

JULY 2004

SUPERFUND

Parent Company's Participation in Subsidiary's Business Not Sufficient to Hold Parent Liable Under Superfund. A New York federal district court recently held that a parent company's high level of involvement and control over its subsidiary is insufficient to hold the parent directly responsible for its subsidiary's Superfund liability. Consolidated Edison Co. of New York v. UGI Utilities, No. 01 CV 8520 (DC) (S.D.N.Y. Mar. 29, 2004). Consolidated Edison (Con Ed) filed a claim against UGI for a portion of the \$100 million in cleanup costs it expected to incur for the remediation of seven manufactured gas plants (MGP) in New York. Con Ed's claim against UGI was based on UGI's involvement with the plants through a former subsidiary and a company that merged with UGI in 1925. Con Ed specifically alleged that UGI was an "operator" under CERCLA because it exerted a high level of control over the subsidiary and the merged company. Rejecting these claims, the court found that Con Ed failed to present evidence demonstrating that the parent specifically controlled waste disposal or environmental decisions at a particular facility. A parent's controlling a subsidiary's purse strings, placing its employees on a subsidiary's staff and board, and exerting significant control over a specific facility owned by a subsidiary do not necessarily make the parent liable as an "operator" for the subsidiary's waste activities. In reaching its decision, the court relied on the analysis in United States v. Bestfoods, 524 U.S. 51 (1998), where the Supreme Court held that a party can only be held liable as an operator if it had direct control over waste disposal or environmental matters at the site and, in the parent-subsidiary

context, the subsidiary acted as an agent of the parent corporation. Furthermore, the court held that a party seeking to impose liability on a parent based upon the dual role of employees must overcome the presumption that such employees are serving the best interests of the subsidiary, and not the parent.

Glen R. Stuart, Philadelphia, 215.963.5883, e-mail: gstuart@morganlewis.com. ■

Pre-Enforcement Constitutional Challenge to CERCLA Permitted. On March 2, 2004, the U.S. Court of Appeals for the District of Columbia Circuit held that CERCLA's bar on pre-enforcement judicial review does not preclude a facial challenge to the statute's constitutionality, allowing General Electric (GE) to argue that CERCLA violates the due process clause of the Fifth Amendment. General Electric Co. v. Environmental Protection Agency, No. 03-5114 (D.C. Cir Mar. 2, 2004). In making its arguments, GE cited three Superfund sites, including the Hudson River project with estimated remedial costs of \$460 million, to assert that the issuance of a unilateral administrative order violates due process due to the absence of pre-enforcement review and the provision for large penalties for noncompliance. The court found that the plain text of Section 113(h) does not indicate that Congress intended to preclude all pre-enforcement review of constitutional challenges to CERCLA, but rather is limited to orders issued under Sections 104 and 106(a). In reaching its decision, the court rejected arguments by the U.S. EPA that a decision in GE's favor would undermine the statute's intent by delaying cleanups.

Glen R. Stuart, Philadelphia, 215.963.5883, e-mail: gstuart@morganlewis.com. ■

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Morgan Lewis
C O U N S E L O R S A T L A W

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Draft "All Appropriate Inquiry" Standards Add Clarity and Cost. On April 14, Eric Rothenberg (Morgan Lewis Environmental Practice Leader in New York) addressed attendees at the RTM Communications, Inc. "Contaminated Property Transactions Roundtable Conference" in Washington, D.C. Mr. Rothenberg's address and the conference agenda focused on the issuance of "all appropriate inquiry" (AAI) standards to qualify bona fide prospective purchasers for an exemption made available for asset purchasers pursuant to the January 11, 2002 Small Business Liability Relief and Brownfields Revitalization Act.

EPA missed the January 11, 2004 statutory deadline for issuance of the AAI standards. Instead, on November 14, 2003, EPA issued a joint working group draft AAI standard to be proposed for comment during May of 2004 with issuance of a final standard by year end.

As proposed on November 14, 2003, the draft AAI standard clarifies significantly the 10 elements required for a BFP environmental assessment. The standard also sets forth qualification requirements for "environmental professionals" who perform environmental assessments. Environmental professionals without advanced degrees may still be qualified to perform site assessments if they have 10 years or more of relevant experience.

