

Environmental Transactions and Brownfields Committee Newsletter

Vol. 13, No. 1

January 2011

MESSAGE FROM THE CHAIR

Rebecca Wright Pritchett

For those fortunate enough to attend the 18th Section Fall Meeting in New Orleans, we heard from a terrific group of experts on obstacles and incentives in green development projects, sustainable remediation, vapor intrusion, and rebuilding New Orleans and the Gulf Coast after Katrina. Nearly thirty people attended our committee dinner at Arnaud's for fantastic food and stimulating conversation, followed by an entertaining evening in the French Quarter. Thanks to everyone who made the Fall Meeting so productive and enjoyable, especially the Committee members and vice chairs who worked on programs and shared their time, knowledge, and company.

As your new chair, I want to welcome all of you and invite you to join us in committee activities. As usual, we're planning an active year for the Environmental Transactions and Brownfields Committee (ETAB). Steve McKinney—our Section chair for 2010-11—has committed the Section to “delivering the goods” to our members. We want to make sure that the ETAB Committee is providing you the information and assistance you need to become a better lawyer. Our committee traditionally has benefited from strong member participation, and the quality of our programs and activities springs directly from your involvement. If you would like to be a part of this effort and get involved in the committee's activities, please let us know and send us your ideas. Our committee web site

has the list of vice chairs, and any of us would welcome your input and participation.

The new year brings with it some interesting issues related to environmental transactions and brownfields in today's uncertain economy. We plan to track and alert ETAB members about these issues, new developments and notable cases through Section of Environment, Energy, and Resources (SEER) conference panels, newsletters, the ETAB list serve, and Quick Teleconferences, where appropriate. The articles in this issue address five of those issues: the latest evolutions regarding environmental insurance for transactions, the appropriateness of Phase I site assessments for brownfield sites, proposed changes to the ASTM Phase II due diligence standards, proposed alternatives to existing public notice requirements under the National Contingency Plan, and an interesting analysis of laws relating to a natural gas shale play in Pennsylvania.

We continue to work to provide you with better tools to keep you up-to-date on the latest developments which affect your practice. On our Web site (<http://www.abanet.org/environ/committees/envtab/>), we have added links to other useful sites and announcements of upcoming conferences that we think may be of interest to you; we welcome your additions to the list. We are providing you with information regarding conferences and recent developments through our list serve and encourage you to participate in the discussion. In addition, we hope you will participate in our One Million Trees Project (<http://www.abanet.org/environ/>

**Environmental Transactions and
Brownfields
Committee Newsletter
Vol. 13, No. 1, January 2011
Thomas R. Doyle, Dean Calland, and
Robert Gelblum, Co-Editors**

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Energy, and Resources.

projects/million_trees/home.shtml). We're planning
tree-planting events around the country. If you don't
see one planned in your area, contact us about
organizing one.

If you have topics that you would like to see addressed
in future newsletters, let me know. I can be reached at
rebecca@pritchettlawfirm.com. If you would like to
get more involved in any of the committee's activities,
just let me or any of the ETAB vice chairs know. All of
our contact information is listed on the ETAB Web site.

**Upcoming Section
Programs—**

For full details, please visit
www.abanet.org/enviro/calendar/

February 1, 2011

**Wave Energy in the U.S. Today: How
Technology, Academia, Regulations, and
Policies are Shaping the Industry**
Quick Teleconference

February 3, 2011

**Criminal Enforcement of Environmental
Laws: A Conversation with the Former
Head of EPA's Criminal Investigation
Division**
Quick Teleconference

February 10, 2011

Hot Topics in Diversity Law
Live Audio Webinar and Teleconference
Primary Sponsor: ABA Section of State and
Local Government Law

February 23-25, 2011

29th Annual Water Law Conference
San Diego

March 17-19, 2011

**40th Annual Conference on
Environmental Law**
Salt Lake City

PENNSYLVANIA'S MARCELLUS SHALE PLAY

Kevin J. Garber
Lisa M. Bruderly

Babst Calland Clements & Zomnir, P.C.

It's no secret that, in recent years, a boom of natural gas development has occurred in Pennsylvania, West Virginia, eastern Ohio, and western New York. A 2010 study by Penn State University estimates that in 2020 the Marcellus industry in Pennsylvania alone could be creating more than \$18 billion in value added, generating more than \$1.8 billion in state and local tax revenues, and supporting more than 200,000 jobs. The catalyst for this increased activity stems from the incredible potential of the Marcellus Shale play, an enormous geological formation located approximately 5,000 to 8,000 feet below ground surface. Experts have estimated that the Marcellus Shale may ultimately yield 489 trillion cubic feet of natural gas, enough to meet the natural gas needs of the United States for 20 years, and, based on the potential for the 2010 production level to reach one billion cubic feet per day, it appears these estimates may be just the tip of the iceberg.

What's Different About Developing the Marcellus Shale in Pennsylvania?

Operators have drilled for natural gas in Pennsylvania for more than a century. Most of these wells were "conventional" (i.e., vertical wells less than about 6,000 feet deep). However, the success of new horizontal drilling techniques in smaller western United States shale plays, including the Barnett, Haynesville, and Fayetteville, now allows operators to drill vertical wells into a shale formation and then horizontal ones within the formation, with the horizontal wells potentially extending more than a mile from the well pad. Multiple horizontal wells can be drilled from the same vertical well, and multiple vertical wells can be drilled from the same well pad. Natural gas is released when the shale is fractured (i.e., "fracked") using at least a million gallons of water mixed with additives that assist in the extraction of the gas. After fracking is completed, the "flow-back" water, typically containing

elevated concentrations of total dissolved solids, is removed from the well to the extent possible.

