# SCHNAPF ENVIRONMENTAL REPORT

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

*Spring 2004* Vol. 6 Issue 6

## Contents

# DUE DILIGENCE/ AUDITING/ DISCLOSURE/ ENFORCEMENT

### *AAI Standard Update*

Under the 2002 Small Business Liability Relief and Brownfield Revitalization Act (2002 CERCLA Amendments), EPA was required to promulgate standards for satisfying the "all appropriate inquiry" standard (AAI Standard) that landowners must perform to satisfy the innocent landowner, bona fide prospective purchaser (BFPP) and contiguous property owner (CPO) defenses by January 11, 2004.

After an EPA rulemaking advisory board reached consensus on the AAI standard, EPA began drafting the proposed rule. However, the draft rule has encountered criticisms from members of the advisory committee who feel that the preamble has included requirements that go beyond what was agreed. As a result, publication of the proposed rule has been delayed.

Meanwhile, Environmental Data Resources (EDR) recently announced a new data package that will enable users comply with some of the new requirements that will be included in the AAI Standard. For example, EDR's "The Works" will allow users to obtain information on existence of land use controls without having to research the county records.

***Commentary:*** According to EDR, 249,000 Phase I ESAs were performed in 2003 at a total cost of $514 million compared to 241,000 in 2002. The average price of an ASTM-quality Phase I was $2,060 with the average minimum price at $1, 700. The average maximum price of a Phase I ESA was $2,850, usually because of the non-scope items that are added to the scope of work.

The number of transaction screens continued to decline. Approximately 28,000 transaction screens were performed in 2003, representing a 13% decline from 2002 and a 33% decline since 1999. The average cost of a transaction screen was $750.

### *ASTM Mold Standard Update*

The draft ASTM transaction screen for mold (TSM) formally known as the "Standard Guide For Limited Survey for Readily Observable Mold in Commercial Buildings: Transaction Screen Process" received several negatives during its first round of balloting. The E50 mold subcommittee plans to revise the standard when it meets in April.

As the name suggests, consultants will only be required to look for observable mold and obvious physical effects associated with mold. Under the present draft, the consultant would be required to use a ladder to inspect ceiling materials and maybe even remove "lay-in ceiling tiles" but materials located below concrete slabs or within walls would be considered not readily accessible. The inspector will be required to review records including construction and renovation dates, drawings and specifications, repair records identifying incidents of water damage, files involving indoor air violations or complaints, indoor air reports, prior ESAs or property condition reports. Interviews must be conducted with persons knowledgeable about the building maintenance history using a 38-question interview checklist. The site inspection should be conducted in accordance with the 60-question sample field guide checklist that identifies where the inspector should look for mold or water-related damage. Areas that

would require an "extraordinary physical search" do not have to be examined. Sampling is not required and is considered an "Out of Scope Consideration"

***Commentary:*** Though the recent concern about mold began in residential settings, it is fast becoming a big issue for commercial buildings because of the potential for mold to be distributed throughout a building by powerful HVAC systems and the high number of persons that can be potentially exposed to mold. For example, a class action suit was recently filed against the Omni Royal Crescent Hotel of New Orleans on behalf of former hotel workers. The workers allege that hotel management mishandled a mold infestation and that the hotel was insufficiently waterproofed. Mold-related lawsuits have also been filed involving the Washington, D.C. Ritz-Carlton where one-third of the 162 units are being torn down. In some cases, mold damage at hotels is exceeding 50% of the initial construction costs.

## *Socially Responsible Investors Using EPA Environmental Performance Track Program*

Calvert Group, Ltd. and KLD Research & Analytics, Inc. became the latest investment funds to use EPA's National Environmental Performance Track program as a criterion for developing their investment ratings. Performance Track facilities voluntarily exceed regulatory requirements, implement environmental management systems (EMS), work closely with local communities and make three-year goals to protect the environment and public health.

Calvert will use Performance Track membership to identify potential companies to include in its socially responsible mutual funds. KLD plans to use Performance Track data to assess how well companies prevent pollution and eliminate wasteful byproducts.

## *Companies to Expand GHG Disclosure*

In response to shareholder resolutions, American Electric Power (AEP) and Cinergy Corp. (Cinergy) have agreed to disclose potential impacts of greenhouse gas emissions (GHG) in their filings with the Securities and Exchange Commission (SEC). Both companies also agreed to appoint a committee of independent directors to oversee the GHG disclosure.

The resolutions were filed at AEP by Connecticut Retirement Plans and Trust Funds, Christian Brothers Investment Services, Trillium Asset Management, Board of Pensions of the Evangelical Lutheran Church in America, the Pension Boards of the United Church of Christ, and the United Church Foundation. The Cinergy resolution was filed by the Presbyterian Church (USA). Similar resolutions have been filed at other utilities and companies by the Interfaith Center on Corporate Responsibility (ICCR), a coalition of 275 religious institutional investors, and CERES, a coalition of investors and environmental groups. According to the Investor Responsibility Research Center, shareholders have filed 51 resolutions in 2004 demanding that companies to respond to energy and environmental issues.

Meanwhile, the Coalition for Environmentally Responsible Economies is coordinating efforts to target smaller companies involved in exploration and production of oil and gas. The group believes that these businesses are more vulnerable than energy giants Exxon Mobil and ChevronTexaco to regulatory changes involving GHG emissions. Indeed, pension fund managers representing public employees in Connecticut, New York, Maine and New York City have also filed shareholder resolutions asking 10 North American oil companies to disclose their plans for dealing with potential impact of climate change on their businesses.

Citigroup recently adopted a corporate policy to evaluate the social and environmental impacts of proposed infrastructure projects. Under the policy, the company will screen financing requests to determine if they would adversely impact to critical natural habitats, will impose a ban on lending for commercial logging in primary tropical forests, decline loans to companies engaged in illegal logging, develop a lending program for investments in sustainable forestry and renewable energy projects, and reporting on GHG emissions from power projects in its portfolio.

## *EPA Issues New SEP Policy*

EPA recently issued a package of guidance documents designed to encourage the use of Supplemental Environmental Projects (SEPs) in enforcement settlements. SEPs are projects or activities that a

defendant/respondent is not otherwise legally required to perform.

The "*Guidance for Determining Whether a Project is Profitable, When to Accept Profitable Projects as Supplemental Environmental Projects, and How to Value Such Projects*" discusses how to calculate if the environmental or public health benefits of a project are significant enough to outweigh profits that the violator might receive. The "*Guidance Concerning the Use of Third Parties in the Performance of Supplemental Environmental Projects (SEPs) and the Aggregation of SEP Funds*" answers frequently asked questions on the use of third parties in developing and/or implementing a SEP. The "*Recommended Ideas for Supplemental Environmental Projects"* provides guidance on the kinds of environmentally beneficial projects that may qualify as a SEP.

***Commentary:*** Under EPA's 1998 SEP policy, settling parties were not allowed to propose SEPS that would eventually generate a profit for the business. Because many SEPs help companies become more efficient, the new policy indicates that SEPs that become profitable will no longer be automatically rejected provided if public health and environmental benefits outweigh the potential profitability. However, settlers will have to satisfy a "high hurdle" to obtain approval for profitable SEPs.

## *Company Resolves Air Violations under State Self-Disclosure Law*

Forsheda Palmer-Chenard, Inc. agreed to pay $38,944 to the New Hampshire Department of Environmental Services for air emission violations discovered during an internal environmental audit. The audit showed that in calendar years 1999 and 2000, the company's VOC emissions exceeded applicable permit thresholds, thereby requiring the company to obtain a state operating permit. In addition, the audit determined that the company was required to install "reasonably available control technology" for its VOC emissions. After self-reporting these violations, Forsheda made a number of production changes, obtained the required air permit and installed air pollution control equipment that has reduced VOC emissions by approximately 91%. In addition to the reduced penalty, Forsheda agreed to purchase and retire 73 tons of nitrogen oxides (NOx) or VOC discrete emissions reduction credits to offset the excess emissions resulting from the violations.

## *Semiconductor industry To Investigate Cancer Rates*

Facing allegations that its members knowingly exposed workers to dangerous chemicals, the U.S. Semiconductor Association (SIA) will investigate the cancer rates of its employees. The purpose of the study will be to determine if wafer fabrication workers have experienced higher rates of cancer than non-fabrication workers. An SIA report on existing health data completed in October 2001 found no evidence that work place chemical exposure increased cancer risk but it refused to rule out that cause.

***Commentary:*** Earlier this year, IBM settled a lawsuit claiming that an employee's exposure to chemicals in a New York microchip factory caused her daughter's severe birth defects. In February, IBM prevailed in a lawsuit by two former workers who claimed their cancers were caused by chemicals in a California computer hard-disk drive factory. National Semiconductor also faces litigation in California state court by former employees who blame the company for various illnesses.

## *Asbestos Soil Cleanups Pose Risks to Developers*

Until recently, property owners, lenders and government regulators were concerned about the possibility that asbestos fibers in building structures could become airborne. However, as former industrial and military facilities become converted into schools and residential developments, exposure to asbestos in soil has become a growing concern and resulting in unanticipated construction costs.

The asbestos is frequently associated with building structures that remain at the property or asbestos debris that was used as fill materials. For example, the cost of the renovation and expansion of Canton Junior-Senior High has increased by $300,000 because of the discovery of buried floor and ceiling tiles made with asbestos. It appears that a contractor apparently used materials from another construction site as fill material when the school was built in the late 1960s.

Three families whose new homes

were constructed on the site of a former school have been notified that their properties are contaminated with trace amounts of asbestos. The Massachusetts DEP advised the three families not to excavate or otherwise disturb the ground since those activities could release the asbestos. DEP believes that the asbestos could have come from historical fires, demolition materials or fill material. The former school caught fire at least eight times before it was eventually demolished in 1992.

Asbestos contaminated soil at the former Lowry Air Force Base illustrates the problems developers can face when converting former military bases to residential developments. Purchasers of homes priced at $400,000 are canceling contracts. Developers have been forced to spend $15 million to excavate and dispose soil the military had previously certified as clean because the Colorado Department of Public Health and Environment ordered that soil at Lowry be removed even when samples contain less than 1% of asbestos by weight. In several cases, freshly landscaped yards are being torn out and workers with respirators are excavating soil in 200-square-foot grids.

Meanwhile, a 22-acre parcel also slated for redevelopment will likely sit empty for the foreseeable future because no developer will take possession of the site unless the Air Force removes the asbestos. The Air Force has refused to reimburse builders and developers because it believes the levels of asbestos in the soil to not pose a risk. The Air Force risk assessment concluded the acceptable cancer risk among workers at the site would be two cases in 10,000. However, the CDPHE uses the one case in a million standard.

***Commentary***: Asbestos is classified as a CERCLA hazardous substance but so long as it is part of a building structure, releases of asbestos fibers are not subject to CERCLA liability. However, once a building is demolished, the cleanup of asbestos debris can be covered by CERCLA. One of the problems with asbestos in soil is that government regulators are now concerned that the mineral can become more easily dislodged from soil than previously thought and may create a dangerous airborne exposure in the process. Thus, the 1% threshold used for regulating asbestos-containing materials may no longer be protective of human health.

Some states have established specific procedures for managing asbestos in soil. For example, the Massachusetts policy establishes different management approaches depending if the asbestos is associated with buried building components, asbestos-containing debris has been buried or if there are unconsolidated asbestos fibers in the soil. The policy establishes different notification requirements for these types of asbestos in soil. For example, separate notification is not required for unconsolidated asbestos in soil that does not pose an imminent risk and non-friable ACM that is buried more than three feet unless it is to be disturbed or moved. However, debris that contains regulated ACM (RACM) from non-friable sources (roof tiles, shingles, caulking putties, etc) at the surface or in the first three feet of soil that could release asbestos if the debris becomes weathered or damaged would be subject to a 120-day reporting obligation. Surface debris with friable RACM that is located within 500 feet of receptors is subject to a 2-hour release reporting requirement while other friable RACM at any depth or on the surface and more than 500 feet from receptors is subject to a 120- day reporting requirement regardless where it is located. Unconsolidated asbestos in soil is considered a “special waste” that must be managed using best management practices (BMPs) without state oversight.

