MESSAGE FROM THE OUTGOING CHAIR

Walter D. James III
Walter D. James III, PLLC
walterjames@jamespllc.com

On Aug. 6, 2006, Doug Arnold became the new chair of the Environmental Enforcement and Crimes Committee (EECC) ending my three years as chair of this great committee. And what a wonderful three years it has been. I have been a member of this committee since before I can remember. Even though I am stepping aside as chair of the EECC, I plan on staying active in the EECC.

Over the last three years we have had a number of different vice chairs in different positions. I would like to thank all of them. They served with distinction and honor. It is a volunteer position with all of the benefits that come with a volunteer position—that is to say, typically, no recognition at all, only the knowledge and satisfaction that you did a great job. And to all of those who have served the EECC the last three years, I extend my heartfelt thank you. The EECC is not what it is today without your grand efforts. I would also like to especially thank Bob Matthews and Doug Arnold. Over the last three years their counsel, support and assistance has been invaluable.

Well, enough of the tear jerking drivel and on with the new. Meet Doug Arnold. Doug is a partner in the Atlanta office of Alston & Bird, LLP. His practice concentrates on environmental law, including civil and criminal enforcement actions, toxic torts, and corporate counseling and compliance. Doug has served the EECC as a vice chair from 2002 though 2006. As if that were not enough, he also currently serves as a subcommittee co-chair for the Environmental Litigation Committee of the ABA Section of Litigation.

Doug received his J.D. degree, magna cum laude, in 1991 from the University of Georgia (what the heck is an UGA, by the way), where he was a member of the Georgia Law Review and Order of the Coif. He received his B.A. degree from the University of Virginia. Doug has been married to the same woman, Tina, for 15 years (she must be a saint) and they have two daughters, Catherine (12) and Caroline (10). Doug is also a YMCA soccer coach for the last 8 years and reportedly led multitudes of young players to victory. (Truth be told, based upon his YMCA record, he is also expecting to be tapped as the next world cup soccer coach for the USA national team). When not coaching or playing soccer, Doug and his family like to frequent Cape Cod.

The EECC will be in great hands with Doug and my hope is that you give him as much assistance and support as you gave me during my three years of service as the EECC chair.

Thanks . . .
MESSAGE FROM THE INCOMING CHAIR

Doug S. Arnold
Alston & Bird, LLP
Doug.Arnold@alston.com

As the incoming chair, I want to thank everyone again for being a member of the Environmental Enforcement and Crimes Committee and to encourage your participation in the committee’s activities for the coming year. We have already sponsored several great programs and have many new ones in the works.

First, our committee sponsored the first two teleconferences for the Section’s new Environmental Litigation Series. The first program, held on Oct. 31 focused on criminal enforcement, and the second on Nov. 14 focused on civil enforcement. Our panelists included senior officials from EPA and Justice Department headquarters, plus in-house counsel for The Dow Chemical Company and outside defense counsel.

Second, our committee participated in the 14th Section Fall Meeting in San Diego, co-sponsoring the presentation on “The Use of Innovative Tools for More Effective Resolution of Civil Enforcement Cases.” In addition, our committee is co-sponsoring several programs at the 36th Annual Conference on Environmental Law in Keystone, Colorado, March 8-11, 2007, including the breakout session, entitled “Environmental Crime Takes Center Stage.”

Third, our committee will be holding a meeting on April 18, 2007 in New York City. Representatives from DOJ and EPA will provide enforcement updates that will be open to all committee members. The briefing will be followed by a business meeting of the chair and vice chairs to continue work on initiatives and activities for remainder of year.

All of these programs will be posted on our committee Web page. I encourage you to check it often for updates on other committee programs and activities.

Lastly, the committee is planning to publish two more newsletters in the coming year—in May and July. Our
Committee Newsletter team—Bruce Pasfield, Teri Donaldson, Eric Hiser, Ben Lippard and Carrick Brooke-Davidson—would welcome any articles or topics for these newsletters. Similarly, if anyone has any suggestions for committee-sponsored programs, teleconferences, etc., please do not hesitate to let me or one our Program vice chairs, Tracy Hester and David Weinstein, know.

NEW ENVIRONMENTAL CRIMES BLOG

Walter D. James III

Where do old committee chairs go after they serve the mother ABA and the committee? In my case, I now have the following responsibilities: I am a vice chair-at-large for the Environmental Enforcement and Crimes Committee (ABA SEER); I am the Section coordinator for 1 Communication and Committee Newsletters (ABA SEER); and chair of the Environmental, Natural Resources and Energy Law committee of the General Practice, Solo and Small Firm Division of the ABA. And I started a blog and a blawg (actually it is just a blog—a blawg is a lawyer trying to be pretentious and those of you who know me—well, you can draw your own conclusions).

I now have a blog on environmental crimes and issues related to the prosecution and defense of environmental crimes. I started the blog in August 2006 and have been posting to it, on average, about two to three times a week, ever since. It does not have much attention—yet. If you Google “environmental crimes,” my blog is on the second page. If you Google “environmental crimes blog,” my blog is number one. Oh, by the way, the link is http://environmentalblog.typepad.com/. One of the distractions, if you will, about a blog is that you constantly need to feed it. A blog does not work unless you post to it on a regular basis.

Why environmental crimes? I have decided that it was a blog niche that no one had, as far as I could tell, had tapped. It is also an area that, if you believe David Uhlmann (and I do), there will always be material available to blog about. I also intend the blog to be supportive, supplemental and complimentary of the Environmental Enforcement and Crimes Committee work and its Web page.

With that, I invite anyone and all to visit the blog (again, http://environmentalblog.typepad.com/) and give me feedback. Feel free to let me know if there is a topic you would like to see addressed. Also, let me know if you would like to guest author a post or two for the blog. As always, comments are appreciated. Feel free to post your comments to any blog post on the site. So, at least in my case here is the answer to the question: Where do old committee chairs go after they serve the mother ABA and the committee? We go kicking and screaming onto something else. Take care.

MESSAGE FROM THE NEWSLETTER VICE CHAIR

W. Bruce Pasfield
Alston & Bird
Bruce.Pasfield@alston.com

How things can change in a year! In 2006, I was a vice chair at large for the Environmental Enforcement and Crimes Committee (EECC) and a 15-year veteran of DOJ’s environmental crimes section. As I write this message, I am vice chair for the Environmental Enforcement and Crimes Committee (EECC) Newsletter and just finishing my first year as a partner in Alston and Bird’s environment and land use practice group. One thing that has helped bridge the gap was continued membership in the committee. The EECC gave me access to practitioners and events that made the transition relatively smooth. The EECC is a great resource and I encourage members to become more involved.

This quarter we took a slightly different approach to articles. We asked authors for shorter articles that could be completed in a month. The response was overwhelmingly positive. Often, active lawyers become so focused on writing their masterpiece that they fail to get pen to paper. Hopefully the newsletter
will serve as a welcomed alternative and a place where enforcement news and practical advice can be dispensed in a timely manner. Thanks to all of you who have contributed to this newsletter and to those of you who have wanted to publish but could not find the time, consider the EECC’s next newsletter publication in May.

TOPICAL REPORTS

EMERGENCY RELEASE NOTIFICATION REQUIREMENTS: HOW SOON IS SOON ENOUGH?

Andrew H. Perellis
Geoffrey B. Tichenor
Seyfarth Shaw LLP
Chicago, Illinois
gtichenor@seyfarth.com,
aperellis@seyfarth.com

Companies that use federally regulated substances in their day-to-day operations are obligated to notify various agencies following a significant release. The specific amount of any given substance that triggers the reporting requirements varies as set forth in applicable regulations. Many companies are surprised to learn that seemingly common chemicals (like ammonia) require notification when released in sufficient quantities. Their surprise turns to shock when slapped by the United States Environmental Protection Agency (U.S. EPA) with civil—and potentially, criminal—penalties for violating the release reporting requirements. It is not uncommon for U.S. EPA to seek the maximum penalty of $32,500 per reporting violation. Alleged reporting errors frequently relate to a company’s failure to notify “immediately” at least three separate governmental agencies, and to make the required follow up report to state and local agencies, for a total of (at least) five violations. These five violations can add up to a penalty in excess of $162,500.

This article aims to introduce industry newcomers to (and remind experienced companies of) the emergency reporting requirements codified in the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA) and the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA). Note, this article does not address all release reporting obligations that may exist under federal and state law.

AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

Calendar of Section Events

Environmental Enforcement: The Year in Review and Enforcement Priorities for 2007
March 1, 2007
Quick Teleconference

36th Annual Conference on Environmental Law
March 8-11, 2007
Keystone, Colorado

Environmental Litigation Series—Session 5: Deposition of Environmental Experts
March 27, 2007
Teleconference/Slide Webcast Presentation CLE Series

Environmental Litigation Series—Session 6: Anatomy of an Environmental Jury Trial (Using an Allocation Case)
April 24, 2007
Teleconference/Slide Webcast Presentation CLE Series

Environmental Litigation Series—Session 7: Ethics (Privilege and Work Product Issues)
May 22, 2007
Teleconference/Slide Webcast Presentation CLE Series

For more information, see the Section Web site at www.abanet.org/environ or contact the Section at (312) 988-5724.
When is a Notification Requirement Triggered?

Notification is triggered when (1) a regulated hazardous substance (2) is released, (3) from a “facility,” (4) in excess of its “reportable quantity,” (5) within a 24-hour period. Regulated hazardous substances include hundreds of chemicals listed in CERCLA’s implementing regulations as well as substances that exhibit certain hazardous characteristics. In addition, under ECPRA, reporting requirements attach both to releases of CERCLA hazardous substances and to a separate (sometimes overlapping) set of chemicals designated “extremely hazardous substances.” By regulation, U.S. EPA has designated a reportable quantity or “RQ” for each chemical. The RQ can vary from 1 pound to 5,000 pounds, depending on the substance.

