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A Newsletter Covering Recent Environmental Developments and Caselaw

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Contents

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The Schnapf Environmental Journal is a bi-monthly report that provides updates on regulatory developments and highlights significant federal and state environmental law decisions affecting corporate and real estate transactions, and brownfield redevelopment. 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.

CLEAN AIR/INDOOR AIR

NOA- The "New" Asbestos

Since the early 1970s, federal and state asbestos programs have focused on minimizing risks posed by products manufactured with asbestos and reducing workplace exposure to asbestos. In the wake of recent studies, attention is shifting to the potential risks associated with naturally occurring asbestos (NOA).

NOA frequently occurs in ultramafic rock, such as serpentine--the official state rock of California. Another well-known example of NOA is the vermiculite deposits in Libby, Montana. Ultramafic rock deposits can contain as much 25% asbestos fibers that can be released when the rock is broken or crushed. These deposits have been commonly used for unpaved gravel roads, landscaping, fill projects and other improvement projects in some localities. As a result, asbestos fibers can be released from vehicular traffic on unpaved roads or driveways surfaced with ultramafic rocks, during excavation or grading activities for residential developments, at quarrying operations, or by other human activities such as yard work, running, hiking or bicycling on unpaved surfaces where asbestos containing soil is present. NOA fibers may also be released naturally through weathering and erosion.

Recent investigations have shown that NOA is more prevalent than formerly believed with NOA present in at least 50 of the 58 counties in California and 27 states. Many school sites and public parks have been constructed in areas that are now known to have NOA. Earlier this year, a report published by the U.S. Geological Survey (USGS) disclosed 324 locations of NOA in the 15 states in the Eastern United States. The USGS Report *"Reported Historic Asbestos Mines, Historic Asbestos Prospects, and Natural Asbestos Occurrences in the Eastern United States,"* also found that previously published maps and data compilations frequently contain inaccurate information about the presence of NOA.

Last month, researchers at UC Davis announced the results of a study concluding that persons living near deposits of NOA have a higher incidence of mesothelioma, a rare form of cancer affecting the lining of the lung. The study, which will be published this fall in the *American Journal of Respiratory and Critical Care Medicine*, identified 2,908 cases of malignant mesothelioma diagnosed between 1988 and 1997 that were related to residential proximity to a source of ultramafic rock. Specifically, the report found that the odds of contracting mesothelioma fell by 6.3% for every 6.2 miles that a person lived from the nearest asbestos source. Health studies conducted in Libby found that approximately 1,200 residents suffer from some kind of asbestos-related illness and have a lung cancer rate that is 30% percent higher than expected when

compared to other areas of Montana and the United States.

There are no federal regulations addressing NOA, so states and local governments that are known to have high occurrences of NOA are beginning to develop NOA standards. These requirements usually consist of engineering controls designed to prevent generation of asbestos-laden dust during construction activities as well as to minimize long-term risks from exposure to asbestos fibers in soils. For example, the El Dorado County's Air Quality Management District (AQMD) promulgated a local ordinance on fugitive dust to minimize construction and mining generated NOA and requiring disclosure of the presence of NOA in real estate transactions. The Fairfax County Health Department in Virginia has developed an asbestos control program for activities that are likely to disturb NOA.

The California Air Resource Board (ARB) has adopted an airborne toxic control measure (ATCM) that prohibits the use of any material originating from one of the designated geographic areas for surfacing purposes if the source rock has more than 0.25% asbestos. The ARB has also adopted another Asbestos ATCM that imposes fugitive dust emission limits for construction, grading, quarrying, and surface mining operations conducted in those source areas.

Likewise, California state agencies are required to address the possibility of human exposure to NOA under the California Environmental Quality Act (CEQA). The lead Agency is required to identify the nature and extent of exposure to NOA based on the proposed location and type of development. NOA must be addressed even if state maps suggest that NOA may not be present. The NOA analysis may be located in the air quality, geology and soils, and/or human health sections of the CEQA, depending on the nature of the project.

Commentary-Implications for Due Diligence: *Since the presence of NOA minerals may not necessarily be obvious, it is important to evaluate the geology of a proposed or existing project to determine if NOA mineral may be present. Unfortunately, the methodology for assessing environmental risk posed by NOA is not well-developed since the existing assessment methods were developed either for health risk assessment of asbestos in industrial settings or for the economic assessment of naturally occurring deposits for minerals exploitation. Moreover, the mere presence of NOA on a site does not pose a risk unless the material can become respirable. As a result, NOA assessment may have to be performed on a site-specific basis using actual disturbance scenario to determine the exposure risk. This can be a daunting task, though, because the absence of widely accepted threshold air concentrations for asbestos fibers can make it difficult to develop a relationship between concentrations of NOA and the amount of soil or rock disturbance necessary to*

generate harmful doses of NOA-bearing dust.

EPA To Test New Asbestos Demolition Practice

EPA recently announced that it will perform a demonstration test of an Alternative Asbestos Control Method at Fort Chaffee, AK, could reduce demolition costs by 30 to 60%. If the experiment is successful, the technique could be used in lieu of the current NESHAP and transform the way cities demolish thousands of dilapidated buildings with asbestos-containing materials (ACM). EPA believes the Alternative Asbestos Control Method could accelerate the demolition of many abandoned buildings in blighted areas, thereby facilitating the redevelopment of these areas.