## *Pfizer to Investigate Contamination Near 30 Homes*

Pfizer Inc. plans to test 30 properties adjacent to Schick-Wilkinson Sword plant after residents expressed concerns that contamination at the manufacturing site had migrated onto their properties. TCE was discovered in the groundwater in 1997. None of the residential properties have drinking water wells and monitoring wells adjacent to the residential properties have not detected any TCE. Indeed, the groundwater contamination appears to be flowing away from the residential properties. The focus of the investigation will be to determine if TCE vapors are migrating into the homes.

***Commentary:*** According to the Agency for Toxic Substances and Disease Registry,

TCE has been found at more than 850 federal Superfund sites, Tetrachloroethylene (PCE) at more than 770 and Trichloroethane (TCA) at more than 690 sites.

In response to EPA's draft Subsurface Vapor Intrusion Guidance, EPA regional offices are increasingly requiring parties to perform expensive indoor air monitoring to determine if groundwater plumes containing volatile organic compounds are releasing contaminants through the soil into the basements and lower rooms of buildings. While many of the tests are being conducted during the remedial investigation stages of a cleanup, the indoor air evaluations are also being required during the five-year reviews.

As a result, cleanups thought to be complete are now being reopened. At some sites, the evaluations are resulting in more stringent cleanup objectives and additional rounds of investigation and remediation. In many instances, the sampling not only raises concerns among residents but can also yield false positive readings because of the presence of paint, cigarette smoke and deodorants in households.

Vapor recovery systems are being installed in 32 homes affected by contamination from Hill Air Force Base. The $1,500 vapor recovery-removal systems collect vapors from basements that are migrating from contaminated groundwater and blow them out of the house. Indoor air tests have been completed in 391 of the 522 homes that are potentially impacted. Affected residents will receive $500 per month to offset the inconvenience and the cost of running the system, which takes air from the basement and blows it out of the home. The contaminated groundwater contamination has not affected drinking water supplies since most residents obtain their drinking water from surface sources or deep aquifers.

EPA plans to install ventilation systems at 15 homes near in East Fishkill in New York's Dutchess County and is conducting vapor sampling at another neighborhood. Chlorinated solvents have impacted groundwater at 28 sites in Dutchess County and dozens of homes are being supplied with bottled water.

The Interstate Technology & Regulatory Council Brownfields Team issued a report in December 2003 entitled "*Vapor Intrusion Issues at Brownfields Sites*" that provides an overview of vapor intrusion, typical contaminants associated with vapor intrusion, the potential for brownfields sites to have vapor intrusion issues, and methods that can be taken to limit exposure.

### *Developer Required to Remediate Tailings*

Morgantown Properties L.P. and New Morgan Properties L.P. have agreed to fund a cleanup tailings pond and the millpond located at a former Bethlehem Steel Grace Mine site in New Morgan Borough, Pennsylvania. New Morgan Properties intends to purchase the property for a proposed residential development.

Morgantown Properties purchased the almost 2,000-acre property in 1977 after operations ceased in 1977. Under the agreement, Morgantown Properties will investigate and remediate the property. The company will submit estimated costs for all work at the site and must deposit $100,000 into a site account immediately upon approval of the workplan. As portions of the nearly 2,000 acres are transferred from Morgantown Properties to New Morgan Properties, 50% of the purchase price will be kept in escrow until the amount in the fund equals the anticipated cleanup costs.

### *Contamination Halts Residential Development*

A & M Enterprises withdrew a proposed 22-lot subdivision in Bedford, Massachusetts after state and city environmental analysts failed to approve the project. A & M Enterprises proposed building on property that sits on the site of the old Wilcox Saw Mill but the state DEP and the Uncas Health District concluded that there was possible environmental contamination under the old mill buildings, inadequate testing of the ground water for contamination and contaminated saw dust left over from the mill. The Director of the Uncas Health District recommended that residential development should not be approved until the extent of the contamination was investigated and contamination was remediated below the residential standards.

### *Incinerator Ash Detected in Residences*

The Town of South Brookline has agreed to excavate 3 feet of ash-filled soil

from the front and back yards of two dozen residences at a cost of $2 million. The town has already spent $1 million to assess the extent of the contamination. The ash contains traces of lead along with lesser amounts of cadmium chrome and zinc. The

The Massachusetts DEP ordered the town to investigate the homes after bottom ash from a former municipal incinerator was detected at the site of a future soccer field that is to be built on the portion of the former landfill. The former municipal landfill and incinerator had operated from 1952 to 1975. Bottom ash from that incinerator was disposed in the portion of the landfill that abuts the homes. Because the ash is believed to extend to a depth of 14 feet, the town plans to impose deed restrictions on the residential properties that would require the homeowners to retain a licensed environmental professional for any construction projects that would disturb more than three feet of soil.

Meanwhile, the Massachusetts DEP has agreed to excavate cadmium-contaminated soil from a 3-acre park located in Lawrence. The park was built on the site of a former battery plant 18 months ago.

***Commentary:*** Homebuyers and their lenders usually do not think about performing environmental due diligence prior to purchasing a home. However, the CERCLA 2002 Amendments did establish a due diligence standards for residential property that would enable the property owners to assert an innocent purchasers defense. The investigation that has to be performed on residential property is less rigorous than that required for commercial properties since it only involves a site inspection and title search.

## *Former Missile Silo Contaminants Groundwater*

The U.S. Army Corps of Engineers (Corps) has started remediating a former Cold War era missile silo after studies showed a toxic solvent used at the site in the 1960s had seeped into the groundwater and residential wells. Trichloroethylene (TCE) had been used in the 1960s in the silo near Wamego, Kansas to clean rocket fuel lines and other areas. It escaped seeped into the groundwater when catch basins sometimes overflowed or when pipes designed to hold the contaminant failed. Since the 1990s, the Kansas Department of Health and Environment has worked with the corps to identify problem silos. The contamination plume is approximately a mile long and a half-mile wide. Another silo that is the source of contamination in Keene, Kansas has been turned into a home. The Corps plans to install a water line to connect households that have contaminated drinking water wells.

***Commentary:*** A GAO report has estimate that only 1% of the estimated 2,307 sites with Unexploded Ordinance (UXO) have been cleaned up and that 60% have not yet be fully investigated. GAO reported that the Army does not expect to finish assessing the remaining 1,387 sites until 2012. GAO said there may be more than 15 million acres of closed military firing ranges on current and former U.S. military and defense training bases may have unexploded military munitions.

EPA has reported 126 incidents and 65 fatalities involving civilians coming in contact with unexploded bombs and artillery shells. The GAO indicated that the number of accidents was likely to increase as the military installations are closed and redeveloped under the Base Realignment and Closures program.

The incidents of contamination at or near residential properties in this and the preceding articles highlight the importance of conducting comprehensive environmental due diligence before purchasing land for redevelopment or companies with facilities that are located near residential areas.

## *EWG Study Finds Asbestos Deaths Yet to Peak*

A analysis by the Environmental Working Group (EWG) Action Fund has concluded that 9,907 Americans die each year from exposure to asbestos. Because the victims were exposed to asbestos 20 to 40 years ago, the study predicts that asbestos deaths will not peak until 2015 to 2020.

The report also found that 30 million pounds of asbestos are still used in the United States annually and more than one million workers are exposed to asbestos each year. The study also found that more than 100,000 people live within half a mile of sites that are contaminated with asbestos.

The EWG study identifies dozens of widely used consumer products that still contain asbestos, mostly used in construction. They include: acoustical plaster, adhesives, asphalt floor tile, base flashing, blown-in insulation, boiler insulation, breaching insulation, caulking/putties, ceiling tiles and lay-in panels, cement pipes, siding, and wallboard, chalkboards, construction adhesives used to glue down floor tile, carpet, ceiling tile, cooling towers, decorative plaster, ductwork, flexible fabric connections, electric wiring insulation, electrical cloth, electrical panel partitions, elevator brake shoes and equipment panels, fire blankets, curtains and doors, fireproofing materials, flooring backing, heating and electrical ducts, high temperature gaskets, HVAC duct insulation, joint compounds, laboratory gloves, hoods and table tops, packing materials, pipe insulation, roofing felt and shingles, spackling compounds, spray-applied insulation, thermal taping compounds, textured paints and coatings, thermal paper products, vermiculite insulation, vinyl floor tile, vinyl sheet flooring, vinyl wall coverings, and wallboard.

***Commentary:*** With many of the asbestos manufacturers having filed for bankruptcy, plaintiffs lawyers have been trying to expand the asbestos liability net to include companies who manufactured or sold products contain asbestos under a product liability theory. As a result, it is important for purchasers of businesses that produce consumer products to determine if the target company manufactured, sold or otherwise distributed products into the stream of commerce that contain any amounts of asbestos.

### *Landowner Fined for Failing to Maintain LUCs*

Worcester New Bond, LLC was fined $17,500 by the Massachusetts DEP for failing to comply with a Notice of Activity and Use Limitation (AUL). After purchasing the property in 1998, Worcester New Bond performed a cleanup and agreed to record a deed restriction on the property. DEP conducted an audit of cleanup actions at the site and found that Worcester New Bond had not properly managed soil excavated at the site, did not provide Health and Safety Plans for construction workers, and did not maintain pavement to prevent exposure to contaminated soil. In addition, DEP determined that some potential sources of contamination had not been completed in sufficient detail to support health risk conclusions. Worcester New Bond has agreed to perform additional assessment at the site, correct the AUL violations, and reevaluate potential health risks at their property.

***Commentary:*** This case illustrates the importance of confirming that land use controls have been properly implemented and maintained when they are part of a remedy, particularly in states like Massachusetts that use a licensed site professional program to certify that the DEP cleanup standards have been achieved. Purchasers and lenders should verify that the cleanup does satisfy the state standards or determine if the state has conducted an audit that verified that the certifications are accurate.

# ENVIRONMENTAL INSURANCE

### *False Statements in UST Insurance Application Does Not Void Coverage*

In *Zurich American Insurance Co. v. Whittier Properties, Inc*., the Court of Appeals for the Ninth Circuit an UST owner may not be denied coverage from a state UST insurance fund even though it made misrepresentation on its application. In *Zurich American Insurance Co. v. Whittier Properties Inc. d.b.a. Zip Mart*, (No. 02-36101, 1/29/04), gas station owner indicated that there had not been any prior releases at the site on the application it submitted to participate in the state insurance fund. By enrolling in the state insurance program, UST owners were able to satisfy their financial assurance requirements. After the provider of the state UST coverage discovered the misrepresentation, it sought to rescind the policy. However, because EPA regulations provide that the exclusive remedy for an insured's misrepresentation is prospective cancellation of a UST insurance policy, the court held that Zurich could not rescind the policy. Instead, the plaintiff would have to pursue a breach of contract

claim for any damages in incurred as a result of the misrepresentation.

**Commentary:** To keep the UST insurance policies affordable, insurers have not generally verified the information on the UST applications or done any background environmental due diligence.

### *Massachusetts Mold Verdict*

The first jury award for a toxic mold case in Massachusetts was handed down when an Essex County Superior Court jury in Salem found a condominium trust responsible for health problems suffered by a new condo owner in Gloucester. The jury awarded the plaintiff, Katrine Stevens $549,326 with interest.

In another Massachusetts's case, the Davis family is suing their home inspector and real estate agents after they purchased a duplex that contained black mold. Nancy Davis began experiencing severe respiratory problems, developing asthma and a chronic cough. Although her husband and five-year old son did not exhibit any symptoms, the family moved to an apartment.

In *Caldwell v. Curioni, (Tex*. App., Fifth Dist. No.05-03-00135CV, 1/7/04) a state appeals court reversed a trial court's dismissal and allowed a family to present expert testimony to show their landlord could be held liable for not properly dealing with, and possibly covering up, large amounts of mold in the house's carpets and walls. The landlord had argued that because there were no established thresholds for permissible levels of mold, the tenants could not establish that the mold levels were not dangerous. The court also rejected the landlord's argument that the "as is" clause in the rental contract negated another clause discussing the landlord's responsibility for health and safety conditions.

***Commentary:*** Estimates suggest that 10,000 mold-related lawsuits are currently pending in the United States, up 300 percent since 1999. The Insurance Information Institute in New York reports that legal claims have tripled in the past three years, totaling $3 billion paid out in homeowners policies.

