# SCHNAPF ENVIRONMENTAL JOURNAL

A Newsletter Covering Recent Environmental Developments and Caselaw

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## Contents

**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.*

# LITIGATION ROUNDUP

## *Supreme Court Approves Use of Unpublished Opinions*

Following the lead of several states, the United States Supreme Court has decided starting in 2007 to allow lawyers to refer to so-called "unpublished opinions" in federal courts. The federal circuit courts will be free to choose how much weight to give to the unpublished decisions but will not be able to prevent attorneys from citing them in their briefs and motion papers.

Approximately 80% of cases decided by federal appeals courts are unpublished opinions and the vast majority of state decisions are also unpublished. This means that the country's law was being determined by a small minority of cases. In the past, these decisions were hard to find but now are more readily accessible because of electronic databases.

Although they do not have precedential value, unpublished opinions can be a trove of valuable sources of information and illuminate how the majority of courts actually interpret environmental laws. It is sometimes stunning to see how unpublished decisions may not align with published case law. Sometimes it seems that judges may feel less bound by legal precedent and more inclined to exercise their equitable powers to reach the "right" result when they know that their decision will not come under the scrutiny that can follow publication. Due to the insight that unpublished opinions can provide, the *Schnapf Environmental Journal (SEJ)* has been routinely reporting on these decisions.

## *Third Circuit Rules PRPs Do Not Have Implied Right of Contribution*

In a 2-1 decision, the United Court of Appeals for the Third Circuit declined to follow the lead of the Second Circuit and ruled in *E.I. DuPont De Nemours v. United States*, No. 04-2096 (3rd Cir. 8/29/06) that a PRP does not have a right to bring contribution action under CERCLA section 107(a). Since the decision creates a conflict among the federal appeals courts, the issue is now ripe for review by the United States Supreme Court.

In this case, Dupont voluntarily remediated 15 sites that it currently owned or operated but that had been owned/operated by the United States during World War I and World War II. Dupont admitted that it was responsible for some of the contamination but sought contribution from the United States. The District Court for the District of New Jersey had ruled that under United States Supreme Court decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), Dupont was barred from bringing a contribution action under section 113 since the company had not been sued and had not remediated the sites pursuant to a administrative or judicial settlement. On appeal, Dupont asked the Third

Circuit to hold that it could bring a contribution action under section 107(a).

In an exhaustive opinion, Judge Thomas L. Ambro carefully reviewed the statutory language and found CERCLA section 107(a)(4)(B) authorizing recovery of costs incurred by "any other person" referred to persons who had not been previously listed as PRPs in section 107(a)(1)-(4). In response to DuPont's argument that the Court should reconsider its two precedents since they would now operate to undercut the primary goal of CERCLA of promoting cleanups by PRPs, the Court thoroughly examined the legislative history of CERCLA and the 1986 amendments that added section 113. The court concluded that while Congress did intend to encourage settlements and voluntary cleanups, the mechanism it provided was for parties to enter into administrative settlements under section 113(f) (3). Since Congress had established an elaborate system for encouraging settlements, the Court said it would not create a remedy that would "risk upsetting Congress' carefully chosen remedy."

The Dupont court expressly refused to follow the interpretation of Third Circuit case law by the Second Circuit in *Consolidated Edison Co. of New York v. UGI Utilities*, 423 F.3d 90 (2d Cir. 2005) . In a convoluted opinion, the three judge panel in Consolidated Edison seemed to contort itself in an attempt to show that it was not overturning the Second Circuit decision in *Bedford Affiliates v. Stills*, 156 F.3d 416 (2d Cir. 1998) when it found an implied right of contribution. The Consolidated Edison court held that a party that had not been sued or made to participate in an administrative proceeding (but if sued would have been liable under CERCLA) could nevertheless seek contribution under section 107(a) since it had not yet been adjudicated to be liable under CERCLA. In reaching that conclusion, the Consolidated Edison court distinguished the Bedford decision and the two Third Circuit cases, stating that they were narrow decisions involving circumstances where the plaintiffs had been compelled to remediate sites and thus qualified for contribution under section 113. The Dupont court, though, said that its prior decisions were not based on the motivations of the parties or particular facts but were broad rulings based on its interpretation of the statutory language. Neither *Aviall* nor *Consolidated Edison*, the court went on, invalidated the analytical foundations of its precedent.

Two weeks earlier, the Court of Appeals for the Eighth Circuit ruled that a PRP that voluntarily remediated a site could pursue a contribution action under section 107(a). In *Atlantic Research Corp. v. United States,* No. 05-3152 (8th Cir. 8/11/06), Atlantic Research Corp. (Atlantic) was hired by the Defense Department to retrofit rocket motors at a facility in Arkansas. After learning that the site had become contaminated, Atlantic voluntarily remediated the site and sought to recover a portion of its costs from the United States under CERCLA sections 107(a) and 113(f). The District Court for the Western District

of Arkansas ruled that Atlantic was precluded from bringing a section 113 contribution action because the company had not entered into an administrative settlement and not commenced its action prior to being sued. The court also held that the Eighth Circuit's decision in *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525 (8th Cir. 2003) ("Dico") foreclosed the company's Section 107 claim. On appeal, the Eighth Circuit noted that the rationale for its Dico was that section 113 was available to all PRPs. Since that assumption was no longer valid after Aviall and that the Supreme Court had determined that sections 107(a) and 113(f) provided distinct remedies, the court decided that Dico was no longer valid. The court found that CERCLA's broad statutory language supported a finding of an implied right of contribution in section 107. Turning to the language of 107(a) (4) (B), the court interpreted "any other person" to mean persons other than the United States Government or a State or an Indian tribe referenced in 107(A) (4) (A). The Court also determined that Congress had not intended to eliminate the judge-created implied right of contribution of section 107 that had existed prior to the 1986 amendments. Allowing PRPs to seek contribution under section 107, the court continued, would advance the goals of CERCLA by encouraging cleanups and ensuring that parties responsible for contamination paid their fair share.

The district courts have also been busy with post-*Aviall* litigation, beginning with the case that started this re-examination of CERCLA. On remand from the Fifth Circuit, the federal district court for the northern district of Texas ruled in *Aviall Services Inc. v. Cooper Industries LLC,* N.D. Tex., No. 3:97-CV-1926 (N.D. TX, 8/8/06) that the plain language of CERCLA prohibited PRPs from bringing a contribution action under section 107.

In *ITT Industries, Inc. v. Borgwarner, Inc.*, 2006 U.S.LEXIS 59877 (W.D.MI. 8/22/06), the plaintiff entered into an administrative order on consent (AOC) with EPA where the company did not admit liability. While this fact might have been helpful in the Second Circuit, it helped convince the court that the AOC did not resolve any of ITT's liability. Moreover, the AOC did not undergo the notice and comment procedure of section 122(g) or (h). The plaintiff countered that the AOC was an administrative settlement approved under section 122(a). However, the court noted that only administrative settlements approved under sections 122(g) and (h) are referenced in the statute of limitations section of section 113(g)(3)(B). Accordingly, the court ruled that the AOC was not an administrative settlement pursuant to section 113(f) (3) and dismissed the plaintiff's CERCLA claims.

In *Niagara Mohawk Power Corporation v. Consolidated Rail Corporation*, 2006 U.S. Dist. LEXIS 44034 (N.D.N.Y. 06/28/06), the plaintiff had entered into Order on Consent with the New York State Department of Environmental Conservation (NYSDEC). The consent order specifically provided that Niagara Mohawk was deemed to have resolved its liability to the State of New York for purpose of

contribution protection under CERCLA, that the company was entitled to seek contribution from any person except those entitled to contribution protection under section 113(f)(2) of CERCLA and provided for a release and covenant not to sue pursuant to state law and "any other provision of State or Federal statutory or common law" relating to the disposal of hazardous substances at the site. However, the court ruled that because there was no evidence that NYSDEC had not entered into any agreements with EPA vesting CERCLA authority to NYSDEC and because the consent order had a reservation of rights provision, the order did not qualify as an administrative settlement under section 113(f)(3).

In *Spectrum International Holdings, Inc. v. Universal Cooperatives, Inc.*, 2006 U.S. Dist. 49716 (D.Mn. 7/17/06), the plaintiff acquired the stock of Streator, Inc., in 1997. At the time of the purchase, Spectrum performed an environmental assessment and did not identify any contamination. After the purchase, Streator used the property for storage, shipment and light assembly of shelving products. When Streator sold the property in 2000, TCE contamination was discovered and the plaintiff remediated the property on behalf of its former subsidiary under the state voluntary cleanup program. The plaintiff then sought recovery of its costs from the defendant, who had operated a dairy equipment facility at the property from the 1950s to 1985. Spectrum argued that it was not a PRP because there was no evidence that it had discharged any TCE during the time after the defendant had sold the property. Because the court found that Spectrum had not exercised any control or directed any operations relating to the disposal of hazardous waste, it was not a PRP and therefore could maintain a section 107 cost recovery action. The court also ruled that while Spectrum had not been subject to an unilateral administrative order or been sued under section 107 when it filed its complaint, the 113(f) (1) claim was now ripe since Universal had filed a section 107 counterclaim against Spectrum.