Pursuant to CERCLA, a “release” is broadly defined and includes virtually any discharge or emission, subject to limited exceptions. CERCLA excludes certain emissions, such as those from motor vehicles, from the definition of release. Federally permitted releases (e.g., releases pursuant to a Clean Water Act NPDES permit) are also excluded. EPCRA defines the term “release” to include all of the activities regulated under CERCLA, as well as releases of hazardous chemicals and extremely hazardous substances. As with CERCLA, EPCRA excludes certain emissions from the definition of release (e.g., emissions from motor vehicles and federally permitted releases).

Under CERCLA, the term “facility” includes more than buildings, warehouses and factories; facility is defined to encompass all sites (with limited exception) where a hazardous substance is located. EPCRA likewise defines the term “facility” broadly. Importantly, however, the only facilities subject to EPCRA reporting requirements are ones that produce, use or store a “hazardous chemical.”

To Whom Must Notification be Provided?

When a release of an RQ occurs, notification must be provided to three levels of government. Under CERCLA, the “person in charge” must notify the National Response Center (NRC). Although the term “person in charge” is undefined, U.S. EPA expects companies to designate one or more individuals or positions responsible for reporting to the NRC. The NRC is a continuously staffed communication center charged with coordinating federal response actions. Under EPCRA, the facility “owner or operator” must provide notice to both the state emergency response commission (SERC) and local emergency planning committees (LEPCs) in all areas likely to be affected by the release. Note that, unlike CERCLA, EPCRA specifically exempts from the reporting requirements releases that do not escape the facility boundary. This exemption covers those releases from which exposure is limited to persons within the site(s) of the facility. This exemption has been interpreted to apply only in instances where the release lacks potential to affect persons off-site.

How Long After the Release of an RQ Does a Company Have to Notify?

The statutes require reporting “immediately” whenever there exists knowledge—or “constructive knowledge,” as explained below—that the release has exceeded the RQ in any 24-hour period. Releases of less than the RQ do not trigger the statutes’ reporting requirements.

Do not confuse the 24-hour period for measuring whether a RQ has been triggered as the amount of time a company has to report a release. The 24-hour period simply relates to the duration of time during which the amount of a release is measured. However, as soon as the RQ is met (whether it takes 15 minutes or the full 24-hour period), a company must immediately notify the NRC, SERC and LEPC(s).

Although neither statute defines the term “immediately,” in enforcement, U.S. EPA relies on a comment in CERCLA’s legislative history that requires notification within fifteen (15) minutes after knowledge of a release of a RQ is acquired. See, e.g., U.S. EPA, “Enforcement Response Policy for Sections 304, 311 and 312 of the Emergency Planning and Community Right-To-Know Act and Section 102 of the Comprehensive Environmental Response,
Compensation and Liability Act” (Sept. 30, 1999) (hereafter “U.S. EPA Penalty Policy”), available at www.epa.gov/compliance/resources/policies/civil/epcra/epcra304.pdf. If U.S. EPA believes that notification occurred beyond this 15-minute window, expect U.S. EPA to threaten or bring an enforcement action for late reporting. Although U.S. EPA applies a rigid definition of “immediate” to commence an enforcement action, case law has rejected this approach, recognizing that the determination of immediacy is a fact-specific inquiry. In the Matter of Morton Internat’l, Inc., Docket Nos. EPCRA/[CERCLA]-VII-96E-218, 1997 WL 821128 (ALJ, Dec. 12, 1997) (noting that—for purposes of defining immediately—the legislative history of CERCLA and EPCRA “although an excellent source for guidance, is not authoritative); see also In the Matter of Nova Chems., Inc., Docket No. CERCLA-01-2005-0051, 2006 WL 2847397, at n.8 (ALJ, Aug. 2, 2006) (“[T]he Court notes, and EPA has conceded, that determining immediacy is a case-by-case determination.”). Nonetheless, the period of delay is an important factor used by U.S. EPA in setting the amount of the proposed penalty. Therefore, notification should be provided within 15 minutes whenever possible.

The issue that gets most companies in trouble involves U.S. EPA’s belief that a company could have, and should have, reported sooner than it did. As noted, U.S. EPA has a difficult time understanding why it can take a company more than minutes to determine if the RQ has been—or for an on-going release, is being—exceeded. In contrast, companies frequently make safety considerations (e.g., addressing and containing the release) their first priority, with notification following as soon as practicable. U.S. EPA is unsympathetic to such prioritizing, contending that safety considerations and notification should be pursued independently and simultaneously. Also, some companies assume incorrectly that they must determine the exact volume of the release before providing notification. In reality, the literal terms of the statutes’ require notification once it is determined that the RQ has been exceeded, whatever the exact amount.

Ironically, even prompt notification following a company’s actual knowledge that a RQ has been exceeded will often fail to satisfy U.S. EPA. This is because, as noted, U.S. EPA believes that the company possessed sufficient information prior to the time of notification such that it had constructive knowledge that the RQ was exceeded. To complicate the issue further, there is no hard consensus on what constitutes constructive knowledge. One oft cited case states that constructive knowledge “neither indicates nor requires actual knowledge but means knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent person ought to exercise, to a knowledge of actual facts . . . .” In re Thoro Products, Co., EPCRA No. VII-90-04 (ALJ, May 19, 1992). Under this formulation, U.S. EPA has virtually unfettered discretion to “second guess” the company’s actions, probing for information available to the company that, in the exercise of due diligence, would have enabled it to more quickly gain actual knowledge of a reportable release.

Other cases acknowledge that a company is entitled to investigate the extent of the release and must be afforded some flexibility in interpreting information available to it. See, e.g., In re Genicom Corp., EPCRA-III-057, 1992 WL 204414 (E.P.A.) (ALJ, July 16, 1992). These cases support the company’s obligation to report only if the RQ is actually exceeded, and recognize that factual inquiry needed to reach that conclusion may take some time; in some cases, even days to reach a determination. Even so, these cases have faulted companies that neglected to diligently investigate the amount of the release. Such failure was deemed indicative of the companies’ ignorance of or hostility to the notification requirements.

At bottom, the constructive knowledge standard prevents a company from waiting to provide notice until it has conclusive knowledge of the amount of the release. Once sufficient information exists to conclude that the RQ was exceeded, it is time to report.

Form and Content of the Notification

Another pitfall for companies concerns proper notification to the authorities. In an emergency, the first contact is commonly to 911. The 911 operator may
itself notify the LEPC, SERC, NRC or all three. A company may assume, incorrectly, that if the LEPC, SERC or NRC receive notification of the release from such a third-party, it need not make further efforts to report the release. This is not U.S. EPA’s position. U.S. EPA insists that it is always the responsibility of the person in charge or the owner/operator to separately report to each the NRC, SERC and LEPC(s). Therefore, a company should never act as though a third-party’s notification to these authorities will fulfill the company’s reporting obligations.

A company should immediately notify the NRC of a reportable release by telephone. Once notified, the NRC will request such information as the:

- contact information of the person reporting the release and the responsible party;
- location of the release;
- date and time the release occurred or was discovered;
- name of the substance released;
- cause of the release;
- amount released;
- medium into which the release was discharged;
- bodies of water, if any, affected;
- weather conditions at the time of the release;
- number and type of injuries;
- estimated amount of property damage;
- current and future cleanup actions planned at the site of the release; and
- other agencies notified of the release.

Initial notification to the SERC and LEPC under EPCRA may be made by telephone, radio or in person. Initial notification must include the following information, provided that it is known to and will not delay the company in reporting the release:

- the name or identity of the substance released;
- whether the substance released is an extremely hazardous substance;
- the time and duration of release;
- where the release occurred (e.g., in a warehouse, vented to the outside);
- known or anticipated acute or chronic health risks;
- advice regarding medical attention necessary for persons exposed;
- precautions to take following the release; and
- the name and telephone number of the company’s contact person(s).

EPCRA also requires that follow-up written notice be provided “as soon as practicable” after a release to affected SERCs and LERCs. Many states, however, require that the follow-up report be made within 30 days of the release. CERCLA does not mandate follow-up reporting.

**Conclusion: When in Doubt, Report**

U.S. EPA aggressively pursues deviations from CERCLA and EPCRA’s reporting requirements. Although case law interpreting the reporting requirements provides a company with some tools to contest a proposed violation, the potential benefit of a legal defense is small consolation to a company facing the expense and distraction of an enforcement action, particularly one that may be highly fact-dependent.

Therefore, given the complexity of and the potentially serious consequences for failing to timely observe the emergency release reporting requirements, a company should make it a priority to apply the reporting requirements conservatively. Ensure that company personnel are properly trained and adequately equipped to make meaningful calculations of the volume of chemical released very soon after a release occurs, if not during the release. Assign reporting responsibility to personnel on a 24-hour basis, and ensure they have access to telephone numbers for the NRC, SERC and all LEPCs. Finally, unless it is known with certainty that there has not been a release in excess of the RQ, consider providing prompt notice of the release despite doubt regarding the volume of the release. A few phone calls and the required supplemental written report could save a company from six-figure penalties and shield it and its corporate officers from criminal liability.
FALLOUT FROM TVA V. WHITMAN: WHEN DO EPA ORDERS DENY DUE PROCESS?

Richard E. Schwartz
Kirsten L. Nathanson
Crowell & Moring LLP

In 2003, the U.S. Court of Appeals for the Eleventh Circuit held that the administrative compliance order (ACO) scheme in the Clean Air Act is unconstitutional to the extent that severe civil and criminal penalties can be imposed for noncompliance with the terms of such an ACO. *TVA v. Whitman*, 336 F.3d 1236 (11th Cir. 2003). These ACOs are issued without adjudication or meaningful judicial review, so they do not provide the respondent an opportunity to contest the order in an independent forum. Under the Clean Air Act, such orders may be based on “any information available to the administrator.” 42 U.S.C. § 7413(a)(i).

