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A Newsletter Covering Recent Environmental Developments and Caselaw

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The Schnapf Environmental Journal is a bi-monthly report that provides updates on regulatory developments and highlights significant federal and state environmental law decisions affecting corporate and real estate transactions, and brownfield redevelopment. The information contained in this newsletter is not offered for the purposes of providing legal advice or establishing a client/attorney relationship. Environmental issues are highly complex and fact-specific and you should consult an environmental attorney for assistance with your environmental issues.

CLEAN WATER

EPA Proposes New Stormwater Construction Site Rules

EPA has proposed effluent limitations guidelines (ELGs) and new source performance standards (NSPS) to control the discharge of pollutants from construction sites. ELGs are technology-based standards that apply to existing point sources. The proposed rule would require construction sites to implement a range of erosion and sediment control measures to control pollutants in stormwater discharges. In addition, construction sites disturbing 10 or more acres at a time would be required to install sediment basins to treat their stormwater discharges. Developers would have to meet numeric standards limiting the amount of sediment in stormwater runoff at sites that are 30 acres or larger and located in areas with high rainfall intensity and with soils that have high clay content. That would require some of the sites to treat and filter their stormwater discharges.

EPA projects that the proposal would reduce the amount of sediment discharged from construction sites by up to 27 billion pounds each year, at an annual cost of \$1.9 billion. The agency said the proposal would provide better protection for drinking water supplies, improve aquatic environments and reduce the need for dredging navigation channels and reservoirs.

Commentary: *Under section 304(m) of the CWA, EPA is required to publish every two years a plan that identifies categories of sources discharging toxic or non-conventional pollutants for which ELGs or NSPS have not been published, and establish a schedule for promulgating the ELGs and NSPS within three years of the plan. In 2000, EPA published a final notice of effluent guidelines plan which listed construction activities as a point source category requiring guidelines (65 FR 53008, Aug. 31, 2000). In 2004, though, EPA announced it was withdrawing its proposed ELGs and NSPS for construction and development sites. Instead, the agency indicated it would rely on existing federal, state and local programs to control stormwater runoff from construction sites because it believed that these programs already adequately addressed stormwater discharges and the costs of the proposed ELGs were disproportionately large. EPA also concluded that definition of a new source should not include construction sites.*

In Natural Resources Defense Council v. EPA, 437 F.Supp.2d 1137, 1139 (C.D. Cal.2006), a federal district court ruled that once a point source category had been identified, section 304(m) of the CWA imposed a mandatory duty to promulgate ELGs and NSPS for those point source categories named in a CWA section 304(m) plan. Since the construction industry was identified as a point source category, EPA was required to promulgate standards for the industry. On appeal, the Ninth Circuit in NRDC v. EPA, 2008 U.S. App. LEXIS 19755 (9th Cir.9/182008) affirmed the district court's decision.

In earlier stormwater case, Natural Resources Defense Council v. EPA,

2008 U.S. App. LEXIS 11080 (9th Cir. 5/23/08), the Court of Appeals for the Ninth Circuit also vacated EPA rule exempting discharges of sediment from oil and gas construction activities from the stormwater permit program.

Four Homebuilders Resolve Stormwater Violations

Four of the nation's largest home builders have agreed to pay civil penalties totaling \$4.3 million to resolve alleged violations of the Clean Water Act. The companies also have agreed to implement company-wide compliance programs that go beyond current regulatory requirements and put controls in place that will keep 1.2 billion pounds of sediment from polluting our nation's waterways each year.

The four separate settlements, which involve Centex Homes (\$1.485M), KB Home (\$1.185M), Pulte Homes (\$877K), and Richmond American Homes (\$795K) resolve alleged violations of storm water run-off regulations at construction sites in 34 states and the District of Columbia. Pulte Homes also agreed to complete a supplemental environment project (SEP) at a minimum cost of \$608,000. The project will reduce the amount of sediment going into a northern California watershed and improve the habitat for aquatic life.

The complaints alleged a common pattern of violations discovered by reviewing documentation submitted by the companies and through federal and state site inspections. The alleged violations include not obtaining permits until after construction had begun or failing to obtain the required permits at all. At the sites that did have permits, violations included failure to prevent or minimize the discharge of pollutants, such as silt and debris, in storm water runoff.