In *Beazer East, Inc. v.The Mead Corporation*, 2006 U.S. Dist Lexis 47628 (W.D. Pa. 07/13/06), the plaintiff had entered into an administrative order on consent (AOC) with EPA under RCRA. In 1996, the district court adopted findings of a magistrate denying Mead's motion to dismiss the 113(f) contribution action on the grounds that Beazer's response costs were voluntarily incurred or had been incurred under RCRA. In a series of decisions over the next 15 years, the district court reached an equitable allocation of the remediation costs for the site but the Third Circuit remanded the matter back to the district court for a new equitable proceeding. Following *Aviall*, Mead filed a motion for summary judgment seeking to dismiss Beazer's action on the grounds that it was not eligible to bring a contribution action under section 113(f) and as a PRP could not maintain a contribution action under section 107(a). However, because Mead had not pursued this issue on appeal following the 1996 decision, the court

denied the motion.

In *City of Bangor v. Citizens Communications Company*, 2006 U.S. Dist. LEXIS 44967 (D.Me. 06/27/06) found that it was operating with a blank slate because the First Circuit had not had an opportunity to rule on *Aviall's* impact on implied rights of contribution under section 107. The court also noted that courts not limited by precedent have allowed PRPs who could not bring section 113(f) actions to bring contribution actions under section 107. Finding that the "any other person" language of section 107(a)(4)(B) was broad enough to include PRPs and that allowing PRPs to bring contribution actions under 107 would advance the goals of CERCLA, the court found that the City could seek reimbursement under section 107.

The district court of Kansas found an implied right of contribution in *Raytheon Aircraft Co. v. United States*, No. 05-2328 (D. Kan., 5/26/05). In that case, Raytheon Aircraft Co. sought contribution from the U.S. Army Corps of Engineers for cleanup costs at a Tri-County Public Airport in Herington, KA. Raytheon had performed the work pursuant to two administrative consent orders and by a unilateral administrative order.

In *Pioneer Metals Inc. v. Univar USA Inc.*, No. 04-15491 (11th Cir., 2/16/06), the Court of Appeals for the Eleventh Circuit ruled that a district court had erred when it treated a motion to amend a complaint to assert a claim under Section 113(f) (3) (B) as a motion to reconsider dismissal of a claim under Section 113(f) (1).

## *Environmental Consultant Sued For Failed Cleanup at Ringwood Mine Site*

In our last issue, we discussed that EPA had re-listed the Ringwood Mine Site to the NPL. Tribal members and other community residents have now filed a class-action suit in New Jersey state court alleging property damages and personal injuries from exposure to the hazardous wastes. The cases were removed to federal court and consolidated under the caption *Pierce Morgan v. Ford Motor Company*, No. 2:06-CV-1080 (JAP).

In addition to Ford, the plaintiffs have named URS, as successor to Woodward-Clyde as defendants for improperly investigating and remediating the contamination. The plaintiffs also allege that the defendants concealed from EPA the fact that some residences were using groundwater for drinking water as well as the magnitude of the contamination, thereby enabling the defendants to avoid remediating all of the contamination at the site. In particular, the complaint asserts that the URS defendants knew or should have known that the site was more extensively contaminated and used "inappropriate, subjective criteria" for identifying potentially contaminated areas. The complaint also states that the defendants failed to take steps to restore drinking water, failed to warn the plaintiffs and regulatory agencies of the extent of the danger posed by the contamination and conspired with Ford to "mask the true extent of the contamination." The URS defendants contend that they are not liable because they operated under the direction of EPA, and that the agency exercised "continuous and direct control" over the investigation and remediation of the site.

# DUE DILIGENCE/ DISCLOSURE

### *Kiddie Kollege Debacle Illustrates Weakness Overlapping Oversight of Institutional Control Leads*

The New Jersey Department of Environmental Protection (NJDEP) ordered the shutdown of Kiddie Kollege Day-Care Center in Franklinville, NJ, following the discovery that more than 30 children ranging in ages from 8 months to 3 years were exposed to mercury vapors that were 25 times the allowable limit. The incident illustrates the weakness of the institutional controls program that depends on close cooperation and communication between state and local government.

Accutherm Corp., a thermometer manufacturer, began operating at the site in 1984. In the late 1980s, groundwater at the site was impacted from wastewater discharged into the septic system and an OSHA inspection revealed elevated levels of mercury in the blood of some workers. In 1994, Accutherm filed a chapter 11 bankruptcy petition and ceased operations. The cessation of operations obligated the company to comply with the state Industrial Site Recovery Act (ISRA) that requires owners and operators to investigate and remediate property to the satisfaction of NJDEP. Accutherm did not comply with ISRA.

Midlantic Bank held a mortgage on the property and after performing its own investigation, the bank postponed a sheriff's sale because of its concerns about the potential for mercury contamination. A lawyer for the bank sent three letters to the owner of Accutherm, Inc. recommending that it post hazard notices signs to protect prospective purchasers touring the building and that it notify the Gloucester County Health Department as well as the real estate agency marketing the building. The bank even went as far as preparing signs at its own expense and provided them to the owner. When the owner of the company failed to respond, the bank attorney contacted the county health department.

In 1995, NJDEP issued a cleanup directive to Accutherm and when the company failed to comply, the agency referred the site to the federal EPA for an emergency removal action. After EPA performed a site inspection, the agency issued a letter in January 1996 indicating that the site did not pose an imminent threat to human health since it was unoccupied but that further investigation and remediation was warranted.

Meanwhile, in 1997, Navillus Group, LLC (Navillus) notified NJDEP that it was planning on acquiring the former Accutherm site through a tax certificate sale and that it was relying on the January 1996 EPA letter that the site did not pose an imminent risk. In August 2002, James Sullivan, Inc., acquired the property from Navillus for $1. (Navillus spelled backwards is

Sullivan.) In 2003, Sullivan requested a change-in-use permit to allow the property to be converted to a day care center. An environmental consultant retained by Sullivan filed a request with the NJDEP under the state Open Public Records Act to review the agency information on the site but the only document provided to the consultant was the 1996 EPA letter. As part of change-in-use permit request, Sullivan provided a copy of the 1996 EPA letter. The site had been placed on the NJDEP database of Known Contaminated Sites in 2001 but apparently had been deleted inadvertently from the list along with 1846 other sites at the time of the zoning change application. Since the zoning for the property permitted day-care centers, no zoning board hearing was required. Moreover, since no construction took place, no planning board hearings that might have required further investigation were held. Since neither board held hearings, the Franklin Environmental Commission was not notified. The Franklin Township zoning officer issued the day care a change-of-use permit in December 2003 and a certificate of occupancy in 2004.

After the Kiddie Kollege was shutdown, Franklinville township officials discovered that a second day-care center was operating at a site that had been formerly used as a petroleum storage facility operated by the McCandless Petroleum Co. The day-care center operated in a building that formerly housed the company office. According to the property owner, the site is impacted with petroleum contamination but contamination is located in a portion of the property that is fenced-off and is not in the building or the outdoor play area. As a precaution, though, the day-care center was moved to a new facility at a local church. NJDEP has indicated that it will send investigators to the property because it was not clear what contamination was present or where it was in relationship to the day-care center.

NJDEP ordered closed a third day care, Ultimate Scholar Inc., after elevated levels of PCE were discovered inside the day-care center. The day care center is located at Bellcrest Plaza strip mall in Tom's River. A dry cleaner had operated at the space now occupied by the day care center from 1976 until 2004 when it was added to the NJDEP Known Contaminated Sites list. Indoor air concentrations of PCE were initially detected at 33 times the level considered safe for adults. After a ventilation system was installed, a second test indicated that the concentrations had increased to almost 50 times the allowable limit.

***Commentary:*** *The day care centers are the latest shockwave to roil the remediation program of the New Jersey Department of Environmental Protection (NJDEP). As we discussed in our brownfield backlash article of the previous issue, the agency has come under withering criticism for what is perceived to be inadequate oversight of cleanups at a series of high profile sites.*

*However, the problems exposed at these sites are not limited to New Jersey. With the shift to risk-based cleanups, institutional and engineering controls play a key role in site remediation programs across the country. Institutional and*

*engineering controls make risk-based cleanups possible by preventing exposure to residual contamination remaining at a site. Yet, as illustrated by the New Jersey day care center cases, the institutional control process can easily breakdown if there is not close communication and coordination among multiple layers of government and private property owners. State regulators often view local governments as their ears and eyes, and expect local regulators to enforce state-mandated controls or advise the state agency when there are problems. However, local officials often lack the resources and expertise to monitoring compliance. This situation is exacerbated by the sheer volume of real estate transactions. State and local regulators simply do not have staffing resources to keep up with the number of real estate transactions. Indeed, NJDEP officials were quoted in local newspapers as saying that they expected banks and prospective purchasers to be the first line of defense in ensuring that the controls are being effectively maintained.*

*This is frequently not the case, though. Often a state regulatory agency will issue an NFA letter requiring recording of a deed restriction but the property owner may neglect to file the required restriction. Since the case manager has moved onto other open cases, they usually is little follow-up unless the state has a program for periodically auditing land use controls (institutional and engineering controls). Then, when the property is sold or refinanced, the subsequent purchaser or lender will assume that all conditions of the NFA letter were complied with and fails to confirm that the deed restriction or other land use control was implemented.*

*In the Kiddie Kollege case, the purchaser of the tax certificate did not do comprehensive due diligence but simply relied on a review of the NJDEP files. Unfortunately, the only document in the NJDEP file was the 1996 EPA letter since the site had been inadvertently deleted from the state list of contaminated sites. Both the purchaser and the local government officials misinterpreted the EPA letter. These parties thought that a finding that the site did not qualify for a federal-funded removal action since it did not pose an imminent risk meant that there were no significant environmental concerns at the site.*

*Under the federal AAI rule and ASTM E1527-05, purchasers of property and those interested in qualifying for one of the CERCLA landowner liability defenses must determine if there are land use controls imposed on the property. Even if a purchaser or lender is not concerned about qualifying for CERCLA defenses, it is important from a business and reputational risk perspective to review the conditions and assumptions of an NFA letter and verify that those conditions have been satisfied.*

*The only party involved in the Kiddie Kollege incident that seemed to understand the environmental issues at stake was the bank. Unlike the cases we discussed in our prior issue where lenders did not adequately disclose site conditions to prospective purchasers, the lender in this case performed a*

*comprehensive investigation and urged the borrower to post hazard signs at the property to minimize risks to prospective purchasers. Had the bank not been so pro-active and relinquished its lien without disclosing the environmental conditions of the property, the lender could have found itself as one of the defendants in the class action lawsuit that was recently filed.*

## *EPA To Revise Vapor Intrusion Guidance Yet Again*

At the recent Air and Waste Management Association (AWMA) vapor intrusion conference in Los Angeles, EPA representatives indicated that the agency will be revising its vapor intrusion guidance in the wake of recent data that suggested to the agency that shallow sub-slab soil gas sampling was not sufficiently predictive of indoor air concentrations.