In the first three years following *TVA v. Whitman*, similar ACO schemes under other environmental regulatory statutes (i.e. in the Clean Water Act and Resource Conservation and Recovery Act (RCRA)) have not generated case law testing the Eleventh Circuit’s analysis in *TVA*. Several attempts have been made to extend the Eleventh Circuit’s analysis to other environmental enforcement schemes that differ from the Clean Air Act’s ACO provisions, but those attempts have thus far been unsuccessful.

In the most recent attempt, the General Electric Company (GE) brought a facial challenge to section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9606. *See General Electric Co. v. Johnson*, 362 F. Supp. 2d 327 (D.D.C. 2005). GE challenged on due process grounds the administrative order process under CERCLA section 106, which authorizes Environmental Protection Agency (EPA) to order parties to clean up a hazardous waste site where there may be an “imminent and substantial endangerment” to the public health or welfare or the environment. Section 106 authorizes a district court to impose civil penalties of up to $25,000 per day for willfully violating an order “without sufficient cause.” The court may also impose punitive damages of up to three times the amount of costs incurred by the Superfund due to the defendant’s failure to comply. GE argued that the issuance of a section 106 order amounted to a deprivation of property and urged the court to apply the balancing test in *Mathews v. Eldridge* (424 U.S. 319 (1976)) to determine whether the procedures provided in CERCLA satisfied the constitutional requirements for due process. GE argued that the CERCLA section 106 orders are analogous to the ACOs at issue in *TVA*, and that the court should follow the Eleventh Circuit’s analysis. See 362 F. Supp. 2d at 340. The court rejected GE’s argument, distinguishing the Clean Air Act text analyzed in *TVA* from CERCLA section 106:

[The] reasoning of the court in *TVA* is inapposite to the question before this Court. There, the Eleventh Circuit struck down the imposition of penalties for noncompliance with an ACO because the standard for EPA’s determination to issue an ACO was “any information available.” The court found that meaningful judicial review of EPA’s determination based on “any information available” could not be conducted. In the case of a section 106 order, however, there is no similarly indefinite standard; instead EPA is required to make a finding that there is an “imminent and substantial endangerment to the public health and welfare.”

In addition, the court found *TVA* inapplicable because: (1) fines and penalties are not automatic under CERCLA—defendants can present a “sufficient cause” defense, (2) a defendant can challenge a section 106 order as arbitrary and capricious on the administrative record and (3) *TVA* did not directly analyze whether the issuance of an ACO constituted a deprivation of property. The court found that the ACO did not deprive GE of property and that the fines and penalties for noncompliance were not unconstitutionally coercive. It dismissed GE’s facial constitutional attack on the CERCLA § 106 order.

The GE court did, however, allow GE to pursue a “pattern and practice” claim (that EPA’s *administration* of CERCLA section 106 denies due process to parties subject to § 106 orders). The court refused to grant EPA’s motion for summary judgment on that claim, and GE is currently pursuing extensive
discovery against EPA related to its section 106 orders to determine if EPA’s pattern and practice in administering CERCLA section 106 orders constitutes a deprivation of property and a procedural due process violation. The outcome of GE’s “pattern and practice” claim could be significant.

Another attempt to extend TVA to CERCLA came in *United States v. Gurley*, 384 F.3d 316 (6th Cir. 2004). There, defendant was subject to civil penalties for failing to respond to an information request from EPA under CERCLA section 104(e), which authorizes EPA to request information from a party and issue orders directing compliance with the request. 42 U.S.C. § 9604(e). Defendant argued, *inter alia*, that section 104(e) as interpreted and enforced by the district court violated the Due Process Clause and should be invalidated, following the *TVA* rationale. The Sixth Circuit “easily” distinguished *TVA* and rejected the defendant’s claim. Unlike in the Clean Air Act scheme invalidated in *TVA*, the defendant in *Gurley* had a full adjudication before a federal judge on whether he violated CERCLA before penalties were imposed. In contrast, under the Clean Air Act ACO provisions at issue in *TVA*, EPA could impose penalties upon violation of an ACO before any opportunity for adjudication. Accordingly, the Sixth Circuit ruled that *TVA* was inapposite.

Finally, plaintiffs in *St. Andrews Park, Inc. v. United States Department of the Army Corps of Engineers*, 314 F. Supp. 2d 1238 (S.D. Fla. 2004), sought to invoke *TVA* to invalidate a preliminary jurisdictional determination by the Corps regarding various wetlands on plaintiffs’ property. The court rejected plaintiffs’ arguments because as an initial matter “there has been no claim that a jurisdiction determination itself had the kinds of consequences that an ACO was to have” in *TVA*. 314 F. Supp. 2d at 1243. The court was quick to note, however, that the Clean Water Act did have identical language to the Clean Air Act language invalidated in *TVA*, but plaintiffs’ case suffered from a fatal omission—no enforcement orders had yet been issued, so the *TVA* rationale could be of no help in supporting plaintiffs’ premature claim. The court found that the preliminary jurisdictional determination did not amount to a reviewable “final agency action” and dismissed plaintiffs’ claim for lack of jurisdiction.

In conclusion, several parties have attempted to extend *TVA*’s holding beyond the Clean Air Act, but in those instances the courts have been unwilling to apply the *TVA* rationale to orders that present better procedural protections. Because administrative orders under the Clean Water Act and RCRA are issued under strikingly similar procedures (compare Clean Water Act § 309(a, d), 33 U.S.C. § 1319(a, d), and RCRA § 2003 (a, b), 42 U.S.C. § 6973 (a, b)), the *TVA* analysis could be applied to them as well. Initial indications are, however, that the courts seem unwilling to strike down ACOs that provide key protections missing from the Clean Air Act.

**THE TOXIC SUBSTANCES CONTROL ACT: EPA'S ENFORCEMENT OF THIS OFT-FORGOTTEN ENVIRONMENTAL STATUTE**

**Erik E. Petersen**  
Bracewell & Giuliani LLP  
erik.petersen@bgllp.com

When one thinks of environmental enforcement, the statutes that typically jump to mind are the Clean Air Act and the Clean Water Act (and justifiably so). It would behoove companies, however, to take a second look at another statute that can fly under the corporate radar: the Toxic Substances Control Act (TSCA). Although TSCA does not compare with the Clean Air Act or the Clean Water Act in total enforcement numbers, the Environmental Protection Agency’s (EPA’s) historical enforcement of TSCA shows that it can result in significant administrative penalties. In addition, the passive nature of the statute and its focus on reporting and recordkeeping can result in company-wide instances of noncompliance, particularly when a company is wholly unaware of the obligations that it owes under TSCA.

The potential for TSCA issues to fly under the radar is much greater at companies that do not believe that they are regulated by TSCA or at companies that are wholly unaware of certain TSCA requirements. Many companies should note that even if they are not in the chemical industry, TSCA may still apply to them.
course, companies exceedingly familiar with TSCA can also be snared by its requirements. This article briefly reviews some of the pitfalls associated with TSCA and the EPA’s recent enforcement of this oft-forgotten environmental statute.

The Toxic Substances Control Act: A Brief Summary

In 1976, the United States Congress enacted TSCA (15 U.S.C. § 2601 et seq.) to help ensure the protection of human health and the environment from risks associated with new and existing chemicals. In practice, it places significant responsibilities on manufacturers, importers and processors of chemical substances. TSCA is implemented and enforced by EPA and the United States Customs Service (now part of the Department of Homeland Security). Both EPA and the Customs Service have issued regulations to fulfill the provisions of TSCA. See 40 C.F.R. §§ 700-799 and 19 CFR §§ 12.118 through 127.28.

Among other things, TSCA (and the related regulations) requires regulated entities to: (1) obtain approval from EPA prior to the manufacture or importation of new chemical substances, (2) provide information to EPA about risks to human health and the environment from specific chemicals, (3) keep extensive records concerning chemicals and how they are used and how they affect third parties and (4) report chemical usage and process- and use-related information to the government. In other words, TSCA places a broad responsibility on manufacturers, processors and importers of chemical substances and requires them to be knowledgeable about the chemicals with which they deal, to develop information about chemicals they distribute in commerce, and to monitor and report on the effects of those substances on human health and the environment.

When dealing with TSCA, there are several key concepts to keep in mind:

First, TSCA regulates chemicals, not environmental media. The most well-known environmental statutes focus on the protection or remediation of air, water and soil. TSCA, on the other hand, focuses on chemical substances and the risks they may pose, regardless of which environmental medium might be affected. In addition, TSCA regulates chemical substances at each important stage of the chemical’s life-cycle, such as: (1) manufacture or importation, (2) marketing, (3) distribution in commerce, (4) processing, (5) use and (6) disposal. Accordingly, companies that engage in these types of activities should pay close attention to TSCA.

Second, regular reporting and recordkeeping are essential to those regulated under TSCA. EPA utilizes this approach because the risks associated with products typically become apparent over time and are more easily discerned if records are kept and reviewed by a single entity (i.e., EPA).

Third, the federal government implements TSCA. Unlike the Clean Air Act, the Clean Water Act and other prominent federal environmental statutes, TSCA does not contemplate, nor does it permit, the delegation of federal TSCA authority to the states. Accordingly, the policies and procedures of the federal government are controlling. As a result, TSCA has not precipitated the regional variation that exists under other environmental statutes. By the same token, the federal focus also means that substantial resources are available at the federal level to implement and enforce TSCA.

