CLIENT ALERT
on the environment

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Manko, Gold, Katcher & Fox, LLP, an environmental and energy law practice, regularly publishes our *Client Alert* newsletter to help our clients and friends stay on top of environmental issues that may affect their businesses. *Client Alert* focuses on hot regulatory issues, recent court and agency decisions, current environmental legislation and technical information.

Air

EPA Statement Regarding Scope of Startup, Shutdown and Malfunction Exemption

By Bart Cassidy

In promulgating categorical National Emission Standards for Hazardous Air Pollutants ("NESHAPs") under Section 112 of the Clean Air Act, the U.S. Environmental Protection Agency ("EPA") included regulatory provisions, which generally afford relief from emission standards during startup, shutdown and malfunction ("SSM") events, to the extent that the source satisfied certain regulatory requirements. On December 19, 2008, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision vacating certain aspects of the regulatory relief afforded by EPA for SSM events. In particular, the Court held that EPA had acted contrary to the express requirements of Section 112 in allowing sources to exceed NESHAP requirements during SSM events. Further, the Court denied motions for rehearing relative to its ruling.

On July 22, 2009, EPA issued a statement regarding the status of the relevant regulatory standards in the face of the Court's decision. In short, EPA stated that the relevant SSM provisions of the NESHAP requirements remain in effect, pending issuance by the Court of a mandate in the underlying court proceeding. EPA went further to state that the Court's expected mandate would render the SSM provisions null and void, immediately eliminating the relief previously afforded regulated sources during SSM events, to the extent that such relief arises from the general SSM regulations included within Subpart A of the NESHAP regulations.

Certain categorical NESHAP standards, however, include specific regulatory standards providing that emissions limitations do not apply during startup or shutdown events, or during expressly authorized periods of maintenance not to exceed a specified duration. EPA's July 22, 2009 letter states that EPA does not currently interpret the Court's December 2008 opinion as having any effect on the relief provided by these specific regulatory provisions. Accordingly, EPA will apparently take the position that such specific regulatory provisions -- providing relief from NESHAP emission standards under specifically defined conditions -- remain in effect even following issuance of the Court's mandate.

The Court's mandate was expected to be issued by August 6, 2009, but prior to its issuance, EPA filed a motion asking the Court to stay its order vacating the rule for an additional 60 days to provide the affected industries and EPA additional time to work out compliance issues. Several affected industry groups also filed a motion with the Court seeking a stay while they appeal the case to the Supreme Court.

EPA Agrees to Reconsider Air Monitoring Requirements for Lead

By Bryan Franey

On July 22, 2009, the U.S. Environmental Protection Agency ("EPA") announced that it would reconsider some of its lead monitoring requirements in response to a petition submitted on behalf of several environmental groups. EPA originally announced its lead monitoring requirements in October 2008 as part of its revisions to the National Ambient Air Quality Standards ("NAAQS") for lead. The 2008 rule required states to place air monitors near (1) industrial sources which emit one or more tons per year of lead; and (2) urban areas with a population of 500,000 people or more. These areas were selected based on their potential to contribute to a maximum lead concentration in excess of the NAAQS, the potential for population exposure, and logistics. EPA agreed to reconsider both the source-oriented and urban area monitoring requirements and expects to issue a proposal by late summer 2009; with a final rule by spring 2010. EPA, however, will not reconsider the revised lead NAAQS, which were lowered to 0.15 micrograms per cubic meter (measured as the concentration of lead in total suspended particles). Additionally, the following implementation schedule of the revised lead NAAQS remains unchanged:

- States must submit recommendations on attainment designations by October 2009.
- EPA will then make final attainment designations by October 2010 (unless additional information is needed).
- States with nonattainment areas for lead must then submit State Implementation Plans within 18 months of designation.
- States with nonattainment areas must attain the NAAQS as expeditiously as practicable, but in no event later than five years from the effective date of the nonattainment designation.

API and EPA Resolve Challenge to Stationary Combustion Engine Standards

By Michael Nines

On June 4, 2009, notice of a proposed settlement reached between the American Petroleum Institute ("API") and the U.S. Environmental Protection Agency ("EPA") was published in the Federal Register, the terms of which address API's challenge to an EPA rule promulgating regulations requiring new source performance standards ("NSPS") for new stationary compression ignition internal combustion engines, also known as Subpart IIII standard of the NSPS. Engines covered by the standards are typically used to generate electricity and operate compressors and pumps. The original rule, which took effect September 11, 2006, required all new, modified, and reconstructed stationary compression ignition internal combustion engines to use the best demonstrated system of continuous emissions reduction to reduce emissions of

nitrogen oxides ("NOx"), particulate matter ("PM"), carbon monoxide ("CO"), sulfur oxides ("SO2"), and non-methane hydrocarbons ("HC").

The settlement requires EPA to finalize revisions to the Subpart IIII standards of the NSPS within one year and to issue a guidance document that lists specific emission standards for various pollutants. Under the terms of the proposed settlement, EPA agreed to propose the following revisions to the regulations:

(1) revisions to allow owners and/or operators to operate and maintain their engines according to their own operation and maintenance ("O&M") practices, rather than engine manufacturer O&M practices, as long as the owner maintains and operates the engine in a manner consistent with good air pollution control practices;

(2) revisions to allow the use of temporary replacement engines (i.e., those in place for less than one year), if the owners and/or operators of such engines meet the requirements of the NSPS or meet the requirements for non-road engines;

(3) revisions to refer to an engine's "certified emissions life" rather than its "useful life;" and,

(4) revisions to include a not-to-exceed ("NTE") emissions limit that applies to engines which are required to test emissions. The proposed NTE limits are intended to simplify the compliance process by adopting specific NOx, CO, PM, and HC exhaust limits specifically applicable to engines undergoing performance testing. For example, current emission standards for NOx compounds listed in table 1 of the regulation are 6.9 g/bhp-hr and would be applicable to manufacturers of certified engines. The addition of the NTE standards to table 1 would result in an NTE for NOx of 8.6 g/bhp-hr and would be the prevailing standard for demonstrating NOx emission compliance by owners and/or operators required to test the engine.