The settlements require the companies to develop improved pollution prevention plans for each site, increase site inspections and promptly correct any problems that are detected. The companies must properly train construction managers and contractors, and are required to have trained staff at each construction site. They also must implement a management and internal reporting system to improve oversight of on-the-ground operations and submit annual reports to EPA.

The settlements are the latest in a series of enforcement actions to address storm water violations from construction sites around the country. A similar consent decree, reached in February with Home Depot, required the company to pay a fine of \$1.3 million and establish a comprehensive storm water compliance plan to prevent future violations.

Washington Pollution Boards Requires Cities to Use Low-Impact Technology in Stormwater Permits

The Washington Pollution Control Hearings Board recently ordered the Washington State Department of Ecology (Ecology) to modify certain stormwater permits it issued to cities and counties around Puget Sound in *Puget Sound Keeper Alliance v. State of Washington, Department of Ecology*, Findings of Fact, Conclusions of Law, and Order Phase I, (PCHB NOS. 07-021, 07-026, 07-

027 07-028, 07-029, 0-030, 07-037 8/7/08). The board ruled that the Phase I Permit failed to require that the municipalities control stormwater discharges to the maximum extent practicable (MEP). It also concluded that the permits did not require application of all known, available, and reasonable methods of prevention, control and treatment (AKART) because they failed to require more extensive use of low impact development (LID) techniques. To remedy this problem, the Board directed Ecology to make specific changes to some provisions in the permits, and also remanded the permits with direction to Ecology to require the permittees to develop methods for use of LIDs at parcel and subdivision levels in their jurisdictions.

After an eight-year process, Ecology issued three NPDES and State Waste Discharge general permits for discharges from municipal separate storm sewer systems (“MS4s”) in January 2007. Unlike traditional NPDES permits, the Phase I permits are “programmatic permits,” meaning they require the municipal permittees to implement area-wide stormwater management programs rather than establishing benchmarks or other numeric or narrative effluent limits for stormwater discharges from individual outfalls. The heart of the Phase I Permits requires that permittees implement a Stormwater Management Program (SWMP). Permittees who implement all of the program requirements in combination with one another are considered by Ecology to be reducing the discharge of pollutants to the maximum extent practicable, even though it may be possible for a permittee to do more in a specific program element or at a specific outfall if the individual requirements were evaluated in isolation from the rest of the program requirements.

Puget Sound Keeper Alliance (PSA) appealed the permits, asserting that the permits were inadequate to protect Puget Sound and its declining populations of salmon, orcas and other marine species. The major contention of the PSA challenge to the Phase I permit was that traditional structural engineered stormwater management practices were inadequate to address the municipal stormwater problem and that the Permit should have also required greater use of Low Impact Development (LID) practices on a broader and more comprehensive scale.

In the Phase I Permit, Ecology chose to regulate stormwater discharges from new development and redevelopment primarily through the imposition of a flow control standard, which generally requires new and redeveloped sites that discharge to surface waters to control the rate at which stormwater is released from their sites so that the discharges do not cause accelerated stream channel erosion. The flow control standard is not a LID concept because it is based on the premise that there will be discharges of stormwater from particular sites and attempts to control the duration and frequency of high stormwater runoff flows. Conventional stormwater management criteria frequently incorporate a post development peak discharge rate for a 2- and 10-year storm event based upon possible property damage due to flooding and stream bank erosion. The goal of LID, on the other hand, is to minimize or prevent entirely the discharge of stormwater from the site. While utilization of LID techniques may be useful or even necessary in some cases to meet the flow control standard on a particular

site, the flow control standard does not require the use of LID techniques. The Phase I Permit includes several conditions that address LID in various ways, nearly all of which are in the nature of encouraging or promoting rather than requiring LID by municipalities. In contrast to other permit terms, the final permit does not require municipalities to implement ordinances or other measures to use LID as a primary tool to manage stormwater within their jurisdictions.