Common Areas of Enforcement under TSCA

Although there are a number of requirements under TSCA, certain missteps consistently trigger the most significant violations. For example, a key concept of TSCA is that one cannot manufacture or import a particular chemical substance, with minor exceptions, unless it is listed on the TSCA Inventory. The TSCA Inventory is an extensive list of chemicals (roughly 75,000) that have been approved for manufacture of import in the United States. Among other things, the Inventory provides EPA with an important tool for identifying, prioritizing and evaluating toxic chemicals and for developing a profile of the chemical industry in the United States.
Prior to manufacture or import of a chemical substance not listed on the Inventory (a “new” chemical substance), one must submit a Premanufacture Notification (PMN) to EPA. Once EPA approves the PMN (or fails to act upon it within a prescribed amount of time), one can begin the manufacture or importation of the chemical substance. That said, within 30 days of manufacture of the initial import, one must submit a Notice of Commencement (NOC) to EPA that alerts the agency to this new activity. In addition, in the case of importation, the importer must certify that the import is either (1) compliant with TSCA or (2) not subject to TSCA.

As a result, if one imports a chemical substance in the mistaken belief that the substance is listed on the TSCA Inventory, a cascade of violations can result from this single misstep. Namely, (1) no PMN was prepared, (2) a NOC was not submitted and (3) the import certification was incorrect. In addition to this initial cascade, the series of resulting violations often brings the spotlight of agency attention on the company in question, which may result in further allegations of noncompliance.

Similarly, a series of violations can result if one is unaware of one’s reporting obligations or duty to keep certain records and report certain information to EPA. For example, EPA just concluded its quinquennial “Inventory Update,” which was targeted at the manufacture and importation of chemical substances during the 2005 calendar year. As part of this update, EPA required manufacturers and importers of chemical substances listed on the TSCA Inventory to provide basic information related to chemicals they manufacture or import. Given the infrequent and somewhat under-publicized nature of this reporting obligation, some regulated entities will inevitably fail to report. Similarly, some companies, unaware of the obligations that pertain to them, neglect to keep adequate records as to adverse health effects or neglect to report necessary information to EPA (e.g., TSCA § 8(a)). By failing to attend to these requirements, numerous violations of TSCA can start to stack up.

Penalties for TSCA violations can be mitigated, however, through the use of agency discretion and EPA’s TSCA Penalty Policies. Technically speaking, EPA can assess civil penalties for violations of TSCA as high as $32,500 per day for each violation. In addition, for criminal violations of the statute, imprisonment for as much as one year can be imposed. According to EPA’s existing penalty policies, however, companies subject to enforcement can often significantly reduce the penalties they face by showing the presence or absence of certain factors, such as: voluntary disclosure, culpability, past violations and ability to pay. While the penalty policies are not binding upon EPA, they are an indicator of how EPA might exercise its enforcement discretion.

Selected Recent TSCA Enforcement Actions

3M’s recent settlement with EPA is a good example of how TSCA violations can stack up as well as how EPA uses its enforcement discretion. See, In the Matter of 3M Company, EPA Docket No. TSCA-HQ-2006-5004. After becoming the focus of EPA’s attention in the late 1990s, 3M agreed to conduct a corporate-wide TSCA compliance audit. Prior to doing so, EPA and 3M agreed to, among other things, a pre-negotiated penalty amount for each potential violation, should any be discovered. After conducting the audit, 3M, while neither admitting nor denying any of the violations, agreed to pay a $1,521,481 penalty for 244 separate violations under TSCA. These violations related to the PMN and NOC requirements discussed above, as well as numerous alleged failures to submit information to EPA as required under TSCA. It is worth noting that at the conclusion of the audit, EPA credited 3M with producing valuable, previously unreported information. Indeed, 3M and EPA continue to work together on a number of chemical issues that arose out of the audit. See, e.g., EPA’s PFOA Stewardship Program.

Another large settlement in 2006 highlights just how significant administrative penalties can be under TSCA. This settlement involved DuPont and a series of alleged violations relating to DuPont’s use of perfluorooctanoic acid (PFOA). Of the eight counts, seven related to DuPont’s alleged failure to provide EPA with information about the impacts of PFOA on human
health, some of which DuPont possessed as early as 1981. In order to settle the allegations, DuPont agreed to pay $10.25 million—the largest civil administrative penalty EPA has ever obtained under any environmental statute. In addition, DuPont committed to conduct two Supplemental Environmental Projects. The first, valued at $5 million, is a project intended to develop more information about PFOA. The second, valued at $1.25 million, is intended to reduce the risks associated with chemical use at schools.

The 3M and DuPont settlements show how enforcement of TSCA can result in significant administrative penalties and how failure to comply with TSCA can result in numerous alleged violations. TSCA enforcement is not limited to large chemical companies, however. Instead, TSCA casts a wide net across many business sectors. For example, all one needs to do to become subject to TSCA is import a product containing a chemical on the TSCA Inventory. This low threshold is made lower still by the fact that the TSCA Inventory contains many items used on a daily basis (e.g., bleach). A good example of the long arm of TSCA is an enforcement action EPA brought against Dial Corporation in 2003. EPA assessed a fine against Dial based on the company’s failure to notify EPA about solvents that were contained within finished household products that it exported to a number of countries. After feeling the sting of TSCA, Dial instituted a program to track any chemical that it exports, including those contained within finished household products.

Conclusion

The potential for enforcement under TSCA can fly under the corporate radar. Many manufacturers, importers and processors of chemical substances would be well served to take another look at their company’s operations and reassess their TSCA compliance status. A proactive internal compliance system can help companies avoid the cascade of penalties that noncompliance with TSCA can unleash.
controlling criteria pollutant emissions from existing sources. The NSPS program, however, established a special set of standards for certain new and modified sources of pollution at power plants. 42 U.S.C. § 7411. Under the NSPS program, increases in emissions are defined in terms of hourly emission rate increases.

The NSPS program, alone, was not entirely successful. Therefore, Congress enacted the 1977 CAA amendments, including the PSD program, which supplements the NSPS program. 42 U.S.C. § 74701(1). The PSD program is intended to protect air quality in areas that have met or exceeded the NAAQS. Under the PSD program, a power plant, prior to engaging in a major modification, must acquire a permit from EPA. 45 Fed. Reg. 52,676. Unlike the NSPS program, the PSD program defines increases in emissions in terms of annual emission rate increases.

Duke Energy operates eight plants in the Carolinas, which include a total of 30 coal-fired generating units. United States v. Duke Energy Corp., 411 F.3d 539 (4th Cir. 2005). Between 1988 and 2000, Duke Energy made upgrades to 29 of these coal-fired generating units. Id. These upgrades extended the life of the generating units and allowed the units to increase their daily hours of operation. Id. Duke Energy did not apply for PSD permits from the EPA for these upgrades. Id.

In 2000, EPA alleged that Duke Energy violated the CAA by failing to obtain PSD permits because its annual emissions increased as a result of the upgrades. However, Duke contends EPA should have applied the hourly emission rate test under the NSPS program. Because Duke’s hourly emissions rates did not increase as a result of the upgrades, they contend the upgrades did not constitute a major modification and therefore, they did not have to obtain PSD permits.

During oral arguments, Justice Scalia’s comments appeared consistent with Duke Energy’s assertions. Justice Scalia expressed concern over the impact of the different regulatory definitions on companies. It was his concern that companies would “get whipsawed.” Chief Justice John Roberts, while recognizing EPA’s authority to interpret ambiguous regulations differently over time, also expressed concern about how changes in interpretation would impact companies, such as Duke Energy.

However, Environmental Defense and the government argue that where there is an ambiguous statutory definition, EPA possess authority to interpret different definitions for different purposes and that such interpretation is reasonable in light of the different purposes of the NSPS and PSD programs.

The second issue taken up by the Court is jurisdictional. Specifically, the issue pertains to whether EPA “can interpret that statutory term ‘modification’ under PSD differently” from how it interprets that term under the NSPS and whether district and/or appellate courts possess jurisdiction over EPA’s clean air enforcement actions. Duke Energy argues that EPA acted outside its authority in defining the statutory term differently under its PSD and NSPS regulations. Duke Energy also contends the district and appellate courts possess the requisite jurisdiction to invalidate EPA regulations.

While the majority of the Justices’ questions during oral argument appeared to focus in on the substantive legal issue, Justice Anthony Kennedy did pose the question of whether district courts reviewing EPA enforcement actions would be precluded from ruling on EPA’s interpretation of statutory requirements. Environmental Defense contended that pursuant to Section 307(b) of the CAA, jurisdiction to invalidate EPA regulations rests solely with the United States Court of Appeals for the District of Columbia. They also argue that Section 307(b) limits the time period within which challenges to EPA’s rules may be brought. Therefore the district court and the United States Court of Appeals for the Fourth Circuit had no authority to invalidate EPA’s interpretation of its own regulations. From a policy perspective, Environmental Defense argued that allowing district courts to rule on EPA’s interpretation of statutory requirements would result in inconsistent judicial outcomes and circuit splits, which in turn would hamper EPA’s enforcement efforts. A ruling from the Court is expected in early 2007.
REGIONAL REPORTS

Region 1

David Erickson
derickson@shb.com

James Neet
jneet@shb.com

Federal/Regional Developments

EPA Region 1 settled claims against Kaler Oil Company, Inc. of North Bath, Maine on Sept. 6, 2006 that the company did not have a Spill Prevention, Control and Countermeasure (SPCC) plan, as required by the Clean Water Act. EPA also alleged that the company failed to construct containment around its oil tanks and loading area causing a risk of a spill to surface water. The oil delivery company agreed to pay a $35,000 penalty and correct the alleged violations.

EPA Region 1 filed a complaint Sept. 6, 2006, seeking fines of $157,500 from Pennywise Oil Company, Inc. of Connecticut for alleged Clean Water Act violations at its oil storage facilities in Essex and Westbrook. The complaint alleges the company did not have SPCC plans in place at either facility, as required by the Clean Water Act. EPA records show two prior spills at the Essex facility, both of which impacted groundwater.