While the promise of lucrative natural gas production has attracted many operators to Pennsylvania, and, in turn, has boosted the economies in many counties throughout the state, the techniques used to develop the Marcellus Shale have generated significant environmental and other concerns among state and local regulators and have presented new mineral rights issues in the Marcellus states. This article focuses on the issues that have arisen in Pennsylvania, although practitioners should be aware of similar issues in Ohio, West Virginia, and New York. Some out-of-state producers have found that navigating the state and local requirements for developing the Marcellus has been somewhat more difficult in Pennsylvania than when developing shale plays in other parts of the country. As such, practitioners advising clients regarding Marcellus Shale development should be familiar with the following areas where the legal and regulatory landscape in Pennsylvania differs from other states and where challenges to Marcellus Shale development have occurred.

Title Searches and Coal Rights; Joint Ventures—

Pennsylvania law recognizes separate estates in the surface and in coal, oil, gas, and other minerals in the subsurface. The subsurface estate is the dominant estate over the surface estate in Pennsylvania. However, because oil and gas production in Pennsylvania dates to Colonel Drake's first well drilled in 1859, title searches sometimes must go back that far to trace the chain of title. Title searching in northeastern Pennsylvania may be further complicated by the historical oddity of "title washing," in which the severed oil and gas interest, if reserved in a chain originating, for example, in the Elk Tanning Company in the 1880s and then passing to the Central Pennsylvania Lumber Company in the 1930s, may belong to the current surface owner if Central Pennsylvania Lumber bought the surface back at a tax sale (*see* Thomas E. Boettger, *Tax Sales: A Threat to Unguarded Oil, Gas, and Mineral Rights*, 67 DICK. L. REV. 413 (1962–1963)). Title searchers must be alert for such problems when they visit county recorders' offices. Title issues may be further complicated by the fact that rights to the coal seams that overlie much of the Marcellus Shale in

Pennsylvania were often severed independently from oil and gas beginning in the 1880s. Pennsylvania's so-called Dunham's Rule creates a rebuttable presumption that natural gas is not a mineral and does not pass under a deed severing coal and other minerals from the surface (*Dunham & Short v. Kirkpatrick*, 101 Pa. 36 (1882)), which can be comforting to producers. But, these title issues must be researched thoroughly. Even where the right to oil and gas is clear, the producer-lessee must coordinate drilling with the coal company's mining operations to ensure that wells are protected by coal pillars or are not drilled in the path of a projected and platted coal mine, which obligations are imposed under Pennsylvania's Oil and Gas Act (58 PA. CONS. STAT. §§ 601.101 *et seq.*) and the Coal and Gas Resource Coordination Act (58 PA. CONS. STAT. §§ 501 *et seq.*).

Regarding corporate entities, many producers currently are drilling directly under their corporate or subsidiary names, sole-purpose entities, or joint ventures. The due diligence for these ventures is similar to other business transactions, in the sense that the parties undertake due diligence regarding geologic reserves, title searches, permitting, and operating approvals. Joint development agreements and joint operating agreements are fairly commonly used for joint ventures, often following the American Association of Petroleum Landmen model forms. Special attention must be paid to leases contributed to the venture to ensure said leases are not about to expire and that operations can be initiated before the lease runs. The nonoperating party to a joint venture should articulate when it may and may not opt out of participation in a well project, and the parties should resolve whether each is under a duty to contribute new leases to the venture as an exclusive undertaking or whether it is free to exploit leases individually. Another important problem to resolve is how produced gas will be brought to market. Private companies do not have condemnation rights in Pennsylvania, and so careful thought must be given to obtaining rights-of-way for intrastate pipelines and locating the wells in the appropriate places. Often, the right-of-way is obtained before the well is drilled, rather than the other way around. These business issues are not necessarily unique to drilling in Pennsylvania, but differences in title history, coordination with coal rights, and obtaining pipeline rights-of-way certainly shape the negotiations.

Challenges to Existing Leasing Agreements—The last three years or so have seen producers competing to quickly lease viable parcels in the Marcellus fairway, which resulted in inflated signing bonuses, royalty percentages, and rental payments. Typically, before the Marcellus Shale development, a landowner could expect to receive rental payments of approximately \$300–\$500 per acre and the state-mandated minimum royalty of 12.5 percent for natural gas removed from a property. Under most of these leases, the property had to be developed within five years or the lease would expire. With the Marcellus Shale boom, lease rates soared, with some landowners receiving in excess of \$3,000 per acre and royalties in excess of 18 percent. Some landowners, seeing the prospect of receiving significantly more for their gas development rights, have filed lawsuits to break their existing leases in the hopes of renegotiating a higher amount. Producers have similarly tried to develop creative ways to maintain existing leases, including developing pooling and unitization agreements among contiguous landowners to demonstrate that a leased parcel has been developed, and arguing that leases are being held open by marginally producing wells. The latest development in this area arose in March 2010, when the Pennsylvania Supreme Court held (in *Kilmer v. Elexco Land Services, Inc.*, 990 A.2d 1147) that the Pennsylvania Guaranteed Minimum Royalty Act permits producers to calculate royalties at the wellhead, as provided by the net-back method in the lease.