According to EPA staff, the revised guidance will likely provide that shallow soil gas sampling results will not be adequate to screen-out a site. Instead, the agency will likely require "multiple lines of evidence" to demonstrate that the vapor intrusion pathway is not complete. This could involve deeper soil gas samples, groundwater sampling as well as indoor air sampling.

The impact of such a policy change cannot be fully evaluated until the revised guidance is made public. However, the policy that seemed to be suggested would require more sites where chemicals of concern have been used to be investigated and could substantially increase the costs of assessing the vapor intrusion pathway.

***Commentary:*** *While EPA takes its vapor intrusion policy back to the drawing board, vapor intrusion is being reported at more contaminated sites. For example, EPA has announced that TCE vapors from a half-mile long plume of groundwater contaminated by the former Nyanza plant in Ashland, MA, pose a "potentially unacceptable inhalation risk" to residents who have lived above the plume for 30 years. As a result, EPA plans to install vapor mitigation systems in about 40 to 50 homes and five commercial buildings as well as collect indoor air samples in 10 to 15 homes. The action follows a new EPA risk assessment that found that residents may have increased risk of developing cancer. The cancer warning was based on an analysis of indoor air samples from 14 homes, the Town Hall and the Police Department. The TCE levels did not exceed the risk threshold currently used by the EPA but did exceed the TCE screening level proposed by the EPA's scientific experts in 2001. The agency has committed $1 million for the vapor intrusion project.*

*The number of homes requiring installation of vapor intrusion mitigation systems in Hillcrest, NY, is now 95. The latest round of vapor intrusion systems will be funded by CAE Electronics. CAE previously excavated 10,500 tons of contaminated soil and 500 tons of sludge from its former site.*

*Last year, Triple Cities Metal Finishing (TCMF) entered into a brownfield cleanup agreement with the state Department of Environmental Conservation (NYSDEC) to remediate*

*contamination beneath its former site. The NYSDEC has not been able to identify a concentrated pocket of TCE in the ground. Unlike the TCE contamination at the well-known Endicott site, the vapors at Hillcrest appear to be originating from low levels of the TCE in a layer of silt 20 to 30 feet below the surface.*

*In Endicott, 480 properties have been impacted by high concentrations of TCE originating from the former IBM site on North Street. Estimates are that the Endicott remediation could cost from $30 million to $60 million. Unlike at the IBM Endicott site, the NYSDEC has detected TCE in 70 homes in the Cortland area located near the former Smith Corona plant that was vacated in the 1990s. NYSDEC plans to install vapor mitigation systems at 20 of the homes where TCE was detected above 5 micrograms per cubic meter and will monitor the other 50 homes. The agency also plans to install 21 new monitoring wells although groundwater contamination is no longer a significant threat to residents since public water was extended to most residences in the area when TCE was initially found.*

*EPA is planning on collecting indoor air samples from the basements of homes, schools, churches and businesses in Troy, OH, in what may be the largest PCE vapor intrusion case in Ohio. Prior tests conducted by the city found PCE vapor readings as high as 189 times the recommended level. There are two PCE plumes. One plume may have originated from a former dry cleaner and the second plume appears to have originated near Spinnaker Coating and Hobart Cabinet.*

## *San Jose To Pay EPA $245K for Cleanup of Asbestos--Contaminated Soil*

During the past year, we have discussed examples of health risks posed by asbestos in soils. The asbestos may be naturally occurring such as the El Dorado High School site or frequently is a result of buried asbestos-containing building materials during construction of residential developments (Klamath Falls Marine Barracks and the Lowry Air Force Base) as well as importation of asbestos-contaminated fill material to a construction site.

In the latest example, the city of San Jose has agreed to reimburse EPA approximately $245,000 for a removal action involving asbestos-contaminated soil at the Environmental Education Center located on the Don Edwards San Francisco Bay National Wildlife Refuge.

In 1983, the City constructed a berm and levee system to prevent area flooding. However, the soils were later found to contain asbestos in concentrations ranging from 1% to 30%, and EPA installed a cap on the structures to prevent the release of asbestos. In 1991, the city resealed the cap with a polymer coating. When the cap was found to be deteriorating in 2003, the EPA excavated and removed 2,500 cubic yards of asbestos-containing soil from the road berm and levee. The city then backfilled the excavated areas with clean soil and restored the project area to original conditions.

***Commentary:*** *In prior issues, we have discussed the risks posed by naturally-occurring asbestos and soil contaminated with asbestos-containing materials from demolished structures or construction sites. Despite the fact that the EPA asbestos regulations have been in effect for over 30 years and that asbestos in soil is not uncommon because of building demolition and earth moving activities, asbestos is just now becoming an emerging contaminant of concern in soils. As with any new environmental issue, there are lots of questions and uncertainties.*

*For example, EPA regulates six types of asbestos but there are other types of asbestos minerals that can pose risks to human health when soils are disturbed. The relationship between asbestos in soil and airborne asbestos is not well understood and results can vary widely between sites. Moreover, EPA historically used a 1% criterion for identifying asbestos in soil but revised that interpretation in 2004 so that soils with asbestos at much lower concentrations required remediation. EPA has not yet established a protocol for sampling asbestos-contaminated soil. Transmission electron microscopy (TEM) is more accurate than the traditional method for measuring the presence of asbestos-polarized light microscopy (PLM) but is not widely used. EPA has found that sites that were initially determined to be non-detect for asbestos using PLM were actually heavily contaminated with asbestos after soil was analyzed using TEM. When providing sampling results, laboratories may use different reporting methodologies such as describing the results by percentage of weight, volume or area. It can be hard to validate or reproduce soil analysis because of the difficulty in obtaining homogenous soil samples and the different techniques may yield different results for which there is little regulatory guidance. It also appears that the EPA toxicity criteria assume that the two major forms of asbestos (amphibole and chrysotile) are equally dangerous, while recent epidemiological data suggests that the amphibole form of asbestos might be substantially more carcinogenic*.

## *Asbestos Holds Up Brownfield Project*

An application for an $888,950 state brownfield grant to help raze and redevelop the former Gilbert Paper Mill in Connecticut has been held up until a plan is in place to address removal of asbestos. Salvage operations at the site were halted after an inspector from Department of Natural Resources found asbestos inside and outside of the buildings. It appears that the asbestos was disturbed during removal of steel beams. The developer is completing asbestos abatement under the oversight of the DNR. The master plan for the $25 million project contemplates construction of commercial and residential development with tax incremental financing assistance.

## *Comprehensive Dust Controls Imposed at Maryland Demolition Project*

As discussed in the prior article, environmental issues can increase costs and delay start of construction. One common concern

is minimizing hazards from dust that can contain a variety of hazardous substances such as lead, asbestos, and PCBs. For example, a $1 billion redevelopment project managed by East Baltimore Development, Inc. (EBDI) is razing 500 vacant homes following guidelines developed by the John Hopkins' Bloomberg School of Public Health. The area in East Baltimore will be redeveloped into a life sciences and technology park that will include offices, retail stores and housing. Nearly 7,000 tons of debris has been removed under the guidelines and another 153,000 tons will be removed when the project is completed.

Prior to commencing demolition, EBDI's guidelines required all items coated with lead based paint (LBP) must be removed from the debris, wrapped in plastic and sealed with duct tape, and placed in special dumpsters; an independent monitor collects samples to assess presence of lead in air, dust and soil; debris is wetted down at a check point to minimize dust emissions; structural steel, concrete, lumber, certain kinds of bricks, shingles, roofing materials and tile must be separated from the debris for possible recycling; and trucks traveling to and from the site must use routes that will not cause traffic problems.

## *BLM To Fund Arsenic Dust Control Measures*

Add Arsenic dust to the issues that should be examined when performing environmental due diligence on properties in California. Officials in San Bernardino County are concerned about arsenic dust from mines near the northwest corner of the county, which may be disturbed by wind and off-road vehicles, that may pose a risk to residents and recreationists. The Centers for Disease Control and Prevention (CDC) has agreed to review recent soil samples collected near the mining community of Red Mountain. The Bureau of Land Management (BLM) has secured $500,000 in emergency funding to begin controlling the contamination.

The arsenic dust may occur naturally in rock or be a byproduct of ore processing. The arsenic has been found in tailing waste piles near the Kelly silver mine just outside of Red Mountain and the Yellow Aster gold mine in nearby Randsburg. BLM has detected high levels of arsenic in the soil residential areas that appears to have been washed from Kelly mine. The Kelly mine operated from 1919 to the 1940s and was one of California's most productive silver mines. As an interim measure, BLM plans to install erosion-control structures.