The board concluded that the permits' focus on traditional engineered stormwater management facilities like retention ponds was inadequate to protect Puget Sound and meet the law's requirements. The board said that flow control standard addressed large stormwater flow rates only, which occur approximately 1% of the time and provided only residual control to runoff the remainder of the time. Another drawback emphasized by the board was that the flow control standard had a significant exception for basins that have had at least 40% total impervious area since 1985. The board found that most areas located within the Seattle, Tacoma, Bellevue and Everett would qualify for this exception. The board acknowledged that there was considerable dispute about the attainable performance of particular LID strategies and engineering techniques, there was no dispute that in combination these approaches offer the best available, known and tested methods to address stormwater runoff. In many cases, implementation of LID techniques on the ground for new or redevelopment, or even retrofitting existing development, is less costly, or no more costly, than conventional engineered BMPs. The board also noted that structural stormwater controls, such as detention ponds, curbs, gutters and pipes, require significant hardware and capital investment while LID techniques eliminate or reduce the need for these structural controls by reducing the volume of water to be managed. LID techniques may also require less space than these traditional methods.

Thus, the board concluded that LID methods were at this time a known and available method to address stormwater runoff at the site, parcel, and subdivision level. The Board also found that LID methods are technologically and economically feasible and capable of application at the site, parcel, and subdivision level at this time. Since application of these methods at the basin and watershed level involves additional cost and practical considerations, the board said Ecology must prepare for the eventual use of this known and available method of stormwater treatment for future iterations of the permit consistent with its obligation to impose increasingly stringent requirements on discharges covered by NPDES permits. The board held that the permit must require municipalities to employ broader use of LID at the parcel and subdivision level but stopped short of concluding that the permit must require use of LID at a basin and watershed level.

Commentary: LID techniques store, infiltrate and evaporate stormwater where it falls rather than collect and convey it to surface waters off site, and can be implemented at an individual development site level, as well as part of a broader strategy employed at a basin or watershed level. Site-level LID BMPs include but are not limited to maintenance of natural vegetation on site, reduction of

impervious surfaces; protection of natural drainage patterns, use of minimal excavation foundations such as pin foundation for structures; use of vegetated swales to capture and retain runoff; use of green roofs, and storage and reuse of runoff. At a watershed or landscape scale, LID strategies can include basin planning, watershed-wide limits on imperviousness, and protection of sensitive areas like riparian zones, wetland and steep slopes.

Attendees at the 2008 "International Low Impact Development Conference" were told that developers can save substantial amounts of money using LID due to reduced costs for site grading and preparation, stormwater infra- structure, site paving, and landscaping. Total capital cost savings ranged from 15% to 80%. However, there were a few instances where LID project costs were higher than conventional stormwater management costs. One such money-saver is pervious pavement that allows stormwater to percolate through the pavement into a filter layer below. Some developers and engineers in northern New England have been hesitant to use such techniques for fear they may not work well in cold climates.

Washington State Plans to Prohibit Residential Car Washing

In another water quality initiative, Washington Department of Ecology (Ecology) has advised its local governments that they must prohibit home car washing. Ecology will require local governments to enact ordinances prohibiting car washing unless residents divert the wash water away from storm drains as a condition for issuing water runoff permits.

According to Ecology, the soapy runoff from car washing is toxic to salmon and other fish and that small metal particles such as brake dust are also harmful to aquatic life. Most city ordinances specifically allow home car washing and permit discharges to drain into storm sewers. Under the Ecology proposal, residents would be able to wash cars on lawns or gravel driveways where water can soak in the ground. Residents could wash their cars on pavement if they install barriers to prevent wash water from going into storm sewers. Local governments would prefer an education campaign instead of an outright ban.

Commentary: *In October, EPA released a 105-page report titled "National Water Program Strategy: Response to Climate Change." The report detailed the impacts of climate change and also outlined goals for mitigation of greenhouse gas emissions to protect the water supply. EPA predicted an array of effects climate change would have on water sources including shorelines moving inland, warming water temperatures creating higher concentrations of pollutants and stronger storms increasing pollution from storm water runoff. One response EPA plans will be to use its National Pollutant Discharge Elimination System (NPDES) to minimize the impacts of climate change. Another key strategy for reducing climate change that EPA identified was water conservation since this also saves energy.*

The Yucaipa Valley Water District (YVWD) has adopted a water banking strategy to protect local residents and businesses from continuing drought as well as uncertainties involving the future availability of water from the Sacramento

Delta. The continued drought and concerns over the fate of several endangered species of fish prompted a federal judge to order 30% reductions in Delta water deliveries this year. YVWD provides water and wastewater treatment services to about 50,000 customers in a 50-square mile service area that includes the cities of Yucaipa and Calimesa and adjacent incorporated areas of Riverside and San Bernardino counties. The strategy is one of several long-term conservation policies recently approved by the district's board of directors.