EPA Proposes to Limit Emissions from Portland Cement Production

By Kate Vaccaro

On May 6, 2009, the U.S. Environmental Protection Agency ("EPA") published proposed amendments to the current National Emission Standards for Hazardous Air Pollutants ("NESHAP") applicable to the Portland cement manufacturing industry (the "Proposed Rule"). The Proposed Rule applies to both new and existing sources and, if finalized, would add or revise, as applicable, emission limits for mercury, total hydrocarbons ("THC"), and particulate matter ("PM") from kilns and in-line kiln/raw mills located at major and area sources, and hydrochloric acid ("HCl") from kilns and in-line kiln/raw mills located at major sources. Pursuant to Section 112 of the Clean Air Act, EPA is required to establish NESHAP for source categories located at major and area sources of hazardous air pollutants ("HAP"). A major source is a stationary source that emits or has the potential to emit 10 tons per year ("tpy") or more of any HAP or 25 tpy or more of any combination of HAP. An area source is a stationary source of HAP that is not a major source. Among other requirements, the Proposed Rule would also amend operating and opacity limits in the current NESHAP, add standards applicable during

startup, shutdown, and operating modes, and identify performance specifications for use of mercury continuous emission monitors.

Supporting the Proposed Rule, EPA has noted that Portland cement kilns are the fourth-largest source of mercury emissions in the United States. By contrast, the Portland Cement Association has claimed that the Proposed Rule would be devastating to the United States cement industry, resulting in more than $300 million in new costs and leading to a significant drop in domestic production. Given the significant impact of the Proposed Rule on the industry, EPA has been conducting public hearings to take public comment on the regulations, which if approved, would likely not take effect until 2013.

Challenge to Designations for Fine Particulate Nonattainment Rejected

By Kate Vaccaro

Particulate matter, a mixture of microscopic solids and liquid droplets suspended in the air, is produced through a variety of combustion activities and certain industrial processes. According to the U.S. Environmental Protection Agency ("EPA"), exposure to particulate matter can cause a host of serious health problems, including heart and lung diseases, decreased lung function, asthma attacks, and even premature death. In 1997, EPA promulgated the National Ambient Air Quality Standards ("NAAQS") for fine particulate matter ("$PM_{2.5}$"), which consists of two parts: a 24-hour standard of 65 micrograms per cubic meter ($\mu g/m^3$), and an annual standard of 15 $\mu g/m^3$. Using these standards, EPA designated various areas of the country as being in either nonattainment or attainment/unclassifiable with the 1997 $PM_{2.5}$ NAAQS. These designations were published in December 2004 and became effective in April 2005. In our region, Bucks, Chester, Delaware, Montgomery, Philadelphia, Camden, Burlington, and Gloucester counties, among others in Pennsylvania and New Jersey, are designated as nonattainment for the 1997 PM2.5 NAAQS.

A number of cities, counties and states that were designated by EPA in 2005 as being in nonattainment with the 1997 PM2.5 NAAQS filed petitions in the U.S. Court of Appeals for the District of Columbia Circuit challenging the designations. These counties argued, *inter alia*, that EPA ignored data from local emissions monitors and inconsistently applied its own guidelines in making the designations. On July 7, 2009, with the exception of one county, the Court unanimously rejected the petitions. With respect to the one exception, Rockland County, New York, the Court directed EPA to clarify its designation. States having at least one county designated as being in nonattainment are required to develop State Implementation Plans to demonstrate attainment with the 1997 PM2.5 NAAQS.

Energy

EPA Proposes Rule to Establish a National Registry of Waste Energy Recovery Opportunities

By Bryan Franey

Also under AIR

Pursuant to the requirements of the Energy Independence and Security Act of 2007, on July 23, 2009, the U.S. Environmental Protection Agency ("EPA") proposed establishing a registry of industrial/commercial sites with the potential for recovering and reusing waste energy. Waste energy is defined to include exhaust heat or gases that would otherwise be flared, incinerated, or vented; or high pressure steam generated in a boiler that would not otherwise be used. To collect the data necessary for the registry, EPA also proposed the distribution of a survey to major industrial and large commercial sources of air pollution. EPA expects to contact over 11,000 industrial and commercial entities including manufacturing facilities, schools, hotels, banks, prisons, hospitals, and colleges.

The purposes of the survey and registry are to:

- provide a list of economically feasible existing waste energy recovery opportunities in the United States;
- provide state and national totals of existing waste energy recovery opportunities, as well as potential reductions in pollution (criteria pollutants and greenhouse gases) that could be achieved through waste energy recovery; and,
- serve as a basis for potential waste energy recovery projects to qualify for financial and regulatory incentives.

As currently proposed, participation in the survey and registry would be voluntary. Additionally, participating facilities would not be required to install new monitoring equipment. Instead, EPA would provide survey participants with a software tool that would rely on existing monitoring data to calculate the quantity and quality of potential waste energy. EPA will be accepting comments on the proposed rule until September 21, 2009.

U.S. Treasury Grant Program for Renewable Energy Projects Now Open

By Brett Slensky

Also under SUSTAINABILITY

The U.S. Department of the Treasury ("Treasury") has opened a temporary federal grant program for renewable energy projects authorized by Section 1603 of the federal stimulus package. Under this program, eligible entities that place certain qualified renewable energy property in service (or begin construction) in 2009 and 2010 may apply to the Treasury for a grant in lieu of claiming the renewable energy tax credit otherwise available to the entity under Section 48 (the "Investment Tax Credit" or "ITC") or Section 45 (the "Production Tax Credit" or "PTC") of the Internal Revenue Service ("IRS") Code for the same property. Examples of

eligible projects include: solar, wind, biomass, landfill gas, microturbines, combined heat and power; and geothermal.

In general, the amount of the grant will be 30 percent of the taxpayer's basis for certain types of qualified property placed in service by the taxpayer (e.g., solar, wind, etc.) or 10 percent of the taxpayer's basis for certain other types of qualified property (e.g., combined heat and power, geothermal). The application deadline for participation in this temporary grant program is October 1, 2011, and applications may only be submitted to the Treasury after the property in question is either placed in service (i.e., the property is ready and available for its specific use) or is under construction (i.e., when physical work of a significant nature begins). The Treasury expects to distribute $3 billion in payments under this program.