## *HUD To Allow ASTM E1527-00 and E1527-05 For Certain FY2006 Grants*

Earlier this year, HUD announced that ASTM E1527-05 or ASTM E1527-00 would be acceptable for the agency's Section 202 (Supportive Housing for the Elderly Program) and Section 811 (Supportive Housing for Persons with Disabilities Program) discretionary grant programs. In its initial notice, HUD indicated that the Phase I ESA must comply with ASTM Standard E 1527-05 (71 FR 25208, April 28,

2006). However, many applicants and their environmental professionals misinterpreted or were confused by HUD's revised Phase I requirements and did not perform the E 1527-05. Thus, the agency decided to amend its Sections 202 and 811 to provide that either version of ASTM E1527 is acceptable. In all instances, the Phase I ESA report must have been completed or updated no earlier than six months prior to the application deadline date.

## *Rhode Island Orders Utility to Remediate Residential Neighborhood After Sale Talks Break Down*

The Rhode Island Department of Environmental Management has ordered New England Gas Co. and its parent, Southern Union, to remediate 130 homes in Tiverton contaminated with arsenic, cyanide and lead from a manufactured gas plant that had been operated by Fall River Gas Co., a predecessor of New England Gas.

Rhode Island Governor Donald Carcieri instructed the DEM to take the action after negotiations with Southern Union and New England Gas broke down. The state attorney general had filed a lawsuit to block the $498 million sale of New England Gas Co.'s Rhode Island assets until the company submitted a remedial action plan for the impacted residences. The company had hoped an escrow account would be set up to pay for a clean up as part of Southern Union's sale of New England Gas Co. assets to National Grid. Under the proposed transaction, Southern Union, a publicly traded company with assets worth $5.8 billion, specifically retained environmental liability associated with its Rhode Island division. The pollution was discovered in 2002 when a construction crew digging a sewer line uncovered arsenic, cyanide, lead and other contaminants in a landfill located beneath a cluster of homes.

Because residents have been concerned that they will be unable to refinance or sell their homes, the governor signed a bill enabling residents of the affected neighborhood to receive low-interest home-repair loans. The Environmentally Compromised Home Opportunity loan program will enable homeowners who have lost significant value because of contamination to apply for low-interest loans of up to $25,000, through Rhode Island Housing.

***Commentary:*** *States that do not have laws like New Jersey's ISRA are nonetheless increasingly relying on other authorities to extract remediation commitments before providing regulatory approval of transactions and are filing objections to bankruptcy confirmation plans. It is important for companies and their acquirers to anticipate environmental issues and develop strategies for dealing with those issues early in the transaction.*

# CLEAN WATER ACT

### *Recent EPA Wetlands Settlements Feature Large Fines and Deed Restrictions*

EPA recently reached an agreement with Tucson, AZ developer Whetstone Development Corp. and its general contractor K.E. & G. Development to pay penalties totaling $110,000 to resolve claims of improperly filling approximately 0.25 acres of desert streams, or ephemeral washes during construction activities at "The Canyons at Whetstone Ranch" residential development in Benson, AZ--the kind of wetlands that the Scalia opinion in *Rapanos* said was not subject to CWA jurisdiction because they were not permanent in nature. The affected area is part of the San Pedro River watershed, a vital ecological resource in Arizona. As part of the settlement, Whetstone Development Corp. also agreed to donate 40 acres of open space containing approximately 2.5 acres of desert wash riparian habitat to the City of Benson.

In addition to fines, landowners are frequently required to restore the illegally filled wetlands as well as provide compensation to mitigate loss of wetlands authorized by individual wetlands permits. For example, the Twin Forks Ranch in Hood River, OR, agreed to restore 4.32 acres that had been destroyed when the 73-acre ranch was converted to cherry orchards. The wetlands were cleared and drained while constructing irrigation facilities to support the orchard. The owner of the ranch thought these areas were exempt as agricultural land. In addition, the owner of the ranch agreed to enhance an additional 1.38 acres of wetlands on the property.

EPA recently ordered the D & J Ocean Farm, Inc. to restore a quarter acre of wetlands at Kalaeloa on Molokai, HI, that were illegally filled. The order requires the company to remove soil and other fill added while cutting a new stream channel to prevent flooding at the shrimp farm. Soil excavated from this process was placed alongside the channel in the wetland. Inspectors also found that in 2001, 0.6 acres of wetlands were filled at an adjacent location on the property to build a nursery structure. In 2004, the Corps had notified D & J to remove the fill and the Natural Resources Conservation Service advised the company that some of the fill activities violated the "Swampbuster" provisions of the Food Security Act of 1985. Under the EPA order, the company will need to submit plans to remove the fill material and to restore the wetland. D & J will also have to submit progress reports to the EPA on the fill removal and restoration work.

Pietraszek Enterprises, Inc. and Munson Excavating, Inc. of El Paso County, CO, have agreed to pay a $105,000 civil penalty for unauthorized placement of fill material in one acre of Monument Creek and its adjacent wetlands in Colorado Springs. EPA alleged that illegal filling occurred in late 2001 to April 2002 when Munson stabilized

the river bank and built temporary road crossings and other structures as part of a hotel construction. In addition to damaging the wetlands, the EPA also charged that the unauthorized activities impacted habitat of the Preble's Meadow Jumping Mouse, which is listed as a threatened species under the Endangered Species Act. In addition to the fine, Pietraszek is required to implement a Restoration and Mitigation Plan that provides for one acre of mitigation for the wetland and 12 acres of habitat restoration and mitigation.

Federal wetland settlements are increasingly requiring settling parties to record restrictions of the use and conveyance of their lands, especially where the defendants have a history of wetlands violations. For instance, in *United States v. Purze*, No. 04C7697 (N.D.Ill), the proposed consent decree, provides for $150K in fines, implementation of a wetlands restoration plan and mitigation payments. It also requires the defendants to record an approved wetlands delineation and deed restriction in the local land records. Moreover, if the defendants apply for a wetlands permit, they are required to record a deed restriction for the delineated wetlands within 60 days of submitting the permit application.

In *United States v. Cardinal Fencing and Frank Bonner*, No. 5-06cv1268 (N.D.Ohio May 19, 2006), EPA used aerial photography and other remote sensing systems to document that the defendants had filled in approximately 18 acres of jurisdictional wetlands without obtaining a wetlands permit, and then failed to comply with a prior administrative consent agreement and consent order (CACO) as well as submit an after-the-fact permit application. In addition to paying a $50,000 fine, defendant Frank Bonner was required to transfer title to the portions of his property identified as the "Wetlands Preservation Site" and the "Conservation Easement Site" to the Ohio Department of Natural Resources within 60 days of entry of the consent decree. Within 15 days of the transfer of the Wetlands Preservation Site, Bonner was to record a form of deed restriction as well as record a copy of the conservation easement for the Conservation Easement Site.

The NJDEP revoked a wetlands permit and has fined the developer of a housing project in Mount Olive $763,500 for "egregious" violations of the state freshwater-wetlands regulations. According to NJDEP, Anthony Mortezai, excessively cleared vegetation and failed to implement soil- and sediment-control measures. An adjacent developer complained that Mortezai had cut down several acres of trees on his property, and another neighbor complained of flooding as a result of the clearing. At one point, the NJDEP and the Morris County Soil Conservation District shut down the project but allowed Mortezai to resume development after he had corrected his violations. In the recent action, NJDEP indicated that the freshwater-wetlands permit will not be restored until he has paid the fines and correct the environmental damage.

## *EPA Announces Largest*

## *Single Site Stormwater Settlement*

Unlike the wetlands program, there is little doubt that the stormwater permit program is intended to prevent impairment of water quality from contaminated stormwater. EPA has been aggressively pursuing enforcement actions that are beginning to rival CERCLA actions in the size of the settlements. For example, a landowner agreed to pay more than $7.5 million for violations associated with construction activities at Pilaa on Kauai, HI. The construction site at Pilaa encompasses approximately 378 acres of coastal property on Kauai. Jeffrey Pflueger, the landowner, conducted grading and other land-disturbing construction at the site beginning in 1997 without obtaining permits. The activities included cutting away a hillside to create a 40-foot vertical road cut, grading a coastal plateau, creating new access roads to the coast, and placing dirt and rock fill into three perennial streams. Under the settlement, Pflueger will pay $2 million in penalties to the state of Hawaii and the United States, and will spend approximately $5.3 million to prevent erosion and restore streams at areas damaged by the construction activity. The settlement also requires Pflueger to spend $200,000 to replace cesspools with improved wastewater systems at residences in a nearby coastal community. The restoration plan calls for terracing of slopes, using native plants to control erosion at vulnerable sites, and control of invasive plant species for all vegetation work. Soil and rock used to fill portions of the streams to build a road and several dams will be removed. The remaining dams will be lowered and stabilized. Workers will reconstruct streambeds to a more natural state by growing native plants along the banks. In May 2005 Pflueger pleaded guilty to 10 felony counts in Hawaii state criminal court and was ordered to pay a $500,000 penalty. In July 2005 the Hawaii Board of Land and Natural Resources fined Pflueger $4 million for natural resource damages associated with sediment runoff and damage to the beach and coral reef at Pilaa.

States, such as California, that are experiencing intense development pressure are also ramping up their stormwater enforcement activities. For example, the California Central Valley Regional Water Quality Control Board (Board) recently fined builder JMC Homes $500,000 for failing to control erosion from its Longmeadow housing development in west Roseville. According to the Board, the developer installed an advanced treatment system that causes sediment particles to settle out of runoff to resolve earlier violations, but opted not to operate the system the following year.