Starting Nov. 1st, YVWD began adding a 15% surcharge on water consumption charges billed to its business and residential customers. The money would amount to about \$2.50 per month for the typical homeowner and will be used to purchase additional State Water Project water that the district could store in its groundwater basins for use during periods of statewide water shortages.

Beginning July 1st, the district will require anyone planning to build a new home or business to deposit sufficient funds for the purchase of at least 7-acre feet of water for each home provided the district is not experiencing mandatory water use restrictions. However, if the district experiences water restrictions requiring a 20% reduction in water use, the district may implement a building moratorium. Developers who purchase upfront 15.7 acre feet of water per dwelling would be allowed to proceed with their development but may face some restrictions if mandatory water use cutbacks of 35% are implemented. No development would be allowed when the district is experiencing mandatory water use cutbacks of 50%.

The district plans to supplement its water banking strategy with new recycled water delivery systems so that water that is locally used can be recycled and reused for outdoor landscaping purposes of new commercial and residential developments. The district hopes that the water banking and recycling strategies will eventually enable the district to maintain a reliable and sustainable water supply. It will also insulate the district from periodic droughts as well as fluctuations in the availability of water imports.

With states struggling with achieving water quality standards because of stormwater runoff and growing concerned about water supplies due to climate change, owners and operators of commercial and multi-family properties should expect to see more innovative approaches like those discussed in this issue.

EPA Brings Enforcement Action Against Residential and Commercial Properties For Failure to Properly Close Cesspool Systems

Many commercial and residential facilities such as hotels, office complexes, restaurants, and multi-family developments use on-site wastewater systems known as septic systems or cesspools, which are regulated as Class V wells under the Underground Injection Control (UIC) program of the Safe Drinking Water Act.

Most Class V wells are shallow disposal systems that depend on gravity to drain fluids directly in the ground. There are over 20 well subtypes that fall into

the Class V category and these wells are used by individuals and businesses to inject a variety of non-hazardous fluids underground. EPA estimates that there are more than 650,000 Class V wells in operation nationwide. Most of these Class V wells are unsophisticated shallow disposal systems that include storm water drainage wells, cesspools, and septic system leach fields. However, the Class V well category also includes more complex wells that are typically deeper and often used at commercial or industrial facilities.

Cesspools discharge raw sewage into the ground that can result in disease-causing pathogens and other contaminants such as nitrates polluting groundwater, streams and the ocean. Beginning in 2000, the UIC program prohibited the construction of new large capacity cesspools (LCCS) and motor vehicle waste disposal wells that receive or have received fluids from vehicle repair or maintenance activities. A large capacity cesspool discharges untreated sewage from multiple dwellings, or a non-residential location that serves 20 or more people per day. All existing large capacity cesspools were to be closed and replaced with an alternative wastewater system by April 5, 2005. Motor vehicle waste disposal wells were to be phased-out depending on the groundwater resources where the disposal systems were located. Generally, owners and operators are required to provide pre-closure notification to the permitting authority and then comply with the closure procedures established by the authority.

Following a grace period, EPA has begun bringing enforcement actions against facilities that have not properly closed and replaced their septic systems/cesspools. A recent example is a settlement with Mauna Loa Macadamia Nut Corporation which agreed to pay a \$75,000 fine for failing to close three large capacity cesspools at its Hilo facility in Hawaii. A subsidiary of the Hershey Company, Mauna Loa owned and operated a macadamia nut processing plant and a visitor center in Hilo.

Commentary: *In contrast to cesspools, EPA chose not to regulate large capacity septic systems (LCSS) because the wastewater tends to undergo sufficient treatment and attenuation. A septic system is considered a LCSS if it receives solely sanitary waste either from multiple dwellings or from a non-residential establishment and the system has the capacity to serve 20 or more persons per day. Owners or operators of large capacity septic systems (LCSS) must provide certain inventory information including the facility name and location, owner/operator name and address, nature and type of injection well, and operating status. In addition, the LCSS must not inject fluids containing any contaminants (such as pathogens, solvents, or heavy metals) into a underground sources of drinking water (USDW) if the presence of that contaminant may cause a violation of any primary drinking water regulation or adversely affect public health.*

Many systems servicing commercial properties may also receive discharges from dry cleaners, gas stations, and other businesses that use hazardous substances. From a regulatory standpoint, these systems are considered Class I industrial waste disposal wells under the UIC that are subject to permitting and treatment standards. Unfortunately, many local permitting

authorities were not aware that the septic systems received commercial or hazardous wastewaters or failed to properly regulate the wells. As a result, septic tanks can be a significant source of soil and groundwater contamination. A number of properties have been placed on the National Priorities List because of hazardous substances that were discharged from septic systems.

