

DECEMBER 2004

## ELECTION IMPLICATIONS

After billions of dollars of campaign expenditures and 115 million ballots cast, in the end it came down to fewer than 150,000 votes in Ohio – not a large number, but one just out of the Kerry campaign’s reach. The hoopla is now over and our government still functions. It is time for us to assess the results – more specifically, what effect the outcome of the election might have on the environmental protection regulatory programs.

The headlines all focused on the Presidential campaign. That was where the big money was spent, and where the deepest emotions were stirred. Yet that may not be where the strongest effects of the election will be felt. In comparing the reality of a second Bush term with the might-have-been alternative of a Kerry administration, the greatest effects may be in the column of things that will not change. The environment was never up there with Iraq, terrorism, the economy, or family values as a driver of voting patterns, but it was a second-tier topic of national interest on which the two candidates clearly presented contrasting plans, with Kerry offering a promise of change and Bush committed to maintaining the status quo.

President Bush seemed focused on the Btu side of the environment/energy tug of war, while Kerry lent his weight to the other. A Kerry administration presumably would have worked to demonstrate a stronger concern for environmental values. One possible action might have been a more supportive approach to the Kyoto Treaty and efforts to address global warming. That was the issue on which President Bush took sides against environmental measures – causing his first EPA administrator, Christie Whitman, to begin her long slide toward an early retirement. It can hardly be conceived that President Bush now will change his position.

There are other issues on which the White House will exert its influence, but the

issues probably will be few, apart from the selection of leadership for EPA and the Department of the Interior. It is unclear whether Michael Leavitt and Gale Norton will remain in their respective positions into the second term. Historical evidence indicates that extensive turnover of leadership is the norm. For Leavitt, new in the job, remaining at EPA would perhaps be an option. But with a wide range of other top slots opening up, he might well go elsewhere. If he moves on, EPA will experience another round of turmoil, even before the recent changes have been absorbed. Confusion in the ranks, resulting from uncertainty over who’s in charge, could exert a more profound effect on Agency performance than any deliberate policy change.

It seems unlikely, however, that deliberate policy change will be the order of the day. It has always been intriguing how little direct impact the Presidency normally has on the mid-tier issues of environmental protection. Most senior Agency officials find that congressional committees exert a more immediate and forceful influence over Agency policy and action. In this case, however, both White House and congressional forces are likely to follow the path of restraint. Environmental protection no longer commands automatic support from the body politic. Even the media have grown more wary of shrieking environmentalists. Yet the movement still has the power to retaliate against efforts to dismantle the framework of protection established over the past 30 years.

When Ronald Reagan rode into town, Republicans were carried away in exuberance. Remember James Watt and Ann Gorsuch? Likewise with Newt Gingrich and his ill-fated Contract with America. But people learn from experience, and it seems unlikely that efforts to dismantle environmental safeguards will appear to offer a political benefit to those who are

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## ELECTION IMPLICATIONS

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now in power. To recall an old phrase, this may be a season of benign neglect.

One major difference between the beginning of this term and President Bush's first term is that he will not need to deal with last-minute rules promulgated just before he took office. In the final hours of the Clinton administration, EPA issued several major rules that the Bush team sought to immediately stay, and eventually had withdrawn. The flak was heavy, but there is no need to plunge into such controversy this time around.

The conspicuous feature will be what you don't see – bold new initiatives. In the EPA sphere, the regulatory programs will roll forward on the momentum of past mandates, not throttled back in rejection of their goals but not often breaking new ground either. Funding limitations will reinforce the restraints, since money is going to be very tight across the entire domestic front for a very long time to come. Renewal of the Superfund taxes is probably out of the question. Major new efforts in any of the EPA programs thus will be difficult to launch – due to both policy and financial limitations.

Similar dynamics are likely to occur in the other natural resource departments and agencies, such as Interior, Agriculture, and the NOAA, where different political constituencies battle over a separate though related set of issues such as wetlands, logging and ranching, and energy. Political pressures may bring some of those issues more quickly to a national

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boiling point, with potential confrontations over proposals to soften protections for endangered species or to allow drilling in the Arctic National Wildlife Refuge. When the fireworks are over, however, it is likely that little will change.

It may be that the motto for the next four years will be "steady as she goes" – minimizing conflicts and polarization, maintaining current programs while adding little to them, seeking regulatory reform without challenging legal foundations, harvesting experience and tweaking current strategies.

But do not think that the world will stand still. Science continues to collect data on the human health effects of exposure to hazardous substances – in some cases data that dictate tighter controls. The polar ice caps are shrinking. Unplanned development continues throughout the country, squeezing out open space in densely populated areas and exacerbating pressures on limited water supplies in other areas. Non-point source pollution continues to grow as a threat, and the regulators really have found no solution to it. Our wetlands continue to shrink. And where will the energy come from?