Significantly, the draft AAI standard will also allow use of prior environmental assessments performed within a year of

the asset acquisition date, provided that they are updated within six months of the acquisition date as to the following key assessment elements: (1) governmental record searches, (2) visual site inspection, (3) environmental cleanup lien searches, and (4) interviews with past and present owners, operators or occupants respecting site conditions. While the draft standard goes a long way to assisting the business community on "commoditizing" risk assessments, the six-month update requirement may be difficult for large-scale projects involving site assessments for multiple properties in large-scale global transactions and financings.

The draft AAI standard also resolves debate as to whether a site assessment can be considered complete even though certain information has not been not secured. The draft AAI standard allows "data gaps," which are gaps that prevent the professional from reaching a conclusion as to whether observed conditions are indicative of releases or threatened releases of contaminants, so long as they are disclosed in the body of the written report. It is not clear under the current draft standard when data gaps will be considered significant enough to disqualify the environmental assessment for purposes of the BFP exemption. Some commentators have suggested that sampling and analysis may become necessary in order for the environmental assessment to pass muster.

It seems clear that environmental assessments performed under the draft AAI standards will be more expensive and will be performed by a class of more highly qualified professionals. This increase in cost is magnified when considered in light of the large number of phase I assessments performed annually in the U.S. — over 300,000 in 2004 according to conference participants.

Eric Rothenberg, New York, 212.309.6371, e-mail: erothenberg@morganlewis.com ■

Superfund Tax Fails to Receive Senate Approval. On March 11, the U.S. Senate rejected a proposal to reinstate the

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2004 EDITION OF MORGAN LEWIS ENVIRONMENTAL DESKBOOK

The Morgan Lewis Environmental Deskbook is presented as a convenient reference source for our clients. The Deskbook is designed for both those needing detailed knowledge of environmental requirements and those for whom a general familiarity is sufficient. This year's Deskbook features an article entitled "The Role of Insurance Assets in Business Transactions." The California section includes an article on Recent California Legislative Developments. The Deskbook also contains updated versions of the following regular sections: a regulatory calendar of selected environmental compliance deadlines; citations to environmental regulations in the Code of Federal Regulations; a description of Morgan Lewis's environmental practice and capabilities; an overview of federal environmental statutes; and an in-depth look at California environmental programs.

"polluter pays" Superfund tax by a vote of 53-43. A similar measure was defeated by a vote of 56-43 during a review of the fiscal 2004 budget resolution. The Superfund tax consisted of three taxes — an excise tax of 9.7 cents per barrel on the petroleum industry, a chemical feedstocks' excise tax on 42 listed chemicals, and an environmental corporate income tax on corporations with annual profits greater than \$2 million. Revenues from these taxes financed the Superfund Trust Fund, which has been used to remediate highly contaminated sites. The tax generated approximately \$1.45 billion from 1990 until its expiration in 1995. Supporters of the tax, including environmental and other

EDITORS:

ERIC ROTHENBERG
erothenberg@morganlewis.com
212.309.6371

GLEN R. STUART
gstuart@morganlewis.com
215.963.5883

ASSISTANT EDITOR:
JOHN J. McALEESE
jmcaleese@morganlewis.com
215.963.5094

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public advocacy organizations, argue that reinstatement of the tax is necessary to provide greater funding for cleanups, and to ensure that responsible parties, as opposed to taxpayers, pay for such cleanups. Those against reinstatement argue that the law already requires the polluter to pay, and that the tax would disproportionately affect the petroleum and chemical industries and impact businesses already experiencing difficulties.

Eric Rothenberg, New York, 212.309.6371, e-mail: erothernberg@morganlewis.com. ■

CLEAN AIR ACT

EPA Designates Hundreds of Counties as Areas of Nonattainment Under the Revised, More Stringent Federal Air Quality Standard for Ozone. On April 15, EPA issued its final designations of counties that do not meet the revised, 8-hour National Ambient Air Quality Standard (NAAQS) for ground-level ozone (or smog). Originally promulgated in 1997, the controversial new standard establishes an ozone NAAQS of 0.08 ppm, averaged over an 8-hour period. The less stringent, prior ozone NAAQS was set at 0.12 ppm, averaged over a 1-hour period. Under EPA's

