SCHNAPF ENVIRONMENTAL JOURNAL

A Bi-Monthly Newsletter Covering Recent Environmental Developments and Caselaw

December 2004 Vol. 7 Issue 2

Contents

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For subscription information or to subscribe, visit our Web site at RTMCOMM.com or telephone 703-549-0977. Published bimonthly.

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.

DUE DILIGENCE/ AUDITING/ DISCLOSURE/ ENFORCEMENT

Contractor Not Liable to Remote Purchaser of LUST Site

A Rhode Island state court recently ruled that a demolition contractor and a prior property owner were not liable for failing to properly abandon a heating oil underground storage tank (UST) when a building was demolished in 1986.

In *Hotel Associates, LLC v. HMS Associates Limited Partnership,* 2004 R.I.Super LEXIS 44, HMS had purchased a four-story building in 1986 that housed a manufacturer of precision materials. After a tornado severely damaged the building, HMS hired International Building Wrecking Company (IBWC) to demolish the building. IBWC removed the building to grade and filled the five-foot basement with rubble from the project. In 1988, HMS sold the property to the plaintiff in an "as is" condition. In connection with a refinancing in 1995, the plaintiff was required to perform a Phase II investigation and discovered that three USTs containing heating oil had been located in the former courtyard where a boiler was located. The plaintiff incurred $160,000 to remediate contaminated soil and groundwater and also claimed to have suffered lost income of $15,000.

The plaintiff filed a claim for equitable indemnification, asserting that the defendant owner had failed to properly abandon the USTs as required by the UST regulations adopted by the state DEM in 2002. However, the court ruled that the 2002 regulations did not apply retroactively and noted that the regulations in existence in 1985 did not apply to heating oil tanks.

The defendant filed a motion for summary judgment asking that the court rule that the doctrine of caveat emptor precluded the plaintiff from recovering its costs. Because the parties had been involved in a commercial real estate transaction, the court found caveat emptor applied. Even if it did not, the court held that the plaintiff did not perform adequate due diligence because it had not asked the defendant or the state DEM about the presence of USTs.

As for the contractor, the plaintiff argued that the contractor knew about the tanks because its demolition permit referenced the USTs and that there was testimony that the contractor had observed the covers of the fill ports. The plaintiff claimed the contractor was liable for negligently or recklessly abandoning the USTs. In addition, the plaintiff alleged that the contractor had removed evidence of the fill ports or vent ports during its demolition activity and this prevented the plaintiff from becoming aware of the presence of the USTs. However, the court said that the contractor did not owe any duty to the plaintiff because it did not have a contractual relationship with the plaintiff and did not even know of the plaintiff. Therefore, the contractor could not foresee any harm to the plaintiff.

Commentary: *This case illustrates the importance of determining the presence of heating oil tanks at properties during due diligence. While the federal UST program does not apply to heating oil tanks that are used for on-site consumption, many states regulate heating oil tanks, but their requirements greatly vary. In addition, in the past, fire marshals or other local authorities often had jurisdiction over heating oil tanks and typically allowed them to be abandoned without collecting any sampling or even requiring all of the fuel to be removed. As a result, these former tanks can be a course of continuing contamination. If information is not available on how the tanks were abandoned or the records indicate that the tanks were not closed in accordance with current standards, the purchaser, prospective tenant or lender should consider requiring sampling.*

Massachusetts Property Owner Fined For Not Disclosing Contamination Discovered During Due Diligence

The owner of the former Niemiec's

Auto Service in Chicopee agreed to pay a $1,500 penalty to the Massachusetts DEP for failing to report in a timely manner a gasoline release. In 2003, USTs were removed during the pre-acquisition environmental assessment and the purchaser's consultant observed soil contamination. The owner, Stanley Sefton, was provided copies of Environmental Assessment reports describing the gasoline contamination in February 2003, but he did not notify DEP until January 15, 2004, approximately seven months after the expiration of the 120 day reporting period.

Commentary: *One of the important issues to address during pre-acquisition due diligence is how to address reporting obligations that might arise when contamination is discovered. Normally, a prospective purchaser or a lender does not have any obligation to disclose the results of its investigation to regulators. Thus, purchase agreements often provide that the purchaser or its lender will not report the results to regulatory authorities unless they believe they are obligated under law and then only after providing the seller with the source of the obligation and time to make its own disclosure. However, many state UST programs provided that any person with knowledge of a spill must report the release. For example, in 1998, an administrative law judge in New York upheld a fine levied against an environmental consultant retained by a bank to observe a tank removal being performed by the borrower's consultant. Even though the lender's consultant was not performing the work, the NYSDEC fined the lender's consultant for failing to disclose obvious evidence that there had been a release.*

Condominium Fined for Failing to Comply with Land Use Controls (LUCs)

A Massachusetts condominium association was fined for delaying implementation of a cleanup. The 307 Beacon Street Condominium Trust agreed to pay a $7,500 penalty and submit required documentation to the state DEP involving release of oil that occurred in February 2001. In April of 2001, the Trust notified the DEP in writing it was taking responsibility for the release. However, after the Trust had failed to submit the required response actions and did not respond to a Notice of Noncompliance, the DEP issued a $7,500 Penalty Assessment Notice.

Commentary: *A number of states have established licensed environmental professional (LEP) programs where environmental consultants implement investigations and cleanups with minimal agency oversight. In theory, these programs can expedite the volume of cleanups since work will not be delayed while understaffed agencies review reports. To ensure that the work complies with state standards, states will often audit a low percentage of the LEP cleanups and terminate the licenses of consultants who fail to consistently comply with state requirements. In addition, a state could exercise a reopener and require the owner or operator to complete the cleanup if the site was not properly characterized or remediated. As a result, purchasers and lenders should not simply rely on the fact that a no further action letter has been issued, but have their consultants review the work to determine if the cleanup was properly completed.*

Survey Finds Smaller Banks Suffer Higher Incidence of Environmental Losses

According to a survey conducted by Environmental Data Resources, Inc., (EDR), one out of every ten banks involved in commercial real estate loans have experienced losses due to environmental issues within the past year. The environmental-related losses involved two loans per year and an average total loss of $1.2 million. Based on the number of banks involved in commercial real estate transactions, EDR said the survey results mean that 900 banks may have experienced losses due to environmental issues during the past 12 months and that the total value of these defaulted loans could be $1.11 billion.

In late 2003, EDR sent surveys to 2,750 of the 8,990 financial institutions involved in commercial real estate transactions. 228 lenders with assets ranging from less than $250 million to $10 billion responded to the survey.

The EDR survey found that the smallest banks had the highest incidence of environmentally related losses. Lenders with assets less than $1 billion (mainly community and smaller regional banks) experienced almost 75% of loan losses due to contamination. For example, 43% of all lenders having less than $250 million in assets reported that they suffered losses from environmental issues. The total loss experienced by this asset category was $473 million. In contrast, 29% of banks with assets between $250 million and $1 billion experienced a total of $319 million in loan defaults where environmental issues were a construction factor. Banks in the $1 billion to $10 billion asset category represented 28% of the respondents and experienced the lowest total loss at $308 million.

EDR concluded that the reason the smaller banks suffered disproportionate environmentally related losses was because they tend to perform less comprehensive environmental due diligence. Also, smaller borrowers had a greater tendency to walk away from contaminated sites since the cleanup costs often exceed the amount of the equity invested in the property. The smaller banks typically do not have in-house environmental expertise, have not developed environmental risk management policies, have not established minimum due diligence requirements, and often simply accept Phase I Environmental Site Assessments (ESAs) performed by consultants who have been retained by the borrower and whom the banks have not pre-qualified.

Commentary: *EDR also indicated that the survey confirmed that the majority of banks perform environmental due diligence to manage risk and not because of concerns over direct CERCLA liability. As a result, many lenders have developed their own environmental due diligence protocols that often exceed the ASTM E1527-00 standard for Phase I ESAs. These so-called ASTM-Plus protocols often require consultants to examine issues beyond those addressed by the ASTM E1527-00 standard such as asbestos, lead-based paint, lead in drinking water, radon and mold.*

Bank Branch Office Added to NPL

EPA recently added the Swan Cleaners/Sun Cleaners Area Ground Water Plume site in Wall Township, NJ to NPL. Two dry cleaners had formerly operated at the site, which is currently a bank branch office owned by Bank of America. The dry cleaners discharged Tetrachloroethylene (PCE) into the on-site septic system where it eventually migrated into the groundwater that serves public and private drinking water wells within a four-mile radius. PCE was detected at concentrations of up to 200 parts per million (ppm) in the groundwater. The PCE-contaminated groundwater may also be impacting surface water. In addition, following indoor air sampling of 300 residential and commercial properties in 2001, EPA has had to install ventilation systems in the basements of nine homes and one ventilation system on a commercial property.

Commentary: *One of the challenges of performing due diligence at older shopping centers or commercial properties is the lack of adequate historical information on dry cleaners. The ASTM E1527-00 requires environmental professionals to review historical records with no more than five-year intervals. However, many so-called commodity style reports frequently use gaps of ten years or more. Even when state and local records are searched, these reviews often do not yield much information since dry cleaners were not required to obtain permits in the past.*

To help fill this gap, EDR has developed proprietary databases from historical city directories that contains information on over 100,000 former gas stations and dry cleaners. The database identifies the name and address along with the direction, distance and elevation of the site relative to the target property. Such information is critical in helping an environmental consultant determine whether contamination is likely to have migrated to a target site. Results from a search of the database are automatically included in the report when the report is ordered as part of a product package.

Environmental Organization Targets Bank to Adopt Environmental Lending Policies

In prior issues, we have discussed how social investment funds and environmental organizations, such as Rain Forest Action Network, have been working with large banks, such as Bank of America and Citigroup, to incorporate environmental principles into their decision-making and lending policies to support sustainable development, such as the Equator Principles. Now, at least one environmental organization has begun to aggressively target financial institutions that have not yet implemented these protocols.

The Rainforest Action Network (RAN) has launched an advertising and Internet campaign against JP Morgan Chase for not adopting a comprehensive environmental policy. The RAN campaign characterizes the bank's current lending practices as "investments of mass destruction" and asserts that JP Morgan Chase has failed to carry through on its commitment to provide a policy to the environmental community. JP Morgan Chase had originally agreed to release its environmental policy in October. However, in September the bank announced it would not release its environmental policy until at least April 2005. RAN is asking JP Morgan Chase to join the United Nations Environmental Programme Finance Initiative and also to endorse the Equator Principles.