Across the globe, protection of environmental values will remain as one of the profound challenges to a world of growing populations, rising economic expectations, and galloping resource consumption. For the immediate future we will remain in a political lull, but the forces of nature will quietly push back against us. It could be a time for thoughtful people to plan for the next round of crises. *John Quarles, Washington, 202.739.5150, e-mail: jqarles@morganlewis.com. ■*

## CLEAN AIR ACT

**EPA Issues Final Rule Governing Hazardous Air Pollutants (HAPs) from Certain Boilers and Process Heaters.** The rule, published on September 13, establishes national emission standards to reduce HAP emissions from thousands of industrial, commercial, and institutional boilers and process heaters located at major HAP sources. The rule regulates boilers and process heaters at a wide range of facilities if they combust specified fuels and are above certain

threshold capacities, and imposes emission limits on certain units reflecting maximum achievable control technology (MACT). The most stringent standards under the rule apply to boilers and process heaters burning solid fuels, such as coal or wood. Other units, such as small units burning gaseous fuels, may be subject to no or very limited requirements. Existing units have three years to comply with relevant emission standards, and new or reconstructed units must comply upon startup. Pollutants targeted under the rule include mercury, particulate matter (as a surrogate for non-mercury metallic HAPs), hydrogen chloride (as a surrogate for inorganic HAPs), and carbon monoxide (as a surrogate for organic HAPs, including dioxins). The rule also includes notification, emissions testing, monitoring, work practice and record-keeping requirements. EPA provides various compliance alternatives in lieu of installing control devices, including emissions averaging and a fuel analysis option for certain units. In a controversial move, EPA has included provisions that allow facilities to comply with risk- or health-based standards in lieu of complying with certain technology-based emission limits, provided they can show insignificant risk to surrounding communities based on methodologies set forth in the rule. On November 12, 2004, several environmental groups filed petitions for review of these risk-based compliance alternatives in the D.C. Circuit Court of Appeals, as well as petitions for reconsideration with EPA. 69 Fed. Reg. 55,218 (Sept. 13, 2004). *Jeffrey N. Hurwitz, Philadelphia 215.963.5700, e-mail: jhurwitz@morganlewis.com. ■*

**EPA Inspector General Issues Report Alleging that EPA's Equipment Replacement Provision (ERP) Rule Hampers Utility New Source Review (NSR) Enforcement.** On September 30, 2004, EPA's Inspector General issued a report focusing on the effects of EPA's ERP rule on the Agency's NSR enforcement activities against electric utilities. The ERP rule, issued in October 2003, clarifies the routine maintenance, repair and replacement (RMRR) exclusion from the NSR program. Among other conditions, the rule provides that an activity can qualify for the RMRR exclusion from NSR requirements if the costs of replacement

components do not exceed 20% of the replacement value of the relevant process unit. The rule is currently stayed by the D.C. Circuit Court of Appeals pending the outcome of a challenge by a number of states and environmental groups. The report recounts the history of EPA's NSR enforcement initiative, and indicates that EPA's enforcement actions have been effective in compelling utilities to install pollution controls and to significantly reduce emissions through settlements covering dozens of electric utility units. It then goes on to state that the ERP rule has "seriously hampered" settlement activities,

existing enforcement cases, and the development of future cases. In particular, it indicates that the provision authorizing replacement projects that come within the 20% replacement cost threshold to be excluded from NSR encourages utilities to forego settlement discussions with EPA. The report includes a number of recommendations, including that EPA consider a range of replacement cost thresholds lower than the ERP rule's 20% level, including a 0.75% threshold recommended by some EPA enforcement staff, and that EPA pursue enforcement aggressively against all facilities "found

in violation of NSR requirements." The Inspector General also notes that EPA generally disagreed with the draft of the report, asserting that it contained "major flaws" and "was inaccurate, misleading, incomplete and superficial."

Evaluation Report, *New Source Review Rule Change Harms EPA's Ability to Enforce Against Coal-fired Electric Utilities*, EPA Office of Inspector General, Report No. 2004-P-00034, September 30, 2004. Jeffrey N. Hurwitz, Philadelphia, 215.963.5700, e-mail: [jhurwitz@morganlewis.com](mailto:jhurwitz@morganlewis.com). ■

## SUPERFUND

**Supreme Court Eliminates Contribution Cause of Action for Voluntary or State-Ordered Cleanups Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).** On December 13, 2004, the United States Supreme Court sharply limited the rights of parties that remediate contaminated sites voluntarily or pursuant to an order of a state agency. In *Cooper Indus. Inc., v. Aviall Servs., Inc.*, U.S. No. 02-1192 (Dec. 13, 2004), the Court held that a party may assert a claim for contribution costs under Section 113(f)(1) of CERCLA only if it previously had been either compelled by the federal government to clean up contamination under Section 106 or sued by another party for response costs under Section 107.

In this case, Aviall Services, Inc. (Aviall) sought contribution from Cooper Indus., Inc. (Cooper) pursuant to CERCLA Section 113(f)(1), for costs incurred by Aviall in remediating properties it owned in Texas. Aviall purchased the properties from Cooper in 1981 and thereafter discovered contamination, which it was ordered by the Texas Natural Resource Conservation Commission to remediate. Cooper successfully argued before the United States District Court for the Northern District of Texas and before a divided panel of the Fifth Circuit Court of Appeals that Aviall could not assert a CERCLA Section 113(f) contribution claim because it had not first been sued under either Section 106 or 107 of CERCLA. The Fifth Circuit, sitting en banc, reversed those rulings.

