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A Newsletter Covering Recent Environmental Developments and Caselaw

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Publisher…….RTM Communications, Inc., Dean Jeffery Telego, President
510 King Street, Suite 410, Alexandria, VA 22314 USA 703-549-0977 or 800-966-7445
Editor…….Tacy Cook Telego, APR, VP RTMC.
Author…….Lawrence Schnapf, Esq.

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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.

ENVIRONMENTAL DUE DILIGENCE

EPA PUBLISHES FINAL RULE FOR ALL APPROPRIATE INQUIRIES

After much anticipation, EPA officially published the final rule for All Appropriate Inquiries (AAI) in the November 1, 2005 edition of the Federal Register. The final rule publication was also announced at EPA's annual Brownfields conference in Denver, CO, where EPA administrator Stephen Johnson recognized the members of the AAI negotiated rulemaking committee.

As reported previously, over 400 public comments were received in response to the proposed AAI rule, which was published on August 24, 2004. Though overall the final rule is quite similar to the proposed rule, changes were made to some of the rules provisions, the most obvious and hotly debated is the definition of the Environmental Professional (EP). Just as important as what changed is what stayed the same. Despite public comments, changes were not made to the assessment of the purchase price of the property, interviewing neighbors, or the definition and use of data gaps.

The effective data of the final AAI rule is November 1, 2006. Perhaps most importantly for the stability of the marketplace, the final AAI rule references the updated ASTM E 1527-05 as complying with its requirements. The ASTM E 1527 Task Group has worked hand in hand with EPA to ensure that the updated standard would comply with the AAI rule. (*For more on ASTM E1527, see ASTM Developments*). Until the November 1, 2006 effective date, EPA will continue to recognize the current interim standard, which includes both E 1527-97 and E 1527-00, along with the revised ASTM E 1527-05.

EPA Focus--Continuing Obligations

As was the case with the proposed AAI rule, the final rule includes a Preamble in which EPA offers interpretation and clarification. One theme that EPA hammered throughout the Preamble was that AAI was just one component of the three landowner liability protections. In order to assert a defense to CERCLA, EPA clearly stated that a landowner must abide by the post acquisition continuing obligations including complying with land use restrictions and not impeding the effectiveness or integrity of institutional controls, and taking reasonable steps with respect to hazardous substances and allowing government access.

Changes From the Proposed Rule

The most obvious change from the proposed rule is the less stringent definition of the EP. As expected, the final rule was broadened to recognize individuals without college degrees, without any sunset or grandfather provision. The final rule continues to recognize P.G.s. and P.Es., state, tribal and federal government certified

individuals and those with a Bachelors in Science. Unlike the proposed rule, individuals with ten or more years of full time relevant experience will meet the definition of the EP. A person who doesn't qualify as an EP can work on an inquiry under the supervision and responsible charge of an EP; however, in the Preamble, EPA continues to recommend that an individual meeting the definition of an EP conduct the visual site inspection.

The final rule also changes the disclosure obligations for the additional inquiries performed by the prospective landowner (of those acting on his/her behalf) to the EP. In both versions of the rule, additional inquiries have to be performed by the prospective landowner. These additional tasks, which are not performed by the EP, include stating the specialized knowledge or experience of the prospective landowner, the relationship of the purchase price to the fair market value of the property if the property was not contaminated, and commonly known or reasonably ascertainable information. In addition, if the EP was not instructed to do so, landowners will conduct the search for environmental clean up liens. The proposed rule required that the prospective landowner then turn the collected information over to the EP; the final AAI rule has dropped this requirement. EPA states that since it is ultimately the landowner who will have to assert the defense to CERCLA liability, the landowner should not be obligated to provide this information to the EP. If the information is not turned over to the EP, the EP should assess the impact of the missing information and determine if it represents a data gap. Therefore the final rule allows for, but does not require, that this information be provided to the EP.

Another, though more minor, change in the final rule is the search for institutional controls as part of the review of federal, state, tribal and local government records. Both AAI rule versions require that registries or publicly available lists of institutional (IC) and engineering controls (EC) be searched in regard to subject property. The only additional searches for ICs and ECs were to include nearby properties that were previously identified or regulated by a government entity due to environmental concerns at the property. For these cases, EC and IC registries were both to be checked for a distance of a ½ mile from the subject property. After consideration, EPA agreed with commentors that searching for ICs associated with properties located within a ½ mile of the subject property was burdensome. Therefore, the final rule drops the requirement for institutional controls, but maintains the requirement for engineering controls.

Hotly Debated, But No Changes

Various stakeholders across the nation were hoping that EPA would make changes to their certain pet issues. However, EPA decided to maintain the requirement that neighbors be interviewed in the case of abandoned properties. In addition, no changes were made to data gaps and the use of sampling & analysis, and determining the fair market value of the subject property.

Despite a surprising number of public comments, EPA maintained that the user must consider whether the purchase price of a property reasonably reflects its fair market value (if it wasn't contaminated). Furthermore, EPA maintained that a real estate appraisal was not needed to make this determination. Though an appraisal is an excellent source of information, it is not needed to make the assessment. The only change in the final rule is that this information, as is same with all the other non-EP performed tasks, need not be turned over to the EP.

EPA also made no alternations to its definition of data gaps and the use of sampling and analysis, offering no further clarification. The final rule states that data gaps must be identified, the sources of information consulted to address these data gaps must be identified, and the EP must comment upon the significance of such data gaps with regard to the ability to identify conditions indicative of releases. Sampling and analysis may be conducted to develop information to address data gaps.

In the Preamble, EPA echoes its previous sentiments, clearly stating that AAI doesn't require sampling and analysis; however, they note that sampling and analysis is a valuable tool in determining the extent of contamination on a property. They further note, that for certain properties it may be "prudent" to conduct sampling & analysis either pre-or post acquisition to fully understand contamination and to fully comply with the requirement for the CERCLA liability protections.