Environmental Regulatory Challenges—Pennsylvania has been delegated most aspects of the major federal environmental regulatory programs under the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, the Surface Mining Control and Reclamation Act, and other federal statutes and programs. Federal oversight of state enforcement and permitting, and joint permitting for activities in wetlands under the jurisdiction of the Army Corps of Engineers pursuant to Section 404 of the Clean Water Act, are similar in Pennsylvania to that encountered in most states which have primacy to administer their water, air, and hazardous waste programs. The practitioner must always bear in mind the relationship between the federal and state programs in these more traditional legal areas. However,

Pennsylvania does have a somewhat unique statutory framework for regulating natural gas development.

Unlike many states, Pennsylvania has three oil and gas environmental statutes: the Oil and Gas Act (58 PA. CONS. STAT. §§ 601.101 *et seq.*), the Coal and Gas Resource Coordination Act (58 PA. CONS. STAT. §§ 501 *et seq.*), and the Oil and Gas Conservation Law (58 PA. CONS. STAT. §§ 401 *et seq.*). The Oil and Gas Act applies to all oil and gas wells drilled in Pennsylvania, establishing requirements for the drilling and operation of gas wells and gas storage facilities. The Coal and Gas Resource Coordination Act applies to gas wells that penetrate a workable coal seam, are capable of producing marketable quantities of gas and are drilled to a depth less than 3,800 feet. The Oil and Gas Conservation Law pertains to certain other wells, including wells that penetrate the Onondaga horizon or wells that are over 3,800 feet deep, where the Onondaga horizon is closer to the surface than 3,800 feet. Several other environmental statutes govern water withdrawal and treatment, air emissions, storage tanks, and solid waste management associated with drilling.

These oil and gas statutes are at least 25 years old and have not been updated to reflect unconventional Marcellus Shale development technologies, including horizontal drilling and placement of more than one well on the same pad. For example, the Coal and Gas Resource Coordination Act requires covered wells to be spaced a minimum of 900 feet apart. Legislative updates to the statutes are being considered, but no significant changes have been made.

However, the Pennsylvania Department of Environmental Protection (PADEP) has responded to concerns over Marcellus Shale development by issuing (and reissuing) new forms, permits and policies, in addition to requiring compliance with the existing requirements for all natural gas wells. These unique requirements include the development of a water management plan and the potential permitting of impoundments to store freshwater and/or flow-back water.

- **Water withdrawal**—Regulators are paying special attention to the sources, timing, and quantity of water used to fracture a Marcellus

Shale well. Each Marcellus Shale drilling application must be accompanied by a water management plan, which identifies the sources and quantities of desired water and, where applicable, includes a low flow analysis and withdrawal impact analysis of the source. Producers new to Pennsylvania may not be familiar with intergovernmental agencies such as the Susquehanna River Basin Commission and the Delaware River Basin Commission, which actively regulate water withdrawal and consumption within their respective watersheds. These commissions have their own (potentially lengthy) review and approval processes that usually must be navigated before a producer can obtain a drilling permit from PADEP.

A producer who intends to store freshwater or flow-back water may be required to obtain a permit to construct a centralized storage impoundment. PADEP has developed guidance regarding the construction specifications for such impoundments. Where the total water withdrawn from a watershed is expected to exceed an average rate of 10,000 gallons per day in a 30-day period, the producers must register with PADEP under the Water Resources Planning Act, 27 PA. CONS. STAT. §§ 3101 *et seq.*

- **Wastewater disposal**—PADEP has also been concerned with the management of flow-back water and other wastes resulting from Marcellus Shale well development. Flow-back water and drill cuttings are typically managed as residual waste in Pennsylvania, under the Solid Waste Management Act, 35 PA. CONS. STAT. §§ 6018.101 *et seq.* PADEP is developing regulations and guidance regarding the treatment, storage, transportation, and disposal of Marcellus-related waste, including specific analytical and reporting requirements for Marcellus Shale wastewaters.
- **Well spacing, unitization, and pooling**—The Oil and Gas Conservation Act authorizes

PADEP to establish well spacing orders, pooling agreements, and integration orders.

Local Municipal Challenges—Unlike most western states, Pennsylvania’s 67 counties are comprised of many local government units. There are 2,566 municipalities in the state. As just one example, Allegheny County, the home of Pittsburgh in southwestern Pennsylvania, has approximately 130 municipalities, each with its own set of ordinances and zoning restrictions. On February 19, 2009, the Pennsylvania Supreme Court (in a pair of companion cases—*Huntley & Huntley v. Borough of Oakmont*, 964 A.2d 855 and *Range Resources Appalachia, LLC v. Salem Township*, 964 A.2d 869) held that the Oil and Gas Act preempts municipalities from regulating much of “how” drilling takes place (i.e., the more traditional regulatory aspects such as well registration, casing and cementing standards, etc.) but does not preempt local governments from zoning for oil and gas development, (i.e., “where” drilling may occur). Thus, municipalities may not totally prohibit oil and gas development within their borders but they may dictate where drilling may occur, and a growing number of municipalities are enacting ordinances to zone for drilling. Municipalities are now also developing ordinances to regulate subjects not addressed by the Supreme Court, such as noise from drilling and compressor stations, bonding requirements for roads used by heavy equipment and water haulers, and ordinances to restrict the hours of operation of drilling rigs. These issues will continue to evolve before local zoning hearing boards and eventually the Pennsylvania state courts.