EPA Announces SEP and Voluntary Disclosure Results

EPA obtained 213 Supplemental Enforcement Projects (SEPs) in FY 2004, a 42% increase compared to FY2003's 150 SEPs. The dollar value of SEPs in FY 2004 was $48 million, compared to FY 2003's $65 million. Some of the SEPs involved lead-based paint abatement and diesel school bus retrofits. Numerous settlements included emergency response supplemental environmental projects where hazardous response equipment was provided to local communities. Finally, there were a number of environmental restoration SEPS to improve water quality, restore wetlands, and conserve environmentally important properties. Of the 213 SEPs in FY 2004, 26 will be performed in environmental justice communities. SEPs are environmentally beneficial projects that a violator voluntarily agrees to perform as part of an enforcement settlement.

The number of facilities disclosing violations under the Audit Policy increased significantly from 614 facilities in FY 2003 to 1,223 facilities in FY 2004. Under EPA's Compliance Incentive Program, the number of facilities resolving self-disclosed violations increased 14 percent in FY 2004 to 969 – up from 848 in FY 2003. Many of these disclosures came from initiatives tailored to improve environmental management at certain types of facilities, such as colleges, universities or health care institutions.

Rhode Island Revises SEP Policy

The Rhode Island Department of Environmental Management (DEM) recently revised its SEP policy to allow violators of environmental laws to undertake beneficial restoration projects in lieu of paying full penalties in enforcement actions. While DEM will not enter into a SEP for work that a violator is required to perform, it may include accelerated or early performance of activities that the respondent will become legally obligated to undertake two or more years in the future. There must be a relationship between the violation and the restoration project, and the project must resolve or reduce environmental or public health impacts or risks caused by the violation, or the likelihood that similar violations would occur in the future. DEM will also consider the monetary penalty, availability of resources, and the respondent's compliance history when determining whether to approve a proposed SEP. A SEP should also be an innovative or new project, and it must be consistent with all provisions of law or regulation.

Under the updated policy, DEM will establish and maintain a bank of pre-identified SEP projects. There are eight categories of projects that may qualify as a SEP. They include public health; pollution prevention; pollution reduction; environmental restoration, protection, and ambient monitoring; assessments and audits; environmental compliance promotion; emergency planning and preparedness; and outreach and education. A SEP cannot directly provide additional resources to DEM, such as vehicles, computers or

equipment, but it may enhance the efforts of a DEM program. A SEP proposal may not perform a task that DEM is required by law to do.

During the past fiscal year, DEM incorporated SEPs into seven enforcement actions that have a combined value of $1.229 million.

University Will Remediate Donated Land

The University of Nevada at Reno submitted a remedial action plan to the Nevada Division of Environmental Protection to address contamination discovered on 42 acres that was donated by the Stead Air Force Base to the university in the mid-1990s. The contaminated land was part of the former Dodd/Beals Fire Fighting Academy that operated from the early 1970s until the mid-1990s. As part of the fire training, mock facilities were set afire using diesel fuel, with some gasoline as an igniter. The fires were extinguished with water and foam. The mock facilities were placed on concrete pads so the water utilized could be captured, conveyed to retention ponds, and re-circulated. However, because of leaching from the retention ponds and runoff from the concrete pads, the soil and groundwater at the property has been contaminated with petroleum hydrocarbons, benzene and MTBE.

Commentary: *It is important that local governments or organizations perform environmental due diligence prior to accepting title to donated property to minimize their potential environmental liability for historical contamination. Trustees should also require environmental site assessments before allowing commercial or industrial sites to become property of an estate. Many local governments acquired excess federal property after World War II or the end of the Cold War and have found themselves saddled with cleanup costs. For example, Fort Worth, TX, recently learned that soil at the playground of Greenbriar Park is contaminated with lead, arsenic, pesticides and other hazardous substances. The city acquired the property from the federal government in 1973. An inspection in 2000 identified soil depressions that are characteristic of landfill cells. A June 2002 study also found metals and pesticides in water and sediment samples taken from Greenbriar Lake where residents fish for bass and catfish*.

ENVIRONMENTAL CASES INVOLVING CORPORATE AND REAL ESTATE TRANSACTIONS

Amended Innocent Purchaser Defense is Not Retroactive

A federal district court ruled in *1325 G Street Associates v. Rockwood Pigments Inc*. (D. Md., No. 02-1622, 9/07/04) that 2002 amendments to the innocent purchaser defense do not apply to a purchaser who acquired property in 1981. As a result, the purchaser was able bring a cost recovery action.

In this case, 1325 G Street bought 800 acres of land in Beltsville, MD, including a 30-acre parcel that had been formerly owned by the Contee Sand and Gravel Company, Inc. (CSG). Prior to purchasing the property, plaintiff observed all 800 acres from the air and also walked the site. The plaintiff also reviewed geological surveys, topographic maps, county planning documents, leases and titles. Shortly after the plaintiff took title, the Maryland Department of the Environment (MDE) determined that a company that operated a nearby pigment-making plant, had dumped waste in sand and gravel pits at the site in the 1970s. After further investigation, the MDE ordered 1325 G Street to conduct additional environmental assessments and requested that the landowner install a security fence around one exposed part of the property. The plaintiff then filed a cost recovery action against Rockwood Pigments, the successor to the paint company, for $180,000 in past costs as well as requesting an injunction requiring Rockwood to pay for any future response costs. Rockwell argued that the plaintiff could not seek full recovery of its costs because it did not qualify for the innocent purchaser defense since it had not conducted the “appropriate inquiry” required by the 2002 CERCLA Amendments.

The court found no evidence that Congress had intended to retroactively apply the new requirements of the innocent purchaser defense. After the plaintiff’s expert witnesses testified that a buyer did not have a duty to conduct a detailed environmental assessment to meet "good commercial standards" for purchasing property in the 1980s, the court ruled that 1325 G Street had made "all appropriate inquiry" into the property's prior use. The court then granted summary judgment to 1325 G Street in its CERCLA Section 107 primary cost recovery action against Rockwood Pigments, Inc. and ordered the company to pay the nearly $200,000.

Developer Liable for Asbestos Debris On Property

A federal district court ruled that the developer of a residential complex did not qualify as an innocent purchaser and could not bring a CERCLA cost recovery action against prior owners who placed asbestos contaminated fill material on the site.

In *Hidden Lakes Development, LP v. Allina Health System and Park Construction Co.*, 2004 U.S. Dist. LEXIS 19360 (D.Minn. Sept. 27, 2004), the corporate predecessor of Allina had owned and operated healthcare facilities on a 68-acre property from 1940 to 1984. In 1978, Allina entered into an agreement with Park Construction allowing the firm to dispose of construction debris in a large ravine. In 1984, Allina’s predecessor sold 32 acres to Golden Valley Health Center (GVHC) who continued to operate a health care facility. In 1995, Allina and Transitional Hospitals Corporation (THC) who acquired the GVHC property sold the land to the plaintiff. During its due diligence, the plaintiff learned of the fill material but did not perform any sampling. During development of the residential complex in 1997, the plaintiff discovered the fill was contaminated with asbestos. The plaintiff excavated and stockpiled the material. The Minnesota Pollution Control Agency (MCPA) then fined the plaintiff $62,000 for failing to comply with

the asbestos work practice rules when it demolished the buildings on the property. The MCPA eventually ordered the plaintiff to rebury the asbestos waste and file a deed restriction to prevent the asbestos from becoming exposed again.

The plaintiff then filed a breach of contract claim against the former landowners and a CERCLA cost recovery action. However, the court ruled that because the plaintiff was aware that construction fill had been placed on the property and had failed to follow the recommendation of its counsel to conduct subsurface investigation, it did not qualify as an innocent purchaser and therefore could only file a contribution action. Moreover, the court found that the plaintiff had contributed to the contamination by improperly handling asbestos-containing materials during the building demolition.

The defendants also charged that the plaintiff could not recover its cleanup costs in a contribution action because it had failed to comply with the public notice requirements of the NCP when it implemented the asbestos response action. Because there was a material dispute over whether the plaintiff had to comply with the remedial action or removal action requirements of the NCP, the court denied the motions for summary judgment filed by both sides.

Commentary: *This case reinforces the importance of performing a Phase I Environmental Site Assessment on properties whose current use might not appear to raise significant environmental issues. Contaminated fill was frequently used in the past to raise the grade of properties. There have been an increasing number of residential developments constructed on former landfills where vapors have begun to migrate as the waste materials settle or decay and also discharges of leachate into sensitive ecosystems. It is important for purchasers and lenders to make sure that historical records such as aerial photography are reviewed and that local officials are interviewed about past uses. If the environmental site assessment suggests that significant filling activities may have occurred, it would be prudent to perform a Phase II to determine if the site has been impacted by the prior uses.*

Court Rules Land Use Control Not Unconstitutional Takings

The U.S. Court of Federal Claims ruled in *John R. Sand & Gravel Co. v. United States*, Fed. Cl., No. 02-509L (10/29/04) that EPA had not engaged in an unconstitutional taking when it prevented the company from drilling in a contaminated landfill area. In this case, the plaintiff entered into a lease in 1969 with the owner of the site that had been operating a landfill. Until the landfill closed, the plaintiff coordinated with the landfill operator, excavating gravel deposits to facilitate landfill expansion and allowed the landfill to operate on a portion of the leasehold. After the landfill closed, it was placed on the NPL. A fence was installed around the former landfill to protect the landfill cap. This fenced region known as the Area of Institutional Controls (AIC) included a portion of the leasehold and prohibited the plaintiff from conducting mining operations.