New Jersey Awarded $29.5 Million in Federal Stimulus State Energy Program Funding

By Brett Slensky

Also under SUSTAINABILITY

On August 25, 2009, the U.S. Department of Energy ("DOE") awarded the State of New Jersey $29.5 million in federal stimulus State Energy Program ("SEP") funding, which will be used by New Jersey to fund: (1) a competitive grant program administered by the New Jersey Economic Development Authority for renewable energy and energy efficiency projects; (2) a new Board of Public Utilities program that will invest in renewable energy and energy efficiency projects at state-owned buildings and public colleges and universities; (3) grant and loan programs administered by the New Jersey Home Mortgage Finance Agency (" HMFA") for solar energy projects on HMFA income-qualified multifamily buildings and energy efficiency upgrades at single-family and multi-family homes; (4) new and existing programs from New Jersey's Office of Clean Energy to increase New Jersey’s investment in energy efficiency; and, (5) programs that will be administered by New Jersey’s Office of Energy Savings to expand auditing and investments in state-owned buildings.

New Jersey has now received approximately 50 percent of its federal stimulus SEP funding and is expected to receive an additional $37 million from DOE once the additional SEP program milestones are achieved.

Summary of American Clean Energy and Security Act

By Todd Kantorczyk

Also under AIR and SUSTAINABILITY

On June 26, 2009, the U.S. House of Representatives ("House") passed sweeping energy and climate change legislation, entitled the American Clean Energy and Security Act of 2009 (the "ACES Act"), by a vote of 219-212. The final version of the bill, which totaled over 1,400 pages, would affect virtually every industry in the U.S., ranging from energy producers to real estate developers. The following is a brief summary of the major provisions of the ACES Act.

The ACES Act passed by the House contains five separate titles that cover a wide range of energy and climate change issues. Title I, entitled "Clean Energy" includes a federal renewable portfolio standard ("RPS") that, starting in 2012, requires a certain percentage of all electricity sold by retail providers come from renewable sources such as wind, solar, geothermal, and landfill gas. The required percentages start at 6 percent in 2012 and gradually increase to 20 percent in 2020. A certain portion of the RPS could also be satisfied through energy efficiency measures. The remainder of Title I includes a number of provisions related to clean energy technologies including carbon capture and sequestration, new source performance standards for coal fired power plants, electric and other advanced technology vehicles, and the "Smart Grid."

Title II of the ACES Act, entitled "Energy Efficiency" contains a number of provisions that would mandate energy efficiency improvements across a number of industries. For example, Subtitle A would require the Secretary of Energy to establish national energy efficiency building codes for residential and commercial buildings designed to achieve increased reductions in energy use between 2014 and 2030. Each state would be required either to adopt these federal building codes or update its own building codes to meet or exceed the federal standards. States would have to demonstrate compliance with these codes, and states that fail to comply would not be eligible for various incentives provided by the ACES Act. In addition to the federal building code provisions, Title II includes provisions related to lighting and appliance energy efficiency, transportation efficiency, industrial energy efficiency, and various "green" mandates applicable to the U.S. Department of Housing and Urban Development.

Title IV of the ACES Act contains various provisions that are intended to provide assistance to transition the U.S. to a "clean energy economy." This assistance covers energy intensive industries, such as steel manufacturers, green jobs and worker transition, consumer assistance, and clean technology exports. There are also provisions that require the federal government to study and potentially implement strategies designed to adapt to climate change threats.

While the aforementioned provisions are all intended to affect climate change, the centerpiece of the ACES Act is the greenhouse gas ("GHG") cap-and-trade program contained within Titles III and V, and parts of Title IV, which is designed to reduce GHG emissions from covered sources to 3 percent below 2005 levels by 2012, 17 percent below 2005 levels by 2020, and 83 percent below 2005 levels by 2050. The program covers seven GHGs (carbon dioxide, methane, sulfur hexafluoride, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and nitrogen trifluoride), and applies to stationary sources emitting more than 25,000 tons per year of GHGs (measured as carbon dioxide equivalents), including producers and importers of petroleum fuels, natural gas distributors, and other specific sources. Like other cap-and-trade programs, these entities will be required to obtain permits (called allowances) for each ton of GHG emitted or produced. These allowances may be purchased from the government or from a private party that possesses extra allowances, or they may be given away by the government for free. The amount of allowances available for all covered entities, however, is reduced over time, which reduces the amount of GHGs emitted and establishes a "price" for carbon through supply and demand mechanisms.

Most of the negotiations leading up to passage of the ACES Act in the House concerned the amount of allowances that the federal government would auction versus how many would be given away for free and which entities would receive the free allowances. The final version of

the ACES Act gives away almost 80 percent of the available allowances through 2026, after which the amount of free allowances are gradually reduced through 2050. The majority of the free allowances would go to electric and natural gas utilities, which would be required to use the value of these allowances to reduce the impact of higher energy prices. In addition, specific "energy intensive and trade vulnerable" industries would receive a percentage of free allowances to allow continued competition with similar industries based in countries without GHG emissions restrictions. Also, many of the incentives in the ACES Act (*e.g.*, for carbon capture and sequestration, energy efficiency, etc.) are in the form of free allowances that can be sold to entities subject to the cap-and-trade program.

Another important aspect of the ACES Act cap-and-trade program is the use of offsets. Offsets are measurable efforts to reduce GHG emissions from entities that are not subject to the cap-and-trade program and that are beyond "business as usual" activities. Under the ACES Act cap-and-trade program, covered entities can use a certain amount of offsets, generated both in the U.S. and in other countries, to satisfy their compliance obligations. One of the key issues with respect to offsets is what activities can qualify for use as an offset. In negotiations related to these offset provisions, representatives from agricultural states were able to include provisions that grant the U.S. Department of Agriculture authority over offsets associated with agriculture and forestry initiatives, while the U.S. Environmental Protection Agency retained authority over other types of offsets.

The ACES Act cap-and-trade program also includes a number of provisions relating to the oversight of the "carbon markets" (*i.e.*, the markets for buying and selling allowances and offsets). In short, the Federal Energy Regulatory Commission is charged with regulating the cash market in allowances and offsets, while the Commodity Futures Trading Commission is responsible for any derivatives or futures markets.