State and Local Developments

Massachusetts

The Massachusetts Department of Environmental Protection (MassDEP) assessed a penalty of $18,500 Sept. 13, 2006 against Motiva Enterprises, LLC for allegedly failing to take action to address vapors that could cause a health hazard at its gas station and convenience store in Auburn. Air sampling in April 2005 showed a significant increase in vapors that required the company to notify MassDEP within 72 hours and conduct immediate abatement actions. The company did not notify the agency or take action until July 2005.

MassDEP fined the Orange Tow Company $5,750 on Sept. 13, 2006 for alleged violations of state air quality and hazardous waste regulations. According to the agency, a January 2006 inspection revealed the company was burning hazardous waste in an incinerator without a permit and was not properly labeling containers of waste oil or delineating areas where waste oil was being stored.

Maine

The Maine Board of Environmental Protection (Maine Board) approved a settlement with Webber Energy of Bangor resolving alleged violations of state underground storage tank regulations. The state agency alleged that Webber failed to submit required annual compliance inspection reports, failed to report evidence of possible leaks to the agency, failed to maintain spill containment buckets and failed to provide for a closed vapor loop for a Stage 1 vapor recovery system. The company operates gas stations in nine Maine cities. Under the terms of the settlement, the company agreed to pay a $33,100 civil penalty.

Connecticut

The Connecticut Department of Environmental Protection entered into a Consent Order with Clean Harbors of Connecticut, Inc. Sept. 8, 2006, in which the company agreed to pay civil penalties totaling $83,535 and undertake Supplemental Environmental Projects costing $153,262 to resolve state water and hazardous waste regulations. The alleged violations were found during inspections in September and August 2005 and included the incidents in September 2004 in which the company discharged excess solids into Britol’s POTW.
Asbestos Contractor Arrested

Everett Blatche, 44, a Syracuse, New York contractor in charge of asbestos removal at the former Agway building in Dewitt was arrested after federal prosecutors alleged he allowed the cancer-causing pollutant to seep into the public sewer system, contaminate construction debris and float freely outside the building where people walk and children play.

Blatche, a supervisor with 22 years experience at Apex Environmental Services, was charged with violating the Clean Air and Clean Water Acts and could face up to 10 years in prison. Prosecutors accused Blatche of allowing asbestos to ooze from the building and coat surrounding streets, dumping asbestos-contaminated water into drains and letting it flow onto public streets, throwing asbestos into construction debris dumpsters and allowing the material to be reused as construction fill, failing to require workers to wear asbestos respirators, directing employees to improperly dispose of asbestos, and ignoring employee complaints and inspectors’ warnings. Apex Environmental Services, 4682 Crossroads Park Drive, Clay, New York, is owned by William Hickok, Bob Leathley and John Leathley according to business records. The owners have not been charged; however, prosecutors advise that the investigation is continuing.

Restitution Uncertain in Asbestos Scam Case

The 1,550 companies that were scammed by an asbestos removal company might never get the $23 million they are collectively owed in restitution. For more than a decade, AAR Contractors took shortcuts, failed to follow federal regulations for asbestos removal and conned clients with fraudulent laboratory tests, according to Assistant U.S. Attorney Craig Benedict. Hospitals, schools and churches were among the victims of the conspiracy and judges determined that the restitution should be divided among them. Raul and Alexander Salvagno, the father and son who owned the company, are now in federal prison, serving 19 years and 25 years, respectively. The Salvagnos say that the money is gone.

Mr. Benedict advised that the U.S. Attorney’s Office is operating under the assumption that the Salvagnos have secreted away funds. A forensic accountant is looking into the matter. The U.S. Attorney’s Office has learned that Alexander Salvagno had taken a class on how to invest money in offshore accounts and speculate he sensed that he would have to hide the company’s assets. Benedict advised that he doubts the Salvagnos have all the money and the likelihood of finding it is not great. The Salvagnos received the longest prison sentences for an environmental crime in U.S. history. A total of 16 people have been convicted in the case. The Salvagnos have filed appeals.

Asbestos in Pennsylvania Schools

On Nov. 21, 2006, EPA Region 3 announced the settlement of four cases involving the improper management of asbestos containing material in schools. The four cases are part of EPA’s larger effort to insure that school districts in the Mid-Atlantic Region are in compliance with the Asbestos Hazard Emergency Response Act (AHERA). Three of the settlements involve school districts in Pennsylvania, the Philadelphia School District, the Diocese of Allentown and the Diocese of Scranton. The fourth case involves Edsyss, Inc., a company responsible for the City Charter High School in Pittsburgh. The alleged AHERA violations included failing to maintain complete updated asbestos management plans, failing to conduct required surveillance and inspection of asbestos-containing materials, and other AHERA recordkeeping violations. In each settlement the school districts agreed to spend additional funds, all in excess of $15,000, to achieve AHERA compliance and no fines were imposed. EPA found that no students or other building occupants were exposed to asbestos as a result of the alleged violations.
**Euclid of Virginia Inc., Fined Leaking Underground Storage Tanks**

On Nov. 16, 2006, an EPA administrative law judge imposed a $3.1 million penalty against Euclid of Virginia Inc. for failing to take required measures to detect and prevent leaks from underground storage tanks at 23 gas stations in Maryland, Virginia and Washington, D.C. Judge Carl C. Charneski found that for certain facilities, Euclid failed to comply with corrosion prevention standards, install or maintain equipment to prevent releases of gasoline due to the overfilling of tanks or other spills when tanks are being filled. The judge also ruled that Euclid did not maintain required financial assurances to respond and clean up potential fuel leaks or spills for its facilities in Washington, D.C. The size of the penalty was in part due to the number of facilities and storage tanks and the extended period of violations.

**Superfund Settlement in Long Standing Dispute Against Beazer East Inc.**

On Nov. 1, 2006, EPA announced it had issued an order to Beazer East Inc., requiring the company to implement and maintain a $52 million remedy at the Koppers Company Inc. Superfund site in Newport, Delaware. The remedy, among other things, required the company to consolidate and contain approximately 600,000 tons of creosote-contaminated soils and sediments at the more than 300-acre site. The order represents a significant milestone in the cleanup of this large Superfund site, bringing almost 20 years of investigation and negotiation to conclusion.

**Voluntary Disclosure**

Eight companies that voluntarily disclosed and corrected environmental violations had penalties waived by EPA. These cases had potential penalties ranging from $1,000 to about $764,000 for environmental violations that the agency determined caused no harm to human health or the environment. Altogether, the eight companies avoided about $1.2 million in fines. The companies involved include Cheetah Chassis Corporation, PolyOne Corporation, Widener University School of Law, Harrisburg Campus, Waynesburg College, Novozymes Biologicals, Inc., and three separate facilities of the National Railroad Passenger Corporation (Amtrak).

**Two Men Indicted for Clean Water Act Violations in Virginia**

Two Washington State men were indicted for alleged violations of the Clean Water Act related to the Clarksville Bypass Project in Mecklenburg, Virginia. According to the indictment which was filed on July 20, 2006, the project involved the expansion of Route 58 south of an existing bridge, as well as the construction of a new bridge across a reservoir. The indictment alleges that during construction the two men knowingly used a hose to pump slurry, a mixture containing water, concrete and plasticizer, into the reservoir in violation of the Clean Water Act. If convicted the men face up to a maximum of three years imprisonment.

**Pennsylvania Man Sentenced to Prison for Asbestos Violations**

On July 26, 2006, Wallace Heidelmark, 48, of Phoenixville, Pennsylvania, was sentenced in the U.S. District Court in the Eastern District of Pennsylvania to 24 months in prison and ordered to pay a $5,000 fine and $41,541 in restitution for violations related to removal of asbestos containing material. Heidelmark’s business, Indoor Air Quality, Inc., was also sentenced to a $100,000 fine and the same restitution. Heidelmark and Indoor Air were in the business of removing asbestos from homes and businesses in the Philadelphia area. The indictment alleged that the defendants were engaged in a scheme to defraud homeowners by promising to use certain proper asbestos removal techniques and then failing to use those techniques, and regularly falsifying air testing at the conclusion of asbestos removal jobs by sending blank unused air sampling canisters to a testing lab. The defendants would then tell the homeowners and business owners that the building’s air had passed the post-removal air test.
West Virginia Man Sentenced to Prison for Clean Water Act Violations

On Jan. 11, 2007, Duke Linzy, 50, of Charleston, West Virginia, was sentenced in the U.S. District Court for the Southern District of West Virginia to 30 months in prison and a fine of $25,000 for illegally dumping raw sewage in violation of the Clean Water Act. According to the indictment, Linzy owned and operated All Clean, a business that picked up sewage from residential and commercial companies and was supposed to transport it to area municipal waste water treatment facilities for treatment and disposal. Linzy plead guilty admitting he directed employees to dump untreated sewage into a floor drain rather than taking it directly to a municipal facility and paying for treatment. During the sentencing hearing, it was revealed that Linzy had continued to violation the law after his guilty plea by directing employees to dump the sewage on the ground at various sites in Kanawha County. Based on the continuing violations, United States District Judge Joseph R. Goodwin revoked his bond and had him taken into custody to begin serving his sentence immediately.

Region 4

Teri Donaldson
tdonaldson@ssd.com

Alabama

Freeman and Patrick Wood Products, L.L.C., of Centerville, Alabama

On June 20, 2006, EPA reported the settlement of an administrative enforcement action against Freeman & Patrick Wood Products, L.L.C., located in Centreville, Alabama, for violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The settlement requires Freeman & Patrick to comply with FIFRA and pay a penalty of $7,500.

The violations at Freeman & Patrick were discovered during an inspection conducted by the Alabama Department of Agriculture & Industries in August 2004. EPA contends it is a misuse of the chromated copper arsenate (CCA) label to treat dimensional wood for a use not listed on the label. CCA is a chemical wood preservative containing chromium, copper and arsenic. In addition, the improperly treated wood is then considered an unregistered pesticide. All facilities that produce pesticides are required to be registered with EPA. Freeman & Patrick was not registered with EPA as a pesticide-producing facility.