# AIR POLLUTION DEVELOPMENTS

### *EPA Delays Mercury Rule*

Concerned that EPA may not meet its target for reducing mercury emissions by 2018, EPA Administrator Mike Leavitt has ordered additional studies to see if the proposed rule should be tightened.

In December 2000, EPA concluded it was appropriate to regulate mercury emissions from coal-fired electric utility steam generating units (Utility Units) and Nickel emissions from new and existing oil-fired Utility Units as hazardous air pollutant (HAPs) (65 FR 79825, December 20, 2000). Pursuant to section 112 of the Clean Air Act (CAA), coal- and oil-fired Utility Units emissions would have been required to install maximum achievable control technology (MACT) for Hg and Ni emissions.

On January 30, 2004, EPA proposed to establish emissions standards Hg and Ni from new and existing coal-and oil-fired Utility Units under the New Source Performance Standards (NSPS) of CAA section 111 (69 FR 4651). EPA also proposed implementing a cap-and-trade program for Hg emissions from new and existing coal- fired Utility Units under CAA section 111 that would cut mercury emissions by 70% by 2018 in two phases. A first phase cap would become effective in 2010 and a second phase cap in 2018. Facilities would demonstrate compliance with the standard by holding one "allowance" for each ounce of Hg emitted in any given year. The agency issued a supplemental notice on March 16th that proposed criteria for approving state mercury cap and trade programs under section 111 of the CAA. The model rule would also serve as the federal trading rule if EPA decides to promulgate a mercury cap and trade program under section 112 of the CAA (69 FR 12397). EPA indicated that the cap-and-trade approach under either sections 111 or 112 would provide an added benefit by meshing with the proposed Interstate Air Quality Rule (IAQR) for sulfur dioxide (SO2) and nitrogen oxides (NOX) that was also proposed on January 30, 2004 (69 FR 4565.

***Commentary:*** The United States has 1,100 to 1,200 coal-fired power plants that emit

five principal pollutants: SO2, NOx, carbon dioxide (CO2), fly- ash; and mercury. EPA determined in 2000 that technology was available to remove mercury emissions by 90% in 2007. EPA believed that utilities could achieve the emissions reduction by that date by using the same equipment used to limit NOx and SO2 emissions. However, a first round of experiments sponsored by the Department of Energy and the industry suggested that the technology used to remove SO2 and NOx would only extract ionized forms of mercury such as mercury chloride or mercury oxide but could not remove elemental mercury. The plants could try to reduce mercury emissions by switching from low-sulfur western coal to Appalachian bituminous coal but this would require installing expensive "scrubbers" to avoid increased SO2 emissions.

## *EPA Identifies Non-Attainment Areas for PM2.5 and Ozone*

EPA tentatively identified 29 States and the District of Columbia as non-attainment areas for the national ambient air quality standards (NAAQS) for fine particles (PM2.5) and/or 8-hour ozone in downwind States (69 FR 4565, January 30, 2004). EPA proposed to require these upwind States to revise their State implementation plans (SIPs) to include control measures to reduce emissions of SO2 and/or NOx in two phases, with the first phase in 2010 and the second phase in 2015. EPA proposes to allow states to adopt a multi-state cap and trade programs for SO2 and NOx. EPA intends to propose the model trading programs in a future supplemental action.

Meanwhile, EPA announced on April 15th that 474 counties in 31 states are in non-attainment for the new ozone standards that were promulgated in 1997 or are responsible for causing a downwind county to be in non-attainment for ozone. EPA also issued classifications of the severity of the ozone non-attainment.

The new standard is based on an eight-hour, rather than one-hour, measurement. It also lowers the standard from 120 pp to 85 ppb of ozone. The new ozone non-attainment designations and severity classifications will take effect on June 15, 2004. States and localities that are in non-attainment will have to implement measures to reduce ozone emissions such as stricter emissions controls on industrial facilities, additional planning requirements for transportation sources or other programs like gasoline vapor recovery controls. The states and local areas will have to implement the controls 2007 to 2021, depending on the severity of an area's ozone problem

***Commentary:*** Because emissions controls and offsets may vary depending on the severity of the ozone non-attainment, similar facilities in different parts of the country may have to comply with differing air pollution control requirements depending on the classification of the area where the facility is located. In addition, facilities that plan on expanding operations, increasing production or alter products may have to obtain different levels of emissions reduction credits to offset the increased emissions. A purchaser of an ongoing business that plans to change operations will have to carefully review its business plans for various facilities with the new requirements. In some cases, purchasers may want to try to focus the operational changes on non-attainment areas that have less severe ozone classifications.

## *EPA NSR Actions*

The South Carolina Public Service Authority (Santee Cooper) has agreed to pay a $2 million penalty and reduce emissions by 83% to resolves claims that the company failed to undergo New Source Review (NSR) when it undertook construction activities at four of its coal-fired electricity generating plants in South Carolina. The settlement is expected to eliminate almost 70,000 tons SO2, NOx and particulate matter emissions. The utility will implement a SEP valued that will cost at least $4.5 million. EPA had alleged that SAPPI Fine Paper North engaged in numerous life extension projects at its recovery furnace that triggered new source performance standards reconstruction provisions but failed to comply with those new source requirements. The facility also failed to submit timely and complete a Title 5 operating permit applications for the foundries.

The United States recently filed a civil complaint against East Kentucky Power Cooperative (EKPC) alleging that the nonprofit utility made major modifications to three coal-fired power plants without

complying with NSR. The complaint alleges that EKPC replaced boilers and turbines that increased coal consumption and emissions from the three coal-fired generating units.

EPA has also filed a complaint that alleges International Truck and Engine failed to comply with NSR by making major modifications to its to its transmission plant that. EPA claims that the modifications to the DaimlerChrysler facility significantly increased emissions and that the company failed to provide enough information about these modifications in its Tile V operating permit application.

***Commentary:*** Because of the new federal NSR rules, some states are returning administration of the prevention of significant deterioration programs (PSD) back to EPA. Facilities in those states will have to obtain federal PSD permits if they undergo NSR for pollutants that are in attainment but obtain a state permit for NSR if the particular pollutant is in non-attainment.

### *Appeals Court Blocks Equipment Replacement Rule*

The U.S. Court of Appeals for the D.C. Circuit granted a motion to stay implementation of EPA's Equipment Replacement Rule, *State of New York v. EPA*, No. 02-1387, 03-1380 (December 24, 2003). The rule established would have redefined the categories of activities that were exempt from the definition of "modification" because they were routine repairs, replacement or maintenance. The rule was scheduled to go into effect in at least 17 states on December 26th but the three-judge panel agreed with the coalition of states and several major cities that they would face irreparable harm to their environments and public health from the changes. Interestingly, five states supported the rule, saying it would cut emissions while 12 other states filed responses indicating that the emissions would remain the same or were unsure about the impact of the rule.

### *2004 SO2 Auction Results*

250,011 tons of SO2 were traded during the 12th annual acid rain allowance auction. The auction conducted by the Chicago Board of Trade had two "vintages" or the earliest year an allowance may be used. The average clearing price for the 2004 vintage was $272.82 while the clearance price for the 2011 vintage was $ 128.00. Each "allowance" is the equivalent of one ton of SO2

### *Domestic GHG Developments*

13 corporations recently joined EPA's Climate Leaders program. 54 corporations have now agreed to voluntarily measure and reduce emissions of the six major greenhouse gases (GHG) from all major on-site emissions of greenhouse gases and emissions related to the electricity they purchase. These reductions go beyond the expected rate of improvement in their respective industry sectors and are equal to the greenhouse gas emissions of five million cars per year. The new companies and their GHG emission reduction commitments are as follows: 3M pledged to slash total U.S. GHG by 30% by 2007, Advanced Micro Devices, Inc. will cut global GHG emissions by 40% by 2007, American Electric Power agreed to reduce its total GHG emissions by 4% below an average 1998-2001 base year by 2006, Cinergy Corp. pledged to lower GHG emissions by 5% from 2000 to 2010, Eastman Kodak Company will cut its total GHG emissions by 10% from 2002 to 2008, FPL Group Inc. pledged to lower GHG by 18% per kilowatt-hour from 2001 to 2008, Interface, Inc. will cut domestic GHG by 15% per unit of production by 2010; International Paper has committed to lower domestic GHG by 15% from 2000 to 2010, PSEG will reduce GHG by 18% per kilowatt-hour from 2000 to 2008, and United Technologies Corporation has committed to reduce its global GHG emissions by 16% dollar of revenue from 2001 to 2006.

Meanwhile, the World Wildlife Fund (WWF) announced that five utilities have answered its challenge to support a mandatory cap on GHG emissions. Under its PowerSwitch! Challenge, WWF power companies must agree to binding limits on national CO2 emissions by increasing the amount of renewable energy to at least 20% of electricity sold by 2020, increase energy efficiency by 15% by 2020, or retire at least half of their least efficient coal generation units by 2020. Of the five companies, Austin Energy and Burlington Electric Department each has pledged to generate 20% of their power from renewable energy sources and to increase energy efficiency by 15% by 2020. FPL Group, Inc. has committed to

increasing energy efficiency through promotion of demand side management projects and improving energy efficiency by 15% in its power generation facilities. The Sacramento Municipal Utility District has agreed to generate 20% of its electricity from renewable sources while Waverly Light and Power will increase its energy efficiency by 15% by 2020.

Finally, a coalition of major Silicon Valley companies and public sector entities have formed Sustainable Silicon Valley project (SSV) that will reduce GHG emissions through the development and implementation of a regional environmental management system (EMS). The participating companies (ALZA, Calpine, Hewlett-Packard, Life Scan, Lockheed, Oracle, and PG&E as well the NASA Ames Research Center, Santa Clara Valley Water District, and the city of San Jose) have committed to a goal of cutting Santa Clara County's CO2 emissions to 20% below 1990 levels by 2010.

## *EPA Issues New MACT Rules*

EPA announced its final four Maximum Achievable Control Technology (MACT) standards for hazardous air pollutants (HAP) on February 26th.

The Boiler MACT will apply to boilers and process heaters are used at facilities such as refineries, chemical and manufacturing plants, and paper mills and may stand alone to provide heat for shopping malls and university heating systems. Boilers burn coal and other substances to produce steam that is then used to produce electricity or provide heat. Process heaters heat raw or intermediate materials during an industrial process. The boiler MACT rule will reduce emissions of SO2, PM, hydrogen chloride, manganese, lead, arsenic and mercury.

The plywood MACT will facilities that manufacture plywood and veneer, particleboard, medium density fiberboard, hardboard, fiberboard, and engineered wood products. The final rule will reduce emissions of acetaldehyde, acrolein, formaldehyde, methanol, phenol, propionaldehyde and other volatile organic compounds (VOCs).

The Auto Coatings MACT addresses operations that apply decorative, protective, or functional coatings to new automobile and light-duty truck bodies and body parts. Surface coating operations emit a number of VOCs.

Finally, the stationary reciprocating internal combustion engines (RICE) MACT applies to facilities such as pipeline compressor stations, chemical and manufacturing plants, and power plants. The final rule will reduce emissions of some formaldehyde, toluene, benzene, acetaldehyde, NOx and PM.

***Commentary:*** Section 112 of the CAA requires EPA to establish NESHAP to control emissions of HAP from both new and existing major sources. MACT serves as the minimum control level of "floor" that all major sources must achieve. It represents the level of control that is at least as stringent as that already achieved by the better controlled and lower emitting sources in each source category or subcategory. For new sources, the MACT standards cannot be less stringent than the emission control that is achieved in practice by the best-controlled similar source. The MACT standards for existing sources can be less stringent than standards for new sources, but they cannot be less stringent than the average emission limitation achieved by the best performing 12% of existing sources in the category or subcategory (or the best performing five sources for categories or subcategories with fewer than 30 sources). In developing MACT, EPA may establish standards more stringent than the floor based on the consideration of cost of achieving the emissions reductions, any non-air quality health and environmental impacts, and energy requirements. EPA has now issued 96 MACT standards for 160 categories of industrial sources.

## *EPA Clarifies Venting Rule for CFC Substitutes*

Section 608(c)(2) of the CAA prohibits the knowing venting, release, or disposal of any substitute for chlorofluorocarbon (CFC) and hydrochlorofluorocarbon (HCFC) refrigerants by any person maintaining, servicing, repairing, or disposing of appliances such as air-conditioning and refrigeration equipment. This prohibition applies unless EPA determines that such venting, releasing, or disposing does not pose a threat to the environment.

