

JULY/AUGUST 2003

**TOXIC TORT**

**The Senate Bill Proposes Trust Fund as Alternative to All Pending and Future Asbestos Litigation Claims.** When the Senate returns from its August break, it may have the task of considering S. 1125, the "Fairness in Asbestos Injury Resolution Act of 2003," (the "FAIR Act"). The bill's sponsors claim it will "create a fair and efficient system to resolve claims of victims for bodily injury caused by asbestos exposure" through the establishment of a \$108 billion privately funded, federally administered trust fund.

Asbestos claims steadily increased during the 1980s and then exploded during the last decade, creating a backlog in the courts. In light of the backlog, the United States Supreme Court has repeatedly called for national legislation to manage the problems in the current asbestos litigation system. The FAIR Act answers that call by taking asbestos injury claims out of the existing tort system and processing claims through the trust fund.

The sponsors of the bill promise that it will introduce "uniformity and rationality to the system" by tying compensation to disease severity through the use of standardized medical criteria. See S. Report No. 108-118, at 2. Thus, those who are the sickest will receive the highest awards from the fund. Payments from the trust fund will be made over a three- to four-year period; however, provisions allow for expedited payments in certain circumstances. In exchange for this quick and almost-guaranteed compensation from the trust fund, potential plaintiffs will no longer have the right to sue in court for asbestos-related personal injuries: all pending and future claims will be swept into the fund, including all nonfinal settlements and judgments that are subject to appeal when the trust fund is certified as fully operational.

The FAIR Act benefits companies and insurers by providing economic stability as a result of certainty about liabilities related to asbestos personal injury suits. Companies and

insurers with more than \$1 million in previous asbestos personal injury expenditures will be assessed mandatory contributions to the fund. Companies and insurers will each contribute a minimum aggregate of \$52 billion to the fund; assets from existing asbestos trust funds, estimated at more than \$4 billion, will also be transferred into the fund. Individual company contributions will initially be determined by tiered assignments based on the company's past asbestos personal injury expenditures and its revenues. The bill includes scheduled step-down contribution reductions, so that a company's annual contribution will decrease over the fund's 27-year life. Insurers will not be assigned to tiers; rather, their contributions will be assessed by an Asbestos Insurer Commission created by the bill. Direct insurers will be required to contribute the entire amount they are assessed within three years of the date of enactment.

The FAIR Act faces a tough fight in the Senate. Four Judiciary Committee members who voted to report the bill favorably to the Senate recently stated that major changes would have to be made to the bill before they would vote for it on the Senate floor. See S. Report No. 108-118, at 74-79. The insurance industry, labor organizations, attorney groups and manufacturer groups have all expressed plans to fight the bill in its current form. *Kimberly K. Heuer, Philadelphia, 215.963.4756, e-mail: kheuer@morganlewis.com.*

**CLEAN AIR ACT**

**Eleventh Circuit Holds EPA's Administrative Consent Orders in New Source Review Litigation Unconstitutional.** On June 24, 2003, the U.S. Court of Appeals for the Eleventh Circuit issued a decision in the new source review (NSR) enforcement litigation involving the Tennessee Valley Authority (TVA). *Tennessee Valley Authority v. Whitman*, No. 00-15936 (11th Cir.). EPA had issued administrative compliance orders (ACOs) to TVA in which EPA found that TVA had undertaken numerous projects in the past

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without complying with NSR requirements. After TVA challenged the validity of the ACOs, EPA conducted a special administrative proceeding to review the orders. EPA subsequently issued a decision upholding the ACOs in most respects, and TVA challenged that decision in the Eleventh Circuit.

In its June 24 decision, the court ruled that it lacks jurisdiction to review the ACOs issued to TVA by EPA because the ACOs are not final agency actions under the Clean Air Act. The court's ruling that the ACOs are not final agency actions was based on its conclusion that the Act's statutory scheme regarding the issuance and review of ACOs is unconstitutional. The court concluded that the statute accords ACOs the "status of law," i.e., the recipient of an ACO can be liable for civil or criminal penalties for violating an ACO. The court further concluded, however, that this violates the Due Process Clause of the Constitution because there is no opportunity for a hearing or to otherwise present evidence before an ACO is issued. Because it found that the ACOs were invalid as a constitutional matter, the court ruled that the ACOs had no effect and were therefore not final agency actions. In addition, the court specifically stated that EPA must bring an action against TVA in district court if it wishes to pursue the alleged NSR violations. The court did not express any opinion regarding the merits of EPA's allegations that TVA's projects were not covered by the regulatory exclusion for activities that constitute routine maintenance, repair, and replacement. *Michael A. McCord, Washington, 202.739.5431, e-mail: mmccord@morganlewis.com.*