The issue of whether a party may bring a CERCLA Section 113(f)(1) contribution

action in the absence of a prior Section 106 or 107 action against it arose as the result of an apparent inconsistency between the first and last sentences of CERCLA Section 113(f)(1). The first sentence reads: "Any person may seek contribution from any other person who is liable under section [107(a)] of this title, during or following any civil action under section [106] of this title or Section [107] of this title." On the other hand, the last sentence reads: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under Section [106] of this title or Section [107] of this title."

By a 7-2 vote, the Supreme Court reversed the en banc decision of the Fifth Circuit, holding that a CERCLA 113(f) contribution claim may be brought only if the plaintiff first had been sued under either Section 106 or 107 of CERCLA. The Court found the language of the statute to be clear and noted that Congress would not have included "during or following" in the first sentence of Section 113(f)(1) if it intended that contribution actions could be brought at any time. The Court further reasoned that if contribution actions could be brought at any time, then Section 113(f)(3)(B), which expressly authorizes contribution actions after settlement, would be superfluous. In addition, the Court noted that while Section 113(g)(3)(A) provides a statute of limitations for contribution actions beginning at the date of judgment or at the date of settlement, that section is silent on a limitations period if neither judgment nor settlement ever occurs. With respect to the last sentence of Section 113(f)(1), the Court explained that that

section does not give rise to a cause of action, but merely clarifies that the first sentence does not "diminish" a cause of action for contribution that "may exist independently of [Section 113(f)]."

The Court's ruling likely will impact the decision of a potentially responsible party to undertake voluntary remediation activities. Since the prospect of recovering contribution costs under Section 113(f)(1) is now unavailable in the absence of a prior action, a potentially responsible party could delay cleaning up a site (notwithstanding its willingness to do so) until it is compelled by the federal government to remediate or sued for response costs. In addition, the Court's ruling undoubtedly will spur numerous motions to dismiss by defendants in existing cases in which responsible party plaintiffs, who have not previously been sued, assert claims for contribution under Section 113(f)(1). Whether those responsible party plaintiffs will be able to recast their claims as ones for response costs under Section 107(a) was left open by the Court's decision. The dissent, which did not disagree with the Court's interpretation of Section 113(f)(1), nevertheless believed a responsible party has a right to maintain an action for response costs under Section 107(a). Indeed, following dismissal of their Section 113(f)(1) claims, plaintiffs likely will ask the district courts to uphold their requests for cleanup costs on that basis. The Court's decision could send a signal to Congress for legislative action to establish unequivocally a party's right to seek contribution under CERCLA at any time. William Pufko, Philadelphia, 215.963.5194, e-mail: [wpufko@morganlewis.com](mailto:wpufko@morganlewis.com). ■

## STATE LAW *Developments*

### NEW JERSEY

**New Jersey adopts new arsenic standards for drinking water.** On November 4, 2004, New Jersey Department of Environmental Protection Commissioner Bradley M. Campbell announced the adoption of new rules that establish new stringent arsenic standards for drinking water and mercury emissions from coal-fired power plants. The rules will reduce mercury emissions from the state's 10 coal-fired power plants by up to 90% by the end of 2007 and will cut in half the limit for arsenic in drinking water by 2006. The new regulations also mandate a reduction of 75% in mercury emissions from the state's six iron and steel smelters by the end of 2009. The state estimates that iron and steel manufacturing plants are the largest New Jersey-based sources of mercury emissions, with much of their materials coming from automobiles shredded for scrap metal. The rules also call for a further reduction of mercury emissions from New Jersey's five municipal solid waste incinerators to at least 95% below 1990 levels by 2011. In addition, the mercury rules contain standards for medical waste incinerators that are already being met by the three facilities operating in New Jersey. The new arsenic rules establish a maximum contaminant level of 5 parts per billion (ppb) for arsenic concentrations in drinking water, effective January 23, 2006. In February 2002, the federal government adopted a 10-ppb arsenic drinking water standard, also effective January 23, 2006. No state other than New Jersey has adopted an arsenic standard as protective as 5 ppb.

### NEW YORK

**Highest Court Holds Gas Station Owner Liable for Spill by Prior Owner.** In a decision that expands the universe of parties potentially liable for cleanup costs under the state's Oil Spill Act, the New York Court of Appeals ruled that the owner of a gas station was strictly liable under the Oil Spill Act for cleanup costs related to an underground storage tank leak that occurred before it purchased the station. *State of New York v. Speonk Fuel Inc.*, 2004 WL 2339553. The Oil Spill Act imposes

strict liability upon "[a]ny person who has discharged petroleum." Navigation Law § 181(1). Unlike CERCLA and similar state statutes, the Oil Spill Act does not impose strict liability upon owners and operators of facilities, regardless of when a spill occurred. The Court of Appeals has previously interpreted the "discharger" concept liberally, to include a property owner that did not cause a discharge but had the capacity to control the activities of a tenant that resulted in a discharge. *State of New York v. Green*, 729 N.Y.S.2d 420, 754 N.E.2d 179 (2001). In *Speonk*, the court went even further, holding liable a party that did not own the property at the time of the discharge.