Under the Alternative Asbestos Control Method, most friable ACM would be removed before demolition and disposed in accordance with the existing Asbestos NESHAP. Once the friable ACM is removed, the demolition will proceed using water suppression before, during, and after demolition to trap asbestos fibers and minimize their potential release to the air. Wastewater generated during the demolition would be collected and all contaminated materials properly disposed as asbestos-containing waste. A two-inch layer of soil would also be removed to ensure that no residual soil contamination remains at the site. A site-specific Quality Assurance Project Plan will be developed.

EPA rejected another proposed alternative earlier this year that was tested in Fort Worth and St. Louis. Indeed, residents in St. Louis residents have filed lawsuits asserting that the test resulted in asbestos emissions within a 300 home area.

Commentary: *Under the Asbestos NESHAP, non-friable ACM is divided into two categories. Category I non-friable ACM includes asbestos-containing resilient floor coverings such as vinyl asbestos tile (VAT), asphalt roofing products, packings and gaskets that rarely become friable. All other non-friable ACM is considered category II non-friable ACM. However, Non-friable ACM that has been damaged during a demolition or renovation or has a high probability of becoming damaged by the force to be used during demolition such as sawing, grinding, or sanding so that the ACM is crumbled, pulverized or reduced to powder will be subject to the Asbestos NESHAP.*

The Asbestos NESHAP work practice requires ACM to be "adequately wetted" to prevent the release of asbestos fibers. If visible emissions are observed coming from ACM, then the material has not been adequately wetted. However, the absence of visible emissions is not evidence of being adequately wet. Sometimes contractors place water in the bottom of a bag, then strips the friable asbestos material dry and lets it fall into the water. The ACM must remain wet until disposal. Dry friable asbestos insulation on the ground violates the "adequately wet"

requirement, and can be considered evidence of a visible emission.

Because complying with the Asbestos NESHAP can be costly and time-consuming, some contractors and building owners may be tempted to ignore the Asbestos NESHAP. As a result, state and federal regulators continue to bring significant asbestos enforcement actions.

For example, EPA fined McGovern's Floor Covering, Inc., $70,535 for failing to comply with the asbestos workpractice when it used a high-speed sander/grinder on existing vinyl asbestos floor tile while installing flooring in two classrooms at the Barrington Congregational Church. After the Church learned of the violations, it closed the building and hired an environmental consultant to test for asbestos. After lab tests confirmed the presence of asbestos, the building was thoroughly inspected and a state-certified abatement contractor performed a cleanup.

The new owner of the Mustang Ranch building agreed to pay $23,000 for improperly removing asbestos prior to demolishing the building prior. In 2003, Lance Gilman bought the building from the Bureau of Land Management (BLM). Before selling the buildings, the BLM determined that the building contained asbestos. Gilman then demolished part of the building and transported several sections to another location.

The Oregon Attorney General filed a racketeering lawsuit seeking $3 million from MBK Partnership of Klamath Falls and forfeiture of profits from a developer for failing to disclose the presence of asbestos-contaminated debris and soil at the North Ridge Estates. This subdivision was formerly used as a Marine Barracks during World War II and was the site of the old Oregon Institute of Technology campus. The ACM is associated with buried pipe insulation that contained as much as 90% asbestos and other ACM such as siding and roofing that was present in the 80 buildings. After MBK acquired title to the property in 1977, EPA issued a compliance order requiring the partnership to file deed restrictions on any parcels it developed that contained buried asbestos. However, in another example of a failed institutional control, MBK not only failed to file the deed restrictions, but Klamath County approved the subdivision application in 1992 and ACM was spread throughout the site by grading activities. In 2002-04, MBK performed an ACM survey and conducted a removal action under EPA oversight that resulted in the excavation of 77 tons of asbestos-contaminated soils. However, after the state DEQ and the Department of Human Services (ODHS) subsequently determined that the remaining buried asbestos constituted a significant public health hazard, MBK refused to perform any further cleanup. In December 2004, MBK filed for Chapter 11 bankruptcy protection and EPA issued a Unilateral Administrative Order (UAO) to various former partners and individuals associated with MBK. In June, EPA began temporarily relocating 27 families so that a

cleanup could be completed before the start of the school year. In addition to the state action, property owners have filed their own lawsuits. EPA is seeking approximately $3 million in response costs.

University Fined for ODS Violations

The University of California agreed to pay $118,404 to resolve violations involving ozone-depleting substances (ODS) at its Berkeley and Davis campuses. EPA inspectors identified 15 violations at the two campuses including failing to properly remove refrigerant from two appliances; inadequately repairing leaks from appliances, failing to develop a one-year retirement or retrofit plan for the leaking appliances and not maintaining proper refrigerant-related records when servicing the ODS-containing appliances.

Commentary: *Title VI of the Clean Air Act (CAA) extensively regulates the manufacture, use and importing of ODS such as chlorofluorocarbons ("CFCs"). The manufacture of CFCs was banned and there is a phase-out for the use of these substances. These restrictions affect vehicle maintenance and building cooling systems, cold storage warehouses, commercial ice machines, industrial process refrigeration, reciprocating chillers, refrigerated transport, residential dehumidifiers, retail food refrigeration, vending machines and water coolers.*

Equipment containing ODS may continue to be used for its useful life. However, refrigerant recovery and recycling equipment must be used when servicing units containing CFCs or HCFCs to minimize the possibility of releases of ozone-depleting substances into the atmosphere, and companies must use technicians who are certified to use this recovery and recycling equipment. Thus, when performing due diligence at older hotels, office buildings and other institutional facilities, it is advisable to determine if the facility has equipment containing ODS and verify if the owner has adopted appropriate repair and maintenance procedures to avoid releases of ODS.