The final version of the ACES Act also included a "border tariff" provision that essentially places a tariff on any goods imported from countries such as China, India, and Brazil, that do not impose similar GHG restrictions on their own industries. While the Obama administration has indicated that it is not in favor of such a provision, a number of Senators from industrial states have voiced support for the provision.

With respect to developing state and regional cap-and-trade programs, the ACES Act allows the adoption of more stringent regulations, but suspends state or regional trading programs between 2012 and 2017 to allow the federal program to develop.

U.S. House Passes Energy and Climate Change Legislation; Action Moves to Senate, but Fate Uncertain

By Todd Kantorczyk

Also under AIR and SUSTAINABILITY

On June 26, 2009, the U.S. House of Representatives passed sweeping energy and climate change legislation, entitled the American Clean Energy and Security Act of 2009 (the "ACES Act"), by a vote of 219-212. The final version of the bill, which totaled over 1,400 pages, would affect virtually every industry in the U.S., ranging from energy producers to real estate

developers. A summary of the major provisions of the ACES Act can be found here. The U.S. Senate has indicated that it will consider its own version of a similar bill, but despite the fact that the Democrats hold a potentially filibuster-proof majority in the Senate, the prospects of getting a similar bill through the Senate before the end of the year remain unclear.

One of the reasons for the uncertainty surrounding the fate of energy and climate change legislation in the Senate is that many of the key issues associated with such legislation cross party lines. For example, the final version of the ACES Act included a "border tariff" provision that essentially places a tariff on any goods imported from countries, such as China, India, and Brazil, that do not impose similar GHG restrictions on their own industries. The Obama administration and many Senate Democrats oppose such a provision, arguing that it may be illegal under World Trade Organization rules and that it may also expose U.S. exports to other protectionist policies. At the same time, many Senators from industrial states, including both Democratic Senators from Pennsylvania, have indicated that a border tariff provision would be necessary to secure their vote for climate change legislation.

Senate Majority Leader Harry Reid initially set a September 28 deadline for all responsible Senate committees to report out their markups of any energy and climate change legislation. Senator Boxer (the chairman of the Environment and Public Works committee) and Senator Kerry (the chairman of the Foreign Relations Committee) recently announced (with Senator Reid's blessing) that a new bill will not be introduced until late September, meaning that the committees with jurisdiction over climate legislation will not begin to address a bill until October.

Ideally, proponents of climate change legislation are hopeful for some type of bill to emerge from the Senate before the last round of scheduled international negotiations on the successor to the Kyoto Protocol begin in Copenhagen in December. If that happens, a House and Senate conference will follow in an attempt to reconcile any conflicting provisions. If the prospects in the Senate for passing a bill are not good, however, it is unlikely that the Obama administration and the Senate leadership would risk a "no" vote from the Senate on climate change legislation in advance of the Copenhagen meetings and instead will likely wait until those negotiations play out before taking up climate change legislation again.

Litigation

New Jersey Decision Further Defines Scope of State's NRD Claims

By Nicole Moshang

In *NJDEP v. Exxon Mobil Corporation,* which appears to be the seminal New Jersey case tackling novel legal issues regarding the New Jersey Department of Environmental Protection's ("NJDEP's") authority to recover natural resource damages ("NRDs") and the scope of those claims, Judge Anzaldi addresses defendant Exxon Mobil Corporation's ("Exxon's") most recent challenge to plaintiff's NRDs claims in a July 24, 2009 letter opinion. Exxon's motion sought partial summary judgment on the ground that NJDEP can only recover NRDs under the New Jersey Spill Compensation and Control Act ("Spill Act") or common law for property it holds in the "public trust," and since several portions of the property at issue are not within the public trust, NJDEP cannot seek damages for any alleged injury thereto. The sections of property

Exxon argues fall outside of the public trust include: private uplands, former tidal wetlands which the state has disclaimed any rights to, and tidally flowed lands conveyed in fee to Exxon or its predecessor. With respect to the private uplands portion of the property, Exxon argued that the area is not within the public trust, as the public trust doctrine only encompasses resources including the air, water and tidally flowed lands - which does not include land above the mean "high water mark" (i.e., the upland). While ultimately rejecting Exxon's argument, Judge Anzaldi acknowledged that the public trust doctrine had not yet been applied to private uplands, but nevertheless determined that, "the Spill Act clearly permits restoration and recovery of property no matter where located or created."

With respect to the current or former wetland portions of the property, Exxon claims such lands were removed from the public trust when the state failed to claim them as required under the 1981 Riparian Claim Amendment ("RCA"), or were conveyed to Exxon from the state in fee in an effort to transform the wetlands into private upland property. NJDEP contends in response that the citizens of New Jersey did not relinquish their rights under the public trust and/or Spill Act upon enactment of the RCA, and further, that while lands conveyed to Exxon may have transferred development rights to the property, it did not allow the pollution of the land. Agreeing with NJDEP, Judge Anzaldi held that "neither Riparian Amendment, nor grants made of riparian lands to Exxon or its predecessors removes the State's rights as public trustee to seek damages for contamination."

New Jersey Supreme Court Strikes Down Local Ordinances Requiring Developers to Provide Open Space

By John Gullace

Also under SITE DEVELOPMENT and BROWNFIELD REDEVELOPMENT

In *New Jersey Shore Builders Assoc. v. Twp. of Jackson*, decided June 25, 2009, the New Jersey Supreme Court, in two consolidated appeals, struck portions of two local ordinances that required developers to set aside open space or make payments in lieu thereof, as a condition of municipal approval for development projects. The Court concluded that the Municipal Land Use Law ("MLUL") must be strictly construed and that "municipalities must exercise their powers relating to zoning and land use in a manner that will strictly conform with that statute's provisions." Since the MLUL does not provide for open space set asides, they cannot be imposed. An effort to overturn the Supreme Court's decision through amendment of the MLUL is anticipated.