In *Speonk*, the new owner, Speonk Fuel, Inc., was aware at the time it purchased the property that a gasoline tank at the property had leaked, and that the New York Department of Environmental Conservation (DEC) had asked the owner to investigate and remediate any groundwater contamination. After the property was sold, the former owner went out of business and its principal left the country. The DEC then investigated and cleaned up the property, and sought reimbursement from both the former owner and Speonk. In holding Speonk liable, the Court of Appeals stated: "While we decline to specify any particular action that Speonk may have undertaken, we consider it sufficient for purposes of liability here that, with knowledge of its vendor's discharge of oil and the need for cleanup, Speonk did nothing." Citing its prior decision in *Green*, the court said liability was predicated on a "potentially responsible party's capacity to take action to prevent an oil spill or to clean up contamination resulting from a spill." Although it did not specify what action Speonk should have taken, it cited the state's argument that Speonk "might have negotiated a purchase contract requiring [the former owner] either to remedy groundwater and soil contamination . . . or to provide an escrow fund for this purpose as a condition of closing." *John Rousakis, New York, 212.309.6082, email: jrousakis@morganlewis.com.*

### PENNSYLVANIA

**Pennsylvania Supreme Court Defines Duties of Upstream Owners of Water Supply Dams and Reservoirs.** The Pennsylvania Supreme Court reversed the Pennsylvania Superior Court's decision that an upstream riparian owner negligently designed, maintained and operated its water supply dams and reservoirs, thereby causing the destruction of downstream properties during heavy rainfalls related to 1985's Hurricane Gloria. *Shamnoski v. PG Energy*, 2004 Pa. LEXIS 2225 (Pa. 2004). The spillways of the dams were not adequate to pass the Probable Maximum Flood or portions thereof, as required by the Pennsylvania Department of Environmental Protection's (PaDEP's) regulations, but the dams were not overtopped during the hurricane event. The lower court found that although the dams did not fail, the owner had a responsibility under § 13 of the Dam Safety and Encroachments Act, 32 P.S. §§ 693.1 *et seq.* (DSEA), to draw down the reservoir and warn the downstream property owners of an impending emergency from floodwaters, and that its failure to do so constituted negligence per se. The Supreme Court distinguished between the purposes of flood control dams/reservoirs and water supply dams/reservoirs and extensively analyzed the provisions of the DSEA and its implementing regulations at 25 Pa. Code Ch. 105. Citing the Third Circuit's opinion in *Beaver Valley Power Co. v. National Engineering-Contracting Co.*, 883 F.2d 1210 (3d Cir. 1989), the court found that a violation of § 13 of the DSEA did not constitute negligence per se. Adopting PaDEP's interpretation of § 13 of the DSEA, the court held that the duty of an owner to operate and maintain its dam in accordance with its permits and PaDEP's regulations, to immediately notify PaDEP and downstream communities, and to take all necessary actions to protect life and property, is directed to preserving the integrity of the dam and not to preserving downstream property. Applying common-law definitions of the duties of upstream riparian owners, the court then concluded that because PG Energy did not channel or direct any

floodwaters into the watershed or unreasonably increase the quantity of the waters, it was not responsible for any damages suffered by the Shamnoskis. *Maxine M. Woelfling, Harrisburg, 717.237.4065, e-mail: mwoelfling@morganlewis.com.*

**Additional NO<sub>x</sub> Control Requirements Adopted.** The Pennsylvania Environmental Quality Board (PaEQB) adopted regulations imposing NO<sub>x</sub> control requirements on Portland cement kilns and large stationary internal combustion engines (those emitting more than 153 tons of NO<sub>x</sub> in the 1995 ozone control season and thereafter) throughout the state, and certain boilers, turbines, and stationary internal combustion units in southeastern Pennsylvania. The requirements, which apply during the ozone control season of May 1–September 30, are designed to ensure continued attainment of the one-hour ozone standard in southeastern Pennsylvania and satisfy Pennsylvania's obligations under the NO<sub>x</sub> State Implementation Plan call. The regulations will become effective upon publication in the *Pennsylvania Bulletin* and will be implemented during the 2005 ozone control season. *Maxine M. Woelfling, Harrisburg, 717.237.4065, e-mail: mwoelfling@morganlewis.com*