State Courts Act on Mold Cases

A state court in **Hawaii** certified a class action suit against the Hilton Hawaiian Village Beach Resort & Spa, *Moffett v. Hilton Hotels Corporation et al*, No. 03-1-1043-05 (Hawaii Cir., 1st Cir.). This action involves the 25-story Kalia Tower that as Hilton was forced to close shortly after it opened in 2001. The company spent $55 million to abate the mold and has sued architects and contractors who were involved in the design and construction of the $95 million hotel tower. The plaintiff class may include as many as 1,000 guests.

The plaintiffs charge that the company failed to disclose the existence of extensive mold growth for more than a year after the mold was initially discovered in common areas and guest rooms when the tower opened in May 2001. The complaint alleges that after senior Hilton managers were personally advised about the mold infestation in

June 2002, the company closed some but not all of the guest rooms. Plaintiff Moffett asserted that when his family checked into a room on July 6, 2002, they were not informed of any mold problems. Moffett said that when his family entered their room, they noticed that the bed sheets were damp. They requested to be moved, three times but on each occasion were advised that there were no other rooms with king beds. Plaintiff Moffett also stated that his wife had been told by the front desk clerk on July 19th that although half of the rooms were empty, management had told the clerk to tell guests that the hotel was sold out. It was only when the hotel moved the family to a room in another tower on July 23rd that plaintiff Moffett said he read in the newspaper that the entire Kalia Tower was shut down and that all guests had been relocated.

In another state mold lawsuit, a **Texas** appeals court affirmed a jury's findings that a homeowner was not entitled to damages under its homeowner policy. In *Swiercinsky v. Nationwide Insurance Company*, 2005 Tex. App. LEXIS 4747 (Texas App., 5th Dist. June 22, 2005), the plaintiffs purchased a house in 1999 that had water-damage. They sold their house for $150,000 two months prior to the end of the policy term. The plaintiff testified that his own investigation and his realtor suggested that house would have been worth $300,000 without mold damage. While the jury did find that the home was damaged from mold during the policy period, the jury concluded that the home was only worth $150,000 when the plaintiffs' bought the house. Since the property value was already diminished prior to the start of the policy period, the homeowner was not entitled to recover under the policy.

CLEAN DRINKING WATER

Report Finds that Stricter Standard May Be Required For Brass Faucets To Minimize Lead In Drinking Water

According to a study reported in the August issue of the *Journal American Water Works Association,* brass faucets may be leaching more lead into drinking water than originally contemplated. As a result, the standard used for inline brass plumbing products may have to be revised to protect the public from excessive levels of lead in drinking water (LIW).

The authors of a report, "*Lead leaching from inline brass devices—A critical evaluation of the existing standard*" found use of brass faucets that complied with the NSF/ANSI Standard 61 did not prevent lead leaching into water supplies. For example, faucets tested in water that was only slightly acidic could release excessive concentrations of lead to drinking water. The study also found that faucets made of pure lead could easily pass the NSF Section 8.

The report recommended changing the testing protocols and substantially reducing the allowable lead content of brass products unless the testing protocol can be brought more in line with known drinking water treatment chemistry and field experiences.

Commentary: *Lead in drinking water occurs primarily from corrosion of plumbing surfaces that may contain lead solder, brass, bronze and other alloys containing lead. The amount of lead attributable to corrosion by-products in the water depends on a number of factors, including the amount and age of lead-bearing materials susceptible to corrosion, how long the water is in contact with the lead-containing surfaces, and the corrosivity of the water. The corrosivity of water can be affected by several factors, including acidity, alkalinity, dissolved solids and hardness. In general, soft acidic waters are more corrosive than hard waters.*

Section 1417(a)(1) of the Safe Drinking Water Act (SDWA) requires that only "lead free" pipe, solder or flux may be used after June 19, 1986 in plumbing located in residences or non-residential facilities providing water for human consumption. To qualify as "lead free", solders and flux may not contain more than 0.2% lead. In addition, pipes, plumbing fixtures and well pumps may not contain more than 8.0% lead. The SWDA also prohibits any person from introducing into commerce any pipe, or plumbing fitting or fixture that is not lead free after August 6, 1998, except for a pipe that is used in manufacturing or industrial processing. The law does not make any distinction between the wholesale and retail sales of these materials. Thus, the sale or distribution from inventory of any pipe, or any pipe or plumbing fitting or fixture, that is not lead free, is

prohibited after the deadline established by the SDWA.

Brass or chrome-plated brass faucets and plumbing fixtures that contain less than 8% lead can leach significant amounts of lead for a period of time after installation even when these devices are in contact with relatively non-corrosive waters. The amount of lead that may leach into the water may be related to the lead content in the alloy as well as the manufacturing process, water flow rate and usage.

As a result, the NSF/ANSI Standard 61 developed a voluntary standard to limit the amount of lead that can leach into the water from a particular product so that it may be certified as "lead free." The standard applies to inline devices used in buildings to measure or control the flow of water such as water meters and valves as well as endpoint devices or components that are typically installed within the last liter of the distribution system and intended by the manufacturer to dispense water for human ingestion. The endpoint devices include kitchen and bar faucets, lavatory faucets, water dispensers, drinking fountains, water coolers, glass fillers, residential refrigerator ice makers, supply stops and endpoint control valves. The NSF Standard does not specify the lead content so devices that are made of brass alloys that contain lead may be certified if they pass the performance test prescribed by the standard.