Third Circuit Rejects Claim for Monetary Relief for Future Cleanup Costs

By Kate Campbell

In *F.P. Woll & Co. v. Fifth & Mitchell St., Corp.*, the U.S. Court of Appeals for the Third Circuit recently held that a plaintiff seeking contribution under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") could not obtain a monetary award for

future cleanup costs, where neither the U.S. Environmental Protection Agency ("EPA") nor the Pennsylvania Department of Environmental Protection ("PADEP") indicated that further remedial action was necessary or demanded payment from the plaintiff for future response costs. The Court found that declaratory relief, not monetary relief, was the appropriate remedy because it would ensure the plaintiff "prompt reimbursement of reasonable response costs incurred in the future," while protecting the defendants "from an excess judgment in the event further responses costs were not incurred."

District Court Finds Site Owner's Costs are Not Recoverable Response Costs under CERCLA

By Nicole Moshang

On August 13, 2009, the U.S. District Court for the District of New Jersey rejected Champion Laboratories Inc.'s ("Champion's") cost recovery and contribution claims brought against a neighboring site owner, Metex Corp. ("Metex"), under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") in *Champion Laboratories Inc. v. Metex Corp.* With respect to the cost recovery claim, the Court held that Champion failed to show "that the costs it has expended are necessary costs of response consistent with the national contingency plan" finding that the costs were incurred in an effort to establish the liability of the neighboring site owner – not to further the site's cleanup. The Court also rejected Champion's argument that the costs were recoverable under the U.S. Supreme Court decision in *Key Tronic v. United States*, which held that "costs incurred in tracking down other responsible solvent polluters may be recoverable costs of response if they ultimately benefit a clean up effort and serve a statutory purpose apart from the allocation of costs among responsible parties." The Court reasoned that *Key Tronic* was distinguishable from the circumstances before the Court in that Champion did not incur its costs in trying to track down Metex, as it had already determined Metex was the responsible party in 1995 – prior to incurring the costs it was now seeking to recover.

The Court also rejected Champion's CERCLA contribution claim based on Champion's settlement of a claim for natural resource damages ("NRDs") asserted by the state of New Jersey. The Court determined that the settlement of NRDs only discharged Champion's liability for discharges on its site, not any liability arising from off-site sources; therefore, there was no basis to seek contribution from Metex.

E-Discovery Continues to Prove Contentious

By Angela Pappas

It has been five years since the seminal electronic discovery ("e-discovery") case, *Zubulake v. UBS Warburg* was decided, yet courts continue to face disputes and issue decisions defining parties' obligations with respect to e-discovery. In one such case, *Ford Motor Co. v. Edgewood Properties, Inc.,* the U.S. District Court for the District of New Jersey ruled on two e-discovery issues relating to the production of documents. The litigation centered around a contract between Ford Motor Co. ("Ford") and Edgewood Properties Inc. ("Edgewood"), whereby Edgewood agreed to haul off concrete after the demolition of a Ford assembly plant in Edison, New Jersey. When the concrete was later found to be contaminated, Ford brought suit against Edgewood to recover clean-up costs it incurred pursuant to the Comprehensive Environmental

Response, Compensation and Liability Act and the New Jersey Spill Compensation and Control Act.

During discovery, Edgewood filed two motions against Ford raising e-discovery issues. The first motion sought to compel Ford to produce documents in their native format (i.e., containing metadata). Although Edgewood had initially requested that the documents be produced in their native format, which it was entitled to do under the Federal Rules, Ford objected to such request and instead produced the documents on a rolling basis in TIFF format, which does not contain metadata. Relying on Federal Rule of Civil Procedure 34, which sets out the procedure for producing electronically stored documents, the Court denied Edgewood's motion to compel, holding that Edgewood waived its rights to obtain the documents in native format because it waited over eight months after production began to object to the production format. In its second motion, Edgewood objected to the adequacy of Ford's manual document collection process and sought employment of a third party vendor to perform searches of electronically stored documents to ensure that Ford produced all relevant documents. Citing the *Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, a leading authority on electronic document retrieval and production, the Court also denied Edgewood's motion, noting that such a burdensome request at this late stage in discovery was not warranted, particularly in light of the presumption afforded to the responding party to choose an appropriate method for document harvesting.

The take away from *Ford Motor*, as highlighted in the Court's decision, is the importance of cooperation among parties to agree upon appropriate discovery exchanges prior to engaging in e-discovery.

Another Defeat for Medical Monitoring Claims

By Lynn Rosner Rauch

In *Harris v. Advance Process Supply, Co.*, the Superior Court of New Jersey (Appellate Division) affirmed the dismissal of plaintiffs' medical monitoring complaint as untimely on June 25, 2009. The Plaintiffs, which included both current and former residents of Camden, New Jersey, filed a class action complaint seeking medical monitoring to address their alleged increased risk of developing health problems due to polluted water, and for a subclass seeking refunds of water bills due to pollution in their drinking water from the mid-1970's through the 1990's, stemming from a well field that served as a water supply source for Camden. The well field was first reported to be contaminated in the 1970's when TCE, diclorethane, PCE, mercury and hexavalent chromium were detected in one well, from which the contamination later spread to other wells. The wells were all eventually closed as a consequence of groundwater contamination. The New Jersey Department of Environmental Protection ("NJDEP") began investigating the extent of groundwater contamination in 1997, and the site was placed on the National Priorities List in 1998. The New Jersey Department of Health and Senior Services found the site "to have represented a public health hazard because of past exposures" and the exposure to a potentially large population, and issued a report to that effect in 2001.

The lower court dismissed the medical monitoring claims as untimely, having rejected plaintiffs' argument that "under the discovery rule, the statute of limitations should run from a date later than the last possible exposure to the polluted water in 1998," on the basis that plaintiffs had

notice of the pollution and its potential health effects years before the 2001 report on the pollution was issued, through personal observations of their water, media articles and inserts enclosed with their bills from their water utility providers. At the latest, the lower court found that plaintiffs knew or should have known that they had a claim concerning the pollution by May 2000, more than two years before initiating suit.