After a trial on the plaintiff's claim that the AIC was a physical taking that entitled it to compensation, the court ruled that it was the plaintiff who was not entitled to compensation because it had allowed the landfill to operate on its leasehold. The court said that other decisions allowed innocent landowners to be compensated for physical takings associated with remedial actions did not apply because the plaintiff had participated in the landfilling by coordinating its excavating operations, had acquiesced to the landfilling operations and knew that the landfill had operated on a portion of the leasehold prior to the commencement of the lease. The court also found that leasehold was a "facility" because contaminants were located on the leasehold and the plaintiff was an operator since it had the right to control the property under its lease and that the landfill could not have operated on the leasehold without the plaintiff's permission. Furthermore, the court said that mining in the AIC could be prohibited under the Michigan public nuisance law because the gravel operations could interfere with the remedial action, exacerbate groundwater contamination and increase the risk of methane emissions and explosions.

Car Franchisee Not Liable as Successor to Generator

A federal district court ruled that a Ford car dealership that acquired the parts servicing business of a defunct Ford franchisee was not liable for the waste oil disposed by that dealership. In *Signature Combs, Inc v. United States*, 331 F.Supp.2d 630 (W.D.TN. 2004), Oakley Motor Company (OMC) and Hull-Dobbs Company (HDC) operated Ford dealerships in Memphis, TN. Both companies had common shareholders. From the 1960s until 1972, the dealerships arranged with Gurley Oil Company to collect used oil generated from car servicing operations. After OMC ceased operations in 1972, Oakley Keese Ford (OKF) acquired OMC's entire car inventory, hired 75% of OMC's employees, and four of its five supervisory personnel. The acquired OMC assets and employees were moved to the HDC dealership. Meanwhile, a new corporation, Dobbs Ford, Inc. (DFI), was formed, acquired the parts inventory of HDC, moved the HDC business to its location and had the OMC franchise agreement with Ford transferred to Hull-Dobbs Ford (HDF).

PRPs for the Gurley Oil superfund site brought a contribution action against DFI as the successor to OMC. The plaintiffs argued that the DFI should be held liable as a successor for the 1966 to 1972 waste disposal activities because of the transfer of the franchise agreement and the fact that HDF held itself as the successor to OMC. The court noted that successor liability would be evaluated using state law and that Michigan law provided that asset purchasers are not liable for the liabilities of their predecessors unless one of the four traditional exceptions applies. The court ruled that most of the assets of OMC had been transferred to OKF and that the transfer of the franchise agreement was not sufficient to override the presumption of non-liability. Even if HDF held itself out as the successor to OMC, the court said this fact did fall within one of the traditional state exceptions to non-liability of asset purchasers.

Commentary: *Perhaps the most important ruling in a successor liability case is whether the court will follow state or federal common law. Here, Michigan followed the traditional test that requires a showing that the purchaser assumed the liabilities, the transaction amounted to a de facto merger, the transaction involved fraud or the purchaser was a mere continuity of the predecessor. Unlike the federal Substantial Continuity test that focuses on the business, the traditional mere continuity test examines if there is a continuation of the corporate structure. Had the court used Substantial Continuity test, it is possible that the actions of HDF holding itself as a continuation of the OMC servicing business might have led the court to conclude that equity would require finding DFI liable for the prior waste disposal activities of OMC.*

Former Officers of Dissolved Corporation May be Liable Under Trust Fund Doctrine

A federal district court allowed a shopping center owner to amend its complaint to bring a CERCLA contribution action against the former officers of a defunct dry cleaner. In *Mercury Mall Associates, Inc. v. Nick's Market, Inc*., 2004 U.S. Dist. LEXIS 22587 (E.D.Va. Nov. 3, 2004), the plaintiff acquired a shopping center in 1988 where a dry cleaner had operated since 1967. After the dry cleaner vacated the shopping center in 2000, the plaintiff discovered that dry cleaning solvents had impacted the property. The plaintiff then sought to recover its response costs and also damages for diminution of property value from the dry cleaner and the former owner of the shopping center.

The dry cleaner defendants filed a motion to dismiss, arguing that they were not proper defendants since the corporation had already been dissolved. The court noted that Tennessee corporate law provides that when a corporation is dissolved and its assets distributed to its shareholders, a creditor may enforce a claim against a shareholder for the value of the corporate assets that it received. However, after observing that the state corporation law was silent on whether creditors could pursue non-shareholders after liquidation, the court noted that Tennessee courts had adopted the "trust fund" doctrine that provides that managers of a corporation at the time of dissolution become trustees of corporate

property for the benefit of corporate creditors. Because the plaintiffs had not properly pleaded this cause of action, the court gave the plaintiffs two weeks to amend their complaint before ruling on the defendants' motion to dismiss.

The prior owner filed a motion to dismiss, arguing that the plaintiff could not bring a CERCLA action because it had not been the subject to a cost recovery action. The court noted that the United States Supreme Court granted a petition for certiorari in *Aviall Servs. Inc. v. Cooper Indus*., 312 F.3d 677 (5th Cir. 2002) and had heard oral argument in October 2004. However, the court said that forcing a plaintiff to wait until it becomes subject to a cost recovery action would discourage voluntary cleanups and undermine CERCLA's "polluter pays" principle . Accordingly, the court denied the motion and allowed the defendant to bring its contribution action.

SUPERFUND/BROWNFIELDS

EPA Announces New Reuse Initiative

On November 10, 2004, EPA announce a new initiative called Return to Use (RTU) that will support community efforts to reuse formerly contaminated Superfund sites. RTU is the latest phase of EPA's Superfund Redevelopment Initiative (SRI) to help communities plan for the anticipated future use of sites after they are cleaned up, while ensuring that human health and the environment are fully protected. The new initiative focuses on those sites that were cleaned up early in the life of the Superfund program, before EPA's current emphasis on considering the anticipated future use of the land while cleanups are in progress.

At many of these sites, the remedy construction is complete and the property is considered ready for reuse, yet remains vacant. At some of these vacant sites, removing or modifying unnecessary barriers with the cooperation of property owners and federal, state and local partners can lead to the site's reuse as green space, recreational or commercial facilities, all without posing any increased risk to human health or the environment. Returning cleaned Superfund sites to beneficial use not only allows local communities to reclaim lost landscapes, it also removes the stigma sometimes associated with fenced and vacant Superfund sites. Newly productive property can lead to increased property values and a higher tax base. People who are responsibly reusing sites have a stake in protecting the site against destructive activities such as vandalism, trespassing or off-road vehicle racing, that can damage the remedy, and against midnight dumping which can result in recontamination.

According to EPA, suitable reuses can include recreational facilities, industrial or commercial uses such as factories and shopping malls, ecological resources (e.g., wildlife preserves and wetlands) community infrastructures such as public works facilities and transportation facilities, and possibly even residential housing. As part of the RTU initiative, EPA is committed to reviewing remedies in place to determine if there are relatively modest ways to alter the remedy (i.e., without triggering changes to decision documents such as Records of Decision) that will encourage reuse of sites. These administrative mechanisms may include:

Modifying fences - Some fences may no longer be needed because the remedies have succeeded and risk decreased over time; in other cases, gates may be added to allow appropriate activities, like jogging, while still precluding activities that might damage the remedies.

Issuing Ready for Reuse (RfR) Determinations - An RfR Determination is an environmental status report written in plain language that tells how a site can be used while maintaining protection of people and the environment. Sometimes that is all that is needed to give local communities, developers, or site owners the confidence to move ahead with reuse of the site.

Eliminating misleading signs and unnecessary obstacles - "Keep Out" signs and barbed wire send a strong message that an area is dangerous even when conditions at the site no longer merit that judgment. Eliminating those potent symbols when they don't reflect reality can open the door to reuse.

Modifying institutional controls - In some cases, institutional controls, such as deed restrictions, are no longer relevant to the property or are unnecessarily restrictive. Adapting those institutional controls may be the key to reuse of the land.

Under the RTU initiative, EPA will work with communities to overcome obstacles to reuse. These site-specific partnerships, referred to in the Initiative as "demonstration projects," can be as formal or informal as communities wish, ranging from the most informal agreement between community representatives and EPA Regional representatives, to a memorandum of understanding between Regional Offices and local stakeholders. Initially, EPA will partner with 11 communities located in California, Illinois, Maryland, Michigan, Missouri, Tennessee and Utah. However, EPA believes there could be several hundred sites around the country where the

Return to Use initiative can help return former Superfund sites to productive use by helping to remove physical or institutional barriers to community use.

Vapor Intrusion Exposing Companies To Liability

IBM Corporation has offered to pay at least $10,000 to Endicott, NY, property owners whose properties have been affected by a plume of TCE emanating from its former plant. Samples collected last year showed TCE vapors were entering homes and businesses in a 300-acre area south of the plant. IBM then installed venting systems in about 480 properties. Under the terms of IBM's value protection plan, owners of those 480 properties have until November 30th to accept either a payment of $10,000 or 8 percent of the property value, whichever is higher. The maximum payment for any individual property will be $50,000. In exchange for the payment, the owners would release IBM from any property damage claims, but could still pursue personal injury claims.

EPA has selected a remedy for addressing VOC contamination at the Jackson Steel Superfund site in Mineola, Long Island, NY. The site was placed on the NPL after PCE was detected in air samples collected from the Tutor Time daycare center and a billiards club in January 2002. EPA installed vapor extraction systems to remove soil vapors from underneath the buildings and conducted additional investigation. Under the approved cleanup plan, EPA will excavate contaminated soils as well as contaminated sediment in dry wells and sumps. The agency will also install soil vapor extraction systems to remove volatile organic compounds from subsurface soils and treat the shallow groundwater. A study of the deeper groundwater will also be performed. The nearest well using the deeper aquifer is located 3,100 feet away and municipal water supply wells serving 300,000 people are located within four miles of the site. EPA estimates the soil cleanup will cost $2,383,000 while a groundwater cleanup could cost $4,159,000 to $4,425,000.

Meanwhile, IBM has agreed to connect residents impacted by the Shenandoah Road Ground Water Contamination Superfund site in the Town of East Fishkill. NY, to the municipal water supply system. The connection will cost approximately $10 million and take 2.5 years to complete. EPA will continue to distribute bottled water to residents and provide whole-house drinking water treatment systems to homes until the connection is completed. In 2000, the New York Department of Health discovered VOCs including PCE in several area residential wells. EPA subsequently determined the source of contamination was a business located on East Hook Cross Road that cleaned and repaired solder-laden computer chip racks owned by IBM. In May 2001, IBM entered into an Administrative Order on Consent (AOC) with EPA to remove contaminated soil, maintain existing drinking water treatment systems and install additional systems if required. IBM entered into a second AOC in 2003 to complete a site investigation and propose a permanent drinking water supply. To date, drinking water treatment systems have been installed at 103 properties.