Proposed Regulatory Changes—In light of the boom in Marcellus Shale development, PADEP has proposed regulatory changes regarding well construction specifications, natural gas migration, and wastewater discharges. PADEP currently is proposing more stringent casing and cementing requirements for natural gas wells and new requirements for well inspections and leak reporting. The proposed changes to the existing technical regulations found in 25 PA. CODE Chapter 78 include a requirement that operators investigate gas migration complaints immediately and notify PADEP when such complaints are received. These proposed changes have been relatively well received by industry and are expected to be adopted by mid-2011.

By contrast, a second, more controversial PADEP rulemaking proposes to restrict the concentration of total dissolved solids (TDS) that may be discharged to surface water under Pennsylvania’s existing water regulations (*see* 25 PA. CODE Chapter 95). Industry, generally, has opposed this proposal because it would require very expensive reverse osmosis and/or evaporation technology to treat TDS. Although certain types of dischargers, primarily mining operations, will be exempt from these regulations and other dischargers will only be required to treat TDS in their effluent to 2,000 (milligrams per liter (“mg/l”)), discharges from natural gas well fracturing, production, drilling, or completion must (1) use a centralized waste treatment facility, and (2) be treated to drinking water standards of 500 mg/l TDS, 250 mg/l total chlorides, 10 mg/l total barium, and 10 mg/l total strontium. Treating large volumes of flow-back water to these standards will be extremely expensive. The Marcellus industry hopes to recycle enough flow-back water to contain its costs under PADEP’s new proposal. The success of recycling remains to be seen.

In addition to these proposed revisions, the governor of Pennsylvania has previously proposed, and is expected to again propose, that the General Assembly impose a severance tax on natural gas. Previous proposals have suggested a five percent tax on the value of gas extracted plus 4.7 cents on every 1,000 cubic feet. As of this writing, the budget process for FY 2010–2011 is underway; it is not clear yet whether a severance tax will be proposed or approved this year.

Conclusion

Marcellus Shale natural gas production has a bright future in Pennsylvania, as the next chapter in a proud 150-year-old history of oil and gas operations unfolds in the Commonwealth. Clearly, significant numbers of transactions will continue to occur, as the Marcellus play unfolds, that will require considerable legal expertise to navigate the complex issues that have arisen and will continue to arise. Lawyers advising clients must be aware of the peculiarities of Pennsylvania property, business and environmental law regarding natural gas production, follow the developing proposed statutory and regulatory amendments, and stay on top of the case law as it continues to develop.

2010 UPDATE: INSURANCE FOR ENVIRONMENTAL TRANSACTIONS AND BROWNFIELDS

James R. Arnold
The Arnold Law Practice

At the ABA Section of Environment, Energy, and Resources (SEER) 39th Annual Conference on Environmental Law, one of the program's sponsors gave us an update on developments in environmental insurance.¹ We learned that environmental insurance for transactions and brownfields redevelopment continues to evolve. As most of us know, environmental protection laws beginning in the early 1970s saw the gradual exclusion of pollution coverage in comprehensive general liability (CGL) insurance policies. Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)² in 1980, and the insurance market collapsed in 1984, partially as a result of policyholders making claims on CGL policies for coverage for cleanup of pollution. Whether or not there was a causal relationship, in 1986 the insurance industry added the absolute pollution exclusion (called the "APE") to CGL policies. The next period of time saw the insurance carriers offering limited "gap" coverage, followed by specialty coverages for such groups as owners and operators of industrial facilities, lenders, creditors, and other potentially liable entities.

One should keep in mind that underwriting for such gap or specialized environmental insurance is not the underwriting used for other insurance. In contrast to the statistical analysis of historic losses used for general underwriting, the underwriting for environmental insurance can be based on identifying elements of risk and then conducting focused engineering analyses.³ And, a further distinction must be made between "remediation cost cap" insurance⁴ and the other types of "environmental insurance." These are seen as two types of "markets."⁵

So, there is one market for remediation cost cap insurance and another market for the other varieties or types of environmental insurance. The latter include insurance coverages for pollution legal liability (PLL),⁶⁶

Also known as premises legal liability (PLL) or environmental impairment liability (EIL) insurance.

contractor's pollution liability (CPL), professional liability or professional errors and omissions (E&O), lender's pollution liability (LPL), and liability of directors and officers (D&O).⁷

In 2009 there was concern about the near collapse of AIG.⁸ However, AIG's regulated insurance subsidiaries were considered to have sufficient reserves for claims that might arise from many brownfields projects.

As outlined at the 39th Annual Conference, four things are happening today. First, third-party claims are increasing. Second, bankruptcies and restructurings of industrial entities are increasing (e.g., GM, ASARCO, and Lyondell), leaving unsettled significant environmental liabilities.⁹ Third, credit is significantly restricted from what it has been the last few years, with the result that lenders are wary of relying on environmental indemnities. Fourth, regulatory programs will increasingly require financial assurance, such as environmental insurance, for potential cleanups that result from business activities.¹⁰

Fortunately, there are more insurance carriers available, with adequate funding, to provide insurance. There are currently 20 environmental insurance providers. These include both insurers known in past transactions (e.g., Zurich, Ace, XL, Chubb, Chartis [AIG]), and new entrants (CV Staff, Great American, Ironshore, Navigators, Arch, Liberty, Hudson, Starr Indemnity, et al.).¹¹ Also, instead of paying a one-time premium when the policy is issued, the costs of insurance can be financed over time.