Alabama Power

The United States District Court for the Northern District of Alabama entered a partial Consent Decree for alleged construction of Miller Plants Units 3 and 4 without obtaining a Prevention of Significant Deterioration (PSD) permit and incorporating Best Available Control Technology requirements. The Consent Decree requires Alabama Power to commence continuous year-round operation of selective catalytic reduction equipment for control of nitrogen oxide (NOx) emissions by May 1, 2008. In addition, Alabama Power is required to install and begin year-round operation of flue gas desulfurization equipment for control of sulfur dioxide (SO2) emissions by Dec. 31, 2011. The installation and operation of these controls are expected to result in the reduction of 4,953 tons per year of NOx and 22,788 tons per year of SO2. Alabama Power is also required to purchase and permanently retire $4.9 million worth of 2007 SO2 emissions allowances. A civil penalty of $100,000 is to be paid.

Florida

EPA Region 4 Drinking Water Airline Agreements

EPA reached settlement under the Safe Drinking Water Act (SDWA) with four of the major airlines headquartered in Region 4 (Air Tran, Atlantic Southeast Airlines, Comair, and Delta.) The action came after an EPA investigation of 327 U.S. and
foreign planes at 19 airports in 2004 found total coliform contamination in the drinking water in 15 percent of the aircraft. The settlements require that the airlines regularly monitor aircraft water systems, notify EPA and the public when tests reveal contamination, and regularly disinfect aircraft water systems and water transfer equipment. The orders also require each airline to study possible sources of contamination from outside of the aircraft.

**Florida Petroleum Reprocessors**

The Florida Petroleum Reprocessors (FPR) Superfund Site located in the town of Davie, Broward County, Florida, was operated as a used oil recycling facility from 1979 to 1992. Groundwater contamination in the form of chlorinated solvents was detected at the site and has migrated northward across roughly 800 acres to the Peele-Dixie drinking water well field. Such contamination has impacted the Biscayne Aquifer, which is designated by EPA as a sole source drinking water aquifer, which serves as Fort Lauderdale’s primary source of drinking water.

In the Superfund Consent Decree involving the Florida Petroleum Reprocessors PRP Group, the Florida Department of Transportation, several federal agencies and the initial site owner/operator, Barry Paul, the settling defendants have agreed to pay $2,585,956.11 towards EPA’s past costs. In addition, chemical oxidation, bio-enhancement injections, potential pump/treat activities and monitored natural attenuation will be implemented through the Consent Decree to address the soil and groundwater contamination beneath the Florida Petroleum Reprocessors facility property and the Site plume. The FPR Group has already spent over $4.5 million dollars in site removal response costs and it is likely to spend several million dollars more on implementing the Consent Decree.

**Stauffer Chemical**

The Stauffer Chemical Superfund Site is a former elemental phosphorus plant located in Tarpon Springs, Pinellas County, Florida. The site comprises an area of approximately 130 acres and includes the former phosphorous production facilities and office/administrative buildings. While operating, the plant used a system of 17 unlined waste ponds on the site. The U.S. District Court for the Middle District of Florida entered the Consent Decree which involves a settlement with Stauffer Management Company LLC and Bayer CropScience Inc. These Settling Defendants will perform and fund the response action designated in the Record of Decision (ROD) issued on July 2, 1998, for the Stauffer Chemical Superfund Site, Tarpon Springs, Florida. Additionally, under the Consent Decree the Settling Defendants will reimburse the United States for past response costs and future response costs.

**Georgia**

**Cook County Wood Preserving, Inc.**

On Oct. 5, 2006, EPA reported settling an administrative enforcement action against Cook County Wood Preserving, Inc. in Adel, Georgia, for alleged violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The settlement requires Cook County Wood to comply with FIFRA and pay a penalty of $50,400. The violations at Cook County Wood were discovered during an inspection conducted by EPA in August 2005.

**North Carolina**

**United Organics Corporation**

On May 15, 2006, the U.S. District Court for the Eastern District of North Carolina entered a default judgment in a major Resource Conservation and Recovery Act (RCRA) case, United Organics, that requires that the defendants comply with the law, investigate and clean-up contamination, and pay a $32 million penalty. United Organics, located in Williamston, North Carolina, was a former manufacturer of specialty chemicals, pharmaceutical chemicals, and detergents. Defendants have not yet complied with the court’s Order. The United States is taking action to address continuing hazardous waste violations, ensure clean-up of the facility, and pursue the penalty.
South Carolina

McCarr Homes of South Carolina, Inc.

A Consent Agreement and Final Order was executed and filed by EPA Region 4 against McCarr Homes, Incorporated, Simpsonville, South Carolina, resolving an enforcement action requiring the company’s compliance with their storm water construction permit, pursuant to the Clean Water Act. This action resulted in a significant reduction of sediment, amounting to approximately 26 million pounds/year.

Savannah River Site

In conjunction with the Department of Energy, the Savannah River Site (SRS), the U.S. Environmental Protection Agency (EPA) and the South Carolina Department of Health and Environmental Control (SCDHEC) agreed on a clean up solution for the SRS’s T area. The T Area, built in the early 1950s, is located in the southwestern portion of the Savannah River Site and is approximately one-quarter mile east of the Savannah River. It was in active operation from the early 1950s until 2003, when operations were no longer required. During that time period and in support of the Cold War effort, the T Area was used for pilot-scale testing and evaluation to support the separation of uranium and plutonium produced from five onsite reactors. This remediation will result in the cleanup of approximately 484,000 cubic yards of soil and materials.

Tennessee

Cargill, Incorporated

EPA reached a Clean Air Act settlement with Cargill, Incorporated (Cargill) that addresses 27 facilities located in five of EPA's eight regions. Cargill’s Memphis, Tennessee plant is in Region 4. As a result of this settlement, Cargill will install or optimize volatile organic compound (VOC) controls at 58 units to achieve 95 percent control or better, install or optimize NOx controls on 30 boilers, and implement aggressive solvent loss ratio for oilseed plants which are better than the Maximum Achievable Control Technology (MACT) levels. Cargill will also achieve approximately a 33 percent reduction of actual SO2 emissions from the boilers. The emission reductions that will be achieved by Cargill are 10,450 tons per year (tpy) of VOC, 1350 tpy of NOX, 10,900 tpy of CO and 2250 tpy of SO2. Cargill will pay a civil penalty of $1.6 million and $4.4 million in Supplemental Environmental Projects (SEPs). The federal SEPs consist of the elimination of gaseous sulfur dioxide at corn mill plants in Memphis, Tennessee, Blair, Nebraska, Cedar Rapids, Iowa, Dayton, Ohio and Eddyville, Iowa; a pilot VOC and hazardous air pollutant (HAP) reduction project on the Memphis, Tennessee Oxidized Starch Process; and elimination of ozone depleting substance at Eddyville, Iowa and Blair, Nebraska. The community-based Supplemental Environmental Projects (SEPs) consist of a Mid-south Clean Air Coalition diesel retrofit program in Shelby County, Tennessee; an Eddyville dunes and wetland restoration project in Eddyville, Iowa; a Cedar Rapids, Iowa Indian Creek Nature Center wetlands restoration project; and a Nebraska-Missouri River wetland reserve enhancement program.

Lucite Corporation

EPA Region 4 settled a major Clean Air Act (CAA) case with Lucite International, Inc. (Lucite), which requires the chemical manufacturer to install pollution controls on three emission sources at its Memphis, Tennessee plant resulting in the elimination of over 7,100 tons of pollution each year. The pollutants addressed in the settlement are sulfur dioxide, sulfuric acid mist, carbon monoxide and volatile organic compounds. Lucite will install a $16 million dual absorption control system on its Sulfuric Acid Regeneration Unit, which will result in the elimination of approximately 2,900 tons of sulfuric dioxide emissions each year. Lucite will also pay a civil penalty of $1.8 million and perform a Supplemental Environmental Project worth $1.3 million which will reroute emissions from two other plant emission sources. This will result in a 90 percent reduction of previously permitted emissions from these sources.
EPA Region 5 recently cited Detroit Edison for failing to timely notify emergency officials, including the National Response Center (NRC), for an alleged 10,559-pound release of sodium hydroxide dating back to May 6, 2003. Specifically, EPA claims that Detroit Edison (1) failed to contact the NRC until more than 20 hours after it knew of the release of the sodium hydroxide, (2) failed to timely file a written report with the Michigan Emergency Response Commission and (3) failed to file a report with the local emergency planning committee. EPA has proposed a penalty of $144,412.

Also, EPA Region 5 has recently settled 3 similar cases with BP Products North America (Whiting, Indiana), Colors (Indianapolis, Indiana), and Crystal Valley Cooperative (Lake Crystal, Minnesota). BP paid a penalty of $13,203 for failing to immediately notify the NRC of a 606-pound release of anhydrous ammonia; Colors paid a penalty of $19,214 for failing to immediately notify the NRC of a 45,906-pound release of sulfuric acid; and Crystal Valley Cooperative paid a penalty of $18,789 for failing to immediately notify the NRC of a 2,200-pound anhydrous ammonia release.

EPA Region 5 and Tween Brands, Inc. reached agreement on alleged violations of some not-so-silly stratospheric ozone regulations. EPA alleged that Tween Brands had sold or distributed, or offered to sell or distribute, in interstate commerce containers of Silly String, Tween Brands confetti string product propelled by an ozone-depleting chlorofluorocarbon. The agreement contained a $109,849 penalty. EPA reached a similar agreement with American Greetings Corp. of Cleveland, Ohio, which included a civil penalty of $84,854.