final designation rule, more than 400 counties in approximately 30 states across the country have been identified as areas of nonattainment under the 8-hour NAAQS. Affected states will now have three years to develop and submit to EPA air quality control plans aimed at achieving compliance with the new standard. The effective date of the designations is June 15, 2004, although EPA has deferred this date until September 30, 2005 for counties that have agreed to reduce ground-level ozone pollution earlier than the Clean Air Act would require. In a companion rulemaking, EPA published Phase 1 of its program addressing implementation of the 8-hour ozone standard. EPA's implementation rule addresses a number of issues, including how nonattainment areas are to be classified and the process for transitioning to the 8-hour NAAQS for those areas already classified as nonattainment under the 1-hour standard. EPA establishes a number of different nonattainment classifications under the 8-hour standard depending on the severity of the ozone problem in the area, ranging from basic to marginal, moderate, serious, severe, or extreme. Basic nonattainment

areas are subject to the Clean Air Act's more general emission control requirements needed for attainment (at Part D, Subpart 1), while areas with higher nonattainment classifications (i.e., those with more serious ozone problems) must meet the more specific emission reduction measures at Part D, Subpart 2 of the Act. However, areas with higher ozone classifications have later attainment dates. For example, basic nonattainment areas must meet the new standard by 2009, while serious areas must achieve attainment by 2013. Severe areas have until 2021 to comply. The 1-hour standard will be revoked on June 15, 2005, one year after the effective date of EPA's implementation rule, but certain requirements under the old standard will remain in effect until an area meets the 8-hour standard. EPA plans to issue a second implementation rule in the coming months to address remaining 8-hour ozone implementation issues, such as requirements for reasonable further progress and reasonably available control technology. 69 Fed. Reg. 23858 (Apr. 30, 2004); 69 Fed. Reg. 23951 (Apr. 30, 2004). *Jeffrey N. Hurwitz, Philadelphia, 215.963.5700, e-mail: jhurwitz@morganlewis.com. ■*

STATE LAW *Developments*

PENNSYLVANIA LAW

"One Cleanup Program" Launched in Pennsylvania. Seeking to encourage the revitalization of brownfield properties, Region III of the Environmental Protection Agency (EPA) and the Pennsylvania Department of Environmental Protection (PADEP) signed a Memorandum of Agreement (MOA) on April 21 that will allow owners or developers of contaminated sites to resolve their liabilities under CERCLA and RCRA, so long as the sites are remediated in accordance with the state's Land Recycling Act

voluntary cleanup program. It will also apply to cleanups of PCB-contaminated sites under the Toxic Substances Control Act. The MOA, the first state/EPA agreement consistent with EPA's 2003 One Cleanup Program, will eliminate the need for landowners and developers to deal with multiple agencies.

The MOA does not apply to properties subject to RCRA Corrective Action, although the two agencies will expand their current work-sharing agreements to ensure better coordination where properties subject to RCRA Corrective Action are also undergoing remediation under the Land Recycling Act. EPA will use Land Recycling

Act final reports as the basis for its corrective action completion determinations. The MOA also does not apply to permitted hazardous waste management units, sites on or proposed for inclusion on the NPL, sites that are subjects of enforcement actions by either agency, or RCRA Corrective Action sites for which final reports under the Land Recycling Act were approved by PADEP prior to the MOA.

The MOA requires PADEP to implement additional public participation measures under the Land Recycling Act Program in the form of language in Notices of Intent to Remediate advising the public of its

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opportunity to obtain and comment on cleanup plans and notifying those affected by releases on the contaminated property of their opportunity to request that PADEP conduct a site assessment.

Maxine M. Woelfling, Harrisburg, 717.237.4065, e-mail: mwoelfling@morganlewis.com. ■

PADEP Adopts Final Clean Fill Policy. After several controversial proposals, PADEP unveiled its final Clean Fill Policy on April 13. The policy responds to criticisms that PADEP's past attempts to regulate the placement of fill materials imposed standards that were more stringent than those adopted under the state's Land Recycling Act and created cumbersome bureaucratic hurdles to the beneficial use of fill materials.

Under the new policy, fill material (soil, rock, stone, dredged material, used asphalt, and brick, block, or concrete from construction and demolition activities) that contains concentrations of regulated substances below the Residential Statewide Health Standards in 25 Pa. Code Ch. 250 (Soil to Groundwater Numeric Values) qualifies as "Clean Fill" and may be used for any purpose without additional PADEP approval, provided that materials such as surfaces with lead-based paint, asbestos, mercury switches, PCB ballasts, and other hazardous substances are removed during demolition. If there is evidence that the fill material was affected by releases of regulated substances, it must be tested to confirm that the levels of regulated substances are below the Residential Statewide Health Standards. Fill materials cannot be blended to meet Clean Fill standards, and information regarding the origin of the Clean Fill materials and a certification that they contain regulated substances below the Residential Statewide Health Standards must be provided to and/or retained by the owner of the property on which the Clean Fill is placed.