**EPA Issues Final Rule on Title V Certifications.** On June 27, 2003, EPA published a final rule amending the compliance certification provisions in Parts 70 and 71 of the Title V operating permits program. 68 Fed. Reg. 38,518. Those provisions require that a responsible official at each source periodically certify compliance with the terms and conditions of the source's Title V permit. The final rule is intended to carry out a 1999 decision of the U.S. Court of Appeals for the District of Columbia which remanded the compliance certification provisions to EPA. The court concluded that the

provisions were unlawful because they did not require that a source's compliance certification state whether compliance was "continuous or intermittent" as required by the statute, but only that a source indicate whether the compliance methods used by the source for determining its compliance status provide continuous or intermittent data. On March 1, 2001, EPA had published a direct final rule revising the certification compliance provisions, but later withdrew the direct final rule in light of adverse comments.

The June 27 final rule inserts regulatory language that requires the responsible official to indicate in the certification whether compliance with each permit term and condition that is the basis of the certification was continuous or intermittent during the period covered by the certification. In response to industry comments, the final rule deletes, as unnecessary, language from the prior rule that required the responsible official to state whether the methods being used to determine compliance provide continuous or intermittent data. *Michael A. McCord, Washington, 202.739.5431, e-mail: mmccord@morganlewis.com.*

## TOXIC SUBSTANCE CONTROL ACT

**EPA Finalizes and Revises Key TSCA Guidance on Reporting of Substantial Risk Information.** Section 8(e) of TSCA requires that any manufacturer, importer, processor or distributor of chemicals (or mixtures) that obtains information reasonably supporting the conclusion that a substance presents a "substantial risk" of injury to health or the environment must "immediately" report that information to EPA, unless the company has actual knowledge that EPA has already been informed. EPA interprets this provision to be self-implementing, and has never issued regulations under TSCA Section 8(e). Instead, the Agency has developed guidance documents interpreting this statutory requirement, the principal one being its 1978 "Statement of Interpretation and Enforcement Policy: Notification of Substantial Risk." On June 3, 2003, EPA published revisions to this policy document based on consideration of previously solicited public comments, completing a process begun more than a

decade ago.

Key changes address the reporting of information pertaining to the widespread and previously unsuspected distribution of chemicals in environmental media, emergency incidents of environmental contamination, and the circumstances under which certain information need not be reported. The final policy revisions clarify that information on environmental contamination found at or below regulatory triggers is not reportable. Also, in an effort to avoid duplicative reporting, EPA now specifies that information need not be reported under Section 8(e) if it must already be reported within certain time frame pursuant to other statutory authority, or if the information is derived from specified source materials such as scientific publications or available databases. *Jeffrey N. Hurwitz, Philadelphia, 215.963.5700, e-mail: jhurwitz@morganlewis.com.*

## WHAT'S NEW

Morgan Lewis' Los Angeles partners Tom Meador and Tom Van Wyngarden, and associates Deanne Miller and Leemore Libesman published "Anti-Toxins" in the July-August issue of the *Los Angeles Lawyer*. The article suggests effective strategies available to defense counsel litigating toxic tort lawsuits, which are often brought through generic complaints on behalf of hundreds of plaintiffs. The authors analyze the impact of recent decisions on available defenses and explain how to streamline the discovery process through case management orders. Read the complete article at <http://www.lacba.org/Files/LAL/Vol26No5/1422.pdf>.