EPA Revises SPCC Rule

On November 26, 2008, EPA proposed amendments to its Spill Prevention, Control and Countermeasures (SPCC) Plan regulations (73 FR 72016). The SPCC regulations apply to owners or operators of non-transportation-related facilities handling certain quantities of petroleum where discharges from those facilities could reasonably be expected that reach navigable waters or adjoining shorelines because of the location of the facilities.

The revisions clarify regulatory requirements for particular industry sectors and streamline certain requirements for facilities. Owners or operators of facilities that were in operation on or before August 16, 2002 must make any necessary amendments to its SPCC Plan and fully implement it by July 1, 2009. For facilities that came into operation after August 16, 2002, but before July 1, 2009, the owners or operators must prepare and fully implement an SPCC Plan on or before July 1, 2009.

EPA also proposed amendments to SPCC rule for certain areas of farms (73 FR 72016). EPA proposes that a farm in operation on or before August 16, 2002 would have to make any necessary amendments to its SPCC Plan and implement that Plan on or before November 20, 2009 and a farm that came into operation after August 16, 2002 would have to prepare and implement an SPCC Plan on or before November 20, 2009. A farm that comes into operation after November 20, 2009 would have to prepare and implement an SPCC Plan before beginning operations the SPCC. "Qualified" farms will not have to comply until November 20, 2010. A qualified farm is defined as having an aggregate aboveground storage capacity of 10,000 gallons or less, and have not had a single discharge exceeding 1,000 gallons or two discharges each exceeding 42 gallons within any twelve month period in the three years prior to the SPCC Plan certification date, or since becoming subject to the SPCC requirements for less than 3 years.

The proposed rule exempts the following facilities from SPCC requirements: Hot-mix asphalt and hot-mix asphalt containers, residential heating oil containers (i.e., those used solely at single-family residences); pesticide application equipment and related mix containers, underground oil storage tanks that supply emergency diesel generators at nuclear power generation facilities licensed by the Nuclear Regulatory Commission, intra-facility gathering lines subject to U.S. Department of Transportation's pipeline regulations, and produced water containers that do not contain oil in harmful quantities.

EPA also issued a final rule on November 26th amending the definition of

"navigable waters" for purposes of the SPCC Plan rule (73 FR 71941). The agency had amended the phrase in July 2002 but a federal district court invalidated the revision in *American Petroleum Institute v. Johnson*, 571 F. Supp.2d 165 (D.D.C. 2008). The final rule restores the regulatory definition of "navigable waters" under the SPCC to the original definition that was promulgated in 1973.

Commentary: *Earlier this year, a Maine-based company agreed to pay a penalty of \$157,500 to resolve EPA allegations that the company failed to comply with SPCC requirements at seven facilities in New Hampshire and Maine. According to the EPA complaint, the seven facilities lacked adequate secondary containment for some portion of each facility. Some of the facilities lacked secondary containment for bulk oil storage tanks and transfer areas and none of the facilities had secondary containment around the loading racks. Two of the New Hampshire facilities are located in drinking water protection areas. CN Brown Company also committed to spend over \$1 million to bring its facilities into compliance.*

Meanwhile, Connecticut-based Draper Energy faced fines of up to \$157,500 for allegedly failing to promptly correct visible oil discharges caused by leaking pumps and worn tank manhole seals at a fuel storage facility within proximity to the drinking water as well as failing to provide sufficient impervious secondary containment around its oil storage containers. The EPA complaint also alleged Draper Energy failed to prepare and implement a SPCC plans at two of its facilities.

Coast Guard Revises OPA Financial Assurance Requirements

In September, the United States Coast Guard issued amendments to the financial responsibility requirements under the Oil Pollution Act of 1990 (OPA) and CERCLA (73 FR 53691, 09/17/08). The amendments conform the amounts of financial responsibility that owners and operators of vessel must maintain in 33 CFR part 138 to statutory increases in the limits of liability of the Oil Pollution Act of 1990 (OPA) that were established pursuant to the Delaware River Protection Act of 2006 (Public Law 109-241). The final rule became effective on October 17, 2008.

