchaser ("BFPP") defense of section 107(r) that was added by the 2002 CERCLA Amendments. The interim policy also provides guidance on when EPA may issue comfort letters regarding the existence of windfall liens.

The BFPP allows parties to knowingly purchase or lease contaminated property without incurring CERCLA liability provided the BFPP complies with certain pre-closing and post-closing obligations (Please refer to our January 2002 issue for a more complete discussion of the BFPP defense). However, to prevent purchasers from becoming unfairly enriched at the expense of the taxpayers, section 107(r) provides that EPA may impose a lien on the property if the agency has performed response actions after the BFPP acquires the property and the response action increases the fair market value of the property.

The windfall lien will be for the amount of the increased property value up to the amount of its unreimbursed response costs. The lien becomes arise when EPA incurs the costs but will not be effective until EPA perfects the lien by filing it in the local land records.

The interim policy indicated that EPA generally will not assert a windfall lien when the agency has already conducted a cleanup that had increased the property's fair market value prior to purchase. However, EPA may file a windfall lien where it has substantial unreimbursed costs, when EPA's cleanup action results in a significant increase in the property's fair market value, or when there are no viable and liable parties from whom the agency could recover costs. EPA also will not impose a windfall lien when the only money that has been spent by EPA at the site was to award an owner a grant or loan, according to the guidance.

EPA does not want to unnecessarily restrict property transfers but also wants to avoid creating incentives for transactions that will result in windfalls at taxpayers' expense. For example, the policy warns that EPA may seek to perfect a windfall lien if a party attempted to complete a transaction to avoid certain other liability such as selling land to prevent EPA from perfecting the non-priority lien of section 107(l) of CERCLA. The policy indicates that EPA will scrutinize property transactions that appear to be at significantly less than fair market value or otherwise appear to not be arms length transactions.

When EPA incurs response costs after a site is transferred or continues a remedial action the purchase, the policy indicates that the agency will calculate the increase in fair market value of the site attributable to the cleanup action by comparing the fair market value of the site if the cleanup were complete to the fair market value of the site when it was purchased. When a cleanup is completed after the buyer purchases the land and the cleanup increases the market value of the site, EPA will generally seek only the increase in fair market value attributable to the response action and not the entirety of EPA's unrecovered costs.

EPA Issues Ready For Reuse Certificates for Two Arkansas Sites

EPA and the Arkansas Department of Environmental Quality ("ADEQ") issued a "ready for reuse" certificate for the former Emerson Specialty Motor Division Facility located in Rogers, Arkansas. The "ready for reuse" determination verifies that the environmental conditions on this property are protective of human health and the environment based on its current use and anticipated future use as a commercial/industrial operation.

Operations ceased at the 20-acre facility in late-2000. Emerson completed a voluntary cleanup at the site which was sold in 2002 to P.I.M., LLC. The property is now mixed-use commercial/industrial facility, housing a metal framing manufacturing and building components supply operation, as well as a commercial laser printing business.

EPA and ADEQ also issued a "ready for reuse" determination for the former University of Arkansas Gregg Site located in Johnson, Arkansas. This is the first certificate issued to a public facility in Arkansas. The one-half acre site had been used as a seismology research station where containers of laboratory chemicals had been buried in shallow pits or trenches on the property in the late 1960s or early 1970s. The University began a voluntarily cleanup in the spring of 2000.

Investors of CDE-sponsored Brownfield Projects May Received Tax Credits

The federal New Markets Tax Credit ("NMTC") Program allows taxpayers who make qualified equity investments in designated Community Development Entities (CDEs) to receive a federal income tax credit. The NMTC is a part of the Treasury Department's Community Development Financial Institutions ("CDFI") Fund.

Under the FY2003 NMTC guidelines, brownfields redevelopment is considered a qualified investment. The credit to investors totals 39% of the cost of the investment and may be claimed over a seven-year period. CDEs are now applying for NMTC allocations to enable them to provide tax credits to investors.