According to state Regional Water Quality Control Board records, developers of housing projects were fined a record $1.5 million over the past year for failing to contain storm-driven pollution at 10 construction sites across the inland region. Nine of the 10 fines have been settled for $1.3 million. In most of those cases, half of the fine was used to fund supplemental environmental

projects. For instance, a $55,000 fine was used to fund water-quality research at Cal State San Bernardino's Water Resources Institute, and $280,014 was directed to the Eastern Municipal Water District to help fund studies for a proposed sewer system in Quail Valley that could cost $70 million to $80 million.

In the tenth construction enforcement case, the Board has proposed a fine of $270,990 against SunCal Companies for stormwater violations at its 802-acre golf-oriented development known as Fairway Canyon. The Board alleges that 13 million gallons of runoff left the site over a four-day period and flowed into a creek that feeds the San Timoteo Creek. The Company was also fined $80,605 for stormwater violations at its Mead Valley site that allowed 13,680 gallons of sediment-laded stormwater to flow into Cajalco Creek, a tributary of Lake Mathews, a major drinking-water reservoir. The fine was based on the estimated $45,605 the developer saved by not implementing proper control measures, the inspector's time of 33 hours at $70 per hour and the volume of the runoff. The Metropolitan Water District, which owns the lake, has had to install a detention dam to prevent sediment and contaminated runoff from development projects from flowing into the reservoir.

***Commentary:*** *To facilitate enforcement, the Board inspectors are using digital cameras to document muddy water trickling off construction sites. Because of the enforcement initiative some developers have begun holding mandatory weekly meetings to keep the different crews up to speed on procedures. Some of the steps used include building retention ponds, checking sandbags stacked around the entrance of storm drains to erecting the neon orange fencing that prevents dirt from flowing off front yards and other areas. Parking lots are lined with large gravel to prevent mud from getting into tire treads, and metal shaker plates at the feet of driveways knock any dirt or stones from the tires as they roll over them. However, these measures cost money. Construction officials have estimated that the stormwater pollution prevention measures can cost as much as $6,000 to $8,000 per lot for large lots and that these costs together with the large fines are leading to higher home prices.*

## *Arsenic Treatment System Causes Elevated LIW Levels in New Hampshire Residential Complex*

Sometimes fixing one problem can cause another. C&C Realty Management installed a filtration system on the drinking water supply well servicing the 25-unit Lakewood Acres housing complex to address naturally-occurring arsenic. However, the filtration system increased the acidity of the water and caused the piping to corrode. A discovery that lead in drinking water levels were 100 times higher than federal limits caused C&C to advise the 40 residents to have blood samples analyzed for lead. Most residents

had blood levels that were acceptable but some children had levels above the 10 micrograms per deciliter level recommended for children.

***Commentary:*** *Public water supply systems were required to comply with the new arsenic drinking water standard of 10 parts per billion (ppb) in January. The standard applies to all 54,000 community water systems. A community water system is a system that serves 15 locations or 25 residents year-round, including most cities and towns, apartment buildings, and mobile home parks with their own water supplies. EPA estimates that approximately 3,000 community water systems serving 11 million people will have to take corrective action to lower the current levels of arsenic in their drinking water. The revised standard also applies to the 20,000 non-community water systems that serve at least 25 of the same people more than six months of the year, such as schools, churches, nursing homes, and factories. EPA estimates that about 1,100 of these water systems, serving approximately 2 million people, will need to take measures to meet the revised standard.*

*EPA estimates the cost of compliance ranges from $90,400 for a facility that handles 700,000 gallons a day and uses activated alumina technology to filter out arsenic through ion exchange to more than $80 million for a reverse osmosis plant that squeezes arsenic out of water and processes 200 million gallons a day. The cost of the new arsenic MCL will depend on the size of the water system, how many people are served by that system, and the concentration of arsenic in the raw water. For small community water systems (those serving fewer than 10,000 people), EPA estimates that the average increase in cost will be between $38 and $327. For larger community water systems, EPA estimates that the annual household costs for water are expected to increase by 86 cents to 32 dollars.*

*Systems needing to install treatment or conduct other capital projects related to arsenic treatment may apply for financial assistance through drinking water state revolving funds.*

*In addition to financial assistance, systems may be eligible for an exemption that may extend the compliance period. A state that is authorized to administer the drinking water program may grant a three-year exemption to any size system that has demonstrated that it cannot comply with the revised arsenic MCL by January 23, 2006. To be eligible for an exemption, the public water supply system must demonstrate that it cannot comply with the MCL due to a "compelling factor" such as serving a disadvantaged community, it was in operation before January 23, 2006, the exemption will not result in an "unreasonable risk to health, and it cannot reasonably make management or restructuring changes that would result in compliance or improve the quality of the drinking water if compliance is not achieved. A system that serves less than 3,300 individuals may request an extension of the initial exemption of up to six years if the system continues to be eligible for an exemption*

## *Arsenic in Pesticides*

While some arsenic is naturally-occurring, another significant source of arsenic can be pesticides that had been sprayed at fruit orchards. As these agricultural lands begin to be developed into residential or commercial developments, there is growing concern that runoff from these sites can impact drinking water supplies.

For example, officials in Lyon Township, MA, recently rejected a development proposal for an orchard because of the presence of arsenic-contaminated soils. The developer, The Beztak Companies, proposed that the town enter into a brownfield tax incremental financing agreement for the Erwin Orchards site where the township would reimburse Beztak for remediation costs that been estimated from $6.8 million to $12 million. Township officials rejected the proposal partially because the site was an attractive parcel for development and was not the typical under-used industrial property that requires brownfield assistance.

Officials in Marlborough, MA, are trying to identify the source of high levels of arsenic that was detected in one of the city's water supply reservoirs after a severe thunderstorm. Some residents believe the arsenic is from the orchards that once blanketed the city. Others believe that the source is runoff from restaurant construction site that was formerly used as an orchid. In the meantime, the construction contractor is being required to sample surface water runoff from the site and has been required to correct improper grading that contributed to the runoff following the June storm.

# INDOOR ENVIRONMENTAL ISSUES

### *Asbestos Enforcement Actions*

EPA is continuing to levy hefty fines against developers and contractors for failing to comply with asbestos work practices rules, which are the only federal Asbestos NESHAP rules in effect for 30 years. The most logical inference to draw from the continuing violations is that developers concerned about rising construction costs or interest rates seem to be willing to risk fines for failing to comply with asbestos work practices rules rather than incur expensive delays in construction schedules.

For example, the owner of the Best Western Landing Hotel in Ketchikan, AK and its demolition contractor agreed to pay $33,000 while the owner of the Endicott Building in Juneau agreed to pay a penalty of $43,700 in connection with the demolition of that structure that had been damaged by a fire in August, 2004. In both cases, the building owners and their contractors failed to provide EPA with the mandatory 10-day advance notice of the projects. In addition, neither project had a trained supervisor on site to make sure they were handling the asbestos properly, and asbestos became mixed with general demolition debris and was not initially disposed of properly.

An Arizona developer was sentenced to three years of probation, fined $2,000 and ordered to pay $75,000 in restitution for failing to comply with asbestos work practices during the demolition of a commercial building. The developer, Jeffrey Springer, is the former owner of Oljato Industries and its industrial facility, which consisted of several buildings in Phoenix. Between July and September of 2000, Springer hired workers to demolish the buildings at the site, but failed to perform a comprehensive asbestos survey prior to the demolition. During a separate assessment by local environmental inspectors, it was determined that about 2,550 square feet of asbestos existed at the site. Inspections conducted during the demolition found that Springer was not following several requirements for asbestos removal, including wetting the material or providing workers with the appropriate protective equipment. None of the workers was trained in the handling of asbestos.

EPA recently settled two cases against Pennsylvania contractors for failing to provide the required 10-day advance notice for demolition work. Glen Miller Demolition & Excavating, Inc. agreed to pay a $19,208 penalty for failing to notify EPA prior to commencing demolition of a condominium complex in Huntingdon Valley, PA. Meanwhile, Neuber Environmental Services, Inc., was assessed a $7,179 penalty for failing to provide advance notification of demolition of a high school field house in Bethlehem.

***Commentary:*** *Lenders financing construction projects or securitizing*

*loans involving buildings that will undergo significant renovation should ensure that their borrowers have performed a comprehensive asbestos survey and that the costs for asbestos abatement by licensed asbestos contractors are specifically addressed in the construction budgets. Due to significant delays that can be associated with asbestos abatement, lenders should also verify that construction schedules take into account the time required to properly complete permit application approvals for asbestos inspection and abatement.*

## *Contractor Fined for Collecting Insufficient Number of Asbestos Samples*

EPA's Asbestos NESHAP imposes extensive requirements on owners and operators of buildings who plan to implement renovation and demolition projects that will disturb threshold quantities of asbestos-containing materials (ACM). The asbestos NESHAP, though, does not contain clear guidelines on the kind of sampling that is required to determine if ACM is present. Instead, contractors and building owners have to look to EPA's "*Guidance for Controlling Asbestos-Containing Materials in Buildings*" (the "Purple Book") and "*Asbestos in Buildings: Simplified Scheme for Friable Surfacing Material*" (the "Pink Book"). The sampling protocols in the Purple and Pink books are just guidelines. However, as illustrated in two recent administrative law decisions, judges will often rely on the sampling guidelines as if they were promulgated regulations having the force of law.