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## STATE LAW *Developments*

### CALIFORNIA

#### **Perchlorate Groundwater Contamination Is a Focus for California Legislature.**

In response to intense pressure from state officials and California congressional leaders regarding military involvement in perchlorate contamination in California, perchlorate contamination is the focus of two bills making their way through the California Legislature. S.B. 1004 (Soto) and A.B. 826 (Jackson) require users of perchlorate to provide information on the use, spills and disposal of perchlorate and dictate certain pollution-prevention management practices. S.B. 1004, which passed the Senate and was heard in the Assembly, requires a person who causes or permits perchlorate to be discharged to waters of the state, or discharged or deposited where it may be discharged to any waters of the state, to immediately notify the State Water Resources Control Board (SWRCB). The bill requires the SWRCB to establish a reporting threshold for perchlorate. Owners of facilities that have stored more than 500 pounds of perchlorate in any calendar year since January 1, 1950 would have to disclose to the SWRCB certain information regarding that storage. The SWRCB would compile and make public the information. A.B. 826, entitled the "Perchlorate Contamination Prevention Act," requires the Department of Toxic Substances Control to adopt emergency regulations specifying management practices for perchlorate, including perchlorate inventories and establishing risk-management plans for preventing releases of perchlorate. The bill would also require a "perchlorate facility" to maintain unsaturated zone monitoring, as well as groundwater monitoring if located within 1/2 mile of a drinking water well. A.B. 826 has passed the Assembly, and is now in committee in the Senate. Although the state's budget crisis may impact the passage of these bills that mandate new obligations on state agencies, the bills' sponsors are optimistic that the bills will pass.

Several other pending bills seek to expand the powers of the SWRCB and strengthen the position of impacted water suppliers. For example, S.B. 922 (Soto) would settle one uncertainty about SWRCB enforcement powers by expressly providing that a Cleanup and Abatement Order from the SWRCB may require the recipient to provide or pay for alternative water to each affected public water supplier or private well owner. S.B. 543 (Machado) prohibits the operator of a groundwater treatment system from selling, transferring or assigning the water produced from the system until replacement water has been provided to every groundwater right holder injured by the contamination. A.B. 1020 (Laird) would allow "a public water system to bring a civil action to recover the costs associated with the investigation or remediation of the contaminated drinking water within four years of incurring those costs." *Martin J. ("Kelly") McTigue, Los Angeles, 213.612.2575, e-mail: kmctigue@morganlewis.com.*

### NEW JERSEY

#### **New Jersey Proposes Self-Disclosure Rule That Provides Penalty Reductions.**

The New Jersey Department of Environmental Protection (NJDEP) proposed a rule on August 18, 2003 that allows businesses to receive reduced penalties for environmental violations that are voluntarily discovered, disclosed to NJDEP within 21 days of discovery, and adequately addressed. The proposed rule is largely consistent with EPA's Audit Policy, which has been in effect since 1995. However, unlike EPA's Audit Policy, New Jersey's proposed rule does not offer a 100% waiver of all penalties discovered during a periodic auditing program. Rather, the proposed rule establishes two classes for violations based on actual or threatened harm to human health or the environment. A business may qualify for a 100% waiver for minor violations that it self-discloses, but may qualify for only a 75% penalty reduction for more serious violations. The harsher penalty policy,

NJDEP theorizes, will provide businesses an incentive to prevent recurrence of these serious violations. To qualify for any penalty reductions, voluntary disclosures must be made through NJDEP's Self-Disclosure Report, forms for which will be available on the NJDEP website. The full proposed rule can be accessed at <http://www.state.nj.us/dep/enforcement/audit%20rule.pdf>. *Joanna Adams Waldron, Philadelphia, 215.963.5361, e-mail: jwaldron@morganlewis.com.*

### NEW YORK

#### **New York State's Highest Court Limits Scope of Pollution Exclusion Clause.**

An insurance company can not use a pollution exclusion clause as the basis for denying coverage in a personal injury claim brought by a person claiming to have suffered harm from paint fumes. Plaintiff sued the insurance company (TIG) to secure defense in a suit by a bystander claiming personal injury from exposure to paint fumes. *Belt Painting Corp. v. TIG Ins. Co.*, No. 86 (N.Y. July 1, 2003). TIG claimed that personal injury damages from paint fumes were excluded under the general pollution exclusion clause barring claims for "bodily injury" resulting from releases of pollutants, defined in part as "any . . . fumes." The court found that adopting TIG's interpretation would "infinitely enlarge the scope of the term 'pollutants,'" and would contradict the common understanding and the reasonable expectations of a business person. The court held that fumes from paint are not environmental pollution, and are not unambiguously within the scope of the exclusion. *Ora Sheinson, New York, 212.309.6673, e-mail: osheinson@morganlewis.com.*

#### **New York Brownfields Legislation Enacted.**

On September 16, 2003 approved the most important environmental legislation to be passed in the state in over a decade. Governor

Pataki is expected to sign the bill within weeks. The legislation creates the state's first statutory brownfields program and refinances the State Superfund, which has been bankrupt since March 2001. The bill, A.9120, passed the Assembly on June 20, 2003, in the early morning hours of the last legislative session day, but after the Senate had already adjourned. Senate Majority Leader Joseph L. Bruno later announced that the Senate would be called back for a special session to pass the measure.