**Triennial Review of Water Quality Standards Completed.** As part of the triennial review of water quality standards mandated by § 303 of the Clean Water Act, 33 U.S.C. § 1313, the PaEQB, pursuant to its authority under the Clean Streams Law, 35 P.S. § 691.1 *et seq.* (CSL), adopted revisions to the state's water quality standards at its August 17, 2004 meeting. The revisions will become effective on publication in the *Pennsylvania Bulletin*. The major changes involve a clarification to 25 Pa. Code § 93.2, which defines the scope of the water quality standards, and revisions to the dissolved oxygen criteria in 25 Pa. Code § 93.7. The current version of § 93.2 indicates that the standards will be considered by PaDEP "in its regulation of discharges." Although PaDEP traditionally

interpreted this language as applying to point and non-point source discharges, the language has been amended to state that PaDEP would consider the water quality standards in its implementation of any regulatory program protecting surface water quality. For example, PaDEP may now consider the water quality standards in evaluating the surface water impacts of a proposed water supply well, as the Pennsylvania Safe Drinking Water Act (PaSDWA) requires compliance with the CSL before a permit may be issued. The changes to the dissolved oxygen criteria recognize differences between flowing waters and naturally stratified lakes, ponds, and impoundments. The epilimnion, or upper layer, of such naturally stratified lakes will be treated the same as flowing waters for purposes of application of the dissolved oxygen criteria. A non-numerical generic standard will be applicable to the hypolimnion, or lower level, of a stratified lake or impoundment. In connection with the revisions to the water quality standards, PaDEP revised its Toxics Management Strategy at 25 Pa. Code Ch. 16. The major substantive changes included updating the chronic conversion factor for mercury so that it applies to all waters and adding references to updated analytical methods in 40 C.F.R. Pt. 136. *Maxine M. Woelfling, Harrisburg, 717.237.4065, e-mail: mwoelfling@morganlewis.com.*

**Environmental Laboratory Accreditation Standards Proposed.** The PaEQB proposed standards to implement the requirements of the Environmental Laboratory Accreditation Act, 27 Pa. C.S. §§ 4101 *et seq.*, at its August 17, 2004 meeting. If adopted, the regulations will apply to any environmental laboratory that analyzes samples of drinking water, solid or chemical materials, or wastewater used for purposes of demonstrating compliance with environmental regulatory programs. The proposed program builds upon the element of the existing laboratory accreditation program under the PaSDWA and includes accreditation standards, quality control procedures, personnel requirements, and recordkeeping and reporting requirements.

It also includes an option for environmental laboratories to seek accreditation under the National Environmental Laboratory Accreditation Conference (NELAC) program to comply with Pennsylvania requirements. Currently, only laboratories analyzing samples used to demonstrate compliance with the PaSDWA and the Oil and Gas Act, 58 P.S. §§ 601.101 *et seq.*, are required to be accredited. The proposed regulations will be published in the *Pennsylvania Bulletin* with a 30-day comment period. *Maxine M. Woelfling, Harrisburg, 717.237.4065, e-mail: mwoelfling@morganlewis.com.*

**Public Interest Group Seeks Mercury Emissions Controls.** The PaEQB accepted a petition from Citizens Concerned for Pennsylvania's Future (PennFuture) and nearly 40 other organizations and individuals requesting the adoption of regulations controlling emissions of mercury. The PennFuture petition asserted that EPA's proposed MACT standards and other programs for controlling mercury emissions from coal-fired generating facilities are inadequate and that the state should adopt its own program based on regulations under consideration by the New Jersey Department of Environmental Protection. The New Jersey proposal would require that mercury emissions from coal-fired boilers not exceed 3.0 mg/MWh, or, in the alternative, that the boilers achieve a 90% reduction efficiency for mercury emissions. PaDEP has heavily criticized EPA's proposed mercury MACT standards, which are slated to be finalized in March 2005. The PaEQB concurred with PaDEP's recommendation to accept the petition for further substantive consideration because it was complete and otherwise met the criteria in the PaEQB's policy regarding acceptance of rulemaking petitions. Notice of the acceptance of the petition was published at 34 Pa. Bull. 5992 (Oct. 30, 2004), and PaDEP will now have at least 60 days to evaluate the substantive aspects of the petition and recommend to the PaEQB whether a rulemaking should be developed. PaDEP may also request the PaEQB to defer its substantive recommendations until it

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## STATE LAW *Developments*

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can evaluate EPA's final action on the mercury MACT standards. *Maxine M. Woelfling, Harrisburg, 717.237.4065, e-mail: mwoelfling@morganlewis.com.*

### CALIFORNIA

**Court Approves Major Oil Company Prop 65 Settlement.** When Communities for a Better Environment (CBE) took on the major oil companies under California's Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop 65), the action was billed as the largest environmental case in California history. *Communities for a Better Environment v. Tosco*, SFCS 300595. CBE alleged that the defendants knowingly released cancer-causing chemicals from petroleum storage facilities throughout the state, which included refineries, terminals and numerous service station sites. Though setbacks for CBE quelled the early hyperbole, recently approved settlements by the Atlantic Richfield Company, BP Oil Marketing, Shell Oil Company, ChevronTexaco Corporation, and others have drawn attention in the environmental community.