Cleanup is Completed at Largest Midwest Brownfield Site

The Lost Marsh Environmental Recreation Area located on the shores of Lake Michigan officially opened in

September. Built on a former slag pile, the $33 million project now contains a 330-acre 18-hole championship golf course, youth golf academy and nature preserve with biking and nature trails, fishing, birdwatching, wetlands and wooded areas, an environmental education center, and winter activities such as ice skating and cross-country skiing. The championship golf course will feature fees as much as 50% cheaper than nearby courses. All other activities are free. In addition to generating revenue for the City of Hammond, fees collected at the golf course will support youth golf programs at Lost Marsh.

NJ Uses Livable Communities Fund for Brownfield Redevelopment

The New Jersey Department of Environmental Protection ("NJDEP") provided South Plainfield Borough with a $250,000 grant to help the community clean up asbestos tiles discovered last summer in Veterans Park. The Borough has also secured funding for remediating the rest of the park, including removal of the tar and cleanup of a patch of soil contaminated with polychlorinated biphenyls (PCBs).

The NJ Livable Communities Fund has provided more than $7 million in grants to over 75 communities to acquire and to improve open space and parks. The state is working to create or to improve at least 200 local parks statewide over the next three years. As part of this goal, the Governor initiated a legislative push to raise the cap on bonding for the Green Acres program. This proposal would allow the state to raise at least an additional $100 million over the next three years, of which $50 million would be dedicated to parks and open space acquisition and improvements in urban and older suburban communities. The decision to raise the bonding cap will appear as a referendum on the November statewide ballot.

Indianapolis Creates Brownfield Loan and Grant Program

Indianapolis recently created a $300,000 grant and loan program for private developers and non-profit entities to develop brownfield sites. Grants of up to $20,000 will be available to not-for-profit entities but will require a 50% match while loans of up to $50,000 will be available to both not-for-profit and private developers. The interest rates will range from 2.5% to 3.0% depending on the length of the loan. Thus far, the city has awarded seven grants totaling $82,282

Arkansas Launches Brownfield Loan Program

The Arkansas Department of Environmental Quality ("ADEQ") recently began accepting applications for its $800,000 brownfield revolving loan program. Low-interest loans may be for up to $500,000 each. The interest rate will be set at 25% of the current prime interest rate for public and non-profit entities and 50% of the current prime interest rate for private entities. The loans may only be used to remediate contamination at non-petroleum sites or properties where petroleum is mixed with hazardous substances.

ENVIRONMENTAL CASES INVOLVING CORPORATE AND REAL ESTATE TRANSACTIONS

Indemnity Obligation Not Limited to Reasonable Expenses

In a drafting lesson for corporate attorneys, the federal district court for the District of Delaware ruled that a seller was not limited to reimburse a purchaser all reasonable expenses incurred to remediate contaminated property. In *GB Biosciences Corp. v. Ishihara Sangyo Kaisha, Ltd.*(No. 02-1584, D.Del.), Zeneca Ag Products Holdings, Inc ("Zeneca") purchased a portion of the pesticide business of Ishihara Sangyo Kaisha, Ltd ("ISK"), including a manufacturing facility near Houston. Pursuant to the stock purchase agreement ('SPA"), ISK agreed to indemnify Zeneca for any and all losses, including environmental liabilities up to $85 million for on-site liabilities and up to $25 million off-site claims. The indemnity also provided that if ISK chose not to defend an indemnification claim, Zeneca could do so and ISK would reimburse it for the costs to defend the claim.

After Port of Houston ("PHA") filed a lawsuit against Zeneca involving contamination at the Houston area plant, Zeneca sought reimbursement from ISK for consultant and attorney fees related to the PHA claim. ISK contended that it was only required to reimburse Zeneca for reasonable expenses and that Zeneca had to provide some "quantum of proof" as to the reasonableness of its expenses. However, the court ruled that ISK had unambiguously agreed to indemnity Zeneca for "expenses as they are incurred without any proof of reasonableness.

The court suggested that ISK had to agree to these terms to convince Zeneca to acquire the "high-risk property." The court also rejected ISK's view that "expenses" was limited to out-of-pocket expenses and not attorney fees. The court said that the term meant a "financial burden or outlay" and that an objective and reasonable third party would not understand the term to exclude attorney fees. Accordingly, the court granted Zeneca's motion for summary judgment.