State and Local Developments

Indiana

The Indiana Department of Environmental Management settled an enforcement case with the United States Steel Corporation (U.S. Steel) for Clean Air Act violations regarding its coke oven batteries operations. The parties entered into an Agreed Order whereby U.S. Steel agreed to monitor, record and report visible emissions from coke pushing operations and take appropriate corrective action when limits are exceeded; routinely monitor for leaks from process doors and take action to ensure compliance with emission limits; develop and implement a compliance plan for refractory repairs at three coke oven batteries and install on-site air monitoring equipment for fine particles, as appropriate, based on future data from existing, downwind air monitoring equipment. U.S. Steel was assessed a monetary penalty of $571,400 and agreed to perform several Supplemental Environmental Projects valued at $3,671,200.

Illinois

The Illinois Environmental Protection Agency issued an enforcement order against Excavating & Lowboy Services, Inc. and Daniel Serritella due to violations at two sites involving illegal dumping of construction spoil waste, fill, mixed debris and other waste. The order requires all illegally disposed of materials to be removed and disposed of at a properly permitted waste facility. The order also requires copies of all shipment and billing records from any and all customers who may have dumped materials at the sites. A civil penalty of $1,461,720 was assessed.

Ohio

Ohio EPA recently reached a settlement with Pure Water Company, Inc. related to exceeding safe levels of disinfection byproducts and failing to maintain adequate chlorine levels within its water distribution system. Pure Water agreed to pay a civil penalty of $26,800. Of this amount, $5,360 will be provided to Ohio EPA's Clean Diesel School Bus Program and
$6,525 will be used by Pure Water for a distribution system modeling project.

Rumpke Waste, Inc. was recently fined $9,875 by the Ohio EPA after it accidently accepted at its municipal solid waste landfill shipments of hazardous waste from Clean Harbors and General Polymers, Inc. Rumpke has agreed to certain enhanced waste screening procedures as part of the settlement, including (1) quarterly audits of at least 20 percent of the RCRA facilities from which it receives municipal solid waste and (2) randomly audit monthly at least one load of municipal solid waste received from a RCRA facility in order to verify that the municipal solid waste is acceptable for disposal at Rumpke’s landfill.

Minnesota

The Minnesota Pollution Control Agency (MPCA) recently settled enforcement actions with Westland Dairy and Alpha Foods for (1) alleged overflows from manure storage basins located at each dairy, (2) inadequate freeboard, (3) failing to follow proper operating procedures and (4) and failing to complete certain weekly inspection reports. According to the MCPA, approximately 10,000 and 25,000 gallons, respectively, were released from Alpha Foods and Westland Dairy. Each facility agreed to pay a $17,000 civil penalty.

Michigan

After an investigation by the Michigan Department of Environmental Quality (MDEQ) it was alleged that Donald Steckman, a manager for Ferrellgas, directed an employee to fill 3 LPG tanks that had been previously “red-tagged” by MDEQ staff because the tanks were in violation of Michigan’s Fire Prevention Code. Pleading guilty to criminal charges, Mr. Steckman has been sentenced to a four-month Delay of Sentence and court-assessed costs and fees.

Southeast Louisiana Water and Sewer Authority

Last August, Michael Culver, an employee of the Southeast Louisiana Water and Sewer Authority (SELA) plead guilty to one felony count of failing to obtain a National Pollutant Discharge Elimination System (NPDES) permit for the sewage treatment plant he operated in Mandeville, Louisiana. EPA alleged that, despite being aware of the requirements, Mr. Culver operated the plant for over a year without a permit, and discharged raw human waste directly into Lake Ponchatrain. Mr. Culver was sentenced to 9 months home detention and 36 months probation with a $3,600 fine. Mr. Culver’s employer, SELA, had previously pleaded guilty and was ordered to pay a $2.1 million fine and placed on probation for 60 months.

Region 6

Brian M. Collins
Brian.collins@haynesboone.com

Overseas Shipholding Group, Inc

On Dec. 19, 2006 the Overseas Shipholding Group, Inc. (OSG) plead guilty to 33 felony charges of deliberate vessel pollution and falsification of pollution logs in several ships at ports around the country. The U.S. Attorney’s Office in Beaumont, Texas, assisted the EPA Criminal Investigation Division, the U.S. Coast Guard, and the DOJ Environmental Crimes Section in an investigation of 12 oil tankers from ports in Los Angeles, San Francisco, Beaumont, Texas, Wilmington, North Carolina, Boston, and Portland, Maine. The investigation uncovered numerous violations, including discharges of thousands of gallons of oily waste, tampering with shipboard pollution control devices and falsification of environmental reports. As part of its plea, OSG agreed to pay a $37 million fine, which includes a $27.8 million criminal fine which will be distributed to the affected regions. In addition to the fines, OSG must implement a strict environmental compliance program and will be on probation for three years.
**TXU Power Plant Permits**

In Texas, EPA has recently submitted formal comments challenging the Texas Commission on Environmental Quality’s (TCEQ’s) proposed permits for eight power plants to be constructed by TXU, the state’s largest utility. In its comments, regional EPA officials claimed that the TCEQ was failing to adequately take into account the cumulative air impacts of permitting so many new coal fired power plants at one time. In addition, EPA questioned whether TXU had, in fact, demonstrated that it was complying with the best available control technology required under the Clean Air Act.

**Region 7**

David Erickson  
derickson@shb.com

James Neet  
jneet@shb.com

**Federal/Regional Developments**

**EPA Region 7** settled an enforcement action July 20, 2006 against a property management company and an apartment building owner resolving alleged failures to inform tenants about actual and potential lead-based paint hazards in housing built before 1978. The alleged violators agreed to spend $242,600 and $16,400, respectively, on Supplemental Environmental Projects and pay $21,529 and $2,347 in penalties to resolve the action.

**EPA Region 7** issued a unilateral order July 17, 2006 to the Doe Run Co. of St. Louis; NL Industries; Park Hill, Missouri; and the Park Hill Chamber of Commerce requiring them to perform cleanup activities at the National Mine Tailings Superfund Site in Park Hills, St. Francois County, Missouri. NL Industries is the successor to a former operator of the site, while the other parties are current owners. The order requires stabilization of 150 acres of lead-contaminated mine waste to prevent wind and water erosion at an estimated cost of $17 million. The order requires the work to be completed within three years of EPA’s work plan approval.

**Kansas**

**The Kansas Department of Health and Environment (KDHE)** entered into a consent agreement Aug. 17, 2006 with Steven Chrysler Body Shop of Wichita, in which the defendant agreed to pay a civil penalty of $9,460 to resolve various alleged hazardous waste violations. At an inspection in June 2004, KDHE inspectors found several hazardous waste violations, including failure: (1) to identify hazardous waste; (2) to identify and date hazardous waste containers; (3) to conduct required inspections; (4) to retain waste manifests; (5) to post emergency response information; and (6) to submit annual monitoring fees and reports to the agency.

KDHE issued an administrative penalty order to Reno Construction Company of Overland Park Aug. 18, 2006, seeking a penalty of $8,000 for violation of state solid waste regulations. Specifically, the agency alleges based on a May 2006 inspection that: (1) a waste cover on a landfill operated by the company had eroded so that waste could be observed; (2) unauthorized waste was observed in the area; (3) a significant amount of litter was found on the property; and (4) the company had failed to pay waste tonnage fees to KDHE for the period May 2005 to May 2006.

**Nebraska**

**The Nebraska Department of Environmental Quality (NDEQ)** entered into a Consent Decree on Aug. 25, 2006, with George Muller in which alleged violations of state water pollution control regulations were resolved. Specifically, the alleged violations included that the defendant, as the owner of property in Saunders County, generated wastewater that was not connected to a wastewater works and that he operated a soil absorption system that did not meet state regulatory requirements. The defendant agreed to pay a $2,000 civil fine to resolve the allegations.

**Region 8:** No Report this issue.
U.S. EPA Region 9 reached a settlement with the Pala Band of Mission Indians and its contractors, Brown Bulk Transportation Co., Valley Materials and Supply, Inc., and James Brown, for illegally discharging dredge and fill material to the San Luis Rey River in California. Under the consent decree, the Pala Tribe is required to pay a civil penalty of $370,000 and provide $545,000 toward projects sponsored by The Nature Conservancy to protect the San Luis Rey River Watershed as mitigation for the impacts caused by the defendant’s activities. The contractors will pay $65,000 collectively.

Region 9 also reached a settlement with Shell Oil Company and the United States General Services Administration (GSA) to pay over $1.2 million for cleanup costs at the Del Amo Superfund Waste Pits located in Los Angeles County, California. The Del Amo Superfund site was used to produce synthetic rubber between 1943 and 1972. Within each facility, wastes from rubber production processes were disposed of either off-site or in six-unlined pits and three unlined evaporation ponds. Shell began court ordered clean-up efforts in 1999 after contamination was discovered in the waste pit disposal area and underlying soil. Groundwater located beneath the site is also heavily contaminated.

On Dec. 13, 2006, Region 9 fined two large quantity generators of hazardous waste. EPA fined Bio Rad of Richmond, California, $29,900 for not complying with air emission control requirement. Among the violations were allegations that the facility failed to determine what kind of hazardous waste was generated, failed to properly train its workers in managing and handling hazardous waste, and failed to have a hazardous waste spill response plan. EPA also fined GKN Aerospace Chem-tronics Inc., of El Cajon, California, in the amount of $11,900 for improperly storing ignitable hazardous waste, possessing open containers of hazardous waste, storing hazardous waste without proper labels and failing to keep records showing the amount of hazardous waste produced.

Region 9 and the Hawai’i Department of Health assessed an additional $135,000 in stipulated penalties against James H. Pflueger for failure to comply with a June consent decree settling Clear Water Act violations associated with alleged construction, grading and other land-disturbing activities beginning in 1997 without the requisite permits. The court order required Pflueger to complete specific restoration and repair work by the end of October 2006 which has yet to begin. The current action builds upon other stipulated penalties of $23,500 being sought by EPA for failure to meet specific deadlines to implement a supplemental environmental project or pay additional fines of $221,000 for abandoning work, which was allowed under the settlement.