EPA has also proposed to add the Hopewell Precision Area Contamination site in Hopewell Junction, New York to the NPL. The site is in a predominantly residential area that is served by private wells and septic systems. Sampling of private wells near a former manufacturer of sheet metal parts and assemblies detected TCE at concentrations of up to 250 ppb. A total of 37 homes were found to have TCE above the federal drinking water standard of 5 ppb. EPA has installed carbon filter treatment systems at those homes and installed ventilation systems at 17 residences to address indoor air quality issues.

EPA Report Finds States Lack Sufficient Superfund Resources

The EPA Office of Inspector General (OIG) has concluded that many states lack the financial resources to carry out their responsibilities under the federal Superfund program. In "*Some States Cannot Address Assessment Needs and Face Limitations in Meeting Future Superfund Cleanup Requirements*," the OIG found that many states do not have adequate funds to conduct preliminary site assessments to determine the risks posed

by potentially contaminated sites. Some of those states may have backlogs of hundreds of potentially contaminated sites that could be impacting communities waiting.

OIG also found that states may not be prepared to assume their operation and maintenance (O&M) obligations for long-term response actions (LTRA) under CERCLA. The National Contingency Plan (NCP) provides that states are required to assume 100% of federal-funded remedial actions at NPL sites. While states are not generally required to assume the O&M responsibilities for remedies involving groundwater treatment until the remedies become operational and functional, they will be required to assume sole responsibility for LTRAs where cleanup goals have not been achieved after 10 years. The report said that that EPA had turned over O&M responsibilities for 24 LTRAs since 1988 and anticipates turning over another 82 LTRAs to the states over the next 30 years. OIG estimated that the annual O&M costs for just the 24 sites will increase from approximately $520,000 in 2004 to over $15.3 million in 2013. However, OIG reported that many states lack the funds to carry out these obligations, thereby jeopardizing the effectiveness of the remedial actions.

Commentary: *The report could have implications for redevelopment of brownfield sites. The 2002 CERCLA Amendments added a federal enforcement bar for states with approved response actions. In states with approved programs, developers can remediate sites knowing that they will not likely be exposed to federal liability if the site is remediated under a state program. However, states that have inadequate financial resources will not be able to have their state response programs approved. As a result, the very states that need private resources to remediate sites may be unable to attract private investment in their brownfield sites.*

NRD Settlements

Eight companies have agreed to pay roughly $56 million in one of the largest natural resources damages (NRD) settlements in the country *(United States and State of Indiana v. Atlantic Richfield Company; et al No. 2:04CV348, (N.D. Ind.)*. The settlement involves the Grand Calumet River and Indiana Harbor Canal that are part of the Lake Michigan ecosystem. 90% of the river's flow originates as municipal and industrial effluent, cooling and process water and storm water overflows. Previous studies had showed high levels of heavy metals, PCBs and polycyclic aromatic hydrocarbons (PAHs) in the sediments and groundwater. However, the settlement only addresses the contaminated sediments because the groundwater is not utilized for drinking water purposes.

Under the proposed consent decree, the defendants will pay $53,653,000 toward restoration of the natural resources, and a total of $2.7 million to the United States Department of the Interior and the Indiana Department of Environmental Management to reimburse them for their costs of conducting natural resource damage assessments, and convey 233 acres of fish and wildlife habitat. In a separate settlement, US Steel will dredge contaminated sediment from the first five miles of the Grand Calumet River and will also provide the trustees with over 100 acres of property to compensate for injuries to the area. In a third separate settlement, the Hammond Sanitary District has provided $2.1 million and American Maize-Products, Lever Brothers, and Ferro corporations provided $4.7 million to clean up contaminated sediment in the West Branch of the Grand Calumet River.

EPA Suggests Studies Show Superfund Does Not Damage Property Values

EPA recently suggested that studies have shown that placing sites on the NPL has no effect on the prices of nearby homes and may actually cause home value to increase. The agency attributed this seemingly counter-intuitive outcome to the fact that the marketplace perceives that listing of a site on the NPL has eliminated uncertainty because there is a federal commitment to remediate the contamination.

According to EPA, dozens of studies involving 30 sites evaluating the effects of NPL sites on home prices have been published in peer-reviewed journals. The agency said that homes close to NPL sites seem to suffer a reduction of about

7.5% to 13% depending on the distance from the site, but that the effect seems to disappear at a distance of two to three miles from the NPL site.

EPA also said the studies show that the initial discovery of the contamination and not the NPL listing is the primary cause of declines in home prices. This led EPA to conclude that housing markets are more interested in the control of hazardous substances and less interested in placement by the government of a site in one category or another.

EPA said the studies also suggest that the housing market responds to evidence that a site will be cleaned up and not to the status of the cleanup. The agency said the studies show that prices begin to rebound after a site is listed on the NPL or publication of the ROD. However, home prices may not "rebound" to their original values if there is a long delay between the discovery of contamination and an NPL listing. When this occurs, EPA said the ratio of homeowners to renters may go down, the average income of residents may decline, the percentage of single parents may increase, and the overall status and political power of residents may fall.

Finally, EPA said there was also evidence that the presence of contamination causes declines in commercial and industrial property and that these declines occur regardless if a site was listed on the NPL.

Legislation Extends Federal Brownfield Tax Credits

President Bush signed a bill that extends the tax deduction for remediation expenses that had expired at the end of 2003. Section 308 of the Working Families Tax Relief Act of 2004 (P.L. 108-311) amended Section 198 of the Internal Revenue Code to allow taxpayers to deduct "qualified remediation expenses" paid or incurred after December 31, 2003 through Dec. 31, 2005. Under this so-called Brownfields Tax Incentive, taxpayers may "expense" or deduct remediation costs to abate releases of hazardous substances for eligible properties in distressed or urban areas. An earlier version of the legislation had proposed to expand the definition of "qualified remediation expenditures" to include costs for remediation petroleum contamination, but this was not adopted in the final. A "qualified contaminated site" is a site that has had a release of hazardous substances, is held by the taxpayer for use in a business or to produce income, and must be located in a "targeted area." Sites that are listed or proposed to be listed on the NPL are not eligible for the special tax treatment.

The recent comprehensive tax bill (P.L. 108-755) created a new Landfill Gas Tax Credit for electrical generating facilities that are placed into service between October 22, 2004 to January 1, 2006. EPA estimates that there are currently about 360 landfill gas to energy (LGTE) projects that convert methane gas to electricity for homes and industrial applications. The LGTE projects lower greenhouse gas emissions by reducing methane emissions from landfills and providing a source of alternative energy. In addition, the projects promote sustainable reuse by encouraging redevelopment at former landfills.

In another development, the Economic Development Administration Reauthorization Act (S. 1134) contained incentives to increase the number of brownfield projects funded by the Economic Development Administration (EDA). Section 208 authorized up to $5 million for fiscal years 2004 through 2008 in demonstration pilot grants for use of solar energy technologies at brownfields sites. The legislation also requires that the GAO prepare a report evaluating EDA grants for brownfield sites.

Meanwhile, a report by the National Association of Local Government Environmental Professionals (NALGEP) concluded that further federal action is required to eliminate obstacles for redeveloping brownfield sites. The report, "*Unlocking Brownfields: Keys to Community Revitalization,*" concluded that significant obstacles still existed for redeveloping brownfield sites consisting of landfills, salvage yards, ports, rail yards, and mining areas.

One problem identified by NALGEP was that Congress had yet to appropriate the $250 million in brownfield financial assistance that was authorized by the 2002 Brownfield Amendments. Indeed, a study prepared by the Democratic staff of the

House of Representatives Committee on Energy and Commerce reported that Congress appropriate only 59% of the $200 million authorized amount and that two thirds of the applications for brownfield funding have been rejected because of the authorization shortfall. The study said that 219 of the 504 applications were awarded brownfield funds for fiscal year 2004. The rejected applications included 285 local governments.

Another obstacle to brownfield redevelopment identified by NALGEP was that local governments could not use brownfield grants or loans to pay for administrative costs of brownfield projects. The report also suggested that some federal agencies such as the Small Business Administration, the Economic Development Administration (EDA), and the Department of Housing and Urban Development continue to have policies that actually discourage brownfield redevelopment. For example, NALGEP reported that the SBA has a policy of not providing financial assistance to projects with environmental contamination.

EPA Launches Brownfield Enforcement Initiative

As part of the next generation of protecting human health and the environment, EPA's Office of Enforcement and Compliance Assurance (OECA) launched a new initiative to promote environmentally responsible redevelopment and reuse (ER3) at brownfield sites. OECA hopes that ER3 will encourage the integration of the sustainable environmental practices, such as using green building design, adopting energy efficiency or renewal energy sources, implementing environmental management systems, and establishing pollution prevention, waste minimization and recycling practices. To encourage ER3 developments, OECA will enter into Prospective Purchaser Agreements (PPAs) or issue Comfort/Status Letters.

Commentary: *This past summer, EPA's Office of Site Remediation Enforcement and the Office of Regulatory Enforcement issued a fact sheet titled "Supplemental Environmental Projects: Green Building on Contaminated Properties." The document serves as a companion to the 1998 supplemental environmental projects (SEPs) policy and focuses on how redevelopment can improve environmental performance once a brownfield site is remediated. This guidance explains the environmental impacts of buildings (that a Green Building SEP would address one or more of the sources of pollution of a redevelopment project) and provides resources and suggestions for pursuing a green building SEP. In exchange for using green building technologies at a brownfield site, a party may obtain penalty mitigation credit for environmental violations that occur within the geographic area. For example, a company with air violations located in the vicinity of a brownfield redevelopment could purchase energy efficient materials/systems or low VOC emitting materials for the redeveloper to help minimize air emissions from the new development. The fact sheet is part of Office of Enforcement and Compliance Assurance's ER3 initiative.*

Leasing To Help Facilitate Auction of Contaminated Federal Property

In California 13 years after announcing it would close the El Toro Marine Corps Air Station, the United States Navy announced plans to auction 3,700 acres of land. The city of Irvine annexed the base last year and adopted a zoning plan that would allow as many as 3,625 homes and 3 million square feet of commercial and industrial space. Four parcels comprising 995 acres will be retained by the Navy to complete environmental investigations and remediation. To facilitate early transfer and development, the Navy has agreed to initially lease three of the four parcels to prospective purchasers and then transfer title once the investigation is completed. The developers would be required to comply with land use restrictions during the term of their lease and after they take title. The alternative approach was to have developers conduct the investigation and cleanup, and then receive a purchase price adjustment. However, this approach was rejected because of concerns that it would further delay transfer of the base that was closed 13 years ago.