In most instances, inline devices installed in building plumbing systems handle a large volume of water used for showering, laundry etc. when compared to endpoint devices dispensing water for human consumption. Although some inline devices containing 8% or less lead may leach certain quantities of lead, the amount of lead leached from these devices would generally be expected to be diluted to levels below those of concern by the relatively high volume of water passing through them.

Under the 1991 Lead and Copper Rule (LCR), water suppliers are required to optimize their treatment system to control corrosion in customers' plumbing, and determine tap water levels of lead and copper for customers who have lead service lines or lead-based solder in their plumbing system. If 10% of required sampling detects LIW levels above the 15 parts per billion (ppb) action level, the utility must take a number of actions to control corrosion and carry out public education to inform consumers of actions they can take to reduce their exposure to lead. If lead levels continue to be elevated after anti-corrosion treatment is installed, the utility must replace lead service lines. Since most lead enters water after the water leaves the public water supply water main, individual homes may have different levels of lead in tap water due to the age or condition of pipes as well as plumbing fixtures.

Jury Rejects Claims of Homeowners in Perchlorate Trial

The California real estate bubble apparently burst the claims of a group of South Santa Clara County

homeowners who were seeking damages from Olin Corporation because their drinking water wells were contaminated with perchlorate.

In this case, the Olin Morgan Hill plant manufactured highway flares from 1955 to 1987. During that period, plant employees burned, buried and poured perchlorate into an evaporation and seepage pit. Perchlorate was detected in the groundwater during due diligence after the company tried to sell the former plant in 1996. Sampling by Olin and the Santa Clara Valley Water District found a ten-mile long plume. Two hundred and fifty-seven wells containing perchlorate above the 6 ppb drinking water standard and another 729 wells had perchlorate at levels down to 2 ppb. Olin is to provide free bottled water to residents whose wells have perchlorate levels above 4 ppb and has installed filters on the more heavily contaminated wells. The company is scheduled to propose a cleanup **plan by June 30, 2006.**

The plaintiffs did not seek any damages for bodily injury. In fact, only one of the plaintiffs' wells has more than 6 ppb of perchlorate. Instead, the homeowners sought damages for loss in property value and emotional distress. According to a real estate appraiser who testified on behalf of the plaintiffs, the homes of the four plaintiffs all lost at least $150,000 in value after the plume was discovered. However, Olin countered that property values in the area have increased at a similar rate in recent years as property values across San Jose. The company offered testimony that the average home in San Martin had increased in value by $96,000 from 2003 to 2004. Indeed, Olin presented evidence that one plaintiff's home that had been appraised at $800,000 before the contamination was discovered in January 2003 was now appraised at $990,000. After only one day of deliberation, a federal jury declined to award any damages to the plaintiffs.

Commentary: *A panel of scientists administered by the California Environmental Protection Agency declined to place perchlorate on the state's Proposition 65 list of toxic chemicals known to cause cancer and birth defects. Under the 1986 law, the state must publish and periodically update a list of chemicals that are known to cause cancer, birth defects or other reproductive harm. Businesses with 10 or more employees are required to warn the public if they produce, handle or distribute chemicals found to cause cancer or reproductive harm. The Developmental and Reproductive Toxicant (DART) Identification Committee concluded that the available scientific information did not clearly establish that perchlorate causes "reproductive toxicity". A decision that a substance falls short of the "clearly shown" standard does not mean that the substance does not cause adverse health effects. Substances that are not listed under Proposition 65 may still be regulated under other state environmental programs. Indeed, the decision to not list perchlorate under Proposition 65 will have no effect on the state's proposed drinking water standard for*

perchlorate

According to a study released by the Government Accountability Office (GAO), perchlorate contamination has been found in water and soil at almost 400 sites in the United States. However, the report "PERCHLORATE: A System to Track Sampling and Cleanup Results Is Needed" (May 20, 2005 GAO-05-462) said that two-thirds of sites had perchlorate concentrations at or below EPA's provisional cleanup standard of 24.5 ppb. Over half of the impacted sites were located in California and Texas. The states with the highest levels of perchlorate were Arkansas, California, Texas, Nevada, and Utah. The report did caution that because EPA does not track perchlorate in drinking water, there might be more contaminated sites than GAO was able to identify. GAO did report that cleanups were underway or planned at 51 of the 400 perchlorate-contaminated sites identified.

The discovery of perchlorate in groundwater has stymied plans for another residential development in the Santa Clarita Valley. In April, perchlorate was discovered at levels ranging from 9.8 to 11 parts per billion in a drinking well near the proposed site of the 2,500-home West Creek development and the 1,089-unit Riverpark project. The Valencia Water Co., which is owned by the largest landowner in the area, immediately shut down the contaminated well. In response to the discovery of the groundwater contamination, the Los Angeles County Regional Planning Department asked Newhall Land and Farming to submit a supplemental environmental review of the project. The former Whittaker-Bermite munitions factory is believed to be the source of the perchlorate contamination.

In the wake of perchlorate concentrations as high as 108 ppb in some drinking water, EPA has informed residents of Hills, Iowa that it will pay for the installation of water filters at affected homes. Ten percent of the population has been drinking bottled water since perchlorate contamination was first discovered. The source of the perchlorate is unexploded fireworks. The groundwater contamination levels correlates with the distance to the fireworks display sites. The Hills site is the first in the nation that has been confirmed to have been impacted by fireworks.