ASTM DEVELOPMENTS

ASTM E 1527-05 Finalized

In the wake of the EPA final rule for All Appropriate Inquiry (AAI), the updated ASTM E 1527-05 is now finalized and published. As mentioned above the final AAI rule includes ASTM E 1527-05 as a standard that complies with all appropriate inquiries. The ASTM E 1527-05 Task Group worked with EPA throughout the revision process to ensure that ASTM E 1527-05 would be compliant. However, it is important to note that ASTM E 1527-05 is not simply a duplication of the rule. ASTM E 1527-05 only needed to be as stringent as the final AAI rule and there are subtle differences between the two.

Scope & User Responsibilities

First, ASTM E 1527-05 will continue to include an inquiry into the presence of petroleum products regardless of the petroleum exclusion under the CERCLA definition of hazardous substances. It also includes comprehensive examples of what is practically reviewable and what constitutes reasonable time and costs. Another subtle difference from AAI is the user's disclosure obligation to the EP regarding the additional inquiries performed by the user. AAI retains the proposed delineation of responsibilities, but the user is not required to disclose the results of their inquiries to the EP. In ASTM E 1527-05, user responsibilities are addressed both within the body of the standard and with an optional user questionnaire included as an appendix. The appendix says the

user must provide the information to the EP. Within the body of the standard, users are directed to review title and judicial records for environmental cleanup liens and for activity and use limitations (AUL), otherwise know as institutional (IC) and engineering controls (EC). Any such environmental liens or AULS shall be reported to the EP. In regards to the user's specialized knowledge and to commonly known or reasonably ascertainable information within the local community, it is the user's responsibility to communicate this information to the EP and this should be done before the EP conducts the site reconnaissance. For the purchase price assessment, if the price doesn't reasonably reflect fair market value, the user is instructed to make a written record of their explanation. There are no further instructions specifically stating that the user should give this information to the EP. The EP's final report shall note whether or not the user provided any of this information to the EP.

EP Requirements, Search for ECs/ICs

Throughout the entire ASTM E 1527-05, searches for AULs are for the subject property only. Federal and state registries of ICs and ECs are required in the records search and the search for AULs in local land records is listed as an additional environmental records source. ASTM E 1527-05 used the AAI definition for the EP, and just like the AAI rule, there are no absolute requirements that the EP must perform specific tasks. However, 1527 does state that at a minimum the EP must be involved in the planning of the site reconnaissance and interviews and also establishes qualifications for the individual conducting the site visit and interviews. Also, there is no site visit exclusion within the standard, though AAI does include a limited exception from this requirement. The ASTM E 1527 Task Group determined that any explicit mention of an exception could lead to abuse.

Data Gaps & Sampling

Finally with regard to data gaps and additional investigation, the EP report will contain an opinions and conclusions section. The opinions section will include the EP rationale for determining whether a recognized environmental condition (REC) does or does not exist and will also identify and comment on the significance of any data gaps. The EP will also provide an opinion regarding appropriate investigation, if any. The ASTM standard stresses that this opinion should only be provided when greater certainty regarding the identified RECs is required. The opinion is not intended to constitute a requirement that the EP include any recommendations for Phase II or other assessment activities.

During the October ASTM meeting, the E 1528 Task Group unanimously agreed to three revisions. One revision related to the suggested next steps upon the identification of a potential environmental concern (PEC). Prior to the amendment, the guidance suggested the user follow up with a Phase I ESA. However, users are

not pursuing CERCLA liability protection with the transaction screen; therefore, it was determined that other steps, such as consulting with an environmental consultant, contractor of governmental authority would be more appropriate guidance. This revision also included a more comprehensive definition of PEC and better integration of the term throughout the document. A second revision clarifies the use of prior transaction screens. A prior transaction screen that is older that 180 days can be used if it meets or exceeds the requirements of the newly updated 1528 and if the preparer concludes that the conditions at the subject property likely to affect PECs are not likely to have materially changed. Lastly, the Task Group agreed to change the two suggested historical research options. Prior to the amendment, the document referenced fire insurance maps or consultation with the local fire department. The Task Group agreed to change the reference to fire insurance maps or review of local street directories, noting the lack of quality of information from fire departments.

After E ASTM 1528 is finally approved, the Task Group hopes to move on to developing a business risk standard.

New ASTM Task Groups

The ASTM Board also approved establishing a new Task Group to develop a standard to assess vapor intrusion as it relates to property transactions. Anthony Buonicore, EDR, will chair the new Task Group (E 50.02.06). The buzz around vapor intrusion has been spreading across the contaminated properties marketplace, potentially affecting remediation and real estate development across the country. More and more states are developing their own guidances and regulations on how to address this problem. So far 16 states have developed either formal vapor intrusion guidance or regulation, with New Jersey recently finalizing its guidance.

The ASTM has also recently approved the development of a practice standard for Continuing Obligations and Appropriate Care. As noted above, EPA highlighted the importance of continuing obligations in the preamble to the final rule for AAI. While E 1527_05 addresses AAI obligations, there is currently no ASTM standard that clearly addresses continuing obligations for appropriate care. This new Task Group will also be located within ASTM E 50 and will be chaired by Bob Wenzlau of Terradex.

HAZARDOUS WASTES/USTS

Energy Bill Contains Enhanced Requirements For UST Owners and Operators

Owners and operators of underground storage tanks will be subject to new inspection and training requirements under the Energy Policy Act of 2005 (H.R.6) that was signed into law on August 8, 2005. The new UST provisions appear in Subtitle B of the law titled the "Underground Storage Tank Compliance Act."

The new law authorizes up to 80% of the $605 million LUST fund to be used to help pay reasonable costs of corrective action, administrative or enforcement costs including conducting inspections and issuing orders of states operating under a cooperative program. EPA and delegated states may also use the LUST Fund to finance corrective actions for releases of MTBE and other oxygenated fuel contamination.