State Brownfield Roundup

California became the 49th state to formally enact comprehensive brownfield legislation when Gov. Arnold Schwarzenegger signed the California Land Reuse and Revitalization Act of 2004 (A.B. 389). The law provides that qualified innocent landowners, bona fide purchasers, or contiguous property owners may not be held liable for response costs or damage claims brought under state statutory or common law for pre-existing pollution. However, the immunity will not apply for bodily injury or wrongful death actions, criminal acts, permit violations, new releases and contractual indemnities.

To be eligible as a Qualifying Property Owner (QPO), the landowner will have to enter into an access agreement with a state agency, submit a report to the agency, implement any response plan required by the agency to address any unreasonable risks posed by the contamination and implement land use restrictions that may be required. The law essentially adopts the CERCLA definitions of innocent landowner, contiguous property owner and bona fide prospective purchaser (BFPP). However, the BFPP defense only applies to purchasers or a tenant of a purchaser who acquires title on or after January 1, 2005.

The QPOs have to conduct an "all appropriate inquiry," and also comply with the post-closing "continuing obligations" that were established by the 2002 CERCLA Amendments. QPOs must also exercise "appropriate care," which includes the requirement to perform a site assessment under state oversight and implement the response plan required by an agency to prevent an unreasonable risk to human health and safety.

The "all appropriate inquiry" (AAI) standard differs somewhat from CERCLA. For property acquired prior to December 1, 2000, the QPO must have performed an environment assessment that satisifies the ASTM E1527-97. For property purchased after that date and until EPA promulgates its AAI standard, a QPO must comply with the ASTM E1527-00.

The immunity from liability will commence when the QPO enters into the access agreement with an agency and shall remain in effect unless the QPO is advised that it is not in material compliance with the agreement or the agreement is terminated prior to issuance of a no further action letter or certificate of completion. A state agency may not require a QPO to take further response actions unless the site conditions pose an endangerment and the agency determines that there are no other responsible parties with sufficient financial resources to implement the remedy.

If an agency determines after the site assessment that hazardous materials are present at levels that are suitable for reasonably anticipated foreseeable use, the agency can make a finding that no further action is required provided certain land use restrictions are implemented. If the agency determines that a response action is necessary to prevent or eliminate an unreasonable risk, the QPO must prepare and implement a response plan. When the response plan is completed, the agency may issue a certificate of completion that will run with the land so that it benefits the QPO's successors.

QPOs are also authorized to bring contribution actions for response costs and oversight fees. The QPO may also be entitled to recover attorney and expert fees if it serves a copy of the response plan to the defendant within 20 days of trial with a written demand for damages.

The legislation also provides for a windfall lien for unrecovered response costs that will operate in a similar fashion to the CERCLA windfall lien. The law also clarifies that passive migration of previously-deposited hazardous substances will not constitute a "release".

Zoning Facilitates Brownfield Development

Bellingham, MA has proposed an overlay zoning district for the 21-acre Pearl Street Mall site that is designed to stimulate the reuse of this brownfield site. The site was developed as a textile mill in 1813. After the mill burned down in 1824, the site was rebuilt and housed a variety of light industry and businesses until 1999 when the site was condemned for occupancy permit violations. The town acquired the site in 2000 for nonpayment of taxes. Redevelopment of the site has been complicated by contamination from a variety

of hazardous materials and waste. The town received a $100,000 Targeted Brownfield Assessment grant in 2002.

The zoning district would limit reuse to elderly housing. The number of units would be capped at 100 with a density nine units per acre of developable land. A developer could increase the density to 12 units per acre, for a total of 135 units, or make the mill a mixed-use building by making a "betterment contribution to the town in the form of additional affordable units or more open space at the site. Although the zoning district was drafted with the Pearl Street mill in mind, it could be applied to the town's other two mills and a church that recently closed.

Commentary: *In prior issues, we have discussed how local governments can use their power of eminent domain coupled with their CERCLA liability defense to stimulate brownfield development. Under this strategy, the cities arrange to acquire the properties through their power of eminent domain under 42 U.S.C. 9601(20) (D) without incurring liability for cleanup though they would have to exercise reasonable care for any contamination that is present at the site.*

The 2002 CERCLA Amendments allowed local governments to apply for federal brownfield money for sites that they voluntarily acquire after the effective date of the law. However, local governments cannot obtain federal brownfield funds for properties that were voluntarily acquired prior to January 11, 2002. The Consolidated Appropriation Act of 2004 (Public Law 108-199) that was signed into law on January 23, 2004 temporarily expanded the eligibility for brownfield funds so that local governments that owned property before January 11, 2004 may apply for loans or grants. Applicants, who otherwise satisfy all of the requirements to be eligible to receive brownfields funding and qualify as a bona fide prospective purchaser, were determined by EPA to be prohibited from using brownfield funds because the applicant acquired the brownfield site prior to the January 11, 2002 enactment date of the 2002 CERCLA amendments.

Pennsylvania Site Illustrates Challenges of Brownfield Sites

Armstrong World Industries would like to redevelop or sell its aging plant in Lancaster, PA. However, the company says it would cost $51 million to demolish the structures and remediate the complex that was originally opened in 1907. This would be on top of the $1.9 million the company already has spent to raze some buildings and $2.6 million in cleanup costs.

As a result, the company feels the lowest-cost alternative might be to mothball the plant. A recent appraisal said the 200 buildings were in average to poor condition partly because of customized floor layouts. The soil and groundwater at the site is contaminated with gasoline, fuel oil and chlorinated solvents. If the buildings were razed, the appraisal estimated that the property would be worth $4.3 million.

The county Board of Assessment Appeals lowered the assessment last December from $21 million to $8 million, which reduced property taxes to $250,000. However, because of its conditions, Armstrong believes the complex should be assessed at $1.

HAZARDOUS WASTES/USTS

EPA Marks 20th Anniversary of UST Program

EPA observed the 20th anniversary of the federal UST program by reporting that 1.5 million substandard tanks have been closed and that 300,000 releases have been completed. The agency said that there are 700,000 active tanks that been upgraded or replaced and that the number of new leaks discovered each year has dropped from a high of more than 66,000 in 1990 to roughly 12,000 in 2003.

Part of the success of the UST program has been the continuing UST enforcement actions against owners and operators of tanks that do not comply with the 1998 UST performance and design standards. For example, EPA recently announced that Super Value, Inc., agreed to pay $132,500 for failing to upgrade tanks and conduct leak detection at 12 of its New York facilities. Super Value agreed to a schedule for attaining compliance with the UST standards and to develop a compliance training course for its employees responsible for the operation and maintenance of tanks.

EPA fined Carroll Independent Fuel Co. $101,894 for failing to perform leak detection at eight Maryland gas stations that are owned or operated by the company. The violations were discovered as a result of a compliance audit that the company agreed to perform at approximately 70 facilities that it owns or operates in Maryland. The company agreed to perform the audit as part of a June 2003 settlement where it paid $32,728 for violations at three service stations in Baltimore and Forks, Md. Earlier this year, the company also paid a $29,112 penalty after the audit revealed violations at seven Maryland facilities.

The Massachusetts DEP recently fined a former auto repair shop $30,000 for failing to complete the cleanup of a 1997 oil spill. The site has been an automotive service and repair facility since 1950. The contamination was first identified when diesel and gasoline USTs were removed in 1997. One of the owners of the same business was also fined $30,000 earlier this month for a similar 1996 violation at another business.

The Oregon Department of Environmental Quality (DEQ) issued penalties totaling $63,197 against Tri-County Petroleum, Inc., and Dwight Estby Enterprises, Inc. and property owner Berget Estby for failing to properly respond to a documented petroleum release in soil and groundwater in Hillsboro, OR. The operators confirmed the existence of a release in December 2000, but did not report the leak until June 2001. Floating product was detected in September 2001, but the defendants did not take any further action until they were contacted by DEQ in March of this year. Because of the tardy response to the leak, DEQ said the plume has migrated across the street and has impacted property owned by U.S. Bank and the Hillsboro School District. DEQ also is concerned that domestic water wells in the area could be affected by the release. $54,707 of the fine was based on the economic benefit that the responsible parties gained by avoiding the costs of conducting and completing an investigation. DEQ has also fined Tri-County Petroleum $29,387 for failing to comply with the 1998 UST standards.

The New Jersey DEP announced the start of a new statewide UST compliance inspection program for the estimated 22,000 USTs at 8,000 facilities. In the past, UST compliance inspections were conducted in response to complaints or referrals to DEP's Site Remediation Program. In addition, some county health agencies conducted inspections and were reimbursed through the DEP's County Environmental Health Act program using state Spill Fund monies. 781 inspections were conducted in New Jersey in 2003.

Under the new initiative, DEP will establish a group of 18 state and county inspectors to conduct compliance inspections at each facility once every three years. Owners and operators of underground storage tanks also must register their tank systems with DEP on a three-year cycle. DEP will also fund nine county inspectors and provide training and

other assistance, including specialized equipment to properly inspect underground storage tanks. The inspectors will target UST operators and fuel transporters that disable or defeat tank system overfill devices, and fuel transporters that place fuel into tanks lacking a valid registration certificate. The state UST program prohibits the filling of unregistered, regulated USTs with motor fuel. For example, the DEP fined Mogas Service Station $56,000 for operating unregistered and non-compliant tanks and banned further fuel deliveries to the site. The agency also fined Woroco Management $15,000 for delivering motor fuel to the Mogas Service Station.