To accommodate the proliferation of substitute refrigerants that have been introduced into the marketplace such as hydrofluorocarbon (HFCs) and perfluorocarbon (PFC) refrigerants, EPA issued a final rule that clarifies that the Section 608(c) venting prohibition applies to all refrigerants consisting of a class I or class II ozone-depleting substance (ODS)(69 FR 11945, March 12, 2004). The rule does not apply to de minimis releases of ODS that are associated with good faith attempts to recapture and recycle the substances. The rule also exempts certain substitute refrigerants from the venting prohibition that EPA has determined does not pose a threat to the environment when they are released. The rule does not regulate the use or sale of substitute refrigerants such as HFC and PFC refrigerants. EPA also declined to will not address leak repair requirements for appliances containing substitutes for ODS refrigerants or certification requirements for refrigerant recovery or recycling equipment intended for use with substitute refrigerants.

***Commentary***: EPA also clarified the scope of the definition of “appliance”. The term includes household refrigerators and freezers (which may be used outside the home), other refrigeration appliances, residential and light commercial air-conditioning, motor vehicle air conditioners (MVACs), comfort cooling in vehicles not covered under section 609 (such as buses using R-22), electrical transformers, secondary refrigeration loops, and industrial process refrigeration equipment.

Many refrigeration and air-conditioning systems operate by cooling an intermediate fluid, which is then circulated to the things or people to be cooled. This intermediate fluid (and the structure for transporting it) is referred to as a secondary loop. Secondary loops are commonly used in comfort cooling chillers, industrial process refrigeration equipment, and some specialty and commercial refrigeration systems. EPA indicated that definition of “appliance" will also apply to refrigerant loops that are primary or involve heat transfer with a change of state such as cascade systems, electric transformers, or any secondary loop containing a regulated refrigerant. However, secondary loops that do not use regulated refrigerants such as water, brine, and glycol solutions will not be considered to be part of an ``appliance”

EPA also amended the definition of ``technician'' to include any person who performs maintenance, service, or repair that could be reasonably expected to release refrigerants from appliances into the atmosphere. A technician includes but is not limited to installers, contractor employees, in-house service personnel, and in some cases owners and/or operators. A maintenance, service, repair, or disposal activity will be considered to reasonably be expected to release refrigerants if the activity is reasonably expected to violate the integrity of the refrigerant circuit. Activities reasonably expected to violate the integrity of the refrigerant circuit include, but are not limited to, activities such as: Pressure checks by attaching and detaching gauges to and from the appliance, attaching or detaching hoses, or adding refrigerant to and removing refrigerant from the appliance. Activities such as painting the appliance, rewiring an external electrical circuit, replacing insulation on a length of pipe, or tightening nuts and bolts on the appliance are not reasonably expected to violate the integrity of the refrigerant circuit.

HFC refrigerants (either pure or in blends) have been approved for use in almost every major air-conditioning and refrigeration end-use, including household refrigerators, motor vehicle air conditioners, retail food refrigeration, comfort cooling chillers, industrial process refrigeration, and refrigerated transport. HFC-134a in particular has claimed a large share of the market for non-ozone-depleting substitutes. Because HFCs and PFCs have been identified as GHGs, EPA concluded that HFC and PFC refrigerants have adverse environmental effects. Hence, the statutory venting prohibition remains in effect for these refrigerants, and the knowing venting of HFC and PFC refrigerants during the maintenance, service, repair and disposal of appliances remains illegal.

Because releases of ammonia and chlorine refrigerants from their currently approved air-conditioning and refrigeration applications are adequately addressed by other authorities such as under EPCRA and the accidental release program of section 112(r) of the CAA, EPA is making the determination that the release of ammonia

and chlorine refrigerants during the service, maintenance, repair, and disposal of appliances does not pose a threat to the environment under section 608(c)(2).

Similarly, EPA determined the releases of propane, ethane, propylene, and butane, which are used as refrigerants in specialized industrial applications such as oil refineries and chemical plants does not pose a threat to the environment since releases of hydrocarbons from industrial process refrigeration systems is adequately addressed by other authorities. This determination only applies to the end-use sector for which hydrocarbon refrigerant substitutes are approved (industrial process refrigeration) and the exemption from the venting prohibition does not apply for hydrocarbon substitutes in non-approved applications (e.g., comfort cooling or motor vehicle air-conditioning).

EPA had previously approved the use of CO2 as a replacement for certain ODS refrigerants in very low temperature and industrial process refrigeration applications and non-mechanical heat transfer applications. The agency also EPA has approved nitrogen expansion as an alternative for many CFC and HCFC refrigerants used in vapor compression systems. EPA determined that the release of CO2 refrigerant, elemental nitrogen, or water during the maintenance, service, repair, and disposal of appliances does not pose a threat to the environment under section 608, and therefore their uses are exempt from the venting prohibition. This finding only applies to the use of CO2 in very low temperature and industrial process refrigeration applications.

The Doubletree Hotel in Portland, Maine recently agreed to pay a $39,600 fine for allowing ODS to vent from two air conditioning units.

# WATER POLLUTION/ENDANGERED SPECIES

### *Report Finds 60% of Dischargers Exceed CWA Permit Limits*

A study by the U.S. Public Interest Research Group (PIRG) has concluded that 60% of industrial and municipal facilities issued National Pollution Discharge Elimination System (NPDES) permits under the Clean Water Act (CWA) violated their wastewater discharge permits at least once between January 2002 and June 2003. The average violation was six times the permit limits. 436 major facilities reported exceedances at least 10 of the 18 monthly reporting periods covered by the study while 35 have excessive discharges for every reporting period. The 10 jurisdictions with the highest percentage of violators were Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire, Nevada, North Carolina, Ohio, Rhode Island, and West Virginia. The 10 states with the highest average permit exceedences for the reporting period covered by the PIRG study were Arizona, Connecticut, Hawaii, Iowa, Michigan, Nevada, North Carolina, Rhode Island, Texas and West Virginia.

Meanwhile, EPA has launched a multi-year review of the categorical discharge limitations for 9 industries with relatively high estimates of potential hazard or risk based on screening information collected by the EPA Regional Offices and stakeholders. In 2004, the agency will perform detailed investigation of the Effluent Guidelines for the Organic Chemicals, Plastics, and Synthetic Fibers sectors as well as the Petroleum Refining sector in 2004. The study will include analysis of technology innovation and process changes in these industrial categories, and address data gaps and uncertainties affecting EPA's estimates of the potential risks and hazards posed by the two industrial categories. EPA will initiate formal rulemaking procedures to revise their existing effluent guidelines. The additional categories that will be review in future years are fertilizer manufacturing, ore mining and dressing, phosphate manufacturing, pulp and paper, steam electric power generating, textile mills and timber products processing.

***Commentary:*** Facilities that discharge their wastewater into sewer systems instead of surface waters are regulated as indirect discharges under the CWA. They may be

subject to pre-treatment standards imposed either under the CWA or by the local sewer authority. During due diligence, it is important to determine if the facility discharge is complying with local discharge requirements since the cost of constructing pre-treatment system can be significant. Discharges to sewer systems can also be important for shopping centers and commercial buildings with medical offices, dry cleaners, photo developers and other businesses that may discharge small quantities of hazardous substances to the sewer system.

It is also important to determine if the local sewer treatment plant is subject to any enforcement actions. If the local wastewater treatment plant in not in compliance with its NPDES permit or has been cited for not having an effective industrial pretreatment program. The local authority will likely take actions against its largest dischargers to reduce the impact of their effluent on plant operation.

### *No Effluent Guideline for Stormwater Construction Permits*

EPA decided not to promulgate a new national effluent guideline for the Phase II stormwater permits issued for construction sites of one to five acres. The agency proposed to adopt national standards in March 2002 that would have affected approximately 200,000 construction sites annually. The technical requirments would have applird to sediment basins of a particular size while the existing Phase II requirements allow states to set technical requirements to meet regional differences in rainfall, seasonal weather patterns, soil types, slopes, and other considerations.

EPA concluded that all 50 states already impose requirements that are equivalent to or even more stringent than those EPA had proposed. For example, EPA found that all states require requiring stormwater pollution prevention plans (SPPP), require site managers to implement a combination of erosion and sediment controls to prevent soil erosion and to manage construction site runoff, mandate regular inspections by construction site operators, and require stabilization of soils after construction activities have temporarily or permanently ceased. In addition, EPA found that over 5000 municipalities are also developing or upgrading their programs to control stormwater runoff from construction sites. As a result, EPA determined that the proposed national standard would have resulted in very high costs with only minor reductions in pollution discharges.

***Commentary:*** A California state court denied a challenge to a stormwater permit issued to the City of Los Angeles in 2001. The County of Los Angeles along with a coalition of cities and building groups sought to invalidate the permit that required use of drain filters, silt removal basins, inspections and other measures that were necessary to prevent urban runoff from causing or contributing to violations of water quality standards. The permit was one of the first in California to require actual reductions in pollution. A similar permit in San Diego was upheld last year and is now being appealed by the Building Industry Association

### *Stormwater Enforcement Actions*

EPA ordered the Seven-Up/RC Bottling Company Inc. of San Francisco to obtain a stormwater permit. The Sacramento facility maintains a truck fleet and EPA found that waste and various materials such as fuel and battery acid are stored outside where they come into contact with stormwater. Contaminated stormwater from the facility drains into a local creek. In addition, the wastewater discharged by the plant into the sewer system was excessively acidic. The permit will require Seven-Up to prepare a SPPP, conduct specific pollution management practices and closely monitor runoff from its operations..

A Los Angeles property developer has agreed to pay $124,866.50 to resolve stormwater runoff violations near Saugus, Calif. EPA alleged that Shapell Monteverde Partnership failed to implement erosion and sediment control devices at two sites it is developing on Plum Canyon Road in unincorporated northern Los Angeles County. In 2002 and 2003 the Los Angeles Regional Water Quality Control Board also inspected these sites and issued four violation notices.

EPA has filed complaints against three New Hampshire-based companies for alleged violations of stormwater regulations at a residential development in Methuen, Mass. The complaints against Methuen Group Realty Trust, Ashwood Development Companies and Park Construction

Companies seek up to $137,500 in fines for failing to obtain Stormwater Construction General Permit (CGP) and failing to implement a SPPP for the 75-acre residential development. The Town of Methuen Conservation Commission issued an enforcement order to the developers in 2001 for similar violations.

EPA and the Kentucky Department of Environmental Protection (KDEP) coordinated enforcement actions at construction sites larger than five acres located in the Frankfort and Florence areas. EPA issued administrative orders requiring contractors at 11 sites to submit Notice of Intent (NOI) and implement best management practices (BMPs). Penalties for these violations will be assessed at a later date.

The Massachusetts DEP issued an administrative consent order to the Borough of Naugatuck for stormwater discharge violations at its public works garage and salt storage facility. The order requires Naugatuck to cease the discharge of vehicle service wastewaters to a local creek and submit a SPPP. In addition, Naugateck perform stream improvements at two streams as part of a $35,000 SEP.

***Commentary:*** Contractors who fail to obtain a CGP or fail to implement and certify a SPPP are not only subject to fines but may also be ordered to halt construction activities until the violations are corrected.

## *Northwest Retailers Must Issue Endangered Species Notices*

Pesticide retailers in California, Oregon and Washington will have to comply with notification requirements as a result of a ruling by the Western District of Washington in *Washington Toxics Coalition, et al. vs. EPA.* The court directed EPA to develop a point of sale notification for pesticide products containing seven active ingredients that are sold in all urbanized areas in California, Oregon and Washington with populations of at least 50,000 people within a federally listed salmon "salmon evolutionarily significant units"(ESU). Retailers of lawn and garden pesticides in these urban areas where salmon supporting waters' pass are required to make the point of sale notification whenever pesticide products containing these active ingredients are sold.

EPA was also directed to provide copies of the point-of-sale notifications to state pesticide agencies, state fish agencies, and land grant university extension coordinators in the urban areas to provide this information to Certified Applicators so they may apply pesticides in urban areas. EPA published the notifications on March 24th (69 FR 13836).