The bill is the product of more than five years of effort on the part of the Legislature and working groups composed of members of the governmental, business and environmental communities. Perhaps the most significant point of contention was whether to allow flexibility in cleanup levels based on future use, a common feature of brownfields legislation. The bill declares that "the current, intended and reasonably anticipated future land uses of the site and its surroundings shall be considered" in selecting remedies for soil contamination. The bill then sets up a system of four "tracks," based on the extent to which a site will be cleaned up and whether the future uses of the site and the groundwater under it will be restricted. While not every site will have to be cleaned up to residential levels, the technical feasibility and cost of achieving a residential-level cleanup must be evaluated at every site and the Department of Environmental Conservation (DEC) retains the discretion to require such a cleanup at any site it deems to be a "significant threat."

The bill establishes procedures for determining eligibility of brownfield sites and conducting site investigation and remedy selection, and, once a site is cleaned up, for submitting a certification and final engineering report. If satisfied, the state will issue a "Certificate of Completion," which provides liability protection from statutory and common-law causes of action. Significantly, the bill modifies the State Superfund to add liability protections modeled on those in CERCLA, including a

lender exemption, an exemption for municipalities that involuntarily take title, a fiduciary liability cap and an innocent landowner defense. However, the bill does not include an exemption for purchasers of contaminated property, which was added to CERCLA in 2002.

The bill provides financial assistance to municipalities and community-based organizations for the establishment of "brownfield opportunity areas" and creates \$135 million in tax credits. Financing for the bankrupt State Superfund program would be provided by \$60 million in fees on business and industry and \$60 million through borrowing by the State Environmental Facilities Corporation. *John Rousakis, New York, 212.309.6082, e-mail: jrousakis@morganlewis.com.*

### PENNSYLVANIA

**Advance Notice of Final Rulemaking for Safe Fill.** PaDEP published an Advance Notice of Final Rulemaking at 33 *Pa. Bulletin* 2880 (June 21, 2003), soliciting public comment on final regulations concerning the use and management of "safe fill" materials. "Safe fill" includes materials such as uncontaminated soils, brick, block, concrete, and asphalt used to bring an area to grade that would otherwise be treated as municipal or residual waste by PaDEP. The agency has been wrestling with policies and regulations for the definition and use of such materials since 1996, and any final regulatory scheme will impact excavation, grading and construction at new and brownfield developments.

The Advance Notice was published in response to a recommendation by the Independent Regulatory Review Commission (IRRC), the oversight agency that determines whether regulations are clear, necessary, reasonable, feasible, and in the public interest. IRRC and numerous other commenters had criticized the proposed regulations published at 32 *Pa. Bulletin* 564 (Feb. 2, 2002) as costly, complex, unnecessarily burdensome, and contrary to the public interest.

The latest advance final regulations establish criteria for defining whether material constitutes safe fill and standards for use and management of safe fill. PaDEP has attempted to harmonize the safe fill regulations with the Land Recycling and Environmental Remediation Standards Act. Responding to criticism concerning the complexity of the permitting scheme, PaDEP has consolidated the types of permits required. While there are fewer permits in the advance final regulations, there are more siting, management, and recordkeeping requirements relating to those permits. The public comment period closed on August 5, 2003. *Maxine M. Woelfling, Harrisburg, 717.237.4065, e-mail: mwoelfling@morganlewis.com.*

**Challenge to PaDEP Comprehensive Stormwater Policy Dismissed.** The Pennsylvania Commonwealth Court dismissed a challenge by a homebuilder's association to PaDEP's Comprehensive Stormwater Management Policy (Document No. 392-0300-002) and a related agreement settling an appeal of a National Pollutant Discharge Elimination System (NPDES) stormwater discharge permit. PaDEP agreed in the challenged settlement to impose certain conditions in NPDES stormwater discharge permits for the Valley Creek watershed. *Home Builders Ass'n of Chester and Del. Counties v. Commonwealth*, 828 A.2d 446 (Pa. Commw. Ct. July 9, 2003).

The court rejected the association's claim that the policy was a regulation and that its use must be enjoined because it was not adopted in accordance with the requirements of the Commonwealth Documents Law, 45 P.S. §§ 1101 *et seq.* Because the policy "merely describes a recommended approach for achieving compliance with the existing requirements" and contains a disclaimer that PaDEP does not intend to accord it the weight of a regulation, the court held that it does not constitute a regulation. *Maxine M. Woelfling, Harrisburg, 717.237.4065, e-mail: mwoelfling@morganlewis.com.*