Enforcement Actions for Failing to Timely Report Petroleum Releases

Federal and state regulators are also stepping up enforcement for failing to promptly report petroleum releases. For example, Arden Realty Limited Partnerships agreed to pay EPA $25,000 for failing to report a 4,000 gallon diesel fuel spill that reached the Los Angeles County Storm Drain System and Centinela Creek last October. The diesel traveled approximately four miles in the storm channel to Centinela Creek, a tributary of Ballona Creek that leads to the Pacific Ocean. The spill was discovered when the Los Angeles Public Works Department (LAPWD) noticed a sheen in the storm channel and notified Arden Realty Limited Partnerships. LAPWD determined that the spill was a result of a faulty overfill detection system on a 500-gallon aboveground storage tank (AST). Diesel flowed onto the ground and into several storm drains at the facility.

Commentary: *Secondary containment must be installed around ASTs at major facilities. However, states often do not require secondary containment for smaller ASTs. During due diligence, purchasers and lenders should determine if ASTs have secondary containment designed to contain leaks from the tank. If the tanks are near storm sewers or floor drains, located in areas of heavy traffic or are situated where spills may runoff into waterways, the secondary containment should be installed as a best management practice to minimize the impacts of spills.*

State-Approved Cleanup Does Not Bar Claim Under NY Navigation Law

In a case that illustrates the shortcomings of risk-based cleanups, the federal District Court for the Southern District of New York held that a property owner can proceed with a damages claim under the New York Navigation Law even though the defendant implemented a remediation plan that was approved by the NYSDEC. In *Kara Holding Corp. v. Getty Petroleum Marketing Inc*. (2004 WL 1811427, SDNY, 8/12/04), the court dismissed the plaintiff's RCRA section 7002 claim because the remedial action had eliminated any "imminent and substantial" threat. However, because the state Navigation Law is a strict-liability statute that requires discharges of oil to restore the environment to its pre-spill conditions, the plaintiff was entitled to have its property restored to its pre-spill condition, not merely to a standard found acceptable by the NYSDEC.

Studies Finding Higher MTBE Concentrations in Deep Wells

A USGS study found that 63% of public wells serving residential areas such as trailer parks, apartment complexes and condos have low levels of methyl tertiary butyl ether (MTBE). However, the more surprising result was that MTBE was detected at concentrations 10 times higher in deep bedrock public supply wells than in shallow wells. This finding was contrary to conventional belief that shallow water supplies are more susceptible to MTBE contamination.

The study noted that while proximity to gasoline stations was a good predictor of potential MTBE contamination, the most significant predictor for the presence of MTBE was the depth of the drinking water wells. The USGS reported that deeper wells were more frequently contaminated than shallow wells and the deeper wells usually had higher concentrations of MTBE. According to the report, wells deeper than 300 feet had MTBE concentrations ranging from 1-ppb to 10-ppb while shallow wells usually had less than 1-ppb. However, the correlation does not apply to private wells.

1998 UST Standards May Not Protect Against MTBE Vapor Leaks

Studies in New Hampshire and California have suggested that double-walled, double-piped tank UST systems may minimize releases to groundwater, but may not be addressing vapor releases. Representatives of the New Hampshire DES told attendees at a recent groundwater contamination conference in Baltimore that extremely sensitive tracer tests uncovered small vapor leaks at numerous UST systems that meet the 1998 performance standards. The suspected source of the vapor leaks is numerous piping connections associated with UST systems as well as underground sumps and vents that may get stuck in the open position. DES also said that MTBE was detected at nearly 100 of the more than 400 gas stations where the DES conducts groundwater monitoring.

Damaged Spill Buckets May Lead to Leaks at Upgraded USTs

Purchasers or lenders for properties with upgraded USTs often believe that these sites do not pose significant risks of leaks. However, there is growing evidence that many properties with new or upgraded USTs may be impacted by damaged spill overflow equipment known as “spill buckets.” This equipment is designed to collect fuel in a fill line after a tank has reached its capacity. However, this equipment is often damaged during the winter months during snow removal. As a result, purchasers and their lenders should consider performing tightness testing on new UST systems to ensure that their integrity has not been compromised.

TOXIC SUBSTANCES

HUD Announces LBP Abatement Grants

HUD recently awarded $168 million in grants to remove lead based paint (LBP) from lower income homes and increase awareness of LBP hazards. The grants will fund 72 local projects in 28 states. More than $145 million will be spent to eliminate lead paint hazards in thousands of privately owned, low-income housing units. HUD's Lead Elimination Action Program will provide $8.9 million to stimulate private sector investment in lead hazard control. In addition, $1.9 million in Lead Outreach grants will be used to support public education campaigns on LBP hazards. Another $1.7 million will assist local research institutions to study ways to drive down the cost and increase the effectiveness of LBP hazard identification and control. HUD is also investing more than $2.6 million to support scientific research into new ways of identifying and eliminating health hazards in housing. The funding includes more than $6.7 million in demonstration grants to identify and eliminate housing conditions that contribute to children's disease and injury, such as lead poisoning, asthma, mold exposure, and carbon monoxide contamination.

Roundup of LPB Enforcement Actions

EPA Region 1 office announces that Ceebraid Management will pay a $95,000 penalty and spend at least $120,000 to test 1,600 rental units at the seven complexes it manages in Connecticut. Under the administrative settlement, Ceebraid also agreed to implement a Lead Management Plan and have its employees take Lead-Safe Work Practices training to properly implement the Lead Management Plan.

Winn Managed Properties, LLC, Winn Management Company, LLC, and Lend Lease Apartment Management, LLC, agreed to pay $105,000 in penalties for failing to comply with LBP disclosure rules at 235 residential properties located in Massachusetts, Rhode Island, Connecticut, New Hampshire, New York, Pennsylvania, Virginia, Washington, D.C., and California. The company also agreed to spend at least $3.7 million to perform LBP risk assessments and hazard abatement at the approximately 10,400 rental units that it owns or manages..

Concrete Joints and Paints Sources of PCB Contamination

Boeing has agreed to build containment structures in the stormwater retention pond at its plant in Everett, WA, to minimize discharges of polychlorinated biphenyls (PCBs) that are being released into local creek from replacement of concrete joints. Since 2000, Boeing has been replacing the joints that separate the large concrete slabs that comprise the flight line where planes are parked for final testing. The joints were constructed in 1960 and contain a sealant that was treated with PCBs. Boeing planned to remove the joints over a six year period, but has discovered that as the remaining joints deteriorated, PCB-contaminated particles are washed off into Powder Mill Creek. PCBs have been detected near the company's stormwater outfall into the creek at concentrations approaching 6,000 ppb. To control the PCB discharges, Boeing will add a sediment trap to its retention pond that will allow contaminated sediment to settle before the water is discharged into the creek.

Meanwhile, PCBs have been detected in the Big Spring Creek in Montana just a few miles from a state fish hatchery. The creek is used for drinking water, fly fishing and swimming. Low levels of PCB's were initially discovered in the stream in the early 1990's. Local officials thought an old industrial site at Brewery Flats was the source of the PCBs, but after it was remediated,PCBs continued to be detected. It turns out that the source is the blue-green paint that was used on the walls of the hatchery. Since the 1960's the paint, with high levels of PCB's added to make it more elastic, has been flaking off the concrete walls at the hatchery, washing downstream and accumulating in a toxic layer of sediment, a foot below the creek bottom in some places. The state Fish, Wildlife and Parks was forced to close the hatchery, drain the raceways and killed nearly three-

quarters of a million fish. An advisory against eating all fish taken from the stream has been implemented. The Centers for Disease Control and Prevention recently took blood from more than a hundred local residents to test PCB levels. A class-action lawsuit has also been filed against the state and the paint manufacturer.

WATER POLLUTION/ENDANGERED SPECIES

Army Corps Of Engineers Announces Realignment For Wetlands Determinations

In the wake of reports that its field offices are not consistently interpreting the definition of wetlands, the Army Corps of Engineers (Corps) has announced that it will be establishing a lead district in each state for its Wetland Regulatory program. The Corps has identified a Lead Corps District for each state in the past, but this role was largely reserved for renewal of nationwide permits. The appointment of a lead office for wetland determinations may be the first step in having only one district office assigned responsibility for wetlands implementation in each state.

The Corps also recently ordered its district offices to begin posting information on their websites for instances where the offices declined to assert jurisdiction over wetlands, which are known as "non jurisdictional determinations" (NJD).

Federal Wetlands Enforcement Actions

EPA issued an administrative order against Sunset Development, LLC, Daniels Construction, Inc., and James P. Daniels requiring the companies to compensate for 4 acres of wetlands impacted by construction of residential development in Sioux Falls, SD. Because the Sunset Ridge development has already been built, the administrative order does not require that the impacted wetlands be restored. Instead, the respondents must create, enhance or preserve three acres of other wetlands for every acre of wetland they impacted.

EPA is seeking $27,500 from Lester V. Moore for unlawfully filling wetlands during construction of the “Great Bridge Estate” housing development. According to EPA, Moore excavated drainage ditches and discharged fill material that impacted 3.5 acres of forested wetlands adjacent to the Poplar Branch, a headwater of the Elizabeth River and part of the Chesapeake Bay watershed.

Actor Bruce Willis agreed to pay $21,000 to settle allegations that he cleared a half-acre of forested wetland and placed fill in depressions on an island where he planned to build a residence. Willis was also required to complete replacement of the destroyed wetland vegetation by October 31st. The agreement also requires that site recovery be monitored over the next decade. According to EPA, the Idaho Department of Water Resources (IDWR) cited Willis and his associates in 1998 for violating the conditions of their Stream Alteration Permit for bank stabilization work. The IDWR required the removal of structures that had been unlawfully installed in the river. The affected forested wetland is part of a spring-fed tributary of the Big Wood River that flows through the Sun Valley area. An Idaho Fish and Game wetlands expert indicates that only 5% of the Big Wood wetlands are forested and that the forested wetlands are declining because irrigation and development pressure.

EPA has proposed a $25,000 penalty against J. Phillip Adams for illegally dredging and filling a wetland and creek on his Diamond T Ranch in Bannock County, Idaho. EPA alleges that Adams filled and bulldozed approximately one-half of an acre of stream channel, wetlands and riparian habitat adjacent to Potter Creek in the Fall 2001 during construction of an earthen bridge across the creek. According to the IDWR, the culvert Adams placed beneath his earthen road crossing did not allow aquatic life to pass and disrupted the natural flow of the creek. In addition, the agencies claim that the disturbed area around Potter Creek resulted in runoff of sediment into the creek. EPA also alleged that Adams and his ranch manager ignored an order from the Corps to cease the activity and has refused to restore any of the damage caused by his unauthorized work.