The court also directed EPA to determine consult with National Marine Fisheries Service (NMFS) to evaluate the effects of pesticides containing any of 55 active ingredients on 26 federally listed endangered and threatened Pacific salmon and steelhead ESUs. The order also sets aside EPA's authorization to apply 38 pesticides within 20 yards of salmon supporting waters for ground applications and within 100 yards of salmon supporting waters for aerial applications. In essence, the ruling effectively establishes a buffer zone around those waters. The court's order will remain in effect until the determinations are completed.

Pesticide registrants, growers, and other pesticide users were required to provide notifications to retailers on or before April 5th. The agency indicated that pesticide registrants could include the notice on products labels without first having to comply with the labeling procedures under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). EPA will not take misbranding actions for any labeling changes made to implement the point of sale notification materials or for any notices that are attached to or accompany any of the subject pesticide products. However, any labeling changes that go beyond the required point of sale notification developed by EPA will be subject to FIFRA labeling requirements and misbranding provisions

***Commentary:*** Under the Endangered Species Act (ESA), EPA may not approve pesticide registrations that are likely to jeopardize the continued existence of threatened or endangered species, or that will adversely modify habitat critical to those survival of the species. This case is another illustration of how laws such as FIFRA and ESA are being extended beyond their traditional reach and are now affecting businesses such as retailers that are usually viewed as having minimal impacts to the environment.

### *Wetland Enforcement Actions*

EPA ordered the Taunton Development Corporation (TDC) a development company in Taunton to restore 6.5 acres of wetlands it filled without a permit during late 2002 and early 2003 at an industrial park. TDC must also obtain a wetlands permit for another 2.5 acres of wetlands that were filled for access roads or provide a restoration plan. The wetlands are part of a 244-acre parcel being developed by TDC.

The owner of Calabrese Farms was ordered to remove fill and restore 5.5 acres of former wetlands. According to EPA Thomas Calabrese filled the wetlands in the late 1980s to create more farmland after he acquired the 18.7-acre farm from his father. The investigation began after the Natural Resources Conservation Service (NRCS) visited the property in connection with a conservation plan. The NRCS determined that Calabrese cleared wetlands vegetation and filled or drained wetlands through pipes and ditches that diverted water away from the wetlands.

Tuckahoe Turf Farm in Maine agreed to pay a $27,500 penalty, restore 54.5 acres of destroyed wetlands and create conservation easements valued at $150,000 to permanently protect habitat for the three species of endangered turtles. As part of the agreement, Tuckahoe will disable part of the drainage system, restore the streams, re-grade the ground surface, replant and monitor the site for five years.

The Norfolk Conservation Commission ordered a developer to halt all work on three residential lots that are part of the Canterbury Estates development. The commission found several violations of the conditions in its development approval, including improperly locating a hay-bale barrier that was to prevent soil erosion and to delineate the wetlands buffer zone.

The Norfolk Conservation Commission also reached an agreement with the company proposing to build a 50-unit senior housing development. Hawthorne Partners has agreed to spend $100,000 to restore three acres of damaged wetlands on the site and to pay a fine of up to $50,000.

A New Hampshire family was ordered to restore three acres of wetlands and the state was awarded a $500,000 attachment to ensure that funds were available to pay for long-term stabilization and complete restoration of the wetlands. Beginning in 1991, members of the Vrusho family filled in wetlands to create a parking lot, and allowed horses and llamas to eat vegetation at the top of a steep slope so that water laden with sediment and E. coli ran into Northwood Lake when it rained. The state is also seeking civil penalties of up to $10,000 a day for each violation of the state's Wetlands Act and Water Pollution Act.

***Commentary:*** The United States Supreme Court declined to hear three wetlands cases involving whether wetlands adjacent to ditches were regulated as jurisdictional wetlands. In each case, the appeals court found that the defendants had illegally filled jurisdictional wetlands. The cases are *Newdunn v. U.S. Army Corps of Engineers,* (No. 03-637), *Deaton v. U.S.* (No. 03-701) and *Rapanos vs. U.S.* (No. 03-929)

### *Aerial Photographs Used for Wetlands Enforcement*

The Massachusetts DEP has begun using aerial surveillance program to determine if property owners are illegally filling in wetlands. Aerial mapping of the eastern third of the state has revealed that 700 to 800 acres of wetland in 3,000 locations were filled from 1991 to 2001 and that at least half of these sites were illegally filled.

To tighten enforcement, state environmental and transportation officials jointly funded overflights of the state in April 2001. The $500,000 project produced detailed infrared images. Agency analysts then used a computer program to compare the 2001 images against previous aerial photos from as early as 1990. The agency hopes to have the entire state mapped by the end of 2004.

The program has already has substantial benefits. The DEP collected $280,000 from a car parts dealer and a concrete company. Both companies have agreed to restore the wetlands and perform SEPs. In both cases, local conservation officials did not know about the violations until the state analyzed aerial photos because the wetlands could not be seen from roads. DEP officials said that many more alleged violations are under

investigation, including several larger wetland cases that have been referred to the attorney general's office for enforcement.

### *USDA Announces Wetlands Grants*

USDA Farm Service Agency (FSA) has announced a Bottomland (hardwood) Timber Establishment on Wetlands initiative under its Conservation Reserve Program (CRP) a voluntary program that helps agricultural producers safeguard environmentally sensitive land. The initiative will allow producers to enroll in the CRP for lands suitable for growing bottomland hardwood trees or adapted shrubs that will provide multipurpose forest and wildlife benefits.

The purpose of the initiative is to establish a stand of trees that will control erosion, reduce pollution, restore and enhance wetlands functions, promote carbon sequestration and restore or connect wildlife habitat. Participants in the initiative will receive rental payments and cost-share assistance from FSA for 14 to 15 years. Producers can enroll in CRP for the Bottomland Timber Establishment on Wetlands initiative anytime. Because this is not a competitive program, the FSA will automatically accept offers to participate in the program provided the land and producer meet certain eligibility requirements.

To be eligible to offer land for enrollment for this CRP initiative, the owner must either have owned the land for 12 months prior to filing for enrollment, acquired the land by will or succession as a result of death, or acquired the land under circumstances other than for placement in CRP. Ownership eligibility requirements are satisfied if there is any combination of continuously leasing and owning by the same "person" during the 12-month period before filing for enrollment.

An operator is eligible to offer land for enrollment in CRP when the person operated the land for 12 months before filing for enrollment and provides satisfactory evidence that control of the land will continue uninterrupted for the contract period. Operator eligibility requirements shall be satisfied if there is any combination of leasing and owning by the same "person" during the 12-month period before filing for enrollment. To demonstrate that it controls the land, the operator may include a statement signed by the owner, written lease for the appropriate time period, or the owner's signature on the CRP contract.

***Commentary:*** Federal conservation programs like the CRP may be more effective in preserving wetlands than the CWA program. For example, the FWS recently awarded nearly $17 million in grants to 10 states to conserve, restore and protect coastal wetlands under its National Coastal Wetlands Conservation Grant Program. The grants will provide funding for 20 projects and will be supplemented by more than $42 million from state and private partners. To date, the FWS has awarded more than $139 million in grants to 25 states and one U.S. territory under the National Coastal Wetlands Conservation Grant Program that have protected and/or restored more than 19,000 acres. About 167,000 acres will have been protected or restored since the wetlands grant program began in 1990.

The Department of Interior also announced $25.8 million under its Landowner Incentive Program. This program provides cost-share grants to help private landowners conserve and restore the habitat of endangered species and other at risk plants and animals. The goal of this ongoing state program is to help avoid the listing of at-risk species and assist in the recovery of listed species. Landowners benefit through the continued use of their lands. Landowners can remove exotic plants, adapt grazing practices to enhance riparian habitat, provide in-stream or stream bank structural improvements to benefit aquatic species, close roads to protect habitat, and encourage conservation easements.

The Migratory Bird Conservation Commission also approved $15.8 million under the North American Wetlands Conservation Act (NAWCA) for 17 habitat conservation projects for migratory birds. The NAWCA grants will protect or restore more than 270,000 acres of wetlands and associated upland habitats in 13 states - Washington, Oregon, California, Montana, Nebraska, South Dakota, Wisconsin, Illinois, Tennessee, Texas, Louisiana, New Jersey, and North Carolina. The Commission also approved the acquisition of more than 370 acres of migratory bird habitat to be added to the National Wildlife Refuge System.

Since the NAWCA program began in 1990, more than $340 million in federal funds has been matched with $857 million in partner funds to establish long-term protection of wetlands and associated uplands needed by waterfowl and other migratory birds in the United States.

# HAZARDOUS WASTES/USTS

### *USTs Leak Into Abandoned Mine*

When a BP gas station in Monroeville, Pa determined that one of its USTs failed a tightness test, the Allegheny County Fire Marshall ordered the remaining tanks to be removed because mine subsidence in the area. During its site assessment, the company not only detected gasoline fumes coming from a parking lot drain on an adjacent property behind the station but also found that voids created by the subsidence allowed the gasoline to migrate 75 feet beneath the station into an abandoned mine. BP has installed a vapor extraction and treatment system to draw the gasoline fumes and the parking lot drains.

***Commentary:*** This case illustrates the importance of learning about the geology and hydrology of a site during due diligence investigations. Many "commodity-style" Phase I ESAs simply review regional groundwater and geology maps and simply infer groundwater flow for a particular site from the topography. However, when properties are located in areas where there may be fractured bedrock or in urban areas, it is important to determine if site-specific factors such as utility lines and underground piping can create preferential pathways for contaminants that may result in different groundwater flow gradients.

### *UST Owner Denied Reimbursement from State UST Fund*

The purchaser of a gasoline station was denied reimbursement from the Mississippi Groundwater Protection Trust Fund for costs incurred to replace USTs. In *Mississippi Commission on Environmental Quality v. Desai* (2004 Miss. App. LEXIS 212, March 16, 2004), the purchaser acquired a service station in April 1993 with five USTs. After filing the change in ownership form, the owner received several requests from the Mississippi Department of Environmental Quality (MDEQ) between 1994-1997, requesting information on the kind of leak detection method used for the USTs. After discovering petroleum leaking through cracks in a concrete pad, the owner notified the MDEQ of a release, removed the tanks, conducted a corrective action and was notified by the MDEQ that the contamination had been sufficiently remediated.

When the owner sought reimbursement of its costs, the MDEQ denied the request because the owner had failed to conduct leak detection and did not have adequate leak detection for the piping. After an evidentiary hearing, the Mississippi Commission on Environmental Quality (Commission) determined that the owner had not substantially complied with the UST requirements. The owner appealed, arguing that he was in substantial compliance because he had submitted the required UST notifications and fees, and had installed the required leak detection equipment. However, the Commission determined that the owner had not substantially complied with the UST requirement because he had failed to conduct leak detection monitoring four years. The Commission also found that his failure to respond to the MDEQ letters and evidence that the monitoring cap was filled with debris was evidence that he had failed in good faith to comply with the UST requirements. The Court of Appeals of Mississippi held that the leak detection requirements were core requirements of the UST program and that the Commission's decision was reasonable in light of the evidence.

***Commentary:*** Purchasers of property with USTs should confirm if the tanks comply with the state or local UST programs especially if the purchaser will be assuming responsibility for corrective action and intends to seek reimbursement from a state UST trust fund.

### *MTBE Shuts Down Vermont Donut Store*

The Rutland Dunkin' Donuts was closed after high levels of MTBE were detected in the store's water. The Vermont DEP found the water used to make the java

chain's signature coffee had 2,000 parts per billion of MTBE, 30 times the state drinking water standard. The Dunkin' Donuts is located inside a convenience store that also serves a gas station. The DEP decided to test the water after learning that an onsite well located underneath the parking lot had never been tested.

***Commentary:*** Purchasers and lenders of commercial properties should verify that on-site wells that are used for drinking water or in the production process have been properly tested. If not, the water quality should be verified particularly at retail operations that serve the public and where there are environmentally sensitive business such as service stations and dry cleaners.

### *Former UST Owner Fined*

A couple that sold a gasoline station in November 2003, agreed to pay $60,000 and not to own USTs in New Hampshire. Charles and Joan Alward had owned Gus's Country Store since 1986. The Alwards' failed to register their USTs, failed to conduct inventory monitoring and failed to upgrade their tanks to meet the 1998 UST performance standards. After the state Department of Environmental Services notified the couple of the violations, the couple sold their gas station for $350,000. The purchaser installed a new system. Under the settlement, the Alwards' agreed to pay $25,000, with the remaining $35,000 to be suspended for two years, provided the couple does not violate any environmental laws during that period.