Region 9 waived penalties for several Arizona companies that voluntarily disclosed and corrected environmental violations arising from Emergency Planning and Community Right-to-Know Act (EPCRA) reporting requirements as a result of EPA’s “self-disclosure” policy which has been successful in getting companies to make good-faith efforts in self-policing their own environmental compliance. The recent “self-disclosure” cases had potential penalties ranging from $11,000 to $74,000 for environmental violations that the agency determined had no serious or actual harm to human health or the environment.

State and Local Developments

Arizona

The Arizona Department of Environmental Quality (ADEQ) entered into a settlement totaling $300,000 with Arizona Portland Cement Company for air quality violations. The settlement resulted from violations of state and federal regulations governing emission of hazardous air pollutants, failure to submit
test reports from the company’s manufacturing plant, failure to install required temperature monitors by the required regulatory deadline and failure to submit required compliance certification reports. ADEQ issued seven Notices of Violation to the company in 2003-2004 for these violations. Pursuant to the settlement, Arizona Portland Cement Company will pay $300,000 in civil penalties, conduct annual performance tests to monitor hazardous air pollutant emissions and improve air quality in the neighboring community of Rillito, Arizona, through community air quality improvement projects.

ADEQ announced a penalty against Carioca Corporation of Phoenix, Arizona, of $80,000 for illegally disposing gasoline contaminated soil near a Carioca gas station in Prescott, Arizona. After receiving a Notice of Violation from ADEQ, Carioca removed the contaminated soil from the residential properties and disposed of it in a landfill approved for contaminated soil disposal. Because the contaminated soil jeopardized a residential neighborhood the state assessed an $80,000 penalty.

California

The Central Valley Air Resources Board (ARB) entered into a settlement agreement with AT&T, Sacramento Concrete and Daily Disposal Services in the amount of $181,750 for failing to properly self-inspect their diesel truck fleets as required under ARB regulations. AT&T paid $161,750, while Sacramento Concrete paid $15,000 and Daily Disposal Services paid $5,000. In addition to paying the fines, in each of these cases, fleet staff responsible for compliance with the ARB’s regulations for diesel vehicle fleets must attend classes conducted by California Council on Diesel Education and Technology.

The California Department of Toxic Substances Control (DTSC) issued a Consent Order to Crosby & Overton, Inc., for eight violations of hazardous waste management laws at its Long Beach, California facility. Under the Order, Crosby & Overton, Inc. will pay a penalty of $17,240 and $13,000 in reimbursement costs to DTSC. In addition to the penalty, under the Order’s “Schedule for Compliance” the facility was given 30 days to replace obsolete equipment to meet state and industry standards. Among the violations were allegations that the facility failed to store hazardous waste in the designated storage area, failed to have an adequate secondary containment system, failed to prepare a hazardous waste manifest prior to transporting hazardous waste on a public street by forklift and failed to properly classify hazardous waste.

LIKE TO WRITE?

The Environmental Enforcement and Crimes Committee welcomes the participation of members who are interested in preparing this newsletter.

If you would like to lend a hand by writing, editing, identifying authors, or identifying issues please contact one of the co-editors:

Carrick Brooke-Davidson (carrickbd@andrewskurth.com)
Teri Donaldson (tdonaldson@ssd.com)
Eric L. Hiser (ehiser@jordenbischoff.com)
Ben Lippard (blippard@velaw.com)
W. Bruce Pasfield (Bruce.Pasfield@alston.com)
Region 10

Michelle U. Rosenthal
Short Cressman & Burgess PLLC
mrosenthal@scblaw.com

Federal/Regional Developments

Agreement Signed to Remediate Portion of the Lower Duwamish Waterway

Region 10, the City of Seattle and King County signed an agreement under which the two local governments will clean up the Slip 4 Early Action Area on the Lower Duwamish Waterway in Washington. Slip 4, which is contaminated with PCBs, is approximately 3.6 acres in size and is located on the east side of the waterway, approximately 2.8 miles south of Harbor Island. The site cleanup will include: dredging 4,300 cubic yards of sediment containing high concentrations of PCBs; excavating 9,700 cubic yards of contaminated soil and sediment long the shore; capping the entire area; disposing of removed material in an appropriate landfill; and removing 500 tons of asphalt, creosote-treated wood and other debris. Following completion of design work, remediation is scheduled to begin in October 2007 at a cost of $7.4 million. The tri-party agreement also requires the city and county to initiate land use controls and engage in site monitoring.

Alaska

Marathon Oil Company Agrees to Pay $38,000 Fine for Violating TSCA

Region 10 imposed penalties of nearly $38,000 on Marathon Oil Company for alleged PCB violations at its Spark oil platform in Cook Inlet, off the Alaskan coast. EPA alleged that the company had improperly registered and stored two PCB transformers, failed to develop and maintain annual document logs, and failed to conduct required inspections in violation of the federal Toxic Substances Control Act (TSCA) over a period of several years. Marathon Oil has since removed and properly disposed of the two PCB transformers. Even at low exposure levels, PCBs can create health hazards, including irritation of the eyes, nose and throat; at high concentrations, PCB exposure can result in liver damage or death.

Refinery Fined $15,867 for Clean Air Act Violations

Flint Hills Resources Alaska, LLC (Flint Hills), a refinery located near the City of North Pole, agreed to pay Region 10 nearly $16,000 for allegedly violating the Federal Clean Air Act (CAA). These alleged violations included the company’s failure to establish procedures for reviewing and updating Flint Hills’ emergency response plan and informing public and local emergency response agencies about unplanned releases of flammable substances. Under its settlement with Region 10, Flint Hills agreed to pay the penalty, and expend a minimum of $60,000 on the purchase of two hazardous substance spill response trailers and an incident command post trailer for the Fairbanks/North Star Borough. Section 112(r) of the CAA requires all public and private facilities involved in the manufacture, processing, use, storage or handling of regulated substances above a threshold amount to develop a Risk Management Program and submit Risk Management Plans to EPA. The program directs such facilities to develop an emergency response strategy, evaluate worst case scenarios and more probable situations, provide operator training, review hazards associated with the use of toxic or flammable substances, and develop operating procedures conduct equipment maintenance.

Idaho

Construction Site Violations Result in $18,000 in Penalties

As part of a settlement reached with Region 10, J.H. Wise Sons Co. LLC and Central Paving Co., Inc. have agreed to pay $18,000 to resolve alleged violations of the Clean Water Act at the Boulder Heights Estates Subdivision construction site in Boise. The settlement addressed allegations that Central Paving, the site operator, failed to apply for an NPDES permit and illegally discharged construction stormwater
at the site. The settlement also resolved alleged violations by J.H. Wise for having prepared an incomplete Storm Water Pollution Prevention Plan and discharged construction stormwater in excess of state water quality standards.

**Oregon**

**U.S. Army Corp of Engineers Fined for Hazardous Waste Violations**

The Oregon Department of Environmental Quality (DEQ) has fined the U.S. Army Corps of Engineers (Corps), which operates McNary Lock and Dam near Umatilla, nearly $17,000 for hazardous waste management violations at the facility. During a March 2006 inspection, DEQ determined that the Corps had violated the state’s environmental laws when it failed to make hazardous waste determinations; failed to properly mark and label containers containing hazardous waste; stored hazardous waste in excess of 90 days; and failed to label 18 containers of spent, oily absorbents and mixed oily wastewater as “used oil.” In an effort to protect public health and the environment, Oregon has strict requirements governing the accumulation, storage, handling, treatment and disposal of hazardous waste and used oil.

**Chrome Plating Facility to Pay $55,000 in Penalties for RCRA Violations**

The Oregon Department of Environmental Quality (DEQ) imposed $55,626 in penalties on Surgichrome, Inc., which operates a hard chrome plating facility for the production of equipment used in the paper and wood products industry in Clackamas, for various violations of the Resource Conservation and Recovery Act (RCRA). The company, which is classified as a small-quantity hazardous waste generator, stored used chrome plating solution in excess of 180 days, failed to properly label and date its hazardous waste containers, and failed to determine the potential hazards of its used chrome plating waste solution and liquid wastes, which resulted in the accumulation of high levels of toxic chemical chromium in a section of the facility’s air pollution control unit. These violations follow a 1995 felony conviction of the company and its principle of criminal charges for illegally dumping chrome plating wastes at the facility that caused soil and groundwater contamination; site cleanup is ongoing. In 1998 and 2000, DEQ investigations revealed other hazardous waste law violations that resulted in penalties of $17,000.

**Washington**

**Celebrity Cruises to Pay $100,000 for Illegal Dumping in Washington State Waters**

The Washington Department of Ecology imposed a penalty of $100,000 on Celebrity Cruises, Inc. for having illegally dumped more than 500,000 gallons of untreated wastewater into Puget Sound and the Strait of Juan de Fuca in 2005 from its ship, Mercury. The company’s discharges violated state water quality standards and breached an agreement relating to ship discharges that had been signed by the Department of Ecology, the Port of Seattle and the Northwest CruiseShip Association, a not-for-profit association that represents major cruise lines operating in the Pacific Northwest, Canada, Alaska and Hawaii. The agreement barred cruise ships from discharging wastewater into Washington’s waters unless the ships used department-approved advanced treatment systems; the Mercury lacked such a system. Celebrity Cruises has since installed advanced wastewater purification systems on its ships to ensure that wastewater discharges are much closer to drinking water quality.

**Fish Processor Fined for Waste Discharges onto Farm Land**

The Department of Ecology (Ecology) imposed a $12,500 penalty against Hoquiam fish processor, Ocean Protein, for discharging high-strength fish waste water onto farm land without a state waste discharge permit. Citizen tips sparked an investigation by Ecology, which found that company trucks had illegally dumped the fishy wastewater at Skookum Farms in Montesano and at House Farms in Aberdeen. The discharges have threatened to contaminate a nearby creek and underground water supplies that are part of the Wynoochee River watershed.