EPA Proposes to Add Perchlorate to SDWA Contaminate Candidate List

EPA has proposed to add perchlorate to its contaminant candidate list (CCL) under the Safe Drinking Water Act which is the first step towards establishing a federal Maximum Contaminant Level (MCL) for perchlorate (70 FR 49093-49138, August 22, 2005). Contaminants on the CCL are currently not subject to any proposed or promulgated national primary drinking water regulation, but are known or anticipated to occur in public water systems, and may require regulation under SDWA. Under the proposal, EPA will require public water systems to monitor perchlorate and 25 other chemicals between 2007-

2011.

Earlier this year, EPA proposed a Drinking Water Equivalent Level (DWEL) of 24.5 ppb for perchlorate. The DWEL is based on reference dose (RfD) of 0.0007 mg/kg/day of recommended by the National Academy of Science's January 2005 report. EPA arrived at its 24.5 ppb by applying the National Academy's formula to a 70-kilogram (about 150-pound) adult who drinks two liters of water a day.

Commentary: *The perchlorate developments illustrate the importance of evaluating the past land uses of adjacent properties when a transaction involves property with on-site drinking water wells or where potable water will be provided by drinking water wells located within proximity to the property.*

Parking Lot Materials May Contribute to Stormwater Pollution

A report by the UGSG concluded that coal tar based sealants that are used to coat parking lots and driveways can result in significant concentrations of polycyclic aromatic hydrocarbons (PAHs) in urban runoff.

The report indicated that the most common sources of PAHs in urban watersheds were thought to be leaking motor oil, tire wear, vehicle exhaust and atmospheric deposition. However, the USGS found that coal tar based sealcoat erodes fairly rapidly and generates small particles of the sealant that are swept up during storm events. The resulting runoff was found to have PAH concentrations approximately 65 times higher than concentrations in particles from uncoated parking lots. Parking lots that are sealed with asphalt-based sealcoat were found to have 10 times the levels of PAHs than unsealed lots. The USGS findings were published in the Aug. 1, 2005, issue of Environmental Science & Technology (ES&T).

Commentary: *While the USGS found new sources of stormwater contamination, EPA and state authorities continued to bring enforcement actions for more conventional violations of its stormwater program. Wal-Mart Stores Inc. was involved in several settlements involving stormwater violations at construction sites. The company agreed to pay $157,500 for failing to apply for a stormwater construction general permit in a timely manner and then failing to comply with the requirements of its general permit at its 27.8 acre construction site in Caguas, Puerto Rico. In 2001, Wal-Mart paid a $1 million fine to resolve storm water violations at 17 sites and had agreed to develop a storm water training program for its contractors. EPA subsequently determined that Wal-Mart had not achieved consistent compliance at construction sites and filed another nationwide action against Wal-Mart in 2004.*

Meanwhile, the company also entered into a $1.15 million settlement with the Connecticut Department of Environmental Protection for stormwater violations at 20 Wal-Mart stores and two Sam's Club locations.

In another stormwater settlement, six home developers and one commercial developer in the Kansas City area were fined $96,500 and ordered to take immediate actions to minimize erosion at their construction projects. During the past year, EPA Region 7 has sent a team of inspectors to the largest, fastest-growing metropolitan areas in its four-state region of Iowa, Kansas, Missouri and Nebraska.

Is Red Hot Real Estate Market Leading to Increased Wetlands Violations?

With concerns over a real estate bubble increasing and interest rates climbing, developers are under pressure to quickly complete developments. Surveying wetlands, preparing mitigation plans or altering developments to accommodate wetlands may not only delay construction, but may also limit the amount of increasingly expensive land that may be developed. These impediments can create economic disincentives for complying with wetlands requirements. It may be just a coincidence, but there seems to have been a burst of wetlands enforcement activity during the past months.

For example, a Loveland, CO development group agreed to pay a $110,000 fine and provide approximately $330,000 to mitigate damage to Indian Creek and its adjacent wetlands. According to EPA, Frederic M. Bernstein, Henry Y. Yusem, K & J Properties, Inc., Y & B Properties, LLC, Indian Creek Investments, LLC, and ICR, LLC of Loveland were responsible for impairing or destroying approximately two acres of stream channel and adjacent wetlands. After the developers failed to submit a plan for assessing and restoring the damage, EPA referred the case to DOJ for civil action. Since many of the defendants filed for bankruptcy in October 2002, DOJ has been negotiating a settlement for the claims.

KB Home Nevada, Inc. agreed to pay an $80,000 penalty and fund three environmental restoration projects to resolve wetlands violations at its 160-acre development in Southwestern Las Vegas. Between September and December 2003, KB Home began clearing land at its 160-acre site in southwestern Las Vegas without obtaining a wetlands permit. The land clearing activities resulted in the discharge of dredged and fill material into tributaries of the Las Vegas Wash. KB Home agreed to fund $193,000 to the Bureau of Land Management for wetlands restoration projects in the Red Rock Canyon National Conservation Area. Projects included fencing Calico and Ash Springs, expanding the riparian enclosure at Wheeler Camp Spring and removing tamarisk and other invasive weeds at selected springs.

A Galt, CA. developer agreed to pay $47,500 and finance the preservation of wetlands to resolve allegations that it illegally filled approximately 3 acres at the Gold Creek Estates residential development. In June 2004, the Army Corps of Engineers determined that CRV Enterprises had used

heavy equipment for grading, compaction and filling activities that filled portions of Cosgrove Creek, its tributaries, and adjacent wetlands in the Calaveras River watershed in Valley Springs. In addition to the cash settlement, CRV Enterprises agreed to protect and preserve 14 acres of similar habitat in the project vicinity. The mitigation requirement includes the purchasing of 6 acres of credits from a wetland mitigation bank and permanently preserving 8 acres of Cosgrove Creek at the violation site. The company will also maintain a 75-foot no-build habitat buffer zone around Cosgrove Creek tributaries until it obtains a wetlands permit.