Fill material with concentrations of regulated substances exceeding the Residential Statewide Health Standards but

below the Nonresidential Statewide Health Standards is "Regulated Fill" and may be beneficially used as part of an approved construction project in accordance with the conditions of General Permit WMGR096. Regulated Fill may not be placed on property used or planned to be used for residential purposes or on greenfield property not planned for development. Prior notice of the use of Regulated Fill must be provided to the affected municipality. A notice describing the type of fill and its locations must be recorded in the deed for the property on which the Regulated Fill is placed and must be provided to PADEP as part of registration under the General Permit. Remediation activities involving the movement of Regulated Fill within or between sites undergoing remediation under the Land Recycling Act do not require registration under the General Permit, so long as the use of the Regulated Fill is documented in the Land Recycling Act notices and reports.

Maxine M. Woelfling, Harrisburg, 717.237.4065, e-mail: mwoelfling@morganlewis.com. ■

PADEP Announces Guidelines for Identification, Tracking, and Resolution of Violations. PADEP Secretary Kathleen McGinty has directed all agency regulatory programs to review their existing inspection, enforcement, and penalty assessment guidance and develop implementation plans to conform such guidance to new department-wide standards by October. The new standards are designed to ensure timely correction of violations and include incentives for regulated entities to maintain good compliance records. Penalty assessment policies must now account for all PADEP costs associated with correcting the violations for which penalties are assessed.

Under the new guidelines, all violations identified during an inspection must be documented in writing on an inspection report within 14 days of the date of the inspection. If the violation is not resolved within 14 days of notification to the violator, a Notice of Violation must be issued. Any violation that requires more

than 180 days to resolve must be addressed in an enforceable document, such as a consent decree, administrative order, or consent order and agreement. If violations of a consent order or other enforceable document are not resolved within 60 days, PADEP will resort to judicial enforcement.

PADEP regulatory programs must also review current permit fees to evaluate whether they are sufficient to cover all inspection costs, and, if not, revise the fees. Programs that do not have authority to withhold new permits because of an applicant's violation history must assess whether such permit bars would be useful compliance tools. The directive also requires timely (i.e., within 10 days) updating of data in PADEP's E-FACTS compliance tracking system.

Maxine M. Woelfling, Harrisburg, 717.237.4065, e-mail: mwoelfling@morganlewis.com. ■

CALIFORNIA LAW

Federal Law Preempts Proposition 65 Warnings on Stop Smoking Products. Since 1986, California's Proposition 65 has withstood virtually every federal preemption challenge, until now. In *Dowhal v. SmithKline Beecham*, 2004 DJDAR 4601, the California Supreme Court held that federal law governing health warning requirements for over-the-counter nicotine-delivery products, such as nicotine gums and patches, preempts California's Prop. 65 warning requirements.

The U.S. Food & Drug Administration (FDA) uniformly requires manufacturers of over-the-counter nicotine delivery products to provide a warning on the product that states: "If you are pregnant or breast-feeding, only use this medicine on the advice of your health care provider. Smoking can seriously harm your child. Try to stop smoking without using any nicotine replacements medicine. This medicine is believed to be safer than smoking. However, the risks to your child from this medicine are not fully known." The plaintiff in *Dowhal* contended that Proposition 65 required the product label to also warn

consumers that: "This product contains nicotine, a chemical known to the State of California to cause reproductive harm," or other words to that effect. The FDA refused, however, to require or even permit manufacturers like SmithKline Beecham to use the suggested Prop. 65 warning. The differences between the FDA and the Prop. 65 warning requirements presented an actual conflict as manufacturers could not satisfy one requirement without violating the other.

Thus, in its April 15, 2004 opinion, the court held that since both federal and state requirements "cannot be satisfied simultaneously, conflict preemption exists and the state requirement must yield." Despite a carve-out in FDA-related legislation which exempts Prop. 65 from preemption, the court found that federal law preempts Prop. 65 labeling requirements for nicotine replacement products in this case. Notwithstanding the truthfulness of the Prop. 65 warning that the product causes reproductive harm, the court adopted the FDA's position that the Prop. 65 warning could mislead pregnant mothers into believing that the nicotine replacement product is just as dangerous as smoking. This would frustrate the federal policy of encouraging pregnant mothers to stop smoking. The court reasoned, therefore, that the Prop. 65 warning should be preempted by the FDA warning. Given this decision, it will be interesting to see how the Dowhal ruling will be applied in the future to other drugs with FDA labeling requirements, such as "statin" drugs used to lower cholesterol and blood pressure, and AIDS/HIV treatment drugs, including AZT.