Under OPA, responsible parties for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into navigable waters are liable for removal costs and damages that result from such an incident, up to prescribed limits of liability. Similar requirements apply under CERCLA for owners or operators of to owners of vessels and facilities that release or threaten to release hazardous substances. The final rule also established a new subpart B setting forth the OPA 90 limits of liability for vessels and deepwater ports, and established the framework for future regulatory changes to the OPA 90 limits of liability, including adjustments for inflation.

In addition to the limit of liability provisions, OPA and CERCLA require the owners and operators of certain vessels and facilities establish and maintain

evidence of financial responsibility sufficient to meet the maximum amount. The financial responsibility requirements apply to responsible parties for any vessel over 300 gross tons using any place subject to the jurisdiction of the United States as well as any vessel using the waters of the exclusive economic zone to transship or lighter oil destined for a place subject to the jurisdiction of the United States. OPA also imposes evidence of financial responsibility requirements on offshore facilities and deep water ports. The amendments eliminate the requirement that an original certificate of financial responsibility (COFR) be physically carried on covered vessels.

EPA Agrees to Issue Standards to Protect Beaches

In a settlement that will no doubt focus more regulatory scrutiny on stormwater discharges, EPA agreed to study the effects of beach water pollution on health and update its water quality standards by 2012 to resolve a lawsuit filed by the Natural Resources Defense Council. NRDC filed its lawsuit in 2006 asserting that EPA failed to establish water quality standards in coastal waters as required by the Beaches Environmental Assessment and Coastal Health (BEACH) Act of 2000.

According to NRDC, 75% of the 20,000 beach closings that occurred in 2005 were prompted by “dangerously high” levels of bacteria. The settlement agreement requires the EPA to create standards that will protect the beach-going public from a broader set of swimming-related sicknesses than past standards that have focused only on stomach illnesses. The new standards must also take into account water pollutants causing ear infections, rashes, respiratory infection, pinkeye and more serious sicknesses, including hepatitis and meningitis. EPA will also create a “rapid” pollution test enabling same-day assessments of beach water safety, according to NDRC. EPA will also examine the risks of stormwater runoff from non-point source pollutants.

Stormwater Permit Moratorium Established in Los Angeles Basin

Los Angeles developers already reeling from the credit crisis received another jolt when the Superior Court of California, County of Orange (Court) issued a ruling prohibiting the State Water Board from accepting additional enrollments for its stormwater general permit. The effect of the ruling is to impose a moratorium on all new construction or industrial activities within the Los Angeles region.

The court issued its injunction in *Cities of Arcadia, et al. v. State Water Resources Control Board, et al.*, (NO. 06CCO2974) following its invalidation of the Los Angeles Water Board's triennial review of its Basin Plan that was conducted in 2005. Specifically, the Court found that the Los Angeles Water Board had not analyzed the reasonableness of its water quality standards pertaining to storm water. The Court ordered the Los Angeles Water Board and

the State Water Board to review and revise water quality standards that apply to storm water. Until such a review is complete, application and enforcement of water quality standards for storm water in the Basin Plan may not be enforced. Since the court found that the Basin Plan is inadequate, it is also unclear if the Water Board may issue individual or federal general permits.

Since the Basin Plan revisions are subject to the California Environmental Quality Act (CEQA) and the cost-benefit analysis under Water Code Section 13241, the review period may be significant.

Commentary: *Earlier this year, Los Angeles Regional Water Quality Control Board (LARWQB) assessed a \$471,190 fine against The Boeing Co. for 79 violations of the California Water Code. The LARWQB alleged that between October 2004 and January 2006, Boeing released wastewater and stormwater runoff with elevated levels of chromium, dioxin, lead, mercury and other pollutants into Bell Creek and the Los Angeles River from the Santa Susana Field Laboratory. On July 1, 2004, LARWQB set waste and stormwater runoff limits and monitoring requirements for the laboratory. The limits permitted the facility to release up to 272 million gallons per day of wastewater and stormwater runoff, as long as it did not contain high levels of harmful contaminants. The monitoring required Boeing to conduct regular on-site testing of its run-off and submit test results to the board.*

Pharmaceutical Plant Fined for Discharges

In another sign over the growing concern over pharmaceutical wastewater discharges, EPA recently fined a San Francisco Bay Area pharmaceutical company nearly \$120,000 for allegedly discharging low-pH industrial wastewater that could cause sewer corrosion and collapses of sewer lines.