In addition, the law added a new section 9003(h)(6)(E) that provides that the inability to pay corrective action costs while maintaining business operations may be considered in determining the liability of a UST owner or operator for cost recovery. This section also authorizes EPA or the state to seek alternative methods of cost recovery if the agency determines that an owner or operator cannot pay all or a portion of the costs in a lump sum payment.

Another requirement is that USTs that have not been inspected since 1998 will have to be inspected within two years of the enactment of the law. After these on-site inspections are completed, states will be required to inspect tanks every three years. However, the inspections may be delayed an additional year if states lack the resources to complete the inspections within the three-year time period.

To address concerns that new tank systems have been failing because of improper management, EPA is required to publish guidelines for training requirements within two years for those having primary responsibility and daily responsibility for on-site operation and maintenance of USTs, and also for those employees responsible for addressing on-site emergencies as result of a UST spill or release. Until passage of the Energy Bill, the LUST program had not been amended or reauthorized by Congress in 19 years.

Beginning two years after the effective date of the law, it shall be unlawful to deliver or accept fuel to USTs at facilities that have been identified by EPA or a delegated state as being "ineligible" to receive fuel deliveries.

The law also requires states receiving LUST funds to require enhanced performance standards for new UST systems and replacements of existing USTs systems after the effective date in certain locations. New or replacement USTs must be equipped with release detection and prevention system (*i.e.,* secondarily containment) if the new or replaced

underground storage tank or piping is within 1,000 feet of any existing community water system or any existing potable drinking water well.

To address concerns about releases from improperly manufactured or installed UST systems, the law establishes financial assurance requirements for manufacturers and installers of USTs to cover the costs of corrective actions directly related to releases caused by improper manufacture or installation.

Untimely Reporting Renders Tank Owner Ineligible for UST Funds

State UST trust funds can be a useful tool in transactions in order to absorb a significant portion of the "first dollars" of liability for petroleum contamination. A recent decision in Tennessee illustrates the importance of reviewing the eligibility requirements of these programs.

In *Texaco Refining & Marketing, Inc. v. Tennessee Dept. of Environment and Conservation*, 2005 Tenn. App. LEXIS 611 (Ct. App. 9/27/05), Texaco removed four USTs from a service station in March 1988. Two years later, the state established its UST fund that provided for reimbursement for releases that occurred prior to July 1, 1988. To qualify for reimbursement, UST owners or operators were required to be in "substantial compliance" with the UST program. The regulations implementing the UST trust fund identified several sections of the UST statute that applicants had to comply with to be eligible for reimbursement, including reporting suspected releases within 72-hours of discovery.

In March 1991, Texaco discovered evidence of petroleum contamination but did not report the release until three months later. In 1998, the company submitted a application for reimbursement. The state initially rejected the application because it involved a release that occurred prior to the July 1988 retroactive date. Texaco appealed the decision and a trial court found in favor of the company, holding that the company had removed its USTs in 1988 before the adoption of the retroactive date. However, the appeals court ruled that Texaco had not incurred remediation expenses until 1991 and was therefore governed by the more restrictive requirements. Moreover, the court found that Texaco was not in substantial compliance with the UST program because it had failed to provide notice of the release to the state within 72 hours.

Commentary: *During due diligence, buyers should verify that the assets being acquired are eligible for reimbursement, review the claims procedures and make sure that existing rights of reimbursement are assignable. In it also important to assess the financial viability of the state funds since some state UST funds are flush with cash but others are insolvent.*

Laboratory Owner Sentenced to Go Back To Prison for Filing False UST Reports

In 1997, Michael Klusaritz of Whitehall, PA, was convicted in 1997 and spent 12 months in jail for falsifying environmental test results

when he worked at Hess Laboratories in East Stroudsburg, PA. In September, he was sentenced to 21 months in prison and ordered to pay more than $112,000 in restitution for filing of false underground storage tank (UST) closure reports while working for Boyko's Petroleum Services, Inc., of Whitehall, PA. Klusaritz had been charged in March for billing customers more than $110,000 between October 2001 and October 2003 for the false reports. The fraudulent scheme included falsification of analytical laboratory reports and forged signatures on false environmental reports that he prepared, which were submitted to the Pennsylvania Department of Environmental Protection and to Boyko's clients.

Heating Oil Tank Enforcement Action

Eastern Petroleum Corp. of Annapolis, MD., agreed to pay a $75,000 penalty for failing to properly conduct required leak detection monitoring and for failing to comply with corrosion protection requirements for five 30,000-gallon heating oil tanks.

The PADEP fined ManorCare Health Services, Inc. $3,161 for failing to report a petroleum spill from a heating oil tank. After observing petroleum product in a storm drain, PADEP inspectors found several inches of oily water in the basement of a building at the ManorCare facility. A contractor had removed a tank containing fuel oil from the basement after finding it floating on its side.

Commentary: *As discussed earlier, there is growing anecdotal evidence that property owners may be increasingly relying on self-directed cleanups where contamination is discovered during excavation or land-grading activities; it is addressed in the field without notifying state authorities because of fears that state involvement will delay construction schedules. Often times, the source of contamination is a previously unknown or improperly closed USTs. Not surprisingly, some states seem to be bringing more enforcement actions for failing to timely comply with UST reporting obligations. During due diligence at residential and commercial properties in the northeast, it is important to determine how the property was formerly heated. Because heating oil tanks are often unregulated or may have been regulated by fire marshals who allowed the tanks to be closed in place, residual contamination from the former tanks may be present on the property.*

Small Business Hazardous Waste Enforcement Concern for Community Banks

EPA is seeking $85,413 from Dean's Auto Salvage in Anchorage, AL for failing to properly manage waste paints, solvents and used oil between May 2002 and September 2003. EPA inspectors observed that the facility was not properly managing paint wastes and used oil. Dean provided some used oil to private entities as fuel for space heaters.