Randolph C. Visser, Los Angeles, 213.612.2632, e-mail: rvisser@morganlewis.com. ■

California Issues Nation's First E-Waste Disposal Rules. California waste regulators have approved "pioneering" standards that will allow electronic waste recyclers and collectors to be paid by the state for keeping discarded televisions and computer monitors out of landfills.

At its April 13, 2004 public meeting, the California Integrated Waste Management Board approved the regulations. The board made only technical changes to the rules, with the understanding that the rules will be debated again when they are introduced as permanent regulations. At that point, the board may make more substantive changes to the regulations.

Promulgated pursuant to the "Electronic Waste Recycling Act of 2003," Title 14, Sections 18660.5 et seq., the regulations cover, among other electronic devices, cathode ray tubes used in televisions and monitors, liquid crystal display monitors for computers and televisions, and other specified video devices.

Legislation approved last year by then Gov. Gray Davis requires a \$6-\$10 upfront, point-of-resale fee on computers and televisions to finance a statewide "free and convenient" e-waste recycling system. The new regulations call for the revenue generated by the fees on devices to be distributed to authorized e-waste recyclers at a rate of 48 cents per pound. Recyclers would then pay authorized collectors in many cases, local governments — 20 cents per pound for e-waste, which these collectors would then transfer to the recycler.

SB 50, an e-waste cleanup measure, may be amended to require the board to limit payments to authorized e-waste recyclers that operate in the state, as opposed to the just-approved rules that provide payments to recyclers operating throughout the country.

The new regulations will allow both recyclers and collectors to charge their own fees if their costs of collecting or recycling materials exceed the payments they are receiving from the state. In other words, if a local government finds that its costs of collecting materials run higher than 20 cents per pound, it can do the math and then charge an additional fee to make up the difference.

Randolph C. Visser, Los Angeles, 213.612.2632, e-mail: rvisser@morganlewis.com. ■

California Announces Health Goal of 6 ppb for Perchlorate in Drinking Water.

California EPA's Office of Environmental Health Hazard Assessment announced on March 11, 2004 the publication of its Public Health Goal (PHG) for perchlorate, a component of rocket fuel which has been detected in a number of California drinking water sources. The PHG identifies 6 parts per billion (ppb) as a level of perchlorate in drinking water that does not pose a significant health risk. As a result, the California Department of Health Services (DHS) revised its advisory action level (AAL) to 6 ppb to conform with the PHG. DHS requires monitoring and public notice of chemicals in water supplies at the AAL and recommends removal from service of drinking water wells at 10 times the AAL, which is now 60 ppb for perchlorate.

The PHG is to be followed by a Maximum Contaminant Level (MCL) and more than likely the identification of perchlorate as a reproductive toxicant under Proposition 65.

No one is happy with the proposed standard. Environmental groups have accused the agency of caving in to pressure from the military and defense contractors by setting the final limit at the high end of the range it had earlier proposed. Defense contractors and others facing potentially expensive cleanup of groundwater contaminated by the chemical contend that the level is set far too low.

Perchlorate has been detected at or above the 4 ppb detection level in 348 drinking water sources throughout the state. Most of the contaminated sources are groundwater wells near existing or former defense contractor or military facilities in Southern California and the Sacramento area. However, perchlorate has been found in the Colorado River at levels between 4 and 6 ppb. The level of perchlorate contamination in wells has reached as high as 820 ppb. However, most readings of the chemical are in the low single- or double-digit range. Readings in excess of 40 ppb (10 times the detection limit level) have occurred in 24 wells. In

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addition to being detected in drinking water, perchlorate at low levels has been found in lettuce and some other produce.

Perchlorate is both naturally occurring and manmade. Perchlorate salts have been widely used as an oxidizer in solid propellants for rockets and missiles since the mid-1940s. Because of its finite shelf life, propellant containing perchlorate has been periodically washed out of the United States' missile and rocket inventory to be replaced with a fresh supply. As a consequence, large volumes of perchlorate have been disposed of since the 1950s. Some of this has leached into soil, and into aquifers used as drinking water sources. The chemical is highly mobile in aqueous systems and can persist for many decades under typical ground water and surface water conditions.