To settle claims that they illegally destroyed wetlands along the Cottonwood Creek north of Visalia, CA, the Leyendekker family has agreed to convey a nearby 300-

acre parcel of land to a regional land trust for permanent protection and management. The parcel, known as "Westside 300", supports 40 acres of rare, alkali vernal pools near the ancient shoreline of the drained Tulare Lake. EPA alleged that the Leyendekkers converted 75% percent of a nearly pristine 320-acre parcel along Cottonwood Creek from wetlands into cultivated farmland in June 2000. Workers destroyed approximately 33 acres of vernal pools and swales by deep-ripping, disking, and land-leveling without appropriate federal and state permits.

State Wetland Developments

Michigan county planners have begun using computer-mapping software for wetlands decisions. The program helps the planners and developers understand the interaction of existing wetlands, identify higher-quality wetlands that need protection, and model how surface waters flow through wetlands and surface areas.

Massachusetts Governor Mitt Romney signed into law a pilot wetlands banking program for the Taunton River Watershed. Developers will be allowed to purchase credit from a wetlands bank based on the ecological value of the wetlands, the location of the wetlands area, or other factors still to be determined. Under the program, developers would still have to minimize wetlands impacts before seeking off-site mitigation credits.

Ohio EPA recently issued a water quality certification for a new Wal-Mart store in Richland County. The project involves constructing a new store behind the current Wal-Mart location and will fill 1.63 acres of medium-quality forested wetlands. In exchange for the certification, Wal-mart agreed to preserve a larger, high-quality wetland on the property. The company will convey a conservation easement for the 2.90-acre wetland to the Gorman Nature Center. In addition to preserving the remaining wetland area at the property, Wal-Mart will restore a minimum of 1.63 acres of forested medium-quality wetland at the 120-acre Franklin Church Wetland and preserve a 2.04-acre high-quality kettle hole wetland at Franklin Church. The Gorman Nature Center will hold the conservation easement.

Stormwater Developments

EPA and the state of California have started inspecting industrial facilities to determine if they are complying with the stormwater program. EPA and the state Regional Water Quality Control Boards plan to inspect 550 industrial facilities to determine each facility's compliance with federal stormwater permit requirements. The inspections will focus on reviewing a facility's recordkeeping, and looking for unpermitted discharges, and ensuring that the facility is implementing best management practices to reduce runoff contamination. If an inspector observes potential violations, a referral will be made to the appropriate regional water board and EPA for follow-up action. In the past year, EPA assessed $300,000 in penalties against 13 stormwater violators in California.

Lane Construction Corp. agreed to pay $51,500 to settle EPA allegations that the company failed to prepare and implement storm water pollution prevention (SPPP) plans at its asphalt plants in Pennsylvania, Virginia, and Washington, D.C. Lane also agreed to take steps to reduce water pollution from runoff from its facilities.

EPA has proposed a penalty of $157,000 to settle allegations that Leed Foundry, Inc., improperly discharged contaminated stormwater from its iron foundry in St. Clair, PA. The Leed Foundry produces gray iron castings such as storm sewer grates from scrap iron. EPA charged that the company dumped baghouse dust containing hazardous levels of cadmium and lead on the ground and an outside concrete pad where the material came into contact with stormwater before flowing into storm drains that drained to Mill Creek. EPA asserts that the facility did not obtain a required storm water permit for this discharge until this past March and has not implemented best management practices to reduce the amount of contaminated stormwater from the site.

EPA fined Orchard Hill Park, LLC and its contractor Borggaard Construction $3,200 for implementing a deficient SPPP plan at a Massachusetts site where a Target store is under development. Sediment from the 40-acre construction site flowed into storm drains that fed into a local brook. Orchard Hill Park will be a 310,000-square-

foot shopping center that will be anchored by a 125,000-square-foot Target store.

The Vermont Water Resources Board recently voted to require developers in five watersheds of polluted streams in Chittenden County to obtain federal wetlands permits instead of a state permit. The board also halted construction of a Lowe's Home Improvement Center in South Burlington after it determined that Lowe's needed an individual site permit rather than the general permit. The actions follow a summer of heavy rain that caused significant amounts of sediment to flow off-site.

Nebraska Department of Environmental Quality (DEQ) reached a settlement with Northern Lights LLC for alleged stormwater violations. The company agreed to pay a civil penalty of $4,000 and implement a SEP in the form of a $1,000 contribution to the Nebraska Department of Agriculture Youth Institute for environmental awareness activities. Northern Lights obtained a general construction storm water permit that required implementation of erosion and sediment controls. However, DEQ inspections between 1999 and 2003 found the erosion and sediment controls were inadequate. Deficiencies included failing to properly establish ground cover and stabilize the site. The developer planted ground cover on four occasions; the cover did not take because of heavy rains or long periods of drought. To remedy the situation, the developer also installed an underground storm water system to control storm runoff.

Food Manufacturer Fined for Wastewater Discharges

Pilgrim Foods, Inc., agreed to pay a $190,000 fine for discharges of acidic and contaminated wastewater into a stream on the company's property. Pilgrim Foods, which makes vinegar, mustard and apple juice, stores liquid in Aboveground Storage Tanks (ASTs), loads and unloads processed materials as well as performs fleet fueling and maintenance. As part of the settlement, Pilgrim will apply for a stormwater discharge permit, implement an Spill Protection Control and Countermeasures (SPCC) plan and agreed to perform an environmental compliance audit.

Commentary: *EPA recently announced that it extended the effective date of its revised Spill Prevention, Control and Countermeasure (SPCC) Plan requirements (69 FR 48794, August 11, 2004). The new compliance dates are February 17, 2006 for amending existing SPCC Plans and August 18, 2006 to implement the revised plans. Regulated facilities that start operations between August 16, 2002 and August 18, 2006 must prepare and implement an SPCC Plan by August 18, 2006. Affected facilities that become operational after August 18, 2006 must prepare and implement an SPCC Plan before starting operations.*

USDA Announces Conservation Grants

The USDA will award $2 million under its Grassland Reserve Program to help private land owners in four Western states protect the habitat of the sage grouse whose populations has declined 90% in the past twenty years. Environmental groups had asked the Interior Department to place the birds on its endangered species list. Such action could sharply restrict use of 770,000 square miles in 11 states where the birds live. About 28% of this land is privately owned.

USDA also announced the availability of $2.1 million in Wetlands Reserve Program (WRP) technical assistance funds for technical service providers and other third parties to conduct restoration activities on WRP lands in 12 states. WRP is a voluntary conservation program that offers landowners the opportunity to protect, restore and enhance wetlands on their property. The WRP resources can be used to expedite wetland restoration and enhancement activities. USDA believes the use of third parties such as technical service providers, state governments and environmental groups expands the capability of Natural Resources Conservation Service to restore acres enrolled in WRP projects.

Minnesota became the second state in the nation to participate in the USDA's Wetlands Reserve Enhancement Program (WREP). The program will help the state leverage $4 million to develop a long-range wetlands restoration strategic plan for approximately 7,250 acres. Through Minnesota's WREP plan, the state will provide $1.2 million and USDA will provide $2.8 million.

Blasting and Fireworks May Be Source of Massachusetts Perchlorate Contamination

Perchlorate contamination is usually associated with military bases or manufacturing locations that produce rocket fuel. However, since Massachusetts has begun statewide testing of perchlorate in drinking water supplies, the substance has been detected at seven sites that are not located near any military bases.

Thus far, perchlorate had been detected in wells located at a Boxborough condominium complex, Mount Greylock Regional and Westport high schools, and the towns of Hadley and Westford. The source of the perchlorate at Westford is believed to be blasting operations for a new town highway department garage. The source of the contamination at the schools is less clear, but believed to be from fireworks.

Westford was forced to shutdown one of its eight wells after perchlorate was detected at 3.3 ppb. Perchlorate was detected in the stormwater retention pond at the new garage at 819 ppb and in a nearby catch basin at 40 ppb. The Massachusetts DEP plans to issue a Notice of Responsibility to the town of Westford that will require the town to take immediate measures to remediate the contamination at a number of locations in town. Meanwhile, the town has received a proposal for a short and long-term remediation plan that will could cost as much as $1.25 million.

Fireworks are the suspected source at the schools because perchlorate is often used to in the stars that create bright flashes of color. Sometimes the stars do not ignite and will drop to the ground where it may then seep into the groundwater. Perchlorate is also found in flash powders, the explosive mixtures that cause a white flash and loud boom.

Environmental Organizations File NAFTA Complaint Over Mercury

A coalition of American and Canadian environmental groups filed a complaint with the North American Free Trade Agreement (NAFTA) Commission for Environmental Cooperation (CEC) to force the United States to reduce its emissions of mercury from coal burning power plants.

The petitioners allege that EPA has failed to effectively to prevent degradation of surface waters from mercury emissions of coal-fired power plants. A June CEC report on industrial pollution found that 64% of mercury air emissions in North America came from coal-fired power plants. Forty-five states have now issued advisories against eating fish affecting one-third of all U.S. lakes and hundreds of thousands of river miles. Elemental mercury released by power plants lands converts to a highly toxic form in water known as methylmercury.

The Canadian petitioners assert that waterbodies in the province of Ontario are being impaired from emissions of coal-burning plants in Ohio, Pennsylvania, Indiana, and Illinois. It is estimated that 38% of mercury deposition in the Canadian portion of the Great Lakes originates from U.S. sources.

New Jersey Adopts Stringent Arsenic Drinking Water Standard

The New Jersey DEP recently adopted the most stringent standard for arsenic in drinking water of 5-ppb for arsenic. The new rule will become effective on January 23, 2006. EPA promulgated a 10-ppb arsenic drinking water standard that also becomes effective January 23, 2006.