The appellate court likewise rejected plaintiffs' contention that only the equitable principle of laches, as opposed to a set statute of limitations, should be applied to their medical monitoring claims. As the Court stated, "[t]his is not a case in which the exposure to alleged toxins is continuing into the present. At the latest, the exposure ended in 1998. Therefore, absent proof supporting equitable tolling under the discovery rule, the statute of limitations would, at the latest, begin to run from 1998…. The discovery rule is an equitable principle by which the accrual of a cause of action is delayed until the injured party discovers, or by the exercise of reasonable diligence and intelligence should have discovered[,] that he may have a basis for an actionable claim." Since plaintiffs were not claiming to have suffered an actual injury as a result or drinking polluted water, but were seeking monitoring in the event they might develop future health issues, the Court found that "[m]ost of the plaintiffs knew, or were on notice, of the problems with the city's water quality in ample time to file a medical monitoring lawsuit within two years after the statute began to run in 1998."

Site Development & Brownfield Redevelopment

Amendment to Pennsylvania's Act 3

By Jonathan Spergel

On July 27, 2009, Governor Rendell signed into law Act 26, which amends the Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act, which is commonly referred to as Act 3. This amendment, which becomes effective on September 24, 2009, clarifies and expands the liability protections afforded to economic development agencies, their officers, and directors for environmental investigation, remediation, or infrastructure improvements in connection with the property, when such agencies take fee title to property to secure public funding. Specifically, Act 26 amends Act 3 to clearly provide that economic development agencies, their officers and directors are not liable under Pennsylvania environmental laws, including common law, for contaminants present at the property merely by taking fee title to facilitate securing public funding for the property. Act 26, which was sponsored by Senator Greenleaf and strongly supported by the Redevelopment Authority of Montgomery County, should assist in the redevelopment of brownfield sites by encouraging economic development agencies to take a more proactive role in brownfields redevelopment projects. For further information regarding Act 26 or Act 3 generally, please contact Jonathan Spergel at (484) 430-2309 or jspergel@mgkflaw.com.

Governor Corzine Signs State Stimulus Bill

By Brett Slensky

On July 27, 2009, Governor Corzine signed the New Jersey Economic Stimulus Act of 2009 (the "Act"), which contains a number of targeted programs and incentives intended to stimulate job growth and New Jersey's broader economy. The programs authorized by the Act include: (1) an Economic Redevelopment and Growth Grant Program that will provide incentive grants (capped at 20 percent of total project costs) to developers for all or a portion of a project's financing gap to encourage redevelopment in certain designated areas of the state; (2) revisions to the Urban Transit Hub Tax Credit Act, which are aimed at expanding eligibility for tax credits and creating a tax credit set aside for certain qualified residential and mixed use projects; (3) retroactive relief to qualifying developers required to pay certain fees pursuant to the Statewide Non-Residential Fee Act; and, (4) a related $15 million appropriation to the New Jersey Affordable Housing Trust Fund.

Prevailing Wage Requirements Extended to Projects Receiving Financial Assistance from the New Jersey Board of Public Utilities

By Brett Slensky

On July 15, 2009, Governor Corzine signed legislation requiring the Board of Public Utilities ("BPU") to adopt rules governing the applicability of New Jersey's prevailing wage law to construction projects undertaken in connection with BPU financial assistance. The law broadly defines the term "BPU financial assistance" to include any rebate, grant, credit, or other such incentive that has been approved, funded, authorized, administered or provided by the BPU, whether received before, during or after the construction project is complete. The legislation also includes three carve-outs where the prevailing wage requirements will not apply: (1) to construction contracts totaling less than $11,892; and where the BPU financial assistance is provided either (2) directly to a homeowner, or (3) for any new construction or weatherization of a single-family home, town home, row home, apartment building or multi-family home of four stories of less. The BPU's rules regarding this controversial extension of the state's prevailing wage requirements are currently being developed.

Site Remediation

New Jersey LSRP and Site Remediation Reform Update

By Bruce Katcher

The New Jersey Department of Environmental Protection ("NJDEP") has been busy developing the new Licensed Site Remediation Professional ("LSRP") program and other site remediation reforms under the Site Remediation Reform Act ("SRRA") signed into law by Governor Corzine on May 7, 2009. The full program is scheduled to commence in early November 2009. Among the steps taken by NJDEP so far are the following:

- The voluntary memorandum of agreement ("MOA") process has been discontinued. An interim process to take the place of the MOA until November 3, 2009 has been established. After that date, all new site remediation cases must use an LSRP.

- Application materials for temporary LSRP licenses have been posted on NJDEP's website, together with a frequently asked questions guidance document. NJDEP has committed to issuing the first licenses in October 2009.

- Draft forms for submittal of Preliminary Assessments/Site Investigations, Remedial Investigation Reports, Remedial Action Workplans and Remedial Action Reports have also been prepared and published on NJDEP's website.

- A draft presumptive remedies guidance document for cleanups at schools, child care facilities and residential (single and multifamily) projects is posted on NJDEP's website. The comment period on the draft closed on August 28, 2009.

- A guidance document describing when NJDEP will exercise its authority to undertake direct oversight of cases (in lieu of oversight by an LSRP) is also available. Direct oversight will give NJDEP the authority to select the remedy and will require the posting of a trust fund to cover remediation costs.

NJDEP is also working on the interim program regulations, which are required to be published by November 2009, and will not be subject to public notice and comment. These regulations will includes changes to the Technical Rules and Oversight Rules to make these regulations consistent with SRRA. They will also address other SRRA requirements such as:

- direct oversight, presumptive remedies and fees;

- mandatory timeframes for completion of the various steps in the site remediation process;

- obligations set forth in Section 30, including the obligation to hire an LSRP for all new cases, proceed without the approval of NJDEP, comply with mandatory timeframes, etc.; and,

- process issues – what to submit and how.

Finally, NJDEP has announced that it will allow existing cases, which are not required to retain an LSRP for up to three years, to voluntarily opt into the LSRP program, subject to NJDEP approval. The time is rapidly approaching when parties performing remediation will be able to make that decision and it is not too early to begin evaluating whether to do so now.

Sustainability

Legislative Action is Increasing Requirements for Energy Efficient Construction

By Meredith DuBarry Huston

On June 25, 2009, New Jersey gave final approval to legislation that would promote energy efficiency and conservation in buildings by authorizing the Commissioner of Community Affairs to amend New Jersey's Uniform Construction Code's energy subcode to include enhanced energy-saving construction requirements.