Perchlorate limits the intake of iodide by the thyroid gland. Reduced levels of iodide in the thyroid can disrupt thyroid hormones that regulate metabolism and growth. Although the body has the ability to adjust to short-term fluctuations in thyroid hormone levels, continuous disruption may cause a harmful imbalance, especially when a body is already under stress (e.g., due to iodide deficiency or pregnancy).

Certain population groups are particularly susceptible to the effects of perchlorate, including (1) pregnant women, (2) women who are lactating, (3) fetuses and infants, and (4) individuals with preexisting thyroid problems. Impairment of thyroid function in expectant mothers may cause developmental difficulties in their offspring, and may cause decreased learning capacity.

Defense contractors, other industries, and the Department of Defense (DOD) contend that any regulatory level for perchlorate in drinking water that is set below 100 ppb is too low. The DOD has already intimated that it might assert sovereign immunity should California try to enforce an MCL in the single- or low double-digit range. Environmental groups, on the other hand, believe that the 6 ppb PHG is a response to industry and DOD pressure and is too high.

Environmental groups are arguing that DHS should establish the new MCL using an emergency rulemaking, while opponents contend that there is no indication of an emergency to justify such a rulemaking.

Randolph C. Visser, Los Angeles, 213.612.2632, e-mail: rvisser@morganlewis.com;

David T. Peterson, Los Angeles, 213.612.1070, e-mail: dpeterson@morganlewis.com. ■

California Environmental Quality Act (CEQA): CEQA Guidelines being revised in attempt to comply with court ruling that invalidated certain Guidelines; court warns that poorly organized administrative record could lead to project invalidation; court reinforces rule that additional environmental studies requested by project opponents not required simply because they would be helpful or were requested. In a case closely watched by land-use, planning and environmental professionals, an appellate court in late 2002 invalidated several significant portions of the California administrative regulations (the California equivalent of the CFR) that sought to implement CEQA (CEQA Guidelines). *See Communities for a Better Environment (CBE) v. California Resources Agency, 103 Cal. App. 4th 98 (2002)*. In response to the ruling, the California Resources Agency (the state agency responsible for drafting the CEQA Guidelines) has prepared draft amendments to the CEQA Guidelines that attempt to comply with, and incorporate the holding of, the *CBE* case (draft amendments available at http://ceres.ca.gov/topic/env_law/ceqa/proposed). Although the amendments have not been approved by the Schwarzenegger administration, and may be revised again before approval, they do provide a preview of what the CEQA Guidelines might look like soon and offer some guidance in complying with CEQA in light of the *CBE* case.

In a clear message regarding handling a CEQA lawsuit, an appellate court last year stated: "The administrative record . . . reads as if its preparers randomly pulled out documents and threw them into binders, failing to organize them either chronologically or by subject matter . . . We publish not because the merits of this case

warrant public proclamation but because we have observed a pattern of CEQA cases with poorly prepared records making review difficult, if not impossible. We iterate to anyone who will listen: CEQA has very specific requirements regarding what findings must be in the record. Do not ignore the requirements . . ." *Protect Our Water v. County of Merced, 110 Cal. App. 4th 362 (2003)*. The lesson to be taken from *Protect Our Water* is that proponents of a controversial project (one where a litigation risk exists) should (1) consider discussing, with the governmental agency preparing the project's environmental review, a protocol for retention and organization of project documents during the project review process and (2) be closely involved in the preparation and organization of the administrative record (i.e., if a lawsuit is filed such that preparation of the record is necessary).

In rejecting a challenge to an EIR for failure to follow some survey guidelines (which apparently were issued at one time by the California Department of Fish and Game) in evaluating whether a project would impact a sensitive species (the kit fox), an appellate court last year stated that the "survey guidelines are not codified in the Public Resources Code, the Fish and Game Code or the California Code of Regulations; they are not posted on the web site maintained by Fish and Game" and found "it notable that Fish and Game did not reference the survey guidelines when" it commented on the project. *Association of Irrigated Residents v. County of Madera, 107 Cal. App. 4th 1383 (2003)* (project opponents had submitted a copy of the survey guidelines as an attachment to a letter commenting on the project). This case provides some helpful guidance in responding to requests from project opponents for additional environmental analysis, particularly when such requests are based on documents produced by other governmental agencies.

James W. Andrew, San Francisco, 415.442.1424, e-mail: jandrew@morganlewis.com. ■