Commentary: The National Contingency Plan ("NCP") provides that plaintiffs seeking contribution under CERCLA may only recover costs that are incurred consistent with the NCP. In most cases, attorney fees are not recoverable under the NCP. In allocating liability under a contract, parties should consider whether the indemnity should only cover costs that are recoverable under the NCP.

In addition, in this era of risk-based cleanups, it is important for transacting parties to clearly articulate in a contract what standard should be used when determining what kind of cleanup costs are covered by the indemnity. If the property is currently used for industrial or commercial purposes but the purchaser plans to redevelop it for residential purposes, the purchaser normally want to use a residential cleanup standard while the seller will want to use the current land use and have the purchaser assume the risk of the increased costs or "delta" necessary to satisfy a residential standard.

It is also important to distinguish between normal costs of construction and those costs associated with contamination. For example, if the buyer will have to excavate soils for footings and the soil is contaminated, the parties should address any delta costs associated with the disposal or treatment of those soils. If the soil is contaminated but not considered hazardous, the buyer might not incur any additional disposal costs. Moreover, the seller could argue that it should not be responsible for the disposal costs of the soil if the buyer could reconsolidate the soil on-site under a parking lot or foundation and not necessarily dispose the soil off-site. The indemnity should specifically address what costs but could still try to have the disposal costs covered by the indemnity.

Third Circuit Rules on Scope of Arranger Liability

Under CERCLA, parties that arrange for the disposal of hazardous substances may be jointly and strictly liable for releases at a facility that handled their hazardous substances. While the federal courts have broadly construed the meaning of "arrange", they have not applied uniform standards. Some courts require the plaintiff to make a showing that the defendant intended to dispose or treat the hazardous substances while others have simply required that the defendant owned or controlled the hazardous substance.

Recently, the Court of Appeals for the Third Circuit articulated its own standard in *Morton International, Inc v. A.E. Staley Manufacturing Company* (No. 01-4259, 09/16/03).After surveying the decisions of its sister courts, the Third Circuit ruled that the key factors in determining arranger liability were ownership or possession of the material, knowledge that hazardous substances can be released as part of the process it has arranged to be done and proof that the defendant had control over the process. The court said that mere ownership alone was not sufficient to impose arranger liability since it would not be fair to impose liability on a defendant who has arranged for a plant to treat a hazardous substances but had absolutely no control and no knowledge that the process would result in a release of hazardous substances.

For the knowledge element, the court ruled that actual or presumed general knowledge that waste disposal was inherent or inevitable part of the process may be sufficient to establish liability. The court suggested that actual knowledge could be shown by an agreement estimating the amount of spillage inherent in the processing operation so that the defendant who receives less than 100% of the material supplied for processing while general knowledge could be inferred by familiarity with industry customs.

Finally, the court said the evidence that the defendant exercised control over the production process that was responsible for the release could expose the defendant to arranger liability. In addition, proof of control could create an inference that the defendant knew the process would result in a release.

Commentary: Another issue that often arises in generator cases is whether the transaction was a sale of a useful product and not an arrangement to dispose of hazardous substances. One way this issue may arise is when a manufacturer sells a commercial product containing hazardous substances to a customer who then disposes of all or part of the product in a way that allows the hazardous substances to be release into the environment. Another area of uncertainty involves suppliers of raw materials when materials are frequently spilled during delivery. Another interesting area involves scrap metal re-processors where users of products that may no longer be used for their intended purpose sell them as scrap to be used as raw material. The more common situation involves formulation agreements where manufacturers provide formulators with ingredients to produce a final product according to a customer's specifications. The finished product is then returned to the manufacturer. Unlike a supplier of raw materials or the seller of finished product, the manufacturer retains ownership and control over the chemicals that are provided to the formulators. If the manufacturer knows that the generation of hazardous waste is inherent in the formulation process, several federal courts have held that the manufacturer may be liable as a generator. These cases are usually highly fact intensive and courts will generally look beyond how the parties characterize the transaction to determine if the if the transaction was truly a sale of a useful product or simply a sham to discard a hazardous substance.