In Pennsylvania, the High-Performance, State Funded Buildings Standards Act, H.B. 444, would require the design, construction, and renovation of buildings that receive state appropriations to comply with specified consensus-based energy and environmental building standards if it is passed by the Pennsylvania Senate and signed by Governor Rendell. In addition to meeting the performance requirements of the adopted high performance building standards, all building projects involving buildings owned or leased by a Commonwealth agency, including state-funded major facility projects, would be required to achieve an Environmental Protection Agency Energy Star rating of 85 or above.

Building energy efficiency requirements in Delaware have also been updated. By December 31, 2025, all new residential construction will be required to be capable of being energy self-sufficient. Commercial buildings must be capable of being energy self-sufficient by December 31, 2030. Zero-net energy capable buildings use construction methods, appliances, and sufficiently energy efficient lighting to allow the buildings to only consume as much energy as they could generate in the event that the building owner opts to add on-site generation (e.g., solar panels).

Municipal "Green" Cement Policies Trigger Lawsuits

By Meredith DuBarry Huston

Also under LITIGATION

A Dallas, Texas suburb is the latest local government to be sued for a policy favoring the purchase of cement made in newer and cleaner "dry" kilns over that made in older "wet" kilns. By incorporating state emissions standards as specifications in bids for cement purchasing, such "green" cement resolutions put pressure on wet kiln operators to either update pollution controls to meet emissions levels achieved by dry kilns, or to replace their wet kilns with new dry ones, thus creating a preference for more aggressive pollution controls. In the latest lawsuit, Ash Grove, the cement manufacturer, alleges that Plano, Texas is acting illegally by giving preferential treatment to companies based on factors outside of the competitive bidding process when only the competence of the bidder and the price should be considered. As similar "green" regulations are implemented in other states and municipalities, they are likely to trigger similar challenges by affected companies. It remains to be seen whether legal challenges to such regulations will succeed or whether the regulations will be left standing to achieve their desired improvements in environmental performance.

Water

EPA to Develop Action Plan for Clean Water Act Enforcement Program

By Bridget Dorfman

The U.S. Environmental Protection Agency ("EPA") is continuing to focus attention on enforcing the Clean Water Act ("CWA") on several fronts. On July 2, 2009, EPA Administrator Jackson issued a memorandum to EPA's Assistant Administrator for Enforcement and Compliance Assurance directing her to work with the Office of Water, the EPA Regional Offices, and the states to (1) develop an action plan to strengthen the performance of the CWA enforcement program, enhance public transparency regarding that performance, and transform EPA's information systems for water quality and compliance information, and (2) report back to the Administrator with her recommendations within 90 days. These steps are necessary, the Administrator notes in her memorandum, because available data shows that non-compliance with CWA permitting requirements is unacceptably high and the level of enforcement activity is unacceptably low in many parts of the country. As part of this effort, the Assistant Administrator started a public discussion forum on EPA's website that was open until August 28, 2009. The ideas submitted in the forum will be considered in the development of recommendations about the direction of EPA's water enforcement program.

In addition, earlier this spring the Obama administration sent letters to key congressional leaders regarding its support for the enactment of legislation to amend the CWA and broaden the statute's protection of the nation's waters, including wetlands. Such legislation will likely be introduced this year.

Other Regulatory Programs

Investor Groups Continue to Push for More Robust Climate Change Disclosure; New Guidance from SEC Now More Likely

By Todd Kantorczyk

Also under AIR

This summer investor activists continued their efforts to pressure public companies for more detailed disclosure concerning risks associated with climate change, while also renewing their efforts to have the Securities and Exchange Commission ("SEC") issue formal interpretative guidance on the materiality of risks posed by climate change. With new leadership at the SEC under the Obama administration, plus the increased legislative and regulatory activity related to the reporting and control of greenhouse gas ("GHG") emissions, the likelihood of SEC guidance on climate change disclosure issues (and environmental issues, generally) coming in the near future has increased.

In June, Ceres (a coalition of investors, environmental groups and public interest groups) and the Environmental Defense Fund issued a report evaluating the quality of climate risk disclosure made by 100 large companies in SEC public filings during the first quarter of 2008. The 100 companies were from five sectors - electric utilities, coal, oil and gas, transportation, and insurance - that the authors characterized as having a high level of exposure to climate risks and opportunities. The climate change disclosures of these companies were evaluated against the Global Framework for Climate Change Disclosure, a framework originally developed in 2006 by a group of institutional investors and other organizations coordinated by Ceres. The report concluded that current climate change disclosure in these SEC filings did not sufficiently apprise

investors of potential climate change risk, with only two companies providing what was characterized as "fair" levels of disclosure. The report called out the insurance and transportation sectors as providing particularly weak, or no, disclosures concerning climate change risk.

In conjunction with this report, members of the Investor Network on Climate Risk (another group of investors coordinated by Ceres) and other investors issued a letter to the new chairman of the SEC, Mary L. Schapiro, renewing their request for formal interpretative guidance concerning the disclosure of climate change risks and for additional efforts to enhance disclosure of material environmental, social and governance ("ESG") risks, generally. The letter asked the SEC to take four steps related to disclosure of climate change and ESG risks, including issuing formal interpretive guidance on disclosure of climate change risk, increased enforcement of disclosure requirements related to ESG issues, recognition of shareholder rights to submit resolutions related to ESG issues, and the adoption of rules mandating disclosure of material ESG issues.

The letter is the latest effort to push the SEC to issue formal guidance on disclosure of climate change and ESG issues, and follows the formal petition these same groups filed with the SEC back in September, 2007 (click here for more information). While the SEC has yet to rule on this petition, a number of factors point towards the SEC finally addressing this issue more definitively in the near term. First, in April 2009, the U.S. Environmental Protection Agency ("EPA") issued its proposed GHG reporting rule which would require large emitters of GHG across all sectors of the U.S. economy to report their GHG emissions starting in 2010 on a facility by facility basis. It has been reported that EPA plans to issue a final GHG reporting rule this October. In addition, at the end of June, the U.S. House of Representatives passed the American Clean Energy and Security Act of 2009, which includes, among other things, a national economy-wide cap-and-trade program to control GHG emissions. These two regulatory and legislative developments, plus the ongoing push by states and regional organizations to control GHG emissions, increase the likelihood of companies facing identifiable financial and legal risks associated with climate change, which in turn may increase the likelihood of SEC addressing the issue. Accordingly, public companies can probably expect continued, if not increased, activity associated with climate change and ESG risk disclosures from investors, environmental groups, and also the SEC.