In *NYC v. George Kan*, Appeal No. 43015-17 (May 25, 2006), a contractor filed a ACP-5 form with the New York City Department of Environmental Protection (NYCDEP) certifying that proposed renovation projects at three buildings would not disturb any friable ACM. In the certification, the contractor indicated that one sample had been collected from each sampling area and no ACM was detected. The materials sampled included plaster walls, the coating of a sink bottom, ductwork waterproofing, exterior stucco, roof insulation, wallboard as well as floor and ceiling tiles.

The NYCDEP regulations provide that for each area that is presumed not to contain asbestos, an investigator is required to collect samples in accordance with the Purple and Pink Books. After conducting a site inspection, NYCDEP filed three notices of violations against the contractor for failing to collect three bulk samples from each area as required by the NYCDEP regulations.

In the administrative hearing, the NYCDEP argued that both the Purple and Pink Books require three samples from each sampling area to ensure that the sampling is representative of the area being tested. The administrative law judge (ALJ) agreed and the contractor appealed to the NYC Environmental Control Board (ECB). The ECB began its analysis by noting that the Purple Book established sampling guidelines for three categories of asbestos. Category 1 was troweled

or sprayed on surfacing materials. The Purple Book provides that these materials should be sampled in accordance with the guidelines in the Pink Book and chapter 2 of the Purple Book. The Pink Book requires a minimum of 3 samples for each sampling area less than 1,000 square feet, 5 samples for sampling areas between 1,000 and 5,000 square feet and 7 samples for larger sampling areas. Category 2 applies to insulation on pipes, boilers tanks, ducts and other equipment. The Purple Book provides that at least three samples should be collected from areas with this material. However, if insulation is in good condition, the Purple Book recommends that be sampling should not be performed to minimize risk of asbestos fibers being released and that the inspector assume the insulation contains asbestos. Category 3 consists of miscellaneous materials that did not fall within the first two categories. These materials are generally non-friable and consist of wallboard, ceiling and floor tiles. The Purple Book does not establish any minimum number of samples for this material and recommends that non-friable materials in this category not be sampled since this could damage the material and release asbestos fibers.

The building materials involved in the proceeding fell into categories 1 and 3. The contractor argued that sampling guidelines were not mandatory. However, because the guidelines were incorporated by reference into the NYCDEP regulations, the ECB ruled that the sampling guidelines had the force of law and upheld the penalties.

In the second administrative proceeding *NYC v. George Kan*, Appeal No. 43018 (May 25, 2006), samples had been collected from floor tiles and ceiling board. The ECB ruled that the floor tiles clearly fell within category 3 and that the Purple Book did not establish any minimum sampling requirement for these materials. While neither the Purple Book nor the Pink Book mentioned ceiling boards, the ECB concluded that this material fell within the miscellaneous category 3. Since the Purple Book did not specify a minimum number of samples for this material, the ECB ruled that collecting one sample from the sampling area consisting of ceiling boards was sufficient to comply with the NYCDEP regulations and reversed the ruling of the ALJ.

***Commentary:*** *Because of the delays and costs of completing new construction, many real estate developers are focusing on renovating existing buildings that most likely have ACM. The limited asbestos inspections that are frequently conducted as part of a pre-purchase due diligence usually do not meet the requirements of the Asbestos NESHAP for renovation or demolition projects, do not comply with the Purple Book or Pink Book and usually do not constitute a comprehensive asbestos survey as defined by the regulations that EPA has promulgated under Asbestos Hazard Emergency Response Act (AHERA). As a result, lenders financing building renovation projects should ensure that comprehensive asbestos surveys be performed and*

*that the costs to properly abate asbestos are included in the construction budget. Some banks require comprehensive asbestos surveys but leave the sampling methodology to the environmental consultant. While AHERA only applies to public and private non-profit primary and secondary schools, some lenders require consultants to follow the AHERA asbestos survey requirements for projects involving residential or commercial buildings.*

## *Environmental Appeals Board (EAB) Rules Management Agreement Does Not Relieve Owner of LBP Disclosure Rule Obligations*

In 1995, Harpoon Partnership (Harpoon) entered into an agreement with Hyde Park Realty (Hyde Park) to manage an 18-unit apartment building located in Chicago, IL. In addition to the day-to-day operation of the building, the management agreement provided that Hyde Park was responsible for preparing leases, collecting rents and showing vacant units to prospective tenants.

In 2001, EPA filed a complaint against Hyde Park alleging that it had failed to comply with the LBP disclosure rule for 520 residential units that it managed. Hyde Park subsequently settled the violations for $20,000. One year later, EPA filed a complaint against Harpoon seeking civil penalties of $56,980 for failing to provide required notices and documents under the LBP Disclosure for nine of the units in its apartment building.

Harpoon sought an administrative hearing, arguing that it was not a "lessor" under the LBP Disclosure Rule because it had not offered the units for lease and never had any contact with the tenants. Instead, Harpoon claimed it was simply an owner of the property and that Hyde Park was the lessor by virtue of its management agreement with the responsibilities of complying with the LBP Disclosure Rule. In 2003, an administrative law judge (ALJ) ruled that the term "lessor" included an owner of a building who hired a management company to act as its agent, and fined Harpoon $37,037.

Harpoon then sought review by the Environmental Appeals Board (EAB). In *In re Harpoon Partnership*, TSCA Appeal No. 04-02 (2005), the EAB found that at common law, the term "lessor" applied to an entity that held legal title to or a possessory interest in property offered for lease. EAB then determined that Harpoon had never alleged that Hyde Park ever had a possessory interest in the building nor had Harpoon denied that it alone was the building's owner. Since Hyde Park did not have a possessor interest in the building, EAB concluded that Hyde Park could not be lessor.

Turning to the regulation itself, Harpoon argued that because the LBP Disclosure Rule only referred to responsibilities of lessors and agents and not owners, it did not have fair notice that it remained liable even though it had contracted with a property management company to operate the building. EAB agreed with EPA that the agency had

provided fair notice that all owners of target housing are subject to the regulation and that the repeated use of the terms "seller" and "lessor" was simply to reflect activities that trigger an owner's obligations under the rule. The EAB ruled that the LBP Disclosure Rule's definition of lessor was consistent with the common law definition and that management companies were simply agents of the owner/lessor. In support of this view, EAB noted that the LBP Disclosure Rule made it clear that management companies had different responsibilities than lessors since agents are required to ensure that a seller or lessor comply with the regulation but are absolved of any liability if the seller or lessor complies or fails to disclose the presence of LBP or LBP hazards to the agent. While the EAB found the ALJ's 35% reduction in the proposed penalty "generous," the penalty was affirmed since the region office did not appeal the penalty determination.

***Commentary:*** *In addition to the EPA/HUD LBP disclosure rules, certain property owners receiving financial assistance from HUD are required to perform LBP risk assessments and implement abatement activities. For multi-family target housing receiving an average of more than $5,000 in project-based assistance per assisted dwelling unit, HUD requires that a LBP risk assessment be performed in accordance with 24 CFR 35.1320(b) and that interim controls be conducted to address LBP hazards identified in the risk assessment. For multi-family properties constructed prior to 1960, the risk assessment must have been completed by September 17, 2001 and by September 15, 2003 for multifamily residential properties constructed between 1960 and 1978.*

*For multi-family target housing receiving $5,000 or less in project-based assistance per assisted dwelling unit, HUD requires a visual assessment of all painted surfaces to identify any deteriorated paint, stabilization of deteriorated paint surfaces in accordance with 24 CFR 35.1330(a) and 35.1330(b) before a vacant dwelling unit becomes occupied; HUD requires 30 days of notification of the results of the visual assessment for occupied units. Paint stabilization will be considered complete when clearance is achieved in accordance with 24 CFR 35.1340 and the owner has provided a notice describing the results of the clearance examination to occupants in accordance with 24 CFR 35.125(b) and (c). Regardless of the amount of financial assistance, the property owners must implement a LBP operation and maintenance plan unless all LBP has been removed.*

## *State Court Finds Knowledge Not Requirement for LBP Violations*

In *Price v. Hickory Point Bank & Trust*, 841 N.E.2d 1084 (4th Ill. App. 2006), the plaintiffs entered into a lease with one of the defendants for a house located in Decatur in July 2000. After the plaintiffs' twins were found to have elevated levels of lead in their blood in November 2001, the county health department issued a notice of lead hazards to the trust office of the Hickory Point Bank & Trust (Hickory) and defendant landlord, and ordered them to abate

the lead hazards.

The plaintiffs then filed negligence actions against Hickory and the other defendants, alleging that the defendants knew or should have known of the lead hazards, leased premises that were in violation of the local building code, failed to inspect the premises prior to leasing it, and failed to disclose the presence of LBP to the plaintiffs.

After Hickory was dismissed from the case, the trial court granted summary judgment to the defendants, finding that plaintiffs had not established that the landlord had actual or constructive knowledge of the lead paint hazards.

However, the appeals court reversed. The court held that the plaintiffs did not have to demonstrate that the landlord had knowledge of the lead paint hazard because the defendants had established that the defendants had violated the Decatur municipal code by leasing property that contained lead paint hazards and had failed to comply with the EPA Disclosure Rule. Since the plaintiffs demonstrated that the defendants had violated the local statute and the EPA Disclosure Rule, the court concluded that the plaintiffs had established a prima facie case for negligence and reversed the lower court's grant of summary judgment.