ChemGenes Corp. agreed to pay a $20,000 fine to resolve

charges that it failed to properly manage its hazardous wastes. EPA originally sought $225,206 in fines from the company that manufactures components used by researchers to create synthetic DNA and RNA, but reduced the penalty under the agency's "ability to pay" policy as well as ChemGenes willingness to correct its mistakes. Some of the violations included failing to determine if its waste was hazardous, failing to properly label hazardous waste as well as complying with employee training and contingency planning. ChemGenes will pay its $20,000 in fines on an installment plan over the course of about two years.

***Commentary**: Many small businesses that are obtaining financing from community banks may not be aware of their environmental obligations or may not have the resources to properly address all of their environmental compliance issues. Yet, community banks often do not perform environmental due diligence on borrowers before entering into loans with their borrowers. It is important for banks of all sizes to evaluate the environmental liabilities of their borrowers and especially before foreclosing on any collateral in the event of a default.*

CLEAN WATER ACT

Aviall Used to Find No Right of Contribution Under CWA

In *Environmental Conservation Org. v. Bagwell*, 2005 U.S. Dist. LEXIS 22027 (N.D.TX. September 30, 2005), runoff from a residential construction site resulted in accumulation of sediment and debris in four ponds located on a neighboring property. The landowners brought an action against the developers under the citizen suit section of the Clean Water Act ("CWA") claiming the defendants failed to maintain erosion controls and adequately manage stormwater. The defendants, in turn, sought contribution and indemnification under the CWA from their subcontractors for any civil penalties that might be assessed or required remediation of the ponds. The subcontractors then filed a motion for summary judgment to dismiss the developer's third-party complaint.

Applying the rationale of the *Aviall* decision, the federal district court found that the defendants failed to point to any language in the CWA or its legislative history suggesting that a right to contribution or indemnification is implied. The defendants also failed to show that Congress intended courts to supplement the comprehensive statutory scheme with a federal common-law right to contribution or indemnification.

The court also noted that defendants are strictly liable for violations of the CWA. Therefore, they were not entitled to indemnification for civil penalties under the CWA. However, because courts are allowed to consider equitable factors in determining the amount of a penalty, the court said the defendants could seek a reduction in penalties for violations that were the result of acts or omissions of third-parties.

Mobile Home Park Owner Faces Imprisonment For Improper Sewage Discharges

There is often a perception in the lending community that residential properties do not require ASTM-quality Phase I ESAs because of the perceived low potential for environmental concerns. Indeed, many lenders often only require a transaction screen or preparation of a questionnaire to satisfy their due diligence requirements.

In past issues we have illustrated the importance of performing comprehensive historical research into the former uses of the property. The following example highlights the importance of understanding the environmental compliance of residential properties. The owner of a mobile home park was sentenced to 27 months in prison and fined $270,000 for discharging pollutants from the park's sewage lagoon without adequate treatment into a tributary of the Roanoke River and Smith Mountain Lake. The Hardy Road Trailer Park was also ordered to remediate the sewage lagoon.

Commentary: *Some areas of the country are struggling to provide adequate supplies of drinking water because of drought and over-development. As drinking water becomes more scarce, states are taking measures to protect their existing supplies. One area of focus is on-site septic systems or decentralized wastewater systems. For example, California has launched an initiative that requires mobile home parks to upgrade their existing septic or wastewater systems. During due diligence, it would be prudent for purchasers and their lenders to determine if existing wastewater treatment systems are adequate or need to be upgraded. If they do need to be modified, the lender should ensure that adequate reserves are set aside to cover the costs of the work.*

Ski Resort Fined for Inadequate SPCC Plan

The owner and operator of Stowe (VT) Mountain Ski Resort agreed to pay a fine of $50,000 to resolve liability associated with a release of approximately 3,350 gallons of diesel fuel from a 6,000-gallon aboveground oil storage tank (AST) in 2003. Because the AST did not have adequate secondary containment, approximately 1,500 gallons of diesel fuel spilled into the West Branch of the Little River. As a result of the spill, the drinking water supply for the Notch Brook Condominium complex was impaired and the aquatic ecosystem was significantly impacted. As part of its investigation, EPA also found that the company did not have a required "Spill Prevention Control and Countermeasure Plan" (SPCC) until 2001, and that the SPCC plan that was in place at the time of the March 2003 oil spill was inadequate. The company also did not properly amend its SPCC plan after the incident. The EPA settlement follows an agreement with the Vermont Attorney General's office where the ski resort owner agreed to pay a civil penalty of $150,000 and to fund a $25,000 resource restoration project to enhance the streambed leading to the river affected by the spill.

Commentary: *Because of concerns about leaking underground storage tanks (USTs) impacts, many facilities have elected to store petroleum used for heating purposes or for emergency backup generators in ASTs. Often times, these ASTs do not have secondary containment and are located on bare soil or grass. Although facilities with ASTs are only subject to the SPCC requirements if they store more than 1320 gallons of petroleum in their ASTs, a best management practice for facility owners and their lenders would be to require that all ASTs be equipped with secondary containment and be located on an impermeable surface away from floor drains and other conduits to surface or groundwater. The cost of these measures is fairly inexpensive and can prevent or mitigate impacts to the environment in the case of spills, overfills or catastrophic failure.*

Ninth Circuit Upholds Restrictions on Developing Isolated Wetlands

The United States Court of Appeals for the Ninth Circuit joined several other circuit courts in allowing the U.S. Army Corps of

Engineers (Corps) to assert jurisdiction over wetlands that were connected to navigable waters by man-made ditches. In *Baccarat Fremont Developers v. U.S. Army Corps of Engineers*, 2005 U.S. App. LEXIS 22187 10/14/05), the plaintiff acquired approximately 31 acres in 1997 near San Francisco Bay in Fremont, CA where it planned to develop a six-building office, research, and manufacturing facility. After the plaintiff sought a wetlands jurisdictional determination, the Corps' San Francisco District office asserted jurisdiction over 7.66 acres of wetland because they were adjacent to navigable flood control channels and separated only by man-made berms. The Corps also found that the wetlands served important functions; that the wetlands' functions were particularly important because of the reduction of wetlands in the San Francisco Bay area; that the wetlands were within the 100 year floodplain of tidal waters; and that the wetlands contained hydric soil contiguous with the tidal waters.