Initially filed in 1999, CBE's action sought penalties, injunctive relief and attorneys' fees, claiming benzene and toluene released from fuel storage facilities posed a threat to drinking water resources throughout the state. The oil company defendants won an early victory, however, when then Superior Court Judge Stuart Pollak ruled that only the initial release of fuel from the storage facility – not subsequent "passive migration" through the soil and groundwater – was actionable under Prop 65. The rationale behind Judge Pollak's ruling was subsequently confirmed in *Consumer Advocacy Group, Inc. v. ExxonMobil Corp.*, 128 Cal. Rptr. 2d 454

(Cal. Ct. App. 2002). While this ruling limited the reach of CBE's claims, the standard would still have to be applied to hundreds of facilities, which presented a complex case management challenge for Judge Richard Kramer, who assumed the case from Judge Pollak.

The case proceeded on two tracks, one designed to winnow out those sites where relief was unavailable based upon the "passive migration" ruling, and another wherein several representative sites may be prepared for trial. ExxonMobil was the first defendant assigned to try representative sites, which included its Torrance Refinery; however, ExxonMobil reached a resolution with CBE earlier this year.

The ExxonMobil settlement included no penalties. ExxonMobil agreed to install upgraded environmental protection facilities at its refinery and service station sites, conduct inspections, and provide remote monitoring for underground storage tank systems. ExxonMobil also agreed to pay CBE \$1.7 million in attorneys' fees. While the Attorney General's office disavowed CBE's self-promoting justification for the attorneys' fee award, the overall package passed agency muster. Calling the settlement "eminently reasonable," Judge Kramer approved its terms on March 24, 2004.

Recently, Shell Oil Company, Atlantic Richfield Company, Thrifty Oil Company, ChevronTexaco and World Oil Corporation followed ExxonMobil in resolving the case. Shell agreed to install secondary containment at 130 service stations at an estimated cost of \$45 million. In addition,

it agreed to undertake monitoring and inspection projects at terminals and refineries, as well as provide additional secondary containment, at an estimated cost of \$40 million. Shell further agreed to pay \$1.8 million in fees and costs to CBE. ChevronTexaco agreed to upgrade tanks and install remote monitoring at Chevron service stations, at an estimated cost of \$3.4 million. ChevronTexaco also agreed to undertake upgrade projects at several terminals and its El Segundo Refinery at a cost of approximately \$3.5 million. The ChevronTexaco deal called for a \$1 million payment to CBE in fees and costs. For its part, Atlantic Richfield will provide upgraded leak detection methods at 63 service stations at a cost of approximately \$1.4 million, and spend \$5 million on environmentally related improvements at its Carson Refinery. Atlantic Richfield also agreed to pay a \$1 million penalty, and \$3.35 million in fees and costs to CBE.

All told, CBE has received almost \$8 million of the \$9 million it claimed in fees and costs. There are still several defendants remaining in the *CBE v. Tosco* action, including Ultramar (Valero), Tosco (ConocoPhillips), and Unocal Corporation.

More potentially precedent-setting rulings may result from the recent settlements. The *Consumer Advocacy Group* action cited above is still active. Those defendants settling in *CBE v. Tosco* plan to seek summary judgment, arguing that res judicata would bar further pursuit of CAG's claims. We will keep you informed of developments in future newsletters. *Michael T. Zarro, Los Angeles, 213.612.7362, e-mail: mzarro@morganlewis.com.*

## HIGHLIGHTS

***We encourage you to visit the Los Angeles County Bar Association Environmental Website***

([www.lacba.org/showpage.cfm?pageid=4086](http://www.lacba.org/showpage.cfm?pageid=4086)) for materials from the April 1, 2004 Environmental Super Symposium: *Total Recall or Moderation: What's in Store in 2004 for the Golden State's Environment?* Of special interest are keynote speeches by California EPA Secretary Terry Tamminen and Los Angeles City Attorney Rocky Degadillo, transcripts of which are available on the website, as well as information on panels moderated by Morgan Lewis attorneys Tom Meador (*Contaminated Properties Litigation: New Theories and Trial Strategies*) and Randy Visser (*Regulatory Risky Business in an Uncertain World: Is California on the Road to Adopting the Precautionary Principle?*).

## SPECIAL INSERT: EPA'S PROPOSED "ALL APPROPRIATE INQUIRIES" RULE IMPOSES NEW DUTIES ON ENVIRONMENTAL PROFESSIONALS AND THEIR CLIENTS

EPA's proposed "All Appropriate Inquiries" rule, if adopted as proposed and fully embraced by the market, could create significant changes in customary practice for pre-acquisition environmental due diligence. In addition to codifying the steps that must be followed to qualify for new federal liability protections, the proposal would impose new duties on the "users" of environmental site assessments who seek such protections. The proposal would create a highly collaborative process that would call upon environmental professionals, their clients, and their legal and real estate advisors to clarify their respective roles early in a transaction, and to exercise a heightened degree of scrutiny.

### BACKGROUND

In the 2002 Brownfields Amendments (formally known as the "Small Business Liability Relief and Brownfields Revitalization Act"), Congress created new defenses to CERCLA liability for "bona fide purchasers" and "contiguous property owners." First-time purchasers or lessors of property can qualify for these conditional liability defenses if they conduct "all appropriate inquiries" before they acquire their property interests, provided they meet relevant statutory criteria. After a long delay, EPA on August 26, 2004 issued its proposed standard for "all appropriate inquiries" (69 Fed. Reg. 52542; available on the web at <http://www.gpoaccess.gov/fr/index.html>; enter "all appropriate inquiries"). The proposal is also intended to clarify the requirements necessary to establish the "innocent landowner defense" created by the 1986 Superfund Amendments.