DOJ Announces Bankruptcy Settlements

Bethlehem Steel Corporation and its subsidiaries (the "Debtors") entered into a settlement agreement to resolve environmental claims for contribution and response costs under CERCLA and liability for civil penalties under the CAA and the RCRA(*In re Bethlehem Steel Corp.*, No. 01-15288 thru 01-15302, S.D.N.Y 09/1103). In exchange for the settlement, the United States will Allowed Secured Claims totaling $200,000 and allowed general unsecured claims totaling $2,492,163.10 for the response costs incurred and to be incurred by EPA at 7 Superfund sites, an allowed secured claim of $125,000 and an allowed general unsecured claim of $250,000 for response costs incurred and to be incurred by the USDA Forest Service in connection with a Montana Superfund mining site, an allowed general unsecured claim of $30,000 for penalties involving pre-petition RCRA violations at the Pennsylvania facility, an Allowed Administrative Expense claim for $165,000 and an allowed general unsecured claim of $500,000 involving penalties for pre-petition and post-petition violations of the CAA at an Indiana facility, and an Allowed General Unsecured claim for $137,191.11 resolving Debtors' liability under a 1997 consent decree.

A bankruptcy court in Ohio approved a $29 million cash settlement to resolve numerous environmental claims against LTV(*In re LTV Steel Company, Inc.*, No. 00-43866, (E.D.Ohio 07/01/03). Pennsylvania will place roughly $25 million into a trust fund to treat polluted mine drainage, reclaim mine lands and perform other environmental cleanup activities at LTV's five coal mining facilities and three steel manufacturing facilities in southwestern Pennsylvania. The trust will also hold title to several thousand acres of land where mining operations had been conducted. The funds and title to the land will remain in the trust and generate a stream of income to fund the treatment activities. LTV had been pumping and treating acidic water from former mines, and collecting water runoff from refuse piles at a cost of about $2 million a year. Since LTV is liquidating, a private nonprofit organization will assume responsibility for these operations until roughly the end of 2004 when the state DEP hopes to have completed its options for the long-term treatment of the mine drainage.

Kaiser Aluminum and certain of its affiliates ("Kaiser") entered into a consent decree to resolve CERCLA and RCRA liability at 66 sites known as the "Liquidated Sites"(*In re Kaiser Aluminum Corp*., No. 02-10429, D. Del). In exchange for a covenant not to sue and contribution protection for the 66 sites, Kaiser agreed to grant the United States an Allowed General Unsecured Claim in the total amount of $24,486,021 and 40% of any insurance proceeds that it may recover. The Consent Decree also provides that the plan of reorganization will provide for treatment of claims for four other categories of sites (Debtor-Owned Sites, Discharged Sites, Additional Sites, and Reserved Sites) where the United States may seek a liability determination in the future for those sites. Any settlement for those sites shall be pursuant to certain conditions set forth in the consent decree and the plan of reorganization.

Pennsylvania Court Holds CERCLA Applies to 1975 Indemnity

In a case of first impression in Pennsylvania, a state superior court held that an indemnification clause from a 1975 contract could impose CERCLA liability. (*County of Delaware v. J.P. Mascaro & Sons Inc.*, Pa. Super. Ct., 509 EDA 2003, 8/1/03). Following opinions by the Second and Third Circuits, the court said it must look to whether the indemnity had any limiting language and whether the language was broad enough to indicate that the parties intended to allocate all potential liabilities among the parties. The court held that the indemnity provision was sufficiently broad to allocate all liability and that there was not any language limiting or clarifying the scope of the indemnity.

Public Agencies Controlling Stormwater Not Liable as Arrangers

The federal District Court for the Central District of California ruled that public agencies that regulate and maintain storm drain systems are not CERCLA "arrangers" or "operators" of hazardous waste facilities. (*Carson Harbor Village Ltd. v. Unocal Corp*., C.D. Cal., No. CV96-3281, 8/11/03). In this case, the plaintiff was the owner and operator of a mobile home park and sought to recover part of its $285,000 in cleanup costs and nearly $3 million in damages from the cities of Carson and Compton and the California Department of Transportation. The plaintiff alleged that lead contained in runoff from storm drain systems manage impacted wetlands on its property. The court concluded that while the defendants might have had some obligation to maintain and monitor storm drains leading onto the plaintiff's property, there was no evidence that the governmental defendants owned the lead waste or that they arranged with another party to dispose it.

 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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