***Commentary:*** In many states, owners of USTs systems must actually operate or exercise control over tanks to be liable for any violations or leaks associated with those tanks. In this case, the purchasers removed the sub-standard tanks without operating them and were able to avoid liability for the violations. It is important for purchasers of sites with USTs to understand the regulatory status of the tanks and to develop a plan for non-conforming t prior to taking title to the site and the tanks.

### *MTBE Alternatives Pose Risk to Groundwater*

A study by researchers at Cal/EPA and UCLA has found that alternative fuel additives could be just as detrimental to groundwater as MTBE. The researchers investigated groundwater contamination at 850 locations in the Los Angeles area for MTBE, tertiary-butyl alcohol (TBA), tertiary amyl-methyl ether (TAME), diisopropyl ether (DIPE) and ethyl tertiary-butyl ether (ETBE). As expected, MTBE was the most commonly detected contaminant, found at 82.5% percent of the study sites. However, TBA was detected at 61.1% and the other three oxygenates were all detected at frequencies below 25%.

Combined with the data on plume lengths, the results indicate that TBA contamination is occurring at a scale similar to MTBE. While the alternative compounds were detected at far fewer sites, the study suggested that this was because they were used less frequently and that the alternative oxygenates would pose groundwater contamination threats similar to MTBE if they were used on the same scale.

The study did suggest that ethanol might pose less of a threat to groundwater and drinking water resources. However, the researchers indicated that ethanol has a number of drawbacks. The compound is more expensive, does not offer the same air quality benefits, cannot be mixed with gasoline and transported long distances, and its use could cause a significant increase in the release of the respiratory irritant acetaldehyde.

### *EPA Expands Petroleum Grants*

EPA hopes to issue nearly $23 million in brownfield grants to promote the reuse of petroleum-contaminated. Sites.

Prior to the 2002 CERCLA Amendments, EPA awarded only about $4.8 million to fund the agency's 50 UST fields pilot projects. The agency estimates that half of the nation's brownfield sites might be impacted from petroleum.

The petroleum brownfield grants differ in some respects from the funds awarded for brownfields contaminated with hazardous. For example, the petroleum funds may be used for both assessment and cleanup. Petroleum-contaminated sites eligible for the awards include sites with USTs, aboveground tanks, abandoned tanks, and heating oil tanks

# TOXIC SUBSTANCES

### *EPA To Reevaluate Drinking Water Program*

In the wake of the discovery of high levels of lead in Washington, DC drinking water, EPA is coming under Congressional pressure to re-examine its lead-in- drinking water program. Indeed, EPA officials have told Congress that the agency does not have current information on lead levels from 78% of the nation's public drinking water systems and has no data from as many as 20 states.

In response, Sen. James M. Jeffords (I-Vt.) is proposing legislation that would overhaul the federal Safe Drinking Water Act (SDWA). The proposed legislation would require water utilities to immediately notify all residents with elevated lead levels, provide free filters to those residents and replace all lead service lines on public and private property. The legislation would also increase the frequency of water testing in houses, schools and day-care centers and force manufacturers of plumbing fixtures to eliminate lead from their products.

Thus far, 18 of the 1,435 young children, pregnant women and nursing mothers that have been tested in the DC metropolitan area had elevated blood lead levels. However, many of these individuals live in homes that have lead in the paint or soil. Lead concentrations 60 times the federal action level have also been detected in schools located within the District, Arlington as well as Montgomery and Prince George's counties in Maryland.

***Commentary:*** From 1999 through 2002, EPA announced that it met its goal that 91% of U.S. residents have access to safe tap water. However, the EPA inspector general has concluded that the data the EPA used to make those conclusions were "flawed and incomplete" because states did not report all violations to the federal agency. According to the inspector general, EPA documents show that some agency officials believed in 2002 that only about 81% of the jurisdictions monitored had safe drinking water, meaning that approximately 30 million additional people were exposed to unsafe levels of lead.

High levels of lead have been detected in more than 5,000 homes and schools in the DC metropolitan area. Federal and local officials believe the high lead levels are the result of efforts by the Washington Aqueduct to comply with federal anti-corrosion requirements. The Washington Aqueduct supplies water to the Washington Water and Sewer Authority (WASA), the supplier of drinking water to the District and northern Virginia. In 2000, the Corps, the operator of the Washington Aqueduct, added chloramines to the water to limit corrosion but this apparently caused the lead to leach from lead service pipes.

Tests conducted by WASA 2002 revealed elevated lead levels in more than 50% of test samples. Additional tests in 2003 found that two-thirds of the 6,188 residences tested had levels above the EPA's action level of 15 ppb. However, WASA focused on the 23,000 homes that were believed to be connected by lead public service lines and did not sample the city's other 107,000 service lines because they were thought to be constructed of copper piping. Last month, though, WASA tests found that 9% of the lines that were though to be copper piping were in fact lead lines. Some tests have shown that running the taps for 10 minutes eliminated 95% of the lead. However, some homes still had lead concentrations of 65 ppb.

Under the SDWA, public water suppliers are required to take corrective action if more than 10% of the test samples exceed 15 ppb of lead. If this threshold is exceeded, the water supplied must notify users and take corrective action. Based on the initial 2002 test results, WASA would have been required to take corrective action. However, the agency invalidated some of the results and retested the houses. The new results showed four houses exceeding the federal lead limit, and that WASA was no longer in violation of the SWDA 10% standard.

WASA is considering a proposal to spend at least $350 million to replace the estimated 23,000 lead lines by 2010. However, while WASA would be responsible

for replacing public portions of the water lines, homeowners would have to pay to replace the portions of the drinking water mains on their property. This cost can exceed $2,000 for some homes

The SWDA requires that buildings constructed after 1986 contain lead-free piping. However, the SDWA definition of "lead-free" includes piping that contains less than 8% lead. Studies have found that piping with 5% lead can leach lead into water, especially if the water is particularly corrosive.

Lead piping is not the only source of lead in drinking water. A report by the Environmental Quality Institute at the University of North Carolina at Asheville found that brass curb valves and water meters in the Los Angeles water system discharged enough lead to cause measurable increases in blood lead levels and IQ deficits among Los Angeles school children. The findings helped persuade the city's water system to begin purchasing only no-lead parts. Homes with copper service lines can have water with high lead levels because those homes might have pipes with lead solder or brass fixtures that contain lead.

### *EPA Issues LBP Abatement Notification Rule*

EPA has issued a new rule requiring persons certified to conduct lea-based paint (LBP) abatement actions required to provide EPA with written notice at least five business days before the start of the LBP abatement actions (69 FR 18489, April 8, 2004). The new rule becomes effective on May 10th and is modeled after the asbestos notification rule. If the abatement activity is required because a government agency determines that persons living in target housing or child-occupied facility have elevated blood levels, notice should be provided as soon as possible if the contractor cannot comply with the five business day notification. If the start date changes or the work is cancelled, EPA must be notified at least two days prior to the original start date. Any other changes to information previously submitted to EPA must be provided within 24 hours of the change.

***Commentary:*** EPA fined the U.S. Department of Veterans Affairs Medical Center in Northampton $3,080 for failing to properly inform tenants about potential LBP hazards at nine residences. The VA also agreed to implement a $40,000 to LBP abatement project in the employee housing. The VA said it informed the occupants about the presence of lead paint when they moved in but failed to keep a formal record of the notifications.

Kriegman & Smith, Inc. of Roseland, New Jersey agreed to pay $4,290 to resolve claims that it had had not consistently provided LBP disclosure statements and had failed to maintain required records for a New Brunswick, New Jersey apartment complex. The company also reviewed its disclosure practices at approximately 1,800 apartments in 40 properties throughout New Jersey and Pennsylvania.

Enforcement actions for failing to comply with the LBP disclosure rules have been brought against Fairview Gardens LLC for property in Kingston, New York ($29,700 fine); Treetop Associates and Brentwood Towers Apartments in Vineland, New Jersey ($22,880); 99 Alpine Way Associates in Dewitt, New York ($13,750) and Sycamore Associates, LLC in New Windsor, New York ($10,560)

### *Children's Trust Agree to Remediate Dry Cleaner Contamination*

Worcester-based David Richards Children's Trust has agreed to pay $20,000 to remediate contamination from dry cleaner that leased the property from the trust in the early 1990s.The site came to the attention of the state DEP when a Gulf gas station located downgradient to the property detected the solvents in groundwater samples collected during a UST removal. After the contaminants were traced back to the former dry cleaner, the DEP entered into a consent decree with the trust, which is required to complete the cleanup by September 2006.

The owner of the former New Franklin Laundry and its landlord in Bangor, Maine are working with EPA and the state DEP to address perchloroethylene (PCE) contamination emanating from the laundry that closed in 2000. The laundry originally began operating in the late 1800s and began dry cleaning operations in the 1950s. Residents in the area are concerned that PCE vapors are migrating into their homes.

It is believed that old streambed that runs under the former laundry building and nearby houses may have served as a migration pathway for PCE contamination. Samples below the laundry have detected PCE at levels as high as 298.6 ppm in the soils and 34.7 ppb in groundwater. Indoor air samples have revealed PCE concentrations in excess of 600 ppm.

Splendid Cleaners and its related companies were fined $37, 000 by an EPA Administrative Law Judge for failing to properly manage its hazardous waste violations the primary dry-cleaning operation at 1287 First Avenue, and nine drop-off locations throughout Manhattan. EPA inspectors found that Splendid had not properly labeled, stored, inspected or otherwise managed the waste. In addition, they did not meet emergency planning requirements.

Approximately 400 dry cleaners, photo processors and printers doing business in Massachusetts have been targeted for enforcement action by the state DEP for failing to comply with the certification requirements of DEP's Environmental Results Program (ERP). 37 small businesses in 29 communities were targeted for significant enforcement actions.

***Commentary:*** Drycleaners are required to safely manage their hazardous waste, keep records and follow manufacturers' instructions for their cleaning equipment. Because the majority of dry cleaners are small businesses (under 100 employees) and may require extra guidance, EPA developed and conducts a compliance assistance program. The Agency has held workshops, handed out multi-lingual plain-language literature to dry cleaner operators and offered temporary relief for all owners who requested an assistance visit. Although many site visits have occurred, hundreds more businesses have not taken advantage of the free environmental assistance, which also includes the possibility of penalty waivers

## *Mercury Cleanups Performed at Residential Property*

The Pennsylvania DEP recently completed cleanup activities at a residential property on Sycamore Street in Newtown Township, Bucks County. The homeowner had stored thermometers and other equipment in a wooden shed on his property. DEP's Emergency Response Team responded removed approximately 70 pounds of mercury and mercury-containing devices from the property in October 2003. Samples taken by DEP confirmed elevated levels of mercury vapor inside the shed and in the soil. DEP removed an additional 40 pounds of mercury in December 2003.

***Commentary:*** A new EPA study indicates that 630,000 newborns had unsafe levels of mercury in their blood in 1999-2000, nearly double the original estimate of 320,000.The study found that one out of six pregnant women had mercury levels in their blood of at least 3.5 ppb, sufficient for fetus blood levels to surpass EPA's safety threshold of 5.8 ppb. The study also showed that mercury levels in a fetus's umbilical cord blood could be 70% higher than those in the mother's blood. EPA and the Food and Drug Administration recently issued advisories cautioning pregnant women not to eat tuna and other large predatory fish and shellfish whose tissues absorb elevated levels of mercury.

## *Historic Use of Pesticide Requiring Rural Areas to Upgrade Drinking Water Systems*

30 towns and schools in North Dakota will have to upgrade municipal drinking water systems or install water treatment in homes to comply with the new arsenic drinking water standards that go into effect in 2006. 4,000 other drinking water systems serving 11 million people face the same problem.