Moreover, with more carriers there is increased competition, with downward pressure on premiums, particularly when compared to a couple of years ago. Policyholders still need to be careful. The recession, the AIG situation, the increasing number of "markets," major bankruptcies, and regulatory programs requiring financial assurances, all raise a concern about the financial strength of individual insurers. Insurance providers that score A- or higher by A.M. Best are considered stable. The net result of increased

competition is more environmental insurance available, from stronger insurance providers, with better pricing and coverage.¹²

Specific case studies discussed at the SEER conference included a purchase of a seafood processor and legacy claims from divested properties. In addition, the bankruptcies of GM and ASARCO provided the context in which divestiture and restructuring will require financial assurances as to both legacy liability from past business activities, as well as ongoing manufacturing, mining, and other activities.¹³

The forms of policies have not changed over the last decade. As a result, more attention is being focused on the CGL absolute pollution exclusion (APE). As we know, the APE is used in all Insurance Services Office (ISO)¹⁴ CGL policies. The APE is long and is meant to be comprehensive. For example, the definition of “pollutant” is not limited to “waste,” “hazardous materials,” and “chemicals.” “Pollutant” is defined as

... any solid, liquid, gaseous or thermal irritant or contaminant including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

The result has been that many types of claims have been denied, based on the APE in CGL policies. Pollution claims that have been denied include those arising from milk and butter, alcohol, carbon monoxide, mold, sewage, paint, and water runoff after a fire.¹⁵

Remediation cost cap insurance is still more limited than the other forms of environmental insurance. The underwriting departments of the insurance carriers use modeling to determine the policy limits (and the premium). This type of insurance will include an “attachment point” as to when such things as newly found contamination will be covered. The insurance carriers in the past set the attachment point at the point set by the policyholders’ consultant. Today, the carriers’ underwriters review the plan itself and the experience their own specialists have had with regulatory oversight. One beneficial result for policyholders is that coverage for change orders is more available.

Finally, what about existing general liability “CGL” policies and “environmental” policies?

For CGL policies, policyholders should perform their “archeology” now. Insurance information, particularly from the past, is as important as property title information for a business—and individuals. Reporting of all lawsuits and all claims to all carriers will reduce a policyholder’s exposure to “late notice” defenses.

As for specialized environmental liability policies (and coverages), policyholders will increase their odds for coverage by securing the longest term possible for preexisting conditions and new conditions. Disclosures in the application for insurance should be comprehensive.

Environmental insurance has been and will continue to be a method of managing the environmental risks of business operations and development. Financial assurance from third party insurance carriers who are stable and solvent can add significant value to business operations and development.

Endnotes

¹ SEER’s 39th Annual Conference on Environmental Law was held in Salt Lake City in March 2010, Marsh USA Inc., one of the program sponsors, made a presentation, Environmental Liabilities in a Greener, or Meaner, Economy. The presentation included an update on environmental insurance during the current recession as well as insurance for climate change, green buildings, etc. This article is based in part on that presentation.

² 42 U.S.C. § 9601 *et seq.*

³ As explained by Bill McElroy, currently senior vice president, Liberty International Underwriters, and Todd S. Davis, currently chief executive officer, Hemisphere Development, in Environmental Insurance in the Brownfields Transaction, chapter 11, BROWNFIELDS, A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY, 155 *et seq.* (2d ed. 2002).

⁴ Also known as cleanup cost cap (CCC) or remediation stop loss insurance.

⁵ Insurance law has its own esoteric terms. For instance, an “insurance market” is essentially the buying and selling of insurance. Specialized “markets” refers to buying and selling specialized types of insurance. People in many areas of life develop their own lexicon. So investment bankers use military terms and we see our environmental law colleagues in RCRA and Clean Air Act practices using lengthy and at times obscure acronyms.

⁷ There are also contractor- and owner-controlled insurance programs, as well as surety bonds and representations and warranties blended with insurance. For a good summary of the basic forms of environmental insurance and the structure of policies, see Tanya C. O’Neill, *Environmental Insurance: Insurance as a Means of Transferring Risks in Environmental Liability Transfers*, 10 ETAB COMMITTEE NEWSLETTER NO. 1 (Feb. 2008).

⁸ See Samantha R. Corson & Curtiss B. Toll, *Environmental Insurance in the Wake of the AIG Bailout*, 11 ETAB COMMITTEE NEWSLETTER NO. 1 (Feb. 2009).

⁹ See materials from panel discussion, *Combining Red Ink and Brownfields: Dealing with Environmentally Contaminated Properties in Bankruptcy*, 39th Annual Conference on Environmental Law, Jeanne Cohn-Connor, moderator.

¹⁰ The U.S. Environmental Protection Agency currently is in rulemaking that includes financial assurance requirements for such activities as hard rock mining, chemical manufacturing, petroleum/coal production, electrical energy generation and transmission/distribution, and phosphorus mining/fertilizer operations. Currently over \$3 billion in financial assurance is posted annually in the United States. In the past, over 55 percent of this financial assurance has been met through financial test demonstrations or corporate guarantees.

¹¹ See *Environmental Insurance: Navigating Unsettled Markets*, Environmental Law Section, Bar Association of San Francisco (BASF), Apr. 1, 2010, Joshua A. Bloom, moderator.