The plaintiff initially sought a permit to fill 2.36 acres of wetlands; but following the United States Supreme Court decision in *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001), the plaintiff asked the Corps to reconsider its jurisdictional determination. The Corps affirmed its earlier decision and issued a permit in 2002 requiring the plaintiff to create 2.36 acres of freshwater wetlands on the site and enhance 5.3 acres of brackish wetlands as mitigation. A state trial court granted summary judgment in favor of the Corps and the Ninth Circuit affirmed. The appeals court ruled the SWANCC holding was limited to the validity of the so-called Migratory Bird Rule (which we have called the "reasonable bird standard") and did not address the issue of jurisdiction over adjacent wetlands. The Court then went on to rule that the Corps did not have to show a "significant hydrological or ecological connection" between the wetlands and adjoining waters to exercise jurisdiction over wetlands and that the factors cited by the Corps were sufficient to assert jurisdiction. Indeed, the court concluded that the facts supported a finding of a significant connection.

Just before the Baccarat decision, the Supreme Court granted *certiorari* to review the holdings of two decisions addressing how much of a hydrologic ink there must be between a property and navigable waters for the federal government to assert jurisdiction over wetlands. The issue in *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004), and *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004) is the scope of the Corps' jurisdiction over "adjacent wetlands" Specifically, the Court will review if CWA applies to wetlands that are not hydrologically connected to navigable waters, and if so, does the connection have to be significant. The Court will also examine if the Commerce Clause of the U.S. Constitution limits the federal jurisdiction over wetlands in either situation.

Commentary: *In our September*

2004 issue, we reported that the Government Accounting Office (GAO) had issued a report concluding that the Corps' district offices were not consistently interpreting the SWANCC decision. In a follow-up report, GAO has concluded that the Corps' offices were not consistently documenting rationale for declining to assert jurisdiction over wetlands. In "Waters and Wetlands: Corps of Engineers Needs to Better Support Its Decisions for Not Asserting Jurisdiction," GAO found that only 53 files of 770 jurisdictional determinations that were reviewed contained detailed rationale for declining jurisdiction. The report also found that most jurisdictional determinations were made without site inspections. Instead, the jurisdictional determination was made by reviewing maps and information provided by applicants. GAO also found that different offices required different types of documentation. The report also noted that the Corps had not compiled information assessing the impact of SWANCC on non-navigable, intra-state, isolated wetlands.

Another report issued by the Environmental Integrity Project found that the Corps had allowed up to 15,000 acres of wetlands to be drained during the past 18 months in 15 states on the basis that the wetlands were "isolated" and not subject to federal jurisdiction because of SWANCC. The report, "Drying Out: Wetlands Opened for Development by U.S. Supreme Court and U.S. Army Corps" also found that 15% of the destroyed wetlands provided habitat for endangered species. The report also claimed that the Corps was liberally interpreting what constitutes an isolated wetland to allow development in mudflats and intermittent streams that supported recreational fisheries and other activities that involve interstate commerce.

The U.S. Army Corps of Engineers ERDC Westland Regulatory Assistance Program has published a "Survey of Potential Wetland Hydrology Regional Indicators" that provides an expanded list of hydrology indicators that could be used by Corps District staff delineating wetlands.

New Guidance Replacing 1994 Wetlands MOA Highlights Dangers to Developers of Farmland

In 1994, the Departments of Agriculture (USDA) and Interior along with the Corps and EPA entered into a Memorandum of Agreement (MOA) to promote consistency in wetlands determinations under the CWA and the Food Security Act (FSA) and to streamline the wetland delineation process on agricultural lands. Earlier this year, the Natural Resource Conservation Services (NRCS) and Corps concluded that amendments to the FSA and the SWANCC decision produced inconsistency between the wetlands programs of the two laws.

For example, the NRCS determined that the 2002 FSA amendments prohibit it from sharing wetlands delineations and determinations with the Corps or EPA for CWA permitting and enforcement purposes. Because of 1996 FSA amendments, NRCS

believes that some land may be considered non-wetlands for FSA purposes, but also be considered jurisdictional wetlands under the CWA. Conversely, land that might be considered wetlands under FSA may no longer be subject to the CWA because of SWANCC. In addition, the MOA required NRCS to conduct wetlands determinations on agricultural land for purposes of obtaining a CWA wetlands permit but the NRCS regulations provide that the agency may only take actions to implement the wetland conservation provisions of the FSA. Finally, the MOA provides that NRCS may not revise wetlands determinations without consulting with the other agencies, but NRCS indicated it is required to comply with decisions of the USDA Appeals Division that could require revisions to wetlands determinations.

As a result, the NRCS and the Corps withdrew from the MOA earlier this year and issued Joint Guidance that replaces the procedures in the former MOA. Under the Joint Guidance, NRCS will make "certified wetland determinations" for participants or persons intending to participate in USDA programs where the proposed activity will involve draining, dredging, filling, leveling or otherwise manipulating land for the purpose of producing agricultural commodities. NRCS will also advise landowners that the certified wetlands determinations may not be valid for purposes of CWA jurisdiction or permitting.

The Corps will be responsible for determining the scope of its jurisdiction over waters other than wetlands on agricultural land. It will also advise landowners seeking to convert land for agricultural purposes that its jurisdictional determination (JD) may be valid for FSA purposes. Where both agencies need to make separate determinations on the presence or extent of wetlands, they will attempt to conduct joint on-site determinations or provide determinations within the same time frame so the landowner can receive all decisions at the same time. The agencies will try as much as possible to rely on each other's delineations. If there are areas on the site that are included within the agency's jurisdiction (*e g,,* isolated wetlands, abandoned prior-converted cropland), the agency will inform the landowner and the other agency. Wetlands determinations made by NCRS for FSA purposes remain valid so long as the property is used to produce agricultural commodities. However, a wetlands determination by NCRS that the Corps determines is valid for CWA purposes will only be effective for five years or a shorter period if new information warrants a revision prior to the expiration date.