The high arsenic levels in North Dakota stem from arsenic bait that was given to farmers in the 1930s to fight a plague of grasshoppers in the southeastern part of the state. EPA has already identified a 570-square-mile area in parts of Ransom, Richland and Sargent counties as a federal superfund site and connected hundreds of residents to a rural water system for a small fee, improved municipal treatment plants and donated treatment filters to homes. However, other areas of the state lack the resources to pay for water system upgrades. For example, the town of Devils Lake with a municipal water system serving 7,500 people estimates that the cost of finding and hooking up a new aquifer to the municipal

system would be $25 million. An EPA grant would only provide the town with $1 million.

### *California Issues Perchlorate Standard*

California become the first state to issue a health standard for perchlorate, the rocket fuel ingredient that has been found in the water supply of 28 states. The state announced a "public health goal" of 6 ppb. The California Department of Health Services will now formulate a regulatory standard for perchlorate.

The California health goal less stringent than the than the 1 ppb goals that EPA and Massachusetts have set while they develop their own. The National Academy of Sciences is reviewing EPA's draft report on perchlorate.

***Commentary:*** Perchlorate is a thyroid gland inhibitor. Studies suggest that changes in the levels of thyroid hormones could result in tumors. In fetuses and newborns, the absence of these hormones could harm brain development and lead to mental retardation, attention-deficit syndrome, and impaired vision, hearing, and speech.

# SUPERFUND/BROWNFIELDS

### *Ready for Reuse Determinations*

EPA and the Arkansas Department of environmental Quality (DEQ) issued the first "ready for reuse" (RfR) determination to a U.S. Army installation to Fort Chaffee, Arkansas. The base was remediated under the Department of Defense Base Realignment and Closure Program. Approximately 7,000 acres of land out of a total of 71,000 acres were declared excess property by the Department of Defense and transferred to the Fort Chaffee Redevelopment Authority. The RfR determination verifies that the parcels have been remediated for their current and anticipated use as commercial/industrial and residential properties.

EPA and the Texas Commission on Environmental Quality (TCEQ) issued an RfR determination for the former Fire Training Area No. 3 (FT003) of the Sheppard Air Force Base in Wichita Falls, Texas. FT003 was used for fire protection training exercises from approximately 1957 to 1992. Waste fuels and other materials were burned at the site during the exercises. The RfR confirms that the site has been investigated and remediated for its use a new fire fighter training facility.

An RfR determination was issued for Approved Oil Services site in Commerce City, Colorado. Approved Oil Services operated a used oil recycling and transporting business between 1976 and 1998. The Colorado Department of Public Health and Environment (CDPHE) ordered the company to remediate the site but the cleanup was not completed when the company went out of business in 1998. A group of companies and public agencies that sent used oil to the company organized approached EPA with an offer to clean up the site voluntarily in exchange for a commitment from the agencies that they would not issue any cleanup orders or place the site on the NPL. The Approved Oil Services Stakeholders Steering Committee collected about $750,000 to fund the cleanup and the RfR confirms that it may be used for unrestricted redevelopment.

***Commentary:*** On February 18, 2004, EPA issued its new "*Guidance for Preparing Superfund Ready for Reuse Determinations.*" The guidance states that an RfR determination is intended to provide potential users of Superfund sites with confirmation that all or a portion of a real estate property at a site can support specified types of uses and remain protective of human health and the environment. Without an The determinations are intended to complement other cleanup decisions such as "construction complete" and deletions from the National Priorities List, but do not have any binding legal effect. The guidance indicates that RfR determinations may be used for NPL sites, "non-time critical removal action sites," and "Superfund Alternative sites. Moreover, EPA will not active monitoring site conditions to determine if ready for reuse determinations remain accurate. However, the agency will evaluate the RfR determinations as part of the five-year reviews that are conducted at superfund sites.

EPA said that potential users often have to seek information about a site's environmental condition from many different sources, and the information that was available was often expressed in terms

difficult for the marketplace to interpret. As a result, EPA believes that many sites able to accommodate certain types of uses were needlessly difficult to market. The RfR is intended to be a step beyond a no further action (NFA) letter.

### *EPA Issues CPO Guidance*

EPA issued its final policy interpreting the scope of the new defenses that were added by the 2002 CERCLA Amendments. The "*Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners*" provides guidance on the liability protection provided under section 107(q) of CERCLA to landowners who own property that is or may be contaminated by hazardous substances but is not the original source of the contamination. The Contiguous Property Owner (CPO) defense is available to contiguous property owners as well as prospective purchasers and innocent landowners or those who acquire land without knowledge of existing contamination.

To satisfy the CPO defense, a contiguous property owner must satisfy many of the same statutory criteria that apply to other landowners that were discussed in EPA's so-called "Common Elements Guidance" that was issued in March 2003. These elements include demonstrating that it did not cause or contribute to the release of hazardous substances, non-affiliation with a liable party in any way, taking reasonable steps to stop any continuing release of hazardous substances, complying with land use controls, providing access to those authorized to conduct response actions and maintain institutional controls, and complying with CERCLA information requests or subpoenas.

The CPO guidance discusses other issues that are specific to this particular defense. The guidance reaffirms that that like the innocent purchaser defense, a person seeking to assert the CPO defense must conduct an appropriate inquiry and must acquire a site without knowledge or reason to know it is contaminated. However, unlike the innocent purchaser, a CPO may be eligible to receive an assurance letter and contribution from EPA. In addition, the CPO is not subject to a potential windfall lien like the BFPP.

While the CPO guidance states that the contamination on the contiguous landowner's site must come from a release or threatened release from a different property, it does recognize that there may be multiple and discrete releases on a site, and that some originate on the landowner's property while others may have migrated onto the property. In such cases, the CPO guidance indicates that EPA may exercise its enforcement discretion and not pursue the landowner with respect to the releases that migrated from the other site.

In the CPO guidance attempts to clarify what land is eligible for the defense. Complicating the task is the fact that the statute refers to property that is contiguous or "otherwise similarly situated with respect to" a contaminated site. EPA indicated that the term "contiguous" means adjoining property. EPA acknowledged that the "otherwise similarly situated " phrase was not clearly defined. As a result, the agency said it would follow a similar approach articulated in its 1995 "Contaminated Aquifers Policy". In the policy, EPA said it would not bring enforcement actions against owners of sites that have been impacted by contaminated groundwater migrating from a neighboring source, even if that source is some distance away. The CPO guidance provides that EPA will analyze a number of case-specific facts, including whether the landowner's site has been impacted by a release from a contaminated property at a distance in the same or a similar way that it would have been impacted by a release from a contaminated property adjoining the landowner's property.

The guidance discusses the relationship between the CPO guidance and EPA's Contaminated Aquifer and Residential Homeowner Policies. The CPO guidance indicates that CPO is broader that residential policy since it applies to any property (e.g., industrial) and is broader than the aquifer policy since it applies to any contamination. However, the older policies apply to persons who purchase with knowledge while CPO cannot know or have no reason to know of contamination. The CPO guidance also indicated that EPA might exercise its discretion to use the older policies where they are broader (apply to more types of landowners).

The CPO guidance indicated that

EPA regional offices can use their enforcement discretion through the use a de minimis landowner settlements under 122(g)(1)(B), comfort letters and assurance letters where they may serve to facilitate cleanup of brownfield. However, the CPO guidance stated that the region offices should use their discretion to issue assurance letters sparingly.

### *EPA Issues Ecological Soil Screening Guidance*

EPA recently issued its "*Guidance for Developing Ecological Soil Screening Levels"* (Eco-SSLs) that helps establish contaminant concentration levels that are protective of ecological receptors (e.g., mammals, birds, or plants) that might have contact with the soil. EPA hopes peer-reviewed Eco-SSLs will streamline the ecological risk assessment (ERA) process at hazardous waste sites by reducing redundancy, increasing consistency, and decreasing potential oversight..

The guidance covers 24 contaminants comprised of 17 metals (including arsenic, chromium, and lead) and seven organics (including polycyclic aromatic hydrocarbons). The Eco-SSLs can be used to make the screening-level risk calculation for a Superfund ERA. If these contaminants are present in soil at concentrations above the Eco-SSL, the soil contaminants may require further evaluation in the baseline ERA. However, The Eco-SSLs may not be used as cleanup levels. Eco-SSLs have not been established for all of the contaminants. To date, interim Eco-SSLs and documentation are available for aluminum, antimony, barium, beryllium, cadmium, cobalt, dieldrin, iron, and lead.

### *EPA Announces Additional PPAs*

EPA entered into a Prospective Purchaser Agreement (PPA) for the Grant Warehouse Time-Critical Removal Site with the Portland Development Commission (PDC), an urban renewal agency for Portland, Oregon. PDC plans to purchase the property as part of the city's redevelopment of the Martin Luther King Boulevard corridor in NE Portland. PDC will purchase the property for its appraised value of $177,000.00 and remediate the property to a level that will allow unrestricted use that will allow construction of low-income housing and desirable retail businesses. EPA had performed a time-critical removal action in 1998 and 1999 address the immediate environmental threats posed by the uncontrolled storage of hazardous substances at the Site. PDC estimates the cleanup will cost approximately $514,000 but will be able to use a $200,000 Brownfields Site Remediation grant from EPA. The agency also entered into a consent decree with the current site owner who has agreed to sell the property to PDC for its appraised fair market value of $177,000.00. In exchange for turning over $88,500.00 of the sales proceeds EPA, the landowner will receive a contribution protection and a covenant not to sue from the United States. The PPA is conditioned on the sale of the property since the brownfield grant required PDC to take title to the property before EPA can finalize the grant. If PDC failed to take title by that date, the grant funding will no longer be available.

EPA announced it had entered into a PPA with W.B. Mason Co., Inc. and JLTS VI L.L.C. to acquire 10.72 acres in Brockton, Massachusetts. EPA had previously performed a removal action at the site. In exchange for a covenant not to sue and contribution protections, the purchaser has agreed to complete the cleanup, reimburse EPA $25,000 in past response costs and provide an irrevocable right of access at all reasonable times to representatives of EPA. The purchaser intends to redevelop the site for an office supply distribution center.

The PPA for the Frontier Hard Chrome superfund site in Vancouver, Washington was interesting because EPA agreed to waive any windfall lien it might be able to assert under section 107(r) of CERCLA. At this site, EPA agreed to enter into a PPA with Kelly Development LLC (Kelly) and a Settlement Agreement with Walter Neth, the Estate of Otto Neth, and the Lillian Mae Neth Family Trust (Settling PRPs). Kelly has agreed to purchase the property for $210,000 and redevelop it for light industrial uses, offices, and storage space. In exchange for a covenant not to sue ad contribution protection, EPA will receive will receive $180,000 of the sales proceeds (less 87.5% of the Settling PRPs closing costs) and place the funds into the Superfund Special Account established for

the site. The Settling PRPs are also to create and deposit $30,000 into a Frontier Hard Chrome Environmental Trust (Trust) from settlements with insurers.

Union Pacific Railroad Company (Union Pacific') agreed to enter into a PPA with EPA and the Colorado Department of Public Health and Environment (CDPHE') for five sites. Union Pacific entered into the PPA to acquire a perpetual easement or other property interest in the five properties so it could establish a more direct east-west rail corridor through the north Denver area without incurring liability for its property interest. The agreement covers the Broderick Wood Products Site in Adams County, the Sand Creek Site near Denver, the Chemical Sales Site in Denver, the Woodbury Chemical Site in Commerce City, and the Koppers Site just east of Broderick. In exchange for covenant not to sue, contribution action and extinguishment of a CERCLA lien, Union Pacific will pay for or perform the remedy repair and replacement work at the sites and reimburse EPA and CDPHE for their reasonable oversight costs incurred in the oversight of Union Pacific's performance of such work.

### *Port Jervis Brownfield Grant Highlights Use of Eminent Domain Authority*

The city of Port Jervis, New York received a $325,000 brownfield grant to remediate the former Erie-Lackawanna Railroad yard and the former State Wide Oil property. The City acquired the 2-acre State Wide Oil facility in 1998 and the 8.67-acre Erie-Lackawanna Railroad yard in 1988.

This grant illustrates how municipalities may be able to navigate around a restriction in the 2002 Brownfield Amendments that prevents brownfield grants to be awarded to applicants who held title to contaminated land prior to January 11, 2002. Because Port Jervis acquired through involuntary means (e.g. tax foreclosure), it is not considered a responsible party and was eligible to receive a Brownfields Grant.