Significantly, the proposal focuses only on the *pre-acquisition* diligence process, and does not discuss in detail the post-acquisition duty of "appropriate care," which is the subject of EPA's March 2003 "Common Elements Guidance" (<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf>). Nonetheless, the preamble makes clear that parties must pay close attention to "reasonable care" requirements after purchase to preserve these conditional defenses.

New landowners and lessors may qualify for the "innocent landowner defense" or the "contiguous property defense" if they follow the "all appropriate inquiry" process and do not identify releases or threatened releases of hazardous substances, provided they meet relevant statutory criteria and exercise "appropriate care" after acquisition. (Among other things, they must "take reasonable steps to stop a release, prevent a threatened release,

and prevent exposure to a release or threatened release.") New owners or lessors who identify contamination during the "all appropriate inquiry" process may qualify for the "bona fide purchaser defense" if they meet relevant statutory criteria and satisfy "appropriate care" obligations after acquisition. (To claim the "bona fide purchaser" or the "contiguous property owner" defense, a party must also demonstrate that it is neither potentially liable to nor affiliated with any other party who is potentially liable for response costs. A "bona fide purchaser" or "innocent purchaser" must show that it bought the property after all disposal of hazardous substances, and the "contiguous property owner" must show that it did not cause or contribute to the release.)

### NEW PERFORMANCE CRITERIA

EPA's proposal and regulatory preamble add flesh to the consensus position adopted in November 2003 by a committee of stakeholders in a negotiated rulemaking under the auspices of the Federal Advisory Committee Act (FACA). The FACA committee chose to forego a prescriptive checklist in favor of a "performance-based approach," which calls upon the environmental professional to exercise best professional judgment in key areas (and will call upon the courts to exercise their discretion in determining whether the report meets the statutory criteria). *Both* the environmental professional *and* the user must "review and evaluate the thoroughness and reliability of the information gathered in complying with each standard and practice in this subpart, taking into account information gathered in the course of complying with other standards and practices of this subpart."

In advancing the proposal, EPA declined to follow or even to reference any portion of the prevailing standard for environmental site assessments (issued by the American Society of Testing and Materials, or ASTM) on the ground that the standard does not address all of the statutory prerequisites identified in the Brownfields Amendments (most notably, interviews with past owners, operators and occupants; inspections of adjoining properties; lien searches; and evaluation of the relationship of the purchase price to the value of the property if it was not contaminated). (EPA notes that it is prepared to reference a new industry standard in the final rule, if one emerges. ASTM is actively working to develop a new standard.)

### IDENTIFYING AN "ENVIRONMENTAL PROFESSIONAL"

At the outset, users of environmental site assessment services will need to verify that the individual or firm they are using meets the rule's new definition of "environmental professional." Consultants can qualify as environmental professionals if they are licensed-professional engineers, professional geologists, or government-licensed or certified professionals with 3 years, relevant experience; college graduates with science or engineering degrees and 5 years, relevant experience; or college graduates of any background with 10 years, relevant experience at the time the rule is finalized. EPA will not act as an accrediting organization, nor will it audit the services of environmental professionals. Instead, parties who assert the relevant defenses in a court proceeding will have the burden of establishing that the environmental professional meets the regulatory qualifications.

Individuals who do not meet the criteria can perform some of the tasks, provided that a qualified professional supervises their work and signs a declaration that the report satisfies all elements of the rule. Users will want to ensure that the environmental professional is adequately supervising the work of any non-professionals under his or her charge.

### NEW DILIGENCE REQUIREMENTS

The proposed rule adds a number of new requirements that are likely to make environmental site assessments costlier and more time consuming. Key new requirements include the following:

**INTERVIEWS** Past owners and operators must now be interviewed. In addition, the rule adds a controversial requirement to interview neighbors under certain circumstances. Neighbor interviews are mandatory for abandoned properties that appear to have had uncontrolled access. To the extent necessary to meet the rule's performance criteria, neighbor interviews may also be required as part of the environmental professional's obligation to collect "commonly known or reasonably ascertainable information" about the property.

**INSPECTIONS OF ADJOINING PROPERTIES** Adjoining properties must be visually inspected from the property line or a right of way, with particular attention to areas where hazardous substances may have been managed.

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## SPECIAL INSERT: EPA'S PROPOSED "ALL APPROPRIATE INQUIRIES" RULE IMPOSES NEW DUTIES ON ENVIRONMENTAL PROFESSIONALS AND THEIR CLIENTS

(continued from page 7)

**LIEN SEARCHES** The *user* must search for environmental liens and provide this information to the environmental professional. These searches may be difficult because some liens are not recorded, and recording methods vary from jurisdiction to jurisdiction.