¹² The competition has resulted in a 20 to 50 percent reduction in premiums since 2007, several carriers offering combined general liability and pollution coverage, and a focus on risk-based corrective action in cleanups. Policies can be more tailored, as to industries (e.g., mining and health care), as to contractor’s pollution liability, nonowned disposal sites, “sick building” diseases (e.g., mold, Legionella, etc.), business interruption costs, and damages (and penalties, where allowed by law).

¹³ For example, recycling companies that do such things as convert old tires into artificial turf for soccer fields, or poultry waste into biodiesel are negotiating with insurance carriers for coverage for pollution-based claims.

¹⁴ The ISO is part of “ACORD,” the Association for Cooperative Operations Research and Development, which is the developer of nonprofit standards for the insurance industry. It has established and maintains a library of standardized forms for the insurance industry. Most claims in the United States are recorded or transmitted on ACORD forms (<http://en.wikipedia.org/wiki/ACORD>).

¹⁵ See *Environmental Insurance: Navigating Unsettled Markets*, supra note 11.



PROPOSED CHANGES TO ASTM PHASE II DUE DILIGENCE STANDARD WOULD DRAMATICALLY INCREASE THE TIME AND COST FOR COMPLETING ENVIRONMENTAL DUE DILIGENCE

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ASTM continues to move forward with planned changes to the standard for conducting Phase II Environmental Site Assessments (ESAs) (ASTM E1903). If approved, these changes would impose drastic new obligations on users (i.e., the parties commissioning the reports) and *likely increase the time and cost* for completing environmental due diligence investigations. Parties involved in commercial real estate and merger-and-acquisition transactions need to be aware of, and involved in, these ongoing discussions.

Background

The ASTM Standard Guide on the Phase II Environmental Site Assessment Process was first published in 1997 and reapproved in 2002. The current changes have been under way for a couple of years and are proceeding under the auspices of the ASTM E50.02 Task Group. The Task Group has stated that it hopes to make the Phase II process more transparent and consistent with scientifically sound methods, with the goal of making the process more “objective, representative, reproducible, and defensible” (Section 1.1). While all of this sounds good in theory, it will require dramatic changes in the way in which Phase II ESAs are conducted in order to achieve these lofty goals. The proposed changes will require the Phase II assessor and the user to examine issues that go well beyond the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) liability, including looking for the mere *presence* (not releases) of *substances* (not just hazardous substances or petroleum products) on the property. The *scope* of the Phase II ESA will be directly related to the user’s *objectives* and may

require refinement as the investigation progresses. More than one round of sampling may be required to achieve the user’s objectives. The Phase II process would also become much more *prescriptive* (in particular, see Sections 5, 6, and 7) than it is at the present time if the proposed changes are adopted.

Nature of the Proposed Changes

The proposed changes to ASTM E1903 would require, among other things, that the user and/or the Phase II assessor do the following:

- confer before initiating the investigation to determine the “*question*” to be answered (Sections 6.4.1 and 7.1); the standard identifies six potential *objectives* (Section 1.2) that can be addressed in the assessment:
 - (1) to assess whether there has been a *release of hazardous substances* within the meaning of CERCLA, for purposes including the landowner liability protections under CERCLA
 - (2) to provide information relevant to identifying, defining, and implementing “continuing obligations” for maintaining CERCLA *landowner liability protections*
 - (3) to develop threshold knowledge of the presence of *substances* on properties defined as brownfields sites as required for qualifying for *brownfields remediation grants*
 - (4) to provide information relevant to identifying *property conditions* associated with target analytes that may pose a *risk* to persons on the property
 - (5) to provide information relevant to evaluating and *allocating business environmental risk* in transactional and contractual contexts, and related due diligence
 - (6) to provide information to support disclosure of liabilities and contingent liabilities in *financial statements and securities reporting*
- prepare a written *Statement of Objectives* (Sections 5.1.1 and 6.4.1), including a

statement of the question to be answered and the hypothesis to be confirmed or refuted by the investigation; the statement must be part of the scope of work, contract, or similar instrument

- prepare a *written scope of work*, identifying the *methods and tasks* to achieve the user's objectives (Section 5.1.4 and Section 7)
- identify any *predetermined limits* on the scope of work because of *schedule, cost, or budget considerations* (Section 5.1.2); in other words, if the user is not willing to spend more than \$12,000 on the Phase II ESA, and/or needs the results within 45 days, that limitation must be shared with the Phase II assessor before the work begins, and must be described in the final report
- develop a *conceptual model* (Sections 6.4.3 and 7.4); the conceptual model must consider each area where target analytes are present or likely present, in light of the environmental behavior, fate, and transport characteristics of those target analytes; the Phase II assessor must determine how the target analytes are likely to have first entered the environment and infer the locations most likely to be impacted by the target analytes (Section 6.4.3)
- develop a written sampling plan *after* developing the conceptual model (Sections 6.4.4 and 7.5)
- conduct the sampling (Sections 6.4.5 and 7.6)
- include a Quality Assurance/Quality Control Plan (Section 7.5.7)
- validate the conceptual model by evaluating the sampling results to determine whether the available information is consistent with the conceptual model (Sections 6.4.6 and 7.7)
- in the event of deviations (i.e., the results are not consistent or do not support the assumptions of the conceptual model), *revise* the conceptual model and sampling plan to meet the objectives of the assessment (Sections 6.4.6 and 7.6)
- interpret the sampling results in light of the conceptual model and the objectives of the assessment in order to develop conclusions, either answering the question or stating why the

question cannot be answered (Sections 6.4.7 and 8.1)

- prepare a *written report* (Sections 6.4.8 and 9.2)

If all of the requirements of the standard have been followed, the Phase II assessor is required to put the following statement in the final report:

We have performed a Phase II environmental site assessment at the property at [address] in conformance with the scope and limitations of ASTM E1903-xx and for the following objectives: [list "statement of objectives" developed pursuant to Section 5.1]

What Will These Changes Mean in Practice?