Under the settlement, BioMarin Pharmaceutical Inc. will spend an additional \$50,270 to restore Novato Creek and tributary Vineyard Creek, which empty into San Pablo Bay just north of San Francisco. As part of the restoration, BioMarin will remove invasive vegetation and replace it with native plants along at least 1,000 feet of creek banks and wetlands, according to the EPA. The company will then maintain and monitor the site for three years to ensure an 80 percent survival rate of the native plantings. The EPA said the restoration project will complement a larger Novato Creek restoration being organized by the Marin County Department of Public Works.

In May 2007, the EPA inspected BioMarin's Novato facility and reviewed monitoring data from the local sanitation district going back to 2004. It allegedly found that the company had discharged low-pH industrial wastewater in violation of federal and local standards on 62 separate days. Low-pH wastewater can cause sewer corrosion and collapses of sewer lines, which often result in sewer overflows and discharges of raw sewage. Under the CWA, facilities are prohibited from introducing pollutants that could cause structural damage into a wastewater system. Facilities are specifically prohibited in their permits from discharging wastewater with a pH lower than 5.0 unless the system is specifically

designed to accommodate such discharges.

DUE DILIGENCE

ASTM Phase I ESA for Rural Property Compliant with EPA AAI

On December 23rd EPA published a direct final rule recognizing ASTM International's E2247-08 *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland and Rural Property* as compliant with all appropriate inquiries (AAI). The direct rule allows for the use of E2247-08 to satisfy the statutory requirements for conducting AAI under CERCLA.

EPA published a direct final rule because it does not anticipate any adverse comment or controversy since the rule only allows for entities to use the new E2247-08 standard, if they so chose. The rule is effective March 23, 2009 unless EPA receives adverse comment by January 22, 2009. If needed, EPA will publish a withdrawal in the *Federal Register* informing the public that the rule will not take effect.

The rule does not require that any entity use the newly published Phase I Environmental Site Assessment (ESA) Process for Forestland and Rural Property; however, public and private entities who as *bona fide prospective purchasers* (BFPP), contiguous property owners or innocent land owners purchasing large tracts of forested lands on large rural properties and who intend to protect themselves from CERCLA liability

can use the new standard. EPA promulgated the AAI rule on November 1, 2005 and the final regulation recognizing ASTM E1527-05 as compliant with the final AAI rule. Therefore, the rule allows for the use of the E1527-05 standard in lieu of following the requirements in the AAI final rule. With this new direct rule, EPA has determined the ASTM E2247-08 is also compliant with the requirements of the AAI final rule.

In addition to the *Federal Register* notice, EPA also developed a document comparing the AAI regulation and the ASTM E 2247-08. The document, which is included in the public docket, states that E2247-08 is essentially congruent with ASTM E1527-05 and states that differences between the ASTM E2247-08 and the AAI regulation are minor and generally reflect the applicability of the ASTM standard to forestland and rural properties.

According to the EPA document the biggest differences between the two are that while AAI was designed to be applicable to all land types, ASTM E2247-08 was specifically developed for use in conducting a Phase I environmental assessment on property 120 acres or greater of undeveloped rural and forestlands. The standard also may be used to assess properties 120 acres or greater with a developed use of managed forestland and/or agriculture. The standard allows that the property may contain isolated areas of other land uses. The standard states that the 120 acres

do not need to be contiguous, although they should be part of the same commercial real estate transaction and have substantially the same land use. Although the specific land use focus of the ASTM E2247-08 standard reflects a narrower scope than the AAI regulation, it still meets the requirements of the AAI regulation.

A second difference is that the AAI regulation requires review of historical sources of information to cover a period of time from the present back until the time when the

property first contained structures or was first used for “residential, agricultural, commercial, industrial or governmental purposes.” ASTM E2247-08 requires historical record review back to 1940 or the property’s first developed use, later defining developed use which includes “agricultural or forestry uses or placement of fill.” The recognition of forestry use as a “developed use” is consistent with the provisions and standards of AAI. Despite these and any other differences, E2247-08 is compliant with the AAI regulation.

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This is our farewell issue of Schnapf Environmental Journal. We appreciate your support over the years and hope you will continue to read e-mails from RTM Communications, Inc.