**EVALUATION OF PURCHASE PRICE** The *user* must evaluate whether the purchase price reasonably reflects the market value of the property were it not contaminated. Formal real estate appraisals are not required. The *user* is not expected to determine the precise value of the property, but instead whether the purchase price reasonably reflects its market value.

**SPECIALIZED KNOWLEDGE** The *user* has a duty to ensure that its "specialized knowledge" regarding the property and the circumstances surrounding it is conveyed to the environmental professional early in the process and is taken into account in the final report. Cases cited by EPA suggest that the general sophistication of the purchaser, as well as specific facts in his or her command, should be evaluated by courts reviewing whether the "all appropriate inquiries" rule has been satisfied.

### EVALUATING DATA GAPS

Both the environmental professional and the *user* must identify any data gaps (defined as lack of information or inability to obtain information) that affect the ability to identify releases or potential releases. The proposal does not provide concrete criteria for determining when a data gap is significant, but rather calls on the environmental professional to comment on the significance of the data gap in view of the totality of information collected under all aspects of the "all appropriate inquiry" process. EPA directs environmental professionals to look to the totality of the circumstances in considering the "degree of obviousness of the presence or likely presence of contamination" and the ability of the landowner to detect contamination upon reasonable investigation. (These latter criteria are considerations required under the 1986 CERCLA amendments to qualify for the innocent purchaser defense.)

The preamble clarifies that a person can meet the "all appropriate inquiry" standard even if the report contains data gaps. Significantly, it notes that sampling and analysis are not required to fill data gaps, but

may be valuable to address certain data gaps. It goes on to say that "the fact that the all appropriate inquiry standards would not require sampling and analysis may not prevent a court from concluding that, under the circumstances of a particular case, sampling and analysis should have been conducted" to satisfy the "degree of obviousness" and "ability to detect" considerations. 69 Fed. Reg. 52568. Furthermore, EPA suggests that failure to fill data gaps after purchase could limit or eliminate the ability to claim the defenses.

This cautionary language, and similar cautions about "continuing obligations" after purchase, will require parties to think very carefully about the need for sampling either before or after the acquisition. EPA's preamble repeats in multiple sections the caution that "[a]n inability to identify a release or threatened release during the conduct of all appropriate inquiries does not negate the landowner's ongoing or continuing responsibilities under the statute, including the requirements to take reasonable care to stop the release, prevent a threatened release, and prevent exposure to the release or threatened release once the landowner has acquired the property." EPA clarifies that these obligations are not contingent on the results of "all appropriate inquiries."

Taken together, these statements create strong incentives to sample after purchase to prevent loss of the applicable defenses. EPA's "Common Elements Guidance" in fact suggests a bias toward sampling by stating that "prepurchase 'appropriate inquiry' will most likely inform the bona fide prospective purchaser as to the nature and extent of the contamination on the property and what might be considered reasonable steps regarding the contamination" after purchase.

In addition to the reasonable care requirements, the purchaser's continuing obligations include the responsibilities (1) to comply with land-use restrictions; (2) not to impede the effectiveness of institutional controls; (3) to cooperate with and provide access to persons undertaking response actions; and, in the case of the bona fide prospective purchaser and contiguous property owner; and (4) to comply with information requests and subpoenas and provide legally required notices.

### RESTRICTIONS ON SHELF LIFE AND TRANSFERABILITY

In addition, the rule would require both authors and users of environmental site

assessments to be alert to "shelf life" and "transferability" issues, which will affect the pace and cost of transactions (particularly large ones). To be valid, an "all appropriate inquiry" report must have been prepared within one year before transfer of title, and key elements of the report must be updated if they were collected more than 180 days before transfer (e.g., interviews, lien searches, local government searches, visual inspections). "All appropriate inquiry" reports prepared for the benefit of one party can be used by another party only to the extent that the information is updated and the new *user* satisfies the performance standards and *user* requirements identified above. These restrictions are likely to lead to new reliance limitations in the contractual terms and conditions for environmental consultants.

### CONCLUSION

It remains to be seen whether the "all appropriate inquiries" rule will prompt the market to "commoditize" a new product that displaces the existing ASTM standard, and to what extent buyers and their lenders will accept less extensive reviews based on their own risk criteria or the size and pace of their transactions. It is clear that the proposed rule provides no easy formula for qualifying for the new conditional CERCLA liability protections. It is important to note that the rule addresses only federal defenses, and does not deal with liability under state law. Some states have enacted bona fide purchaser defenses to state law liability.

To mitigate potential liability concerns, transaction parties and their advisors will need to clarify their respective roles early on, carefully review the "all appropriate inquiry" report, and avail themselves of other critical tools, such as carefully drafted contracts, insurance, and well-conceived development plans. Buyers will also need to ascertain their lenders' requirements early on. Most importantly, new owners should not expect that they will be able to avoid liability simply by commissioning a newer, more expansive report. They will need to be constantly attentive to the post-purchase obligations imposed by statute. While they may not be required to remove contaminated soil or treat groundwater, they are very likely to need to do (or require others to do) something to contain or prevent exposure to contaminants. Mark C. Pennington, New York, 212.309.6175, e-mail: mpennington@morganlewis.com. ■