The Joint Guidance notes that activities that result in a violation under the CWA may not necessarily create a violation under the FSA. For example, a violation of the FSA occurs only if the wetland was converted for the purpose of producing agricultural commodity while a CWA violation occurs when there is an unauthorized or non-exempt discharge of dredged or fill materials regardless of the purpose or intent. Moreover, the document states that a violation of the FSA

only results in a loss of USDA benefits for the landowner.

Commentary: *Under the FSA, wetlands that were converted from a non-agricultural use prior to December 23, 1985 are exempt from the FSA even if it satisfies the wetlands criterion so long as agricultural commodities are produced on the land. However, if a developer purchases this land and changes the land to a non-agricultural use, such as by building a residential complex, the developer will not be able to rely on the non-wetland determination of the NRCS. The Joint Guidance indicates that in such circumstances, a new wetlands determination will be required for purposes of the CWA.*

Developer Convicted for Wetlands Violations

A federal jury in Pocatello convicted eastern Idaho developer C. Lynn Moses on three counts of violating the Federal Clean Water Act by knowingly discharging dredge and fill material into Teton Creek without a permit. The jury reached its verdict following a four-day trial during which the government proved that Moses supervised and directed heavy equipment operators to manipulate the stream bed in a continuing effort to develop property immediately adjacent to Teton Creek. Teton Creek is a tributary of Teton River, which flows into the Snake River. Moses refused to submit a permit application prior to undertaking the stream bed manipulation work in 2002, 2003 and 2004, and had failed to comply with previous administrative notices directing him to cease all work in Teton Creek. As recently as April 2004, Moses violated an administrative order issued by the United States Environmental Protection Agency ordering him to stop all discharges of dredge and fill material into Teton Creek. Moses will be sentenced before United States District Judge B. Lynn Winmill on December 21, 2005 at the federal courthouse in Pocatello, Idaho. The maximum penalty for each felony violation is three years imprisonment and a $250,000 criminal fine.

Developer Mitigates Wetlands Impacts Caused by Predecessor

Landmark Development, LLC, agreed to create and protect 2.5 acres of wetlands adjacent to Burnt Bridge Creek in northern Vancouver, WA, to offset wetland impacts caused by the previous land developer during the initial development of the site. This wetland mitigation will allow Landmark Development, LLC, to pursue permits required from the city, state and federal government to develop the remaining property as a planned residential development. In 1999, J. Clifford Cook, Jr,. and his company, Lacamas Creek Enterprises, Inc., filled approximately 1.2 acres of wetlands adjacent to Burnt Bridge Creek without obtaining a wetlands permit from U.S. Army Corps of Engineers (Corps). EPA fined Cook for the violation and sought restoration of the impacted wetlands. However, after meeting with EPA, Cook filed a chapter 13 personal bankruptcy petition and Lacamas Creek Enterprises, Inc., began liquidating under Chapter 7 of

the bankruptcy code. Because Cook no longer had access to the property and did not have adequate assets, he was unable to perform the required mitigation.

Roundup of CWA Enforcement Actions Against Developers

The high level of enforcement activity against developers for wetlands or stormwater violations that we mentioned in our last issue shows no signs of slowing as evidence by the following summaries.

EPA is seeking a $152,500 from the owners and builders of the "Fairfield at Longneck" housing development in Millsboro, Sussex Co., DE. EPA alleged in its complaint that Anderson Homes, LLC, and Fairfield at Longneck, LLC, and builder Triad Construction Company, LLC, failed to implement required erosion and sediment control measures, including completion of sediment basins, installation and maintenance of adequate silt fences, stabilization of disturbed earth, and storm sewer inlet protections. As a result, fill or dredged material was discharged below the high tide level of Indian River Bay, and into adjoining wetlands. EPA also ordered the parties to mitigate unpermitted discharges to 3.6 acres of tidal waters and wetlands.

Hawthorne Development, LLC, of Independence, MO, agreed to pay $60,000 to resolve claims that it illegally placed 80 cubic yards of fill material into a tributary of the Blackwater River during construction activities for a housing development in Warrensburg, MO. According to EPA, the unpermitted discharge of fill affected 950 feet of stream length. As part of the settlement, Hawthorne also agreed to perform a one-acre mitigation project at the construction site to compensate for the environmental damage caused by its actions.

The EPA Region 8 office issued an administrative complaint against Sunset Development, LLC, Daniels Construction, Inc., and James P. Daniels seeking $157,500 in fines for discharging dredged and fill material into wetlands and portions of a waterway in Sioux Falls, during construction of the Sunset Ridge development. According to EPA, the actions resulted in the elimination of a 0.4-acre and a 0.6-acre wetland and in adverse impacts to portions of a waterway and 3.0 acres of associated wetlands, which are connected to a surface water drainage system that flows into the Big Sioux River. EPA settled an enforcement against another Candle Development, LLC, another Daniels entity, in 2004.

EPA Region 10 issued a compliance order to Michael Achen and CMK Investments to stop development activity for failing to obtain a wetlands permit prior to conducting mechanical land-clearing work at the proposed Rasmussen Business Park. Achen and his company were ordered to stop all unauthorized work on the site and initiate a restoration effort to restore approximately 6.5 acres of wetlands impacted by their unauthorized actions. EPA took the action after Achen ignored an August 2004 warning from the Corps and resumed land-clearing operations at

the site in July 2005.