For the user, it will no longer be sufficient to simply request that a Phase II ESA be conducted. The user will need to confer with the Phase II assessor to explain what it hopes to accomplish in the investigation and should share with the assessor all of the existing environmental information in its possession. Here is an example:

The subject property previously had an auto repair facility on it and there were a number of suspect sources (dry cleaners, gas stations, heating oil tanks, etc.) in the immediate vicinity of the site.

- What does the user want to know, and which of the six identified objectives is relevant?
- Does the user simply want to confirm whether the auto repair facility has had any releases for purposes of establishing a defense to CERCLA liability? For purposes of allocating business environmental risk in the context of a planned transaction? For purposes of reporting contingent liabilities to the Securities and Exchange Commission?
- Does the user want to confirm whether the nearby dry cleaners, gas stations, and heating oil tanks have impacted the property? Does the user need to know this with a reasonable degree of certainty, because it plans to

redevelop the property, or does it simply want a present/not present determination?

- Are there any limitations that it intends to impose on the Phase II assessor because of scheduling or cost reasons? Who gets to determine when “enough” investigation has been conducted?

For the Phase II assessor, he or she must confer with the user to determine the question to be answered and the user’s objectives for the investigation. The assessor will need to consider what to do if the user fails to cooperate in identifying the question to be answered or in formulating the objectives or in identifying any limitations on the scope because of schedule, cost, or budget considerations. It is certainly not uncommon at the present time for the user to fail to provide information required under the ASTM Phase I ESA standard (E1527), whether it is title information, environmental liens, activity and use limitations, litigation, or purchase price. The following are some considerations:

- Why should we expect users to be more cooperative in identifying the objectives of the Phase II assessment?
- What should the Phase II assessor do if the user is unwilling to disclose its objective(s) for the assessment?
- How can the assessor prepare a conceptual model and written sampling plan if the user is unwilling to identify the question to be answered? Failure to follow the prescriptive requirements in the Phase II standard may also result in increased liability for the assessor.
- What will be the consequence for failing to include each of the mandatory tasks identified under Section 6 of the proposed standard?
- What if the assessor fails to include one of the areas where target analytes might be present? Or fails to investigate an area that has been identified as a data gap?

The proposed changes would give the Phase II assessor little discretion in these areas. See, e.g., Sections 6.4.3 and 7.3. The proposed changes to the Phase II standard also demand that the assessor’s

sampling results be “accurate and reproducible.” What happens if another assessor is unable to reproduce the Phase II assessor’s results?

Conclusion

The revised Phase II ESA standard is currently being balloted at the ASTM subcommittee level. An E50 main committee ballot will be required before the proposed changes can be finalized. Users are underrepresented on the E50.02 Task Group and need to make their views known on these important due diligence matters. If you are not already involved in the ASTM standard-setting process, now is the time to get involved in the proposed changes to the ASTM Phase II ESA standard.



ABA Section of Environment, Energy, and Resources

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PHASE I SITE ASSESSMENTS ARE NOT FOR BROWNFIELDS

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“Facts do not cease to exist because they are ignored,” Aldous Huxley, *Proper Studies*, 1927

A Phase I environmental site assessment (ESA) is not an adequate baseline for identifying the host of subsurface environmental problems likely to be encountered while redeveloping a brownfields property. Phase I ESAs performed to ASTM’s E1527 standard or the U.S. Environmental Protection Agency’s All Appropriate Inquiries (AAI) rule fail to recognize as many as 75 percent of the areas of concern (AOCs) at sites whose histories involved manufacturing or handling of potentially contaminating substances. Such standard Phase I ESAs do not offer the brownfields developer reliable protection against unforeseen contamination that often leads to construction delays and cost overruns.

With the advent of the two standards, Phase I ESAs have focused only on three prescribed lines of evidence that collectively comprise the keystone for identifying releases, while failing to exercise an all-important fourth line of evidence—*professional knowledge of inherent releases*. The standard Phase I ESA keystone evidence sources are (1) visual observations made during a property reconnaissance; (2) interviews with property personnel; and (3) agency records. Even on a collective basis, these sources only scratch the surface and are unlikely to reveal many AOCs (or “Recognized Environmental Conditions” (RECs) in ASTM terminology), considering (a) the chances are slim that an assessor will find visible evidence of many sorts of historical releases on the day of the site visit; (b) it’s not reasonable to expect that site personnel will be aware of and reliably disclose all historical releases; and (c) regulatory agency records typically are poor indicators of release histories since many releases were never reported.

It’s true that these prescribed Phase I ESA keystone evidence sources *could* reveal a historical release, so of course they’re worth pursuing, but absence of

affirmative evidence in no way means absence of releases. Whereas checking the prescribed keystone evidence sources in performing a standard Phase I ESA may promise to secure landowner liability protections under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the usefulness to the brownfields developer is limited.