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Energy

Summary of American Clean Energy and Security Act

by TODD KANTORCZYK

On June 26, 2009, the U.S. House of Representatives ("House") passed sweeping energy and climate change legislation, entitled the American Clean Energy and Security Act of 2009 (the "ACES Act"), by a vote of 219-212. The final version of the bill, which totaled over 1,400 pages, would affect virtually every industry in the U.S., ranging from energy producers to real estate developers. The following is a brief summary of the major provisions of the ACES Act.

The ACES Act passed by the House contains five separate titles that cover a wide range of energy and climate change issues. Title I, entitled "Clean Energy" includes a federal renewable portfolio standard ("RPS") that, starting in 2012, requires a certain percentage of all electricity sold by retail providers come from renewable sources such as wind, solar, geothermal, and landfill gas. The required percentages start at 6 percent in 2012 and gradually increase to 20 percent in 2020. A certain portion of the RPS could also be satisfied through energy efficiency measures. The remainder of Title I includes a number of provisions related to clean energy technologies including carbon capture and sequestration, new source performance standards for coal fired power plants, electric and other advanced technology vehicles, and the "Smart Grid."

Title II of the ACES Act, entitled "Energy Efficiency" contains a number of provisions that would mandate energy efficiency improvements across a number of industries. For example, Subtitle A would require the Secretary of Energy to establish national energy efficiency building codes for residential and commercial buildings designed to achieve increased reductions in energy use between 2014 and 2030. Each state would be required either to adopt these federal building codes or update its own building codes to meet or exceed the federal standards. States would have to demonstrate compliance with these codes, and states that fail to comply

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would not be eligible for various incentives provided by the ACES Act. In addition to the federal building code provisions, Title II includes provisions related to lighting and appliance energy efficiency, transportation efficiency, industrial energy efficiency, and various "green" mandates applicable to the U.S. Department of Housing and Urban Development.

Title IV of the ACES Act contains various provisions that are intended to provide assistance to transition the U.S. to a "clean energy economy." This assistance covers energy intensive industries, such as steel manufacturers, green jobs and worker transition, consumer assistance, and clean technology exports. There are also provisions that require the federal government to study and potentially implement strategies designed to adapt to climate change threats.

While the aforementioned provisions are all intended to affect climate change, the centerpiece of the ACES Act is the greenhouse gas ("GHG") cap-and-trade program contained within Titles III and V, and parts of Title IV, which is designed to reduce GHG emissions from covered sources to 3 percent below 2005 levels by 2012, 17 percent below 2005 levels by 2020, and 83 percent below 2005 levels by 2050. The program covers seven GHGs (carbon dioxide, methane, sulfur hexafluoride, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and nitrogen trifluoride), and applies to stationary sources emitting more than 25,000 tons per year of GHGs (measured as carbon dioxide equivalents), including producers and importers of petroleum fuels, natural gas distributors, and other specific sources. Like other cap-and-trade programs, these entities will be required to obtain permits (called allowances) for each ton of GHG emitted or produced. These allowances may be purchased from the government or from a private party that possesses extra allowances, or they may be given away by the government for free. The amount of allowances available for all covered entities, however, is reduced over time, which reduces the amount of GHGs emitted and establishes a "price" for carbon through supply and demand mechanisms.

Most of the negotiations leading up to passage of the ACES Act in the House concerned the amount of allowances that the federal government would auction versus how many would be given away for free and which entities would receive the free allowances. The final version of the ACES Act gives away almost 80 percent of the available allowances through 2026, after which the amount of free allowances are gradually reduced through 2050. The majority of the free allowances would go to electric and natural gas utilities, which would be required to use the value of these allowances to reduce the impact of higher energy prices. In addition, specific "energy intensive and trade vulnerable" industries would receive a percentage of free allowances to allow continued competition with similar industries based in countries without GHG emissions restrictions. Also, many of the incentives in the ACES Act (*e.g.*, for carbon capture and sequestration, energy efficiency, etc.) are in the form of free allowances that can be sold to entities subject to the cap-and-trade program.

Another important aspect of the ACES Act cap-and-trade program is the use

of offsets. Offsets are measurable efforts to reduce GHG emissions from entities that are not subject to the cap-and-trade program and that are beyond "business as usual" activities. Under the ACES Act cap-and-trade program, covered entities can use a certain amount of offsets, generated both in the U.S. and in other countries, to satisfy their compliance obligations. One of the key issues with respect to offsets is what activities can qualify for use as an offset. In negotiations related to these offset provisions, representatives from agricultural states were able to include provisions that grant the U.S. Department of Agriculture authority over offsets associated with agriculture and forestry initiatives, while the U.S. Environmental Protection Agency retained authority over other types of offsets.

The ACES Act cap-and-trade program also includes a number of provisions relating to the oversight of the "carbon markets" (*i.e.*, the markets for buying and selling allowances and offsets). In short, the Federal Energy Regulatory Commission is charged with regulating the cash market in allowances and offsets, while the Commodity Futures Trading Commission is responsible for any derivatives or futures markets.

The final version of the ACES Act also included a "border tariff" provision that essentially places a tariff on any goods imported from countries such as China, India, and Brazil, that do not impose similar GHG restrictions on their own industries. While the Obama administration has indicated that it is not in favor of such a provision, a number of Senators from industrial states have voiced support for the provision.

With respect to developing state and regional cap-and-trade programs, the ACES Act allows the adoption of more stringent regulations, but suspends state or regional trading programs between 2012 and 2017 to allow the federal program to develop.

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Will the SEC Weigh In on the Climate Change Debate?

The Legal Intelligencer

by TODD D. KANTORCZYK

If asked what federal agencies are being pressed to promulgate climate change programs, the first answer for most would likely be the Environmental Protection Agency. But in September, a coalition of public interest groups, government officials and institutional investors filed a petition before the Securities and Exchange Commission requesting that the SEC provide explicit guidance on the need for public companies to disclose all material information related to the impact of climate change risk.

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