Anchorage, AL developer Cloyd Moser and his company Modeb Investments agreed to establish a 318-acre wetland conservation area, restore damaged wetlands, and pay a $12,500 civil penalty to resolve wetlands violations associated with road-building activities at its Stariski Meadows subdivision near Anchor Point. Under the settlement, Moser and Modeb agreed to establish a 318-acre wetland conservation area adjacent to Stariski Creek by transferring more than $200,000 in land and easements to the Katchemak Heritage Land Trust (KHLT). This conservation area will buffer and permanently protect from development more than a mile and a half of important anadromous fish habitat. Moser and Modeb are also required to remove fill from two roadways in the subdivision, improve site hydrology by installing culverts under a third roadway, and to re-vegetate the restored areas.

Four companies will be required to spend almost $900,000 in fines and restoration or mitigation projects to replace wetlands in Puerto Rico. EPA filed a complaint against the presidents of Ciudad Centro, Inc., and the Economic Construction Corporation for filling in 2.9 acres of wetlands to build a portion of a housing development called Villas de Sotomayor in Aguada. The companies were ordered to remove the fill and replant aquatic vegetation. After the companies' demonstrated good faith by removing most of the illegal fill, EPA settled for a payment of $87,000 and completion of on-site restoration work.

EPA also filed complaints against the Western Shopping Center, Norte, Inc. and Tamrio, Inc. for filling wetlands without a permit. The companies apparently filled 1.9 acres of wetlands during the construction of the Western Industrial Park in Mayaguez after encountering delays in obtaining a wetlands permit. As part of the settlement, the companies agreed to pay $40,000 and spend $700,000 to complete wetlands restoration projects. The restoration projects involve removing a portion of the fill that was placed on the property, preserving the remaining on-site wetlands and creating new wetlands at a nearby site that will be five times the size of the wetlands lost.

Local governments have also been targets of EPA enforcement actions. EPA is seeking nearly $500,000 in fines and wetlands

restoration projects from three Puerto Rican governments for failing to prevent destruction of wetlands during the construction of 200 homes during the past five years. The Municipality of Canovanas faces a $157,500 penalty for continuing to fill wetlands and fined the Puerto Rico Land Authority (PRLA) $23,000. In addition, the Office of Special Communities could pay up to a $32,500 fine for its role in encouraging the development. EPA is also requiring the PRLA and the Office of Special Communities to either relocate the community from these wetlands or apply for a federal permit to rebuild the community. The agencies must also create a wetland preserve of approximately 300 acres.

The Corps recently issued a cease and desist order to the City of Seattle for illegally filling wetlands and a portion of Hamm Creek during construction of a $26 million Joint Training Facility project. A gravel quarry was formerly located on the 13-acre parcel. The project is funded by a voter-approved $167 million fire station and emergency-preparedness levy. It will include classrooms and buildings for staging mock fires and other disasters to train firefighters and utility workers. Since the project is largely completed, the order only halted minor paving and grading work. The Corps indicated that it would probably not impose monetary penalties if the city agrees to perform restoration work on other nearby wetlands.

New Jersey Developer Fined for Falsifying Wetlands Data

Instead of ignoring wetlands requirements, some property owners and consultants may try to demonstrate that there are no wetlands on a parcel. A landowner and two consultants took this a step too far and were fined a total of $738,000 for falsifying information in a freshwater wetland permit application for the proposed 155-unit Twin Brooks Village adult community in Tinton Falls, NJ. The applicants withheld information in an effort to develop wetland areas protected under the New Jersey Freshwater Wetlands Protection Act. According to the New Jersey Department of Environmental Protection, Gregory S. Blash & Associates, Air, Land and Sea Environmental Management Services, Inc., and Twin Brooks Village, LLC., jointly submitted an application for a letter of interpretation and freshwater wetland transition area waiver in November 2004. The application failed to identify approximately 107,000 square feet of obvious freshwater wetlands, freshwater wetland transition areas, and State open waters on the site of the proposed development. The permit application proposed the construction of parking lots, roads and condominiums within protected natural resource areas such as a 5,000 square foot pond and extensive freshwater wetlands. After NJDEP issued a notice of violation to each respondent for failing to identify all features which would be relevant to determining compliance with the Freshwater Wetlands Protection Act, the applicant

withdrew its application for the development. In a related enforcement action, DEP fined the project's surveyor, John P. Houwen of B&B Hi-Tech Solutions, Inc., $41,000 for failing to identify on-site freshwater wetlands and State open waters on the property.

In another enforcement action, a developer who obtained a wetlands permit, but then ignored its conditions was fined $555,000 by NJDEP. In November 2004, Pulte Lifestyle Communities, Inc. obtained a wetlands permit from NJDEP requiring the company to minimize impacts to sensitive environmental areas and comply with the permit's conditions and limitations. Pulte exceeded the scope of its permit by clearing land within stream buffer zones and disturbed approximately 1.9 acres of freshwater wetlands and transition areas during construction of 499 homes, various roadways and utilities including underground electric wires, sewers and water pipes. The company also failed to file deed restrictions in Somerset County prior to initiating construction activities, which prevented interested parties from reviewing the permit, which can negatively impact water quality and cause excessive sedimentation. In addition to paying the $555,000 penalty, Pulte Homes must restore 3.3 acres of wetlands and comply with all conditions of its permit.