The most prescient line of evidence, not articulated by the standards, is the site assessor’s knowledge of releases that are *inherent* to the kinds of activities and operations that have taken place at a property. For example, most environmental practitioners would conclude that a twenty-year tenure of a dry cleaner at a property would likely have led to contamination, even if there was no visible evidence of a release on the day of the site visit, the property personnel did not disclose any releases, and the regulatory agency databases contained no records of a release. This is because the accumulated knowledge of the assessment community has established that releases are inherent to the dry cleaning industry.

A Phase I ESA assessor commonly will cite such dry cleaning operations as a potential release (REC) despite the lack of affirmative evidence from the prescribed keystone evidence sources. In so doing, the assessor is going beyond the keystone evidence sources prescribed by the standards—unwittingly or not, the assessor is deducing the potential release based on professional knowledge of releases inherent to that specific site use. Ironically, the assessor could have concluded that the dry cleaning operation did not constitute a REC, and still have been in strict conformance with ASTM E1527 and AAI, because the standards do not prescribe this line of evidence; the exercise of deduction based on professional knowledge of releases inherent to certain activities and operations is not articulated by the standards. It’s rare that an assessor will not identify a dry cleaning operation as a REC though, because dry cleaning enjoys such notoriety amongst the spectrum of site uses that dismissing it does not pass the straight-face test.

Contrarily, the same sort of deductive logic is not used in standard Phase I ESAs, so a host of other well-

known potential releases that are inherent to specific site uses are often not identified. Hence, the opportunity to forewarn the brownfields redeveloper of lurking problems is lost.

An ESA of a brownfields site warrants special consideration. By their nature, brownfields redevelopment projects involve construction and, very often, subsurface construction. Once a developer starts digging, the chances are high he will encounter any contamination that the standard Phase I ESA might have failed to predict, with significant negative impacts to the project's schedule and budget. This makes the transfer of a brownfields site unlike most other commercial real estate transfers. The brownfields developer cannot afford to let sleeping dogs lie—in contrast to parties to non-brownfields transactions who can often be content to let potential releases go undiscovered and to lean on the ASTM/AAI standard to meet their “innocent landowner” burden of proof.¹

In order to more reliably identify the universe of AOCs (i.e., potential release areas) at a brownfields site, an assessor can use his knowledge of the generic activities and operations associated with the former uses of the site to deduce potential release areas that are not revealed by the three lines of evidence prescribed by the Phase I standards. The brownfields industry has experienced many instances of stumbling upon site contamination and, in retrospect, this has given us insight into the historic operations and activities that typically result in such subsurface contamination. Likewise, the long history of regulatory-driven remedial investigations has provided the assessment community with many lessons as to activities and operations that commonly lead to site contamination. And so it is that we now know much about the sorts of releases that are inherent to a given site use.

We professionals know, for example, that widget manufacturing entails metal plating and degreasing. We know that drips of heavy metal-laden solutions from plating tanks, and solvents from degreaser units, are endemic and go through floors, and leak out of floor drain systems. We know that prior to the modern era of hazardous waste management, widget manufacturers stored messy, odorous drums of waste liquid on the ground outside the back door. If, in conducting the

standard Phase I ESA, we learned only that widget manufacturing occurred at the site in the past but no RECs were identified through the prescribed keystone evidence sources, we can still identify these AOCs through deduction based on the assessment community's knowledge of releases inherent to widget manufacturing, without ascertaining any affirmative evidence from the site reconnaissance, the site personnel interviews, or agency records.

One might acknowledge that such AOCs are more speculative than RECs identified in strict conformance with the Phase I ESA standards; nevertheless, they are obvious to, and able to be detected by, assessors who benefit from retroactive insights gained from brownfields cleanups and comprehensive remedial investigations. Simply said, a Phase I site assessment that follows the narrow prescription of the ASTM/AAI standards, but does not avail itself of the knowledge and experiences gained from brownfields redevelopment and remedial investigations, is deficient.

All good information is worth having, even if it is limited, so standard Phase I ESAs are valuable to a point. But their limitations—the evidence they do not consider—must be understood so that the brownfields developer can supplement the evidence and minimize surprise contamination, construction delays, and cost overruns.

Endnote

¹ Note, by the way, that a developer would likely lose any “innocent landowner” or “bona fide prospective purchaser” status he might think he'd earned (having performed his ASTM/AAI Phase I ESA) when contamination is newly discovered during site construction, if the court determines that the “ability to detect” and the “degree of obviousness” of the contamination were high. On this issue, “consult your attorney!” It is this writer's opinion that a large portion of AOCs missed by ASTM/AAI Phase I ESAs are indeed obvious, and that we have an adequate ability to detect them using information developed in Phase I ESAs, as averred in this essay.

THERE'S GOT TO BE A BETTER WAY: SATISFYING THE PUBLIC PARTICIPATION REQUIREMENTS OF THE NCP IN THE INTERNET AGE

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The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) allows recovery by one responsible party from another responsible party of response costs associated with the remediation or removal of a hazardous substance from a facility, so long as the response costs are necessary and consistent with the National Contingency Plan (NCP). To be consistent with the NCP, in addition to other requirements, the public must be provided with notice of the proposed response action and an opportunity for meaningful participation. In some instances this public/community element of NCP compliance can be achieved by agency participation. The remaining instances require adequate and sufficient notice to the public regarding the response and the proposed remedy and alternatives, as well as a meaningful opportunity for public comment and input. This begs the question of how, in situations in which agency involvement alone is insufficient, should these notice, information, and comment requirements be accomplished? This article evaluates the historical methods for accomplishing these requirements, and proposes improvements made possible by the technological innovations of