A Virginia real estate developer agreed to pay $250,000 and restore roughly 26 acres of wetlands to resolve allegations filed by the federal government and the Commonwealth of Virginia that his company improperly dredged wetlands. The settlement, which resolves fours years of litigation, requires Newdunn Associates and its contractors, Orion Associates and Northwest Contractors, to restore nearly 26 acres that it dredged and filled in 2001 to build an apartment complex in Newport News, VA. Newdunn will also purchase six mitigation bank credits to restore wetlands in the same watershed or pay $75,000 to the Virginia Aquatic Resources Fund in Charlottesville, VA, to compensate for the lost wetlands. Virginia will receive $150,000 from the federal fines. The state intends to spend $90,000 to restore wetlands along the Elizabeth River, direct $15,000 to its emergency cleanup fund, and give $45,000 to a nonprofit group, Wetlands Watch, to promote wetlands protection.

***Commentary:**. Some of the enforcement actions were brought under EPA's Construction Storm Water Expedited Settlement Offer (ESO) Policy which allows EPA to employ a streamlined enforcement process with lower fines for operators who are first-time violators and where several other criteria are also met. For example, in EPA Region 10, the nine ESO settlements have resulted in penalties ranging from $4,550 to $6,100.*

Residential Subdivision Ordered to Comply With Rule

The EPA Region 9 office ordered the Alma Ranchettes Cooperative in Chandler, AZ, to begin monitoring its drinking water for lead, copper, and other contaminants under the Safe Drinking Water Act (SDWA). Because the Alma Ranchettes Cooperative Water System serves 32 residents and co-owners, it is considered a public water system under the SDWA. Under the order, the development is required to submit a water sampling plan within 30 days and begin sampling water for contaminants within 60 days and every month thereafter. The order also requires the Alma Ranchettes Cooperative to hire a certified operator to run the system and report sampling data to residents and the State.

In another Arizona enforcement action by the Region 9 office, Speedy's Truck Stop in Lupton was ordered to monitor its drinking water supply. Because Speedy's Truck Stop supplies water to more than 2,000 people per day, it is considered a small drinking water system that is required to monitor tap water for contaminants.

Meanwhile, the owner of the Harvest Moon Mobile Home Park in Linden, PA, was ordered by the state Department of Environmental Protection to sample four drinking water wells and to pay a $4,000 fine for using two drinking water wells without obtaining permits from the DEP. Depending on the test results, the wells may have to be filtered or abandoned. In addition, the facility will have to submit an abandonment

plan for Well No. 2, and install meter boxes, taps and check valves on the four drinking water wells.

Commentary: *Many mobile home parks, smaller residential complexes and commercial establishment may be served by on-site potable wells. The operators of these facilities and the community banks who often provide financing to these smaller businesses may not be aware that the facilities are regulated under the SDWA. It is important that water quality samples be collected from any on-site wells that are used to provide potable water as well as to determine if the facility is required to subject to the SDWA monitoring requirements.*

Owner of Inactive Mine Liable for Acid Mine Discharges

The United States Court of Appeals for the Tenth Circuit ruled in *Sierra Club and Mineral Policy Center v. El Paso Gold Mines, Inc.*, 2005 U.S.App. LEXIS 18161 (August 24, 2005) that the owner of 100 acres of land containing an inactive gold mine was strictly liable under the CWA for discharges of pollutants from a collapsed mine shaft.

In this case, pollutants in the form of zinc and manganese flowed through rock and mine workings until they reached the abandoned mine shaft that formerly served as an elevator shaft for miners to access various levels of the mine. From there, the pollutants flowed down the shaft into a drainage tunnel that eventually discharged into navigable water. The plaintiff brought a citizen suit claiming that the defendant had violated the CWA by discharging pollutants from a point source without a permit. The defendant asserted that it could not be liable because it never conducted mining operations and was purely a passive landowner. The defendant argued that because the CWA defined a discharge as "any addition of any pollutant" implied that there had to be some form of affirmative conduct by the landowner. Since there was no activity involving the point source, the defendant maintained it could not be liable under section 402 of the CWA prohibiting discharges of pollutants from point sources without permits. However, the court disagreed. In contrast to the wetlands permits that regulate activity (dredging or filling of wetlands), liability under section 402 of the CWA was based on ownership or operation of a point source. Thus, the court said, owners of point sources can be liable for discharges occurring on their land even if they did not in any way cause the discharge. As a result, the federal district court granted the plaintiff's summary judgment and ordered the defendant to pay $94,900 in civil penalties as well as attorney fees and costs.

The appeals court agreed that there was an ongoing discharge from a point source and affirmed the district court on the scope of liability, holding that section 402 focused on the point of discharge and not the underlying conduct. As the court said, "if you own the leaky faucet, you are responsible for the drip."

The court distinguished from migration of residual contamination from a prior discharge from the ongoing discharges from a point

source that was involved in this case. The court also said that migration of pollutants from surface waste piles through the ground to the tunnel or seepage of naturally occurring metals into the tunnel would not constitute a discharge from a point source. Acknowledging that the term "addition" did imply some affirmative conduct, the appeals court said this requirement was satisfied by the contemporaneous introduction of pollutants from the defendant's property through the point source owned and maintained by the defendant. The court never explained how the defendant "maintained" the collapsed mine shaft. Instead, it pointed to EPA regulations requiring stormwater permits for runoff from inactive mining sites as interpretative support for its conclusion.

Having found that the defendant could be liable for the discharges, the court returned the case to the district court because there was a genuine issue of material fact whether discharges from the mine shaft were actually reaching navigable waters.