Commentary: *States are also aggressively pursuing wetlands enforcements actions, especially where states have launched initiatives to preserve open space. For example, the Massachusetts Department of Environmental Protection (MADEP) continued its crackdown on illegal wetlands destruction by assessing 11 property owners a total of $984,100 for filling and alteration of 15 acres of wetlands without permits. Many of the cases were developed under MADEP's high tech wetlands enforcement program that uses computers to analyze before-and-after aerial photographs to identify wetlands that have been altered. Other cases relied on surveillance from airplane flyovers and tips from local officials and the general public about illegal alterations in their neighborhoods. The penalties range from $410,450 assessed against three parties for wetland alterations uncovered in Hadley to an $11,150 penalty assessed for alteration of approximately 3,000 square feet in Templeton. Two other cases carried no financial penalty, but required restoration of approximately an acre of filled wetlands. Since MADEP implemented its enhanced wetlands enforcement effort, it has brought 83 higher-level enforcement actions for wetlands violations have been taken, more than 35 acres of wetlands ordered restored and $1.9 million in fines assessed.*

Developer to Create Virginia's First Tidal Wetlands Bank

Chesapeake Land Development LLC recently received approval to create Virginia's first tidal wetlands bank. When completed at the end of the summer, the 7.5-acre tract will be used to help

compensate for waterfront marshes lost to new piers, bulkheads, boathouses and other shoreline construction activities along the lower James River, the Nansemond River, the Elizabeth River, the Pagan River and the Warwick River. Credits for the bank will cost approximately $8 per cubic foot or $348,000 per acre. Thus, a developer needing to purchase a 1,000-square-foot "credit" from the bank would pay $8,000.

The wetlands banks will be developed on a tract of land that is sandwiched between an apartment complex and a used auto parts store, and has been used as an illegal tire dump. A junkyard and chemical plant are also located near the site. To develop the wetlands bank, the company will excavate soil to lower the property, then construct cut ditches to allow tidal flooding from a tributary of the Elizabeth River. The company will plant 25,000 Spartina reeds, but will leave two small groves of trees for birds and small wildlife. Prior to commencing construction activities, the firm collected an estimated 20,000 junk tires that were collected by the state.

USDA Announces New Wetlands Funding

The United States Department of Agriculture announced that $5 million would be available through the Wetlands Reserve Program (WRP) for restoration activities in 20 states. These funds will restore and protect nearly 40,000 acres of wetlands. The WRP, which is administered by the Natural Resources Conservation Service (NRCS), is a voluntary conservation program that offers landowners the opportunity to protect, restore and enhance wetlands on their property. The goal of the program is to achieve the greatest wetland functions and values and create optimum wildlife habitat on every acre enrolled in the program. The amount provided to each state ranges from $50K to as much as $800,000. The states that will receive the WRP funds are California, Delaware, Idaho, Illinois, Iowa, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New York, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas and Vermont.

RI Court Finds No Taking After Remand from U.S. Supreme Court

Every so often, the United States Supreme Court will issue an opinion that draws a lot of attention because it seems to articulate a new legal doctrine or alter existing precedent, but does not actually decide the case on the factual merits. In such instances, the Court will "remand" or send the case back to a lower federal court or state court for further evaluation based on the ruling. After taking additional evidence, the lower court will frequently issue a new decision that is not significantly different from its prior ruling.

Such as the case in *Palazzolo v. State of Rhode Island*, 2005 R.I.

Super. LEXIS 108 (July 5, 2005.) In this case, a corporation controlled by the plaintiff purchased property with coastal wetlands in 1959. The plaintiff immediately sold six building lots and filed several development plans in the 1960s for 18 acres of land containing 74 building lots that would have required fill material to be placed on the property. The local planning agency denied the initial application for incompleteness and referred the other two applications to the Rhode Island Department of Natural Resources (DNR). The DNR initially approved the applications, but then withdrew its approval because of adverse environmental impacts. The corporation did not contest the ruling and took no further action.

During the 1970s, the salt marshes on the property were classified as coastal wetlands when the petitioner acquired title to the property in 1978. In 1985, the petitioner submitted another proposal to fill the site, but was denied a permit. The petitioner then filed an inverse condemnation petition. He claimed that because the property was zoned for residential purposes, the state's denial of the development plan deprived him of $3 million in profits from the sale of the 74 building lots.

The Rhode Island Supreme Court ruled the owner's taking claim was not ripe because he had never specifically sought permission to build the 74-home development on the coastal wetlands. The state court also found that the owner had not suffered an unconstitutional taking because the regulations prohibiting development of wetlands had been enacted before the plaintiff had acquired the land. The court also said that the landowner had not shown that "all value" had been taken by the regulation since he could build a substantial residence on an upland 18-acre portion of the property that had an uncontested residual value of $200,000. The court said it did not matter that the balance of the property was undevelopable.

The United States Supreme Court ruled that the mere fact that the regulation pre-existed the purchase of the property did not *automatically* preclude a landowner from bringing a takings claim. The Court said that a transfer of land occurring after a regulation went into effect did not destroy the takings claim that a previous owner might be able to assert. However, there was no clear majority on the weight that notice of the regulation should play in determining if the owner had a "reasonable" investment-backed expectation.