***Commentary:*** *Lenders that require LBP to be investigated during due diligence usually only require consultants to sample for the presence of LBP and then require implementation of a LBP O&M plan if LBP is detected. However, financial institutions rarely require borrowers to demonstrate that they are complying with the LBP disclosure rule despite the fact that property owners are receiving sizable fines for non-compliance.*

*In a recent enforcement action, a Connecticut real estate management company and property owner agreed to pay more than $45,000 to settle EPA claims that they failed to provide tenants with mandated LBP disclosure notices in Hartford and East Hartford.*

*In Philadelphia, a landlord agreed to pay a $20,000 penalty for failing to disclose the presence of LBP to tenants in eight rental properties in Philadelphia. The settlement also requires the landlord to conduct $70,000 in LBP abatement projects in at least 12 of his residential rental properties.*

*The owners of 14 residential rental properties in Ephrata, PA agreed to pay a $10,000 penalty and complete a $90,000 project to abate LBP in at least eight of their properties to resolve violations of the LBP Disclosure Rule.*

*In Providence, RI, two landlords agreed to pay a $6,207 fine and implement LBP abatement activities consisting of replacing 124 old windows and 62 old doors at an estimated cost of $60,000.*

*In Manchester, NH, EPA has filed a complaint seeking nearly $60,000 against two individuals that own and leased 22 apartment buildings containing 119 apartment units. EPA alleges that the landlords failed to provide LBP notices to tenants from July 2003 to July 2005.*

*EPA is seeking a fine of $45,210 from Karen Krach of Fishers, IN, for allegedly failing to comply with the*

*LBP disclosure requirements for six homes or apartment buildings that Krach rents, owns or previously sold. The Cohen-Esrey property management company agreed to pay a reduced penalty of $21,529 and spend $242,600 to assess LBP assessments and replace windows, window casings and trim as well as exterior doors and casings at several properties in Kansas City, MO. The building owner, Mohamed Ali Naji, agreed to also spend $16,400 on LBP abatement projects in exchange for a reduced civil penalty of $2,347. Donald R. Henely agreed to abate LBP at two properties in San Diego, CA, at a cost of $55,000 and pay a penalty of $2,941 to settle claims of failing to provide mandated LBP disclosure notices to his tenants. William and Johanna Morin agreed to pay a $4,035 fine and implement LBP abate actions estimated to cost $40,000 at five apartment buildings in Manchester, NH. Under the terms of the EPA settlement, the Morins agreed to enclose exterior, multi-level decks presumed to be finished with LBP because the buildings were all constructed before 1920. The violations were identified as part of an enforcement to evaluate LBP in low-income areas of Manchester. EPA originally proposed penalties totaling $57,640 but because the Morins promptly corrected the violations and worked cooperatively with EPA, the agency agreed to reduce the penalty.*

*EPA also brought an enforcement action against Allied Realty Corp. of Bethesda, MD, for failing to provide LBP disclosure to tenants in 16 rental properties in Washington, D.C. and its Maryland suburbs. The EPA complaint identified 82 violations involving 19 lease agreements for 16 rental properties signed between November 2001 and May 2004.*

## *Court Finds Property Not "Lead-Free" Because of Improper Sampling*

A recent New York state court decision illustrates the importance of conducting the correct kind of sampling when determining if a building contains LBP. In Morales vs. 711 Topsey Corp., 2006 N.Y. Misc. LEXIS 1554 (Bronx Cty. Sup. Ct. June 26, 2006), the plaintiff alleged that her infant suffered lead poisoning from exposure to LBP.

After the plaintiff vacated the premises, the New York City Department of Health (NYCDOH) determined that the apartment did not contain elevated levels of lead. The defendant also retained its own environmental consultant to test for LBP. The consultant used an x-ray fluorescence (XRF) analyzer that detected 0.93 milligrams of lead per square centimeter in one area of the apartment and concluded that none of the painted surfaces contained any LBP in excess of the standards established by the NYCDOH. As a result, the defendant argued that it should not be held liable because the apartment did not constitute a lead hazard under the NYC Lead Law known as Local Law 1 of 2004 since the paint contained less than 1.0 milligram of lead per square centimeter.

The court first ruled that the applicable law was Local Law 1 of 1982 since the alleged exposure had taken place in 1998 and 1999. The earlier law defined LBP as paint

having a reading of 0.7 milligrams of lead per square centimeter. Since the paint sample collected by the contractor exceeded this threshold, the defendant argued that the court should rely on the NYCDOH report that concluded that there was no LBP. However, the court said that the report did not mention whether it had used XRF or had analyzed paint chips and therefore could not be introduced. The court went on to dismiss the defendant's motion for summary judgment.

***Commentary**: The phase 1 scopes of work developed by lenders usually only require the use of swab samples that react to painted surfaces. However, this type of sampling is not sufficient to demonstrate that a building is considered "lead-free" under the EPA and HUD LBP regulations. Unless XRF or laboratory analysis of paint chips is used to show that pre-1979 buildings do not contain LBP, the building will still be considered target housing and the owners or buildings managers will be required to comply with the LBP disclosure rule and other requirements applicable to target housing.*

# TOXIC SUBSTANCES

## *PCBs in Caulking Complicate Renovation of Graduate Center*

The presence of PCB contamination in buildings is commonly associated with spills of dielectric fluids from electrical or hydraulic equipment. Now, though, PCBs are being detected with increasing frequency in caulking. The latest example is the Lederle Graduate Research Center at the University of Massachusetts at Amherst that was constructed in 1971. During a $4 million facade repair and renovation project, the resealing and waterproofing contractor sampled the caulking for PCBs. After the sampling analysis results detected PCBs at concentrations as high as 20,360 parts per million, work was halted and additional samples were collected that yielded PCBs at 723,000 ppm. In addition, soil samples collected from the area where the building exterior was pressure-washed had 41.7 ppm of PCBs. It is anticipated that the PCBs will delay project completion for at least a year.

***Commentary:*** *Because of rising costs and delays in construction schedules, renovation and rehabilitation of existing buildings is gaining in popularity. This trend has caused developers to bid up the price of existing buildings, thereby increasing the financial risks to developers and their lenders. Under such market conditions, environmental issues can play a more prominent role because of their potential for construction delays and increased costs. Thus, it is more important than ever to perform thorough environmental due diligence prior to renovating existing structures. In particular, it is essential to evaluate the presence of former petroleum tanks, perform comprehensive asbestos surveys and carefully review prior uses of a building to determine if the prior uses could have contaminated building materials. Building materials contaminated with VOCs, PCBs or mercury can be a continuing source of vapor intrusion. In addition, contaminated building materials could increase disposal costs since the waste might not be able to be disposed as construction and demolition debris.*

# INSURANCE

## *Federal Court Rules "Personal Injury" Coverage Trumps Pollution Exclusion*

Since insurers added the pollution exclusion to Commercial General Liability (CGL) policies, insureds have tried a variety of novel theories to limit the impact of these pollution exclusion clauses. In *Great American Insurance Company of New York v. Helwig*, 419 F.Supp.2d 1017 (N.D. Ill 2006), a federal district court ruled that an insurer had a duty to defend its insured under a "personal injury" endorsement.

In this case, the plaintiff issued a primary CGL policy and an excess policy to Avtec Industries for the period November 1986 to November 1987. Both the primary and excess policies contain pollution exclusions that excluded coverage for bodily injury and property damage resulting from pollution that was not sudden or accidental. A land trust was subsequently added as an additional insured to the primary policy. The defendant, a beneficiary of the land trust, sought coverage in connection with a cost recovery action filed by the State of Illinois and two class actions for groundwater contamination emanating from land owned by the land trust. Great American initially denied coverage and refused to defend Helwig, but subsequently agreed to defend under a strict reservation of rights. The insurer then sought a declaratory judgment that it had no obligation to defend or indemnity for any damages arising out of the three lawsuits because of the pollution exclusion.

The defendant filed a counterclaim that Great American owed a duty to defend because the underlying complaints fell within the scope of the policy's personal injury and advertising injury coverage that had been added after the inception of the policy. The endorsement defined personal injury to include "wrongful entry or eviction or other invasion of the right of private occupancy" and did not contain its own pollution exclusion. At the same time, the pollution exclusion for both policies was modified to remove coverage for sudden and accidental pollution.

The court first noted that the United States Court of Appeals for the Seventh Circuit and Illinois courts have held that under canons of policy construction requiring them to narrowly construe exclusions against the insurer and in favor of coverage, pollution exclusions for bodily injury and property damage do not apply to personal injury claims unless expressly stated in the pollution exclusion (see following article for such an example).

The plaintiff pointed to language in the modified pollution exclusion stating that "pollution damages… are totally excluded" to buttress its argument that the modified exclusion should be broadly interpreted to exclude personal injury damages. However, the court indicated that the language relied on by the plaintiff was simply to explain

the broad introduction of the exclusion, stating that bodily injury and property damage resulting from pollution was totally excluded. Again, the court said that the language was at best ambiguous and it was obligated to construe the exclusion in favor of the insured.

Having ruled that the pollution exclusion would not necessarily apply to personal injury damages, the court then examined if the three lawsuits alleged damages that fell within the scope of the personal injury endorsement. The court said that the definition of personal injury covered the personal rights incidental to ownership of property since the endorsement applied to invasions of the right of private occupation such as trespass, nuisance and other interferences with possession. The court found that one of the class action complaints clearly alleged claims of nuisance and trespass and therefore Great American had a duty to defend under the personal injury endorsement. The court found that the third party complaint for the other class action did not allege on its face if there had been a wrongful entry or other invasion of a right of private occupancy and ordered the parties to produce the original complaint for a determination if the plaintiff had a duty to defend in that lawsuit. Finally, the court ruled that the plaintiff had no duty to defend in the action brought by the state because while the complaint alleged a claim for public nuisance, it did not seek compensation for a violation of any rights of private occupancy.