CLEAN AIR ACT

Former Building Owner Convicted of Asbestos Violations

Property owners in a rush to begin demolition so they can start construction may view the asbestos regulations as a time-consuming nuisance. To borrow from the Monopoly game: owners who fail to comply with the asbestos National Emission Standards for Hazardous Air Pollutants (NESHAP) are taking a chance and may be forced to go directly to jail without passing "Go." As evidenced by a recent enforcement Arizona action, asbestos liability does not end when an owner sells a building. In this matter, Jeffrey Springer of Phoenix pleaded guilty to illegally transporting asbestos, failing to train workers and not complying with asbestos workpractices in connection with demolition of several commercial buildings between July and September of 2000. Springer failed to conduct a pre-demolition asbestos survey and hired unlicensed workers to demolish the buildings that contained approximately 2,550 square feet of asbestos-containing materials. Springer faces a maximum penalty of five years imprisonment and a maximum fine of $250,000 per count. Springer could also be ordered to pay $70,000 in restitution to eight victims of exposure to asbestos as well as an additional $5,000 to the Agency for Toxic Substances and Disease Registry (ATSDR) to provide education and counseling to the victims.

In another asbestos criminal action, a Philadelphia man was sentenced to 10 months in prison, three years of supervised release, and ordered to pay a fine of $15,000 as well as a $700 special assessment. Beginning in 1999, John Kay, principal of Kay Properties, hired laborers to cut down thousands of feet of asbestos-covered heating pipes as part of a renovation project at a self-storage facility. The workers used handheld gasoline-powered saws rented by Kay to remove the pipes and did not wet the asbestos, creating a significant amount of dust containing airborne asbestos fibers. The workers also disposed the asbestos-containing debris into dumpsters and debris piles outside of the building. None of the workers were certified for asbestos work and none of the workers were provided with personal protective equipment.

EPA Region 10 is seeking $79,555 in civil penalties from two hotel owners for failing to comply with the asbestos NESHAPs during demolition of two buildings at the Best Western Landing Hotel in Ketchikan, AL, in January 2005. EPA charged that the owners and their contractor did not provide EPA with the ten day advance notice of the demolition, did not remove all of the asbestos before the demolition, and did not use water to wet all of the asbestos during the demolition. In addition, some of the asbestos debris from the demolition project was mixed with general demolition debris and disposed of improperly.

In another Alaska demolition case, EPA is seeking $123,387 in civil penalties form Huntington Family Ltd. Partnership, Hugh Grant, and George Davidson for asbestos violations during the demolition of the Endicott Building in Juneau, AL. The century-old Endicott Building (also known as the Skinner Building) was destroyed by a fire on August 15, 2004. Following the fire, the three parties demolished the remains of the building despite being notified by a State Health Inspector that samples taken from the debris tested positive for asbestos. The demolition debris was then disposed at the Capitol Landfill, which was not authorized to accept asbestos.

TOXIC SUBSTANCES

EPA Brings First Enforcement Action For Violation of LBP Pre-Renovation Disclosure Rule

A Virginia contractor is facing a fine of $27,500 and loss of its contractor's license for failing to comply with EPA's Lead-Based Paint Pre-renovation Education Rule (PRE). According to EPA, Millennium Quests, Inc. (doing business as "American Dream Consultants") renovated a home in Norfolk, in September-October 2003 without providing the homeowner with required information about lead-based paint hazards. Responding to a complaint from the homeowner, the City of Norfolk's Department of Health conducted a post-renovation inspection in November 2003 and discovered lead-contaminated dust and paint chips throughout the house. In April 2005, the company pleaded guilty in state court to a criminal charge related to its failure to comply with a December 2003 Norfolk Health Department order to clean up lead and asbestos at this property. Because of Millennium's refusal to comply with the order, the homeowner had to pay another contractor $34,725 to cleanup the LBP debris and to dispose of thousands of dollars of personal property that had been contaminated with LBP-dust. The Virginia Department of Professional and Occupational Regulation also fined the company $8,000 and revoked its Class A Virginia contractor license.

The PRE rule requires general contractors, special trade contractors (*e.g.,* painters, carpenters, plumbers and electricians) property managers, employees of landlords and others who perform renovations for compensation in "target housing" (built before 1978) to provide homeowners and adult occupants with a copy of EPA's lead information pamphlet "Protect Your Family From Lead in Your Home." The PRE applies to repair, remodeling and maintenance activities that disturb more than two square feet of painted surfaces unless the project is part of a LBP abatement project or involves an emergency renovations. Minor repairs such as drilling holes to run electrical line or replacing light fixtures or a piece of window trim to not trigger the PRE requirements so long as it disturbs less than two square feet of paint surfaces. The PRE also applies to renovations to common areas of multi-family housing as well as to exterior work. Contractors are also required to follow certain work practices to avoid exposure to lead-contaminated paint dust and debris that may be generated by the renovation.

Commentary: *The nation's largest real estate boom occurred in the early to mid 1970s. However, unlike the current real estate cycle, which involves primarily single-family residences, the 1970s event primarily involved multi-family housing. Because these pre-1978 complexes likely contain LBP, it is important that contractors and owners ensure that they comply with the requirements of the Residential Lead-Based Paint Hazard Reduction Act of 1992.*

Former Owners Fined for Failure to Comply w/ LBP Disclosure Rule

The former landlords of a rental property in York, PA, agreed to pay a $16,300 to resolve allegations that they failed to provide tenants with the required LBP notifications. The EPA Region 3 office determined that Carla Frey and William Frey, Jr., failed to comply with the LBP Disclosure Rule for three leases covering 2000-2002. The Freys' sold the rental property in 2004.

In another LBP enforcement action, the EPA Region 5 office is seeking $107,030 from Veselko Leko, Vinko Leko and V & V Management of Chicago for failing to provide the required LBP notification to tenants in four rental apartment buildings containing 134 rental units.

The EPA Region 1 office is seeking $82,720 from a property management company involving violations of the LBP Disclosure rule for seven apartment complexes in East Hartford, CT. According to EPA, MCR Property Management, Inc. which manages over 1000 apartment units in Connecticut, and Brookside Commons, LP, the owner of the property, failed to provide information about the presence of LBP and LPB hazards to a significant number of tenants. Approximately 50% of the leases inspected at Brookside Commons listed children under age 18.

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. Because 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.*

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