Under the new rule, 600 public community water systems and 900 non-transient, non-community systems will be required to monitor for arsenic. Arsenic is a naturally occurring element in many parts of New Jersey, including the Piedmont region and areas in Bergen, Essex, Hudson, Hunterdon, Mercer, Middlesex, Morris, Passaic, Somerset and Union Counties. As a result, DEP predicts approximately 34 community and 101 non-community systems will have arsenic levels that will exceed the f5-ppb standard. Water suppliers will have to take steps to reduce arsenic levels in drinking water. DEP has identified four treatment technologies can bring arsenic concentrations below the maximum contaminant level of 5-ppb.

***Commentary**: The new state arsenic standard will also apply to private well owners regulated under New Jersey's Private Well Testing Act. Thus, sellers and landlords of property with private wells will be required to notify purchasers and tenants about arsenic concentrations in the water.*

AIR POLLUTION DEVELOPMENTS

EPA Releases First Annual NOx Budget Trading Program Report

According to EPA's first annual NOx Budget Trading Program 2003 Progress and Compliance Report, total ozone season NOx emissions from power plants and other large combustion sources were 30% below 2002 levels in eight northeastern states and the District of Columbia. EPA said that the NOx Budget Trading Program cuts along with other NOx control programs have reduced ozone season NOx emissions from sources in these states 70% below 1990 levels. The emissions reductions occurred despite power generation increases by the affected sources in 2003.

The report said that emission reductions occurred for both average emissions and the short-term peak NOx emissions that occur on hot, high electricity demand days. More than 99% of the affected units were in full compliance in 2003.

The NOx trading program was established by EPA under the 1998 Nitrogen Oxides State Implementation Plan (SIP) Call, or "NOx SIP Call," which required reductions in NOx emissions from power plants and other sources in eastern states that were demonstrated to impair air quality in downwind states. Eight northeastern states and the District of Columbia began implementing the NOx Budget Trading Program in 2003. Sources in 11 additional states across the East and Midwest joined in May 2004. Two more states will join in 2007. When fully implemented, EPA estimates the program will lower NOx emissions by one million tons.

Pennsylvania Approves NOx ERC Trade

The PADEP announced that it had approved the transfer of NOx emission reduction credits (ERC) from Hershey Foods Corp. to the Chesapeake Bay Foundation (CBF), which will permanently retire all the transferred credits. Hershey Foods generated 189 tons a year of NOx, ERCs from the shutdown of its Boiler No. 6 and a reduction in actual emissions from Boiler Nos. 5 and 7 at its Dauphin County plant. As a result of the retirement of the ERCs by CBF, PADEP will remove these credits from the state Emission Reduction Registry and they may not be used as federal New Source Review emission offsets.

Commentary: *Under the PADEP program, ERCs can be created for emission of volatile organic compounds (VOC) and NOx that are permanently reduced below the level required to comply with regulatory requirements. The ERCs can be generated from shutdowns, source reduction, emissions overcontrol or curtailment of production, or limiting hours of operation at a facility. PADEP maintains an Emission Reduction Registry to track the creation, transfer and use of ERCs. The ERCs then can be used to offset emission increases from major new or modified stationary sources that are subject to federal New Source Review permitting regulations.*

Thus far, more than 150 companies have submitted ERC registry applications requesting 22,560 tons per year of NOx credits and 9,730 tons per year of VOC credits. Currently, 12,413 tons of NOx ERCs and 4,259 tons of VOC ERCs are certified and registered in the state's registry system.

Return of the Killer Trees

While campaigning for president in 1980, Ronald Reagan was criticized for stating that approximately 80% of air pollution came from hydrocarbons released by vegetation. However, a group of Princeton University researchers have shown that tree production of volatile organic compounds (VOCs) has increased in some parts of the country. The authors of the report say its findings could explain why ozone levels have not improved as much as anticipated from Alabama to Virginia. The report suggests that increased VOC emissions from forests reclaiming abandoned farmland and increases in plantation forestry might be offsetting the significant cuts in VOC emissions from human sources. The scientists analyzed data collected by the U.S. Forest Service involving 2.7 million trees on 250,000 plots of land across the country. The researchers calculated the VOC emissions for each tree

and plotted VOC levels nationally. After comparing data collected from the 1980s with data generated taken in the 1990s, the scientists found that younger trees growing in abandoned farmland produced higher levels of VOCs than older growth forests. For example, pine plantations that grow fast growing sweetgum trees are major producers of VOCs. The researchers found that every tree that grows quickly is a heavy VOC emitter. The study could have implications for plans to develop biofuels as alternative fuel sources.

Study Finding Upsets Result in Significant Air Pollution

According to a study released by the Environmental Integrity Project (EIP), accidental and unplanned emissions from facilities may be exceeding the total annual allowed emissions from the facilities. The report, "*Gaming the System: How the Off-the-Books Industrial Upset Emissions Cheat the Public Out of Clear Air*, 29 states do not even track these so-called upset emissions or include them in their state air emission inventories that are used to establish air pollution control strategies.

EIP said that annual upset emissions from 10 of the 37 facilities in the study were greater than their total annual emissions. For example, the upset emissions of carbon monoxide (CO) from Exxon Mobil's Baton Rouge facility were almost three times its reported annual CO emissions. The report found that more than half of the 37 facilities studied had upset emissions of at least one pollutant that were 25% or more of their total reported annual emissions of that pollutant.

Of the 26 states that responded to an EIP survey, half said they either do not include or only sometimes include upset emissions in annual inventories of pollution. The 29 states that EIP said do not track upset episodes are: Alabama, Alaska, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, North Dakota, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Rhode, Island, Texas, Utah, Virginia, Washington, West Virginia and Wisconsin

New Jersey to Regulate CO^2 as Air Polutant

The New Jersey DEP used the 50th anniversary of the state's Air Pollution Control Act to announce its intention to regulate carbon dioxide (CO2) as an air contaminant. This action will allow the state to participate in the Regional Greenhouse Gas Initiative. Other states participating in the initiative are Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont. In addition, Pennsylvania, Maryland, the District of Columbia, the Eastern Canadian provinces and New Brunswick are participating as observers in the initiative. RGGI states will develop a regional strategy for controlling emissions by establishing a multi-state cap-and-trade program.

San Francisco also plans to take action to reduce its greenhouse gas emissions. Under its Climate Action Plan, the city hopes to annual emissions of the CO^2 by more than 2.5 million tons by 2012, principally by relying on renewable alternative fuel and hybrid transportation fleets. The plan also calls for transit improvements, increased transit ridership, investment in alternative energies, recycling and energy conservation. Earlier this year, the SFPUC completed the largest city owned solar power system and will be working with the Department of the Environment to install solar power systems on municipal properties, businesses and residences across the city. San Francisco promotes energy efficiency through the Department of Environment's Peak Energy Program which aims to reduce electricity demand in San Francisco by 16 megawatts, and through the recently adopted Green Building Ordinance requiring environmentally friendly building design standards in city construction projects. San Francisco is among 600 cities around the world that are participating in the Cities for Climate Protection campaign of the International Council for Local Environmental Initiatives.

New Jersey Adopts Mercury Emission Standards

The New Jersey DEP adopted new rules that establish the most stringent

mercury emissions standards in the country. These rules will require the regulated entities to attain substantial reductions in mercury emissions.

The state requires 10 coal-fired boilers in power plants to reduce mercury emissions by up to 90% by the end of 2007, though the compliance deadline could be extended to 2012 if the plants agree to major reductions in their SO^2, NOx and fine particulates emissions. The state's six iron and steel smelters will have to reduce mercury emissions by 75% by the end of 2009. Municipal solid waste incinerators will have to slash their mercury emissions by at least 95% below 1990 levels in 2011.

Asbestos Enforcement Actions

EPA has proposed to fine Sargent Enterprises, Inc. $4,620 for failing to comply with the ten day advance notice requirement for two asbestos abatement projects in public schools in Bucks County, PA. According to EPA, Sargent Enterprises notified EPA on June 10, 2003 that it would begin an asbestos abatement at Palisades High School on June 23, 2003 to remove asbestos-containing floor tile, transite paneling, and pipe insulation. The notice was just nine working days from the notification date and when an EPA inspector visited the site on June 24th, he learned that the work actually began three days earlier on June 20, 2003. For the second project, Sargent notified EPA On November 7, 2003 that it would begin an asbestos abatement project by removing ACM pipe insulation, floor tile, transite paneling, ceiling plaster, and insulation materials at the Pfaff Elementary School on November 14, 2003, only five working days after the notification date.

Two South Lake Tahoe business owners were fined $50,000 for failing to comply with asbestos abatement rules involving the remodeling of Mulligan's Irish Pub. According to EPA, the owner of Mulligan's Irish Pub and the owner of the South Lake Tahoe Super 8 Motel did not provide the ten-day advance notice of the abatement work and did not comply with the asbestos work practices.

The Oregon Department of Environmental Quality (DEQ) fined a homeowner $3,600 for failing to comply with work practices for asbestos-containing waste materials (ACWM) during the demolition of his home. In February 2004, DEQ staff observed shattered cement asbestos board (CAB) and torn ACM felt floor backing on the ground of the property owned by Carl Daniel Jones. The open accumulation of weathered and deteriorated asbestos-containing waste material likely released asbestos fibers in to the air, exposing neighbors and the public to asbestos. CAB siding can be safely handled by homeowners and general contractors, provided the material is not broken and remains wetted and intact during removal, transportation and final disposal. However, DEQ requires ACM that easily releases asbestos fibers such as sheet vinyl flooring and broken CAB siding to be handled by an Oregon-licensed asbestos abatement contractor.

Aubrey Lewis Ritz of Sacramento, CA. was sentenced to serve five years of probation and ordered to pay a $100,000 fine for failing to comply with asbestos workpractices at the Stardust Hotel in Idaho Falls.

The Western Regional Office of the Massachusetts DEP levied more than $225,000 fines against several individuals and companies as part of the DEP's statewide asbestos enforcement initiative that began last year and culminated in February 2004. Most of the violations occurred at residential properties and at educational institutions as well as at commercial businesses.

The Arizona DEQ issued notices of violation against three companies and two individuals for disposing more than 1,000 bags of asbestos-containing material on private property in Yuma. The DEQ charged that the contractor hired to transport the ACWM sold four trailers filled with the material to another contractor who then instructed his employees to dispose of the material on the private property where the waste material was subsequently discovered.