## *So You Want to Dabble In Real Estate? Beware of the Business Pursuit Exception to Your Homeowner Policy*

With the real estate market on both coasts beginning to cool, investors are beginning to shift their attention to areas of the country's heartland that have not experienced a run-up in real estate values. As prices rise in these areas, increasing numbers of individuals without real estate experience are starting to dabble in real estate as a part-time occupation. With this in mind, speculators seeking to cash in on this trend should consider a recent Indiana state court decision in *Mid-America Fire & Casualty Company v. Shoney's and SHN Properties et al*, 843 N.E.2d 548 (Ind. App. 2006).

In this case, a college professor purchased a parcel of land in Indianapolis that had formerly been used as a gas station. After contamination was discovered on the property, the former owner of the property implemented corrective actions and then sought contribution from the defendant on the grounds that the college professor had owned the USTs at the time of the release. The defendant then sought coverage under the property damages and personal injury enhanced coverage of his homeowner policy. The policy provided that the definition of bodily injury included personal injury, but did not apply to "injury arising out of the business pursuits of the insured."

In response to the plaintiff's claim that the business pursuits exclusion barred any coverage, the defendant argued that his livelihood as a college professor and therefore

his ownership of the contaminated property did not rise to the level of a business pursuit. Since the policy did not define the term "business pursuit," but simply indicated that "business" included a "trade, profession or occupation," the defendant said the policy should be interpreted under decisions holding a business pursuit required a continued or regular activity for the purpose of earning a livelihood.

However, the court found that the college professor had regularly invested in real estate projects, including development of a ski resort and a housing project, and that he had earned significantly more income from his real estate ventures than his salary as a college professor. The court also noted that the defendant held title to the property to build a restaurant that would serve an adjoining hotel in which he held an ownership interest. The court concluded that the professors purpose in "dabbling" in real estate was to earn additional livelihood and that his ownership of the property constituted a business pursuit. As a result, his claim for remediation costs under his homeowner's policy was denied.

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## *State Court Rules Insurer Has No Obligation To Notify Of Change in Law After Claim is Denied*

In another interesting Indiana gas station case, the seller of the service station spent approximately $160K of the sales proceeds to remediate contamination associated with six USTs. After the seller was reimbursed approximately $63K from the Indiana Excess Liability Trust Fund, he considered filing a claim with his policy primary property and casualty in March 1994 but his insurance agent advised him that his claim would be rejected because his Garage Policy had a pollution exclusion. As a result, the seller never filed a claim.

In 1996, the Indiana Supreme Court ruled that an absolute pollution exclusion in a garage policy was ambiguous and unenforceable. However, the seller did not learn of the change in the law until the first quarter of 2004 when the environmental consultant who had performed the property investigation in 1994 advised him that his claim might now be covered under the former Garage Policy. In December 2004, the seller sought a declaratory judgment, arguing the ten-year statute of limitations discovery rule for insurance contracts. The trial court granted summary judgment to the insurer and a state appeals court affirmed in *Perryman v. Motorist Mutual Insurance Company*, 2006 Ind. App. LEXIS 715 (Ind. App. April 28, 2006).

In its appeal, the plaintiff argued that it had acted diligently when it had learned of the change in law. However, the appeals court said that the discovery rule did not apply to knowledge of legal rights, but to when an insured knew or in the exercise of ordinary diligence could discover that an insurance contract has been breached or injury had been sustained. Since the plaintiff became aware of its damages in March 1994 when he incurred remediation costs, the appeals court ruled that the discovery rule did not apply.

The plaintiff also argued that the running of statute of limitations should have been tolled or stopped under the doctrine of equitable estoppel. Since the insurance agent had initially advised him that his policy would not cover his claim, the plaintiff argued that the insurer had an obligation to notify him of the change in the law and its failure to do so constituted fraudulent concealment. The court declined to impose such a duty on insurers, finding that this would create an undue burden on insurers to have to keep abreast of developments impacting rejected claims that may still be viable within the statute of limitations. In addition, the court said that the state supreme court ruling was a matter of public record. The court did not want to reward plaintiffs who failed to diligently follow legal developments that could affect their legal rights that were still actionable under the applicable statute of limitations.

## *California Court Finds No Collusion in Insurance Claim Involving Municipality and Its Redevelopment Agency*

Local governments are increasingly turning to redevelopment agencies to return contaminated property to productive reuse. What happens, though, when the redevelopment agency files a cost recovery action against a municipality that does not have first party insurance coverage for cleanup? Is the insurer obligated to pay the third party claim of the redevelopment agency? In *Continental Insurance Company v. Pomona Redevelopment Agency, 2006 Cal. App. Unpub. LEXIS 4167 (2nd Cal. App. May 15, 2006),* a California state court denied an insurer's request to intervene to dismiss the action on the grounds that the parties had filed a collusive suit to obtain insurance coverage.

Here, the City of Pomona (Pomona) had disposed of wastes at the privately owned Phillips Ranch Landfill between 1925 and 1964. In 1982, the property containing the landfill was sold to the Pomona Redevelopment Agency (Agency). In the 1990s, the Agency learned from a prospective purchaser that the land was contaminated and subsequently issued a Polanco Act notice to the prior owner and Pomona as a transporter of wastes. Pomona tendered the notice to its insurer carriers who attempted to negotiate a settlement. When those negotiations failed, the agency then filed a complaint against Pomona and the prior owner seeking a declaration of liability and recovery of remediation costs. In 2003, Continental denied its policy was implicated due to its status as an excess carrier and advised Pomona that it was closing its file.

In 2004, a state trial court held bifurcated proceedings. In the liability phase, the court dismissed the claim against the former owner but found Pomona was a responsible party under the state Polanco Act and ordered Pomona to remediate the landfill. Prior to commencement of the damages portion of the trial, the plaintiff sought to intervene to file a motion to dismiss on the grounds that there was no adversarial proceedings since the only two parties remaining in the action were

Pomona and the Agency. In advancing this argument, the insurer pointed to the fact that the Pomona City Council was the governing body for both parties. Pomona had paid for both sets of lawyers, Pomona had received confidential legal advice from both sets of lawyers and it had controlled the legal strategy for both parties. Since Pomona had no first-party insurance for remediation costs, the plaintiff argued that Pomona had, in effect, sued itself by manufacturing a third-party action in the guise of a claim by the Agency. As a result, the plaintiff charged that the parties shared the same financial incentive to have Pomona's insurer pay for the cleanup and therefore Pomona lacked the incentive to defend its action.

The appeals court said that redevelopment agencies are separate and distinct legal entities from the governing bodies of their communities and that the mere fact that the same body of officers acts as the legislative body for two different governmental entities does not mean the governmental entities were the same body. The court held that the close relationship of the parties was a natural consequence of their status as municipality and redevelopment agency and that merely pointing to the equivalence of the parties' attorneys or a common source of payment of legal fees was not enough to establish collusion between the parties. Because the insurer had delayed intervening in the case during the trial, the appeals court affirmed the judgment of the trial court and ruled the insurer's motion was untimely.

## *Federal Appeals Court Rules Notice of NPL Listing Constitutes Claim Under EIL Policy*

The United States Court of Appeals for the Fifth Circuit upheld a jury verdict in *International Insurance Co. v. RSR Corporation*, 426 F.3d 281 (5th Cir. 2005) that notification of placement of a site on the National Priorities List (NPL) constituted a claim under a claims-made Environmental Impairment Liability (EIL) policy.

In this case, Revere Smelting and Refining Corporation of New Jersey (RSR) purchased an EIL policy from the plaintiff for the period September 1981 to November 1982 with an extended reporting period until November 4, 1983. The EIL policy provided coverage against liability for environmental impairment damages causing personal injury, property damage and damage to environmental rights as well as reimbursement of the costs and expenses for voluntary cleanup performed with the insurer's consent. After EPA issued a press release in December 1982 that it was proposing to place RSR's Harbor Island lead smelter facility on the NPL, RSR forwarded a copy of the press release to its insurance broker in January 1983. In September 1983, EPA published a final notice in the *Federal Register* formally including the site on the NPL. Late in 1983, RSR sold the Harbor Island site to Bergsoe Metals (Bergsoe), which was owned by East Asiatic. As part of this transaction, Bergsoe agreed to indemnity and reimburse RSR for environmental liability associated with the facility.

In July 1986, EPA issued a CERCLA §104(e) PRP information request to a RSR entity, Quemetco Realty, Inc. In 2000, EPA filed a complaint seeking recovery of $8 million in response costs at the facility. The plaintiff sought a declaratory judgment that it was not obliged to indemnity RSR.

The district court ruled that because the term "claim" was ambiguous and not defined in the policy, Texas law required application of the meaning of the term most favorable to the insured. In its instructions to the jury, the court said that a claim was an assertion by a third party whereby the third party believes the insured is liable whether or not the insured is actually liable. The court also instructed the jury that a claim does not require institution of formal proceedings.

In upholding the jury verdict, the appeals court found that the placement of the site on the NPL created a virtual certainty of further investigation and enforcement actions by EPA. The insurer argued that RSR had waived its right to coverage and that its prior conduct was inconsistent with its assertion that it had a right to coverage under the EIL. Specifically, the insurer pointed to letters written by RSR's general counsel in 1995 that it did not intend to pursue a claim. However, the court noted that the general counsel had testified that because RSR thought it was going to be indemnified by Bergsoe, it would not have to file a claim. He did not intend the letters to waive any of RSR's rights, but simply expressed his expectation that an insurance claim would not be necessary. Due to this conflicting evidence, the district court found that a reasonable jury could conclude that RSR did not permanently and unequivocally waive its right under the policy. Accordingly, the appeals court ruled that the district court had not abused its discretion when denying the plaintiff's motion for a new trial.

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