The Court agreed with the Rhode Island court that the owner was not deprived of all economic use of his property since the value of upland portions of the land was substantial. The Court remanded the issue as to whether there were "investment backed expectations" that had been taken in any event by the regulation of the bulk of the parcel to an undevelopable state.

On remand, the Superior Court of Rhode Island held a second hearing in 2004 and ruled that state law principles limited the rights that the plaintiff acquired. For example,

the court found that excess nitrogen discharges from individual septic systems that would have been constructed on the wetlands would have impaired water quality and created a public nuisance. Under state law, the court said a property owner had no right to create a public nuisance. Moreover, the court found the state held title to all land below the mean high water mark under the Public Trust Doctrine. As a result, the plaintiff had not acquired any right to develop the portion of the property below the wetlands. Since the plaintiff did not have a reasonable investment-backed expectation right to fill or develop the portion of the site below the mean high water mark, the court held there was no regulatory taking.

TOXIC SUBSTANCES

Roundup of Lead-Base Paint (LBP) Enforcement Actions

EPA is seeking a $167,363 penalty from a Philadelphia landlord for failing to comply with the LBP disclosure rule. According to EPA, William A. Rowell failed to disclose the presence of known LBP to prospective tenants and homebuyers in 14 lease agreements at eight rental properties.

A San Jose landlord agreed to pay $15,393 in fines and perform LBP abatement work valued at $138,539 at 72 rental units in the cities of San Jose and Cupertino, CA. EPA alleged that Allen Wong failed to include a lead warning statement in leases for the 72 units, a statement of his knowledge about LBP paint in the units, did not identify records regarding LBP in the units, did not obtain executed affirmations from lessees that they had been provided with the disclosure information as well as signatures and dates of Wong and his lessees certifying the accuracy of their statements. As part of the settlement, Wong will conduct lead inspections and risk assessments and perform lead abatement work at 21 rental units identified by EPA where children live or that will soon be occupied by children age six and under. If funds remain after addressing hazards at these units, Wong will be required to address LBP at additional units he owns.

EPA recently obtained the largest fine issued by an administrative law judge when the owner and management company of four residential apartment buildings in Richmond, VA were fined $84,224. The judge found that Genesis Properties, Inc., and the individual property owners, Ronald Hunt, Patricia Hunt, David Hunt and J. Edward Dunivan failed to comply with LBP disclosure requirements at ten apartments. Five of the apartments had children under the age of six when they entered into the lease. The other five apartments were occupied by children ranging from seven to 15 years old at the time they entered into the lease.

Pier Properties, Inc., and Atlantic Holdings, LLC, agreed to spend $26,565 to replace windows and doors containing LBP and pay a $2,880 for failing to comply with the LBP disclosure rule at one of their seven apartment units in the Lewiston, ME.

Liberty National Enterprises was fined $13,675 for failing to provide evidence that it complied with the LBP disclosure rule for 50 rental units in Tucson, AZ. The company was unable to produce documentation that it had supplied tenants with the EPA-approved lead information pamphlet, failed to include a lead warning statement in its leases, did not identify available records identifying the presence of LBP in the units, did not obtain executed statements by renters

affirming receipt of lead information, and dated signatures certifying the accuracy of their statements.

Cranston-based real estate investor Norman Reisch and one of his companies, Juris Realty Associates, Inc. agreed to pay $11,000 to resolve LBP disclosure violations at three houses in Providence and Warwick, RI,. EPA alleged that Juris failed to comply with the LBP disclosure rule when it sold residential properties in Providence and Warwick. In 1999 EPA fined Reisch in his capacity as an agent of the seller. The agency said he failed to provide the mandated LBP warning statement and failed to insure that the seller complied with its disclosure obligation.

EPA fined two Los Angeles-based apartment property management firms $8,008 for failing to comply with LBP disclosure requirements at 12 apartment buildings in Los Angeles, Burbank, Canoga Park, Orange, Santa Monica and Malibu. The Beaumont Company, an L.A.-based property management and real estate brokerage firm, failed to provide federally required lead warning statements to rental apartment tenants and failed to provide information on the presence of LBP at these locations prior to tenants signing leasing agreements.

Commentary: *During due diligence, many banks simply require consultants to sample painted surfaces for LBP and require implementation of an LBP O&M plan if LBP is present. Since borrowers could incur substantial fines even if LBP surfaces are in good condition and violations could lead to reputational issues, consultants should be asked to review tenant files to make sure that the required disclosures and other documentation requirements are satisfied.*

PCBs Detected In Caulk

A school district in Westchester County, NY, will spend approximately $100,000 to remediate PCB-contaminated soil at the French Hill Elementary School in Yorktown Heights. The PCBs apparently originated from caulking that was left on the school grounds after the windows were replaced in 2003. The PCBs were discovered by a parent who tested scraps of the caulking and found PCB's at 350 times above the federal limit.

Commentary: *The State Department of Health indicated that this was the first known incident of PCB contamination from caulk in New York. However, a Harvard study performed on 24 buildings around Boston found eight buildings with caulking material that contained more than 50 parts per million of PCBs. The study also found varying levels of PCBs in the indoor air and dust taken from the buildings revealed varied levels of contamination. Studies in Europe suggest that PCB's may have been commonly used in caulking from 1960 to 1977, particularly in brick buildings. A study in Finland apparently found a correlation between PCBs in caulk and PCBs in the blood of construction workers*

handling the materials during renovations. In Germany, a study found elevated blood levels of PCBs in teachers working in schools with contaminated caulking. The study recommended random testing in schools, hospitals and other masonry buildings constructed or renovated during the 1960s or 1970s.