The Consolidated Appropriation Act of 2004 (Public Law 108-199) that was signed into law on January 23, 2004 temporarily expanded the eligibility for brownfield funds so that local governments that owned property before January 11, 2004 may apply for loans or grants. Applicants who otherwise satisfy all of the requirements to be eligible to receive brownfields funding, qualify as a bona fide prospective purchaser, and were determined by EPA to be prohibited from using brownfield funds because the applicant acquired the brownfield site prior to the January 11, 2002 enactment date of the 2002 CERCLA amendments.

# ENVIRONMENTAL CASES INVOLVING CORPORATE AND REAL ESTATE TRANSACTIONS

### *Bankruptcy Asset Purchaser Assumes CAA and RCRA Obligations*

Coffeyville Resources Refining and Marketing, LLC, and Coffeyville Resources Terminal, LLC have agreed to spend a total of about $22 million to settle claims that two refineries formerly owned by Farmland Industries failed to comply with the NSR program when they increased its capacity from 71,000 to 125,000 barrels per day. The consent decree requires Coffeyville Resources to take interim steps to reduce emissions of NOx, SO2, VOCs, PM and benzene. Coffeyville Resources also agreed to assume Farmland's RCRA corrective action. The cost of the cleanup could reach $15 million. Farmland's assets were sold to Coffeyville Resources pursuant to a bankruptcy court order.

The purchaser of a power generating plant was required to comply with NRS in *New York v. Mirant* (300 B.R. 174, October 15, 2003). In that case, the state DEC filed a complaint in June 2003 alleging that the Orange and Rockland Utilities, Inc. had modified two power units without complying with NSR. Mirant had purchased the plant in 1999 and agreed to enter into a consent decree with the DEC

whereby it agreed to upgrade the units by 2008 at an estimated cost of $100 million. In July 2003, Mirant filed a chapter 11 bankruptcy petition and filed a motion with the bankruptcy court, arguing that it was not obligated to comply with the consent decree until it was approved by the bankruptcy court. Concerned that the bankruptcy court might reject the settlement or rule that the automatic stay prevented it from entertaining the motion, the DEC filed a motion to approve the consent decree with the federal District Court for the Southern District of New York. The court ruled that the consent decree was not subject to the automatic stay and approved the settlement without modification.

***Commentary:*** These two cases illustrate the importance of performing comprehensive due diligence prior to purchasing assets in a bankruptcy proceeding.

### *Bankruptcy Settlements Allocate Environmental Liability*

A Stipulation and Order was filed with the United States Bankruptcy Court for the Southern District of New York in *In re Cedar Chemical Co*. (Case No. 02-11039) and *In re Vicksburg Chemical Corp*. (Case No. 02-11040) concerning the liabilities of the Debtors for chemical plant facilities in West Helena, Arkansas, and Vicksburg, Mississippi. This settlement would resolve the EPA's claims in this bankruptcy proceeding for a cash payment of $250,000, $125,000 for each site.

A proposed settlement was lodged with United States Bankruptcy Court for the Northern District of Illinois in *In Re National Steel Corp.* (No. 02-08713). The United States sought civil penalties and injunctive relief arising from National Steel Corporation's violation of several environmental laws at its three integrated steel mills and recover of response costs at two superfund sites. The settlement provides the United States with an allowed general unsecured claim of $2.1 million for the violations as well as two general unsecured claims in the amounts of $115,565 and $5,200 for reimbursement of response costs for the Abby Street/Hickory Woods Subdivision Superfund Site in Buffalo, New York and the Rasmussen Dump Site in Michigan. Payment of the penalty and response costs will be subject to the procedures established in National Steel Corporation's Chapter 11 Bankruptcy proceeding (No. 02-08699)

### *Bankruptcy Court Authorizes Abandonment of Pulp Mill*

The United States Bankruptcy Court approved the abandonment of two paper mills owned by Eastern Pulp and Paper Corp after an $8.5 million offer to purchase the mills was withdrawn (In Re Eastern Pulp & Paper Corporation, Nos. 00-11612-14). The state of Maine has appealed the ruling.

Eastern Pulp & Paper Corporation filed a petition for reorganization in September 2000. Congress Financial Corporation (Congress) provided debtor-in-possession (DIP) financing in exchange for first priority liens on accounts receivable and inventory. After its DIP financing ran out, the company was forced to shutdown operations and the case was converted to a chapter 7 liquidation. In February 2004, the court authorized the bankruptcy trustee to enter into a post-conversion loan agreement with the Finance Authority of Maine (FAME) and Paper Acquisition Corporation (PAC) to provide a source of funds to maintain two paper mills in "warm stasis" while a buyer was sought. After a proposed sale fell, through, the trustee ran out of funds to pay for the “warm stasis” and could not obtain additional loans from PAC and FAME. The trustee then filed a motion to abandon the property. The Maine DEP opposed abandonment, arguing that there were hundreds of drums of hazardous materials at the site that would pose an "immediate and imminent threat" to human health and the environment. The DEP also sought an order requiring Congress to remove the hazardous chemicals since they were inventory that served as part of the loan collateral. With the trustee having no funds or unencumbered assets to pay for the continued maintenance of the mills, the court approved the abandonment on the condition that the trustee allow access to DEP and EPA to take whatever actions are necessary to abate the threat posed by the hazardous chemicals. Since the order, the DEP has been maintaining the mills with funds from $1.175 million bond that had been approved by voters in 2001 and 2003 to remediate 17 sites statewide. The DEP

has also threatened to put liens on the mills to cover the cleanup costs.

In a rare chapter 11 abandonment case, the Bankruptcy Appellate Panel for the First Circuit affirmed a bankruptcy court ruling allowing a debtor to reject a lease and abandon a tank farm at its mill in Lawrence, Massachusetts. In *In re Malden Mills Industries, Inc*. (303 B.R. 603, January 21, 2004), the court said there was no evidence that the abandonment would create any imminent threat to public health or safety. Because there was no evidence of exigent circumstances, the court also rejected the landlord's motion to grant it administrative expense priority for the costs to remove the debtor's personal property and tanks from the property.

***Commentary:*** The power of a debtor or trustee to reject a lease under section 365(a) and abandon property under section 554 of the Bankruptcy Code is similar. However, a lease may only be rejected upon approval of a court while property may be abandoned without court approval unless a party in interest challenges the abandonment.

### *Ninth Circuit Rules Owner Non-Polluting Landowner Not Entitled to Cost Recovery*

In *Western Properties Service Corp. v. Shell Oil*, (No. 01-55676, 02/13/04 -), the Ninth Circuit Court of Appeals ruled that defendant oil companies were liable for arranging to dispose acid sludge during World War II on land now owned by the plaintiff. However, the court held that Western Properties was not entitled to recover all of its $5,002,903 because Western Properties knew about the sludge when it bought the land. After an eight-day trial in May 2000, the district court had imposed 100% of the response costs on the defendants on the theory that Western Properties was a non-polluting innocent landowner. The Ninth Circuit ruled, though, that only plaintiffs that qualified as innocent parties were entitled to cost recovery. Since the Western Properties knew about the prior disposal, it did not qualify for the innocent purchaser defense and was therefore only entitled to bring a contribution action.

***Commentary:*** In the vast majority of cases, landowners who were not responsible for the contamination but do not qualify for the innocent purchaser defense because they either knew about the contamination or failed to conduct an appropriate inquiry will be assessed a small percentage of liability, usually not more than 10%. If the activities causing the contamination were caused by a tenant of the owner, courts will usually allocate a higher percentage of liability the property owner on the grounds that it benefited from the operations at the site through rent or other payments, or was aware that the operations could have impacted the environment and did not take steps to prevent such impacts.

### *Successor Cannot Avoid Penalties for Pre-Acquisition Violations*

The Environmental Appeals Board (EAB) ruled that an asset purchaser was liable for FIFRA violations that occurred prior to the merger. The EAB ruled in *In re William E. Comley, Inc. & Bleach Tek Inc*. (EPA EAB, FIFRA Appeal No. 03-01, 1/14/04), that Indiana-based Bleach Tek Inc. was a successor to WECCO and therefore liable for violations discovered in 1997. EPA inspectors determined that WECCO had not properly maintained pesticide registrations for sodium hypochlorite for the preceding seven years allegedly to avoid paying fees to maintain the registrations. Because both companies were solely owned and chaired by the same person, shared vendor numbers, and operated from the same address, EBA ruled that the purchaser was liable under the *de facto merger* exception to the general rule that asset purchasers are not liable for pre-existing liabilities of predecessors.

### *Survivor of Merger Agrees to Cleanup*

Monsanto agreed to assume responsibility for remediating contamination caused by a predecessor at its Sauget, Illinois facility. In 1997, Monsanto spun off its chemical business as Solutia, Inc. (Solutia), which inherited environmental liability for the old Monsanto chemical business. After Solutia determined that its total potential environmental liability was approximately $1 billion, the company filed for Chapter 11 bankruptcy protection. In 2000, Monsanto merged with Pharmacia & Upjohn Inc. to form Pharmacia Corp. A year later, the agrochemical and biotech seeds division were spun out to form the new Monsanto. The new company assumed all

legacy liabilities that Solutia failed to or became unable to pay. In 2003, Pfizer Inc acquired Pharmacia. In its plan of reorganization, Solutia is seeking to shed all but $ million of its legacy environmental liabilities. As a result, EPA turned to Pfizer and Monsanto to foot the bill before Monsanto agreed to the settlement.

### *Phillips Conoco Settles Property Damage Claims*

ConocoPhillips has agreed to a $70 million preliminary settlement with as many as 7,000 Florida Panhandle property owners who sued over pollution from a former fertilizer plant site the company owned. The agreement would settle two lawsuits alleging that a groundwater plume has devalued property and may caused bodily injury. The proposal would divide $65 million in varying amounts among 7,000 people who currently or previously owned about 3,000 homes and other properties in Pensacola. $3.6 million would also be available for medical monitoring and $750,000 for administering the settlement. The suits had originally sought $500 million for 11,000 property owners but the judge slashed the number of plaintiffs to 3,000 residents. Conoco Inc. purchased the fertilizer plant in 1963 and sold it in 1972 to Agrico Chemical Co. The plant was closed in 1975 and placed on the NPL in 1989. Cleanup of contaminated soil was completed in 1997.

### *Exxon Settles Class Action Suit With Property Owners*

ExxonMobil Corporation reached a settlement in a long-running class-action lawsuit with over 300 South Carolina property owners whose properties had been impacted from leaking USTs. The plaintiffs include owners of former Exxon service station sites and adjoining parcels contaminated over the years by leaks from improperly abandoned USTs. The lawsuit was filed in after the lead plaintiff, Mary Louise Fairey, tried to sell commercial real estate she owned in downtown Orangeburg in 1988. When the lender of a prospective buyer learned an Exxon station had once been located on the site, the lender ordered a Phase II that revealed that the site was contaminated. The deal fell through and the plaintiff who still owns the property filed her lawsuit in September 1992. The case was certified as a class-action lawsuit in 1998.

Exxon Mobil Corporation also reached a multi-million-dollar settlement in *Communities for a Better Environment et al. v. Tosco Corp., et al.* (No. 300595). The lawsuit alleges that defendant oil companies engaged in unfair competition and violated California's Proposition 65. Under the agreement, Exxon Mobil agreed to upgrade gas stations, remediate groundwater contamination, and enact other changes to its gasoline distribution system to protect California drinking water. Among provisions in the agreement, Exxon Mobil has agreed to install and maintain remote fuel monitoring systems at all its gas stations, implement a five-year program to inspect its UST systems in California at least three times, replace all UST systems that have single-wall tanks and piping, and conduct monthly inspections of aboveground pipes and storage tanks at Exxon Mobil's Torrance Refinery and three other terminals.

***Commentary:*** These final four articles highlight the theme that we have been repeating throughout our five year publication of the newsletter; namely, the need to perform comprehensive historical due diligence. Though performing thorough historical investigations may be more resource-intensive and time-consuming, the information gathered from this process can be used to more accurately negotiate price adjustments, escrows or indemnities as well as assist in obtaining insurance and help purchasers develop environmental management strategies to minimize future environmental liabilities.

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

The information contained in this newsletter is not offered for the purposes of providing legal advice or establishing a client/attorney relationship. Environmental issues are highly complex and fact-specific and you should consult an environmental attorney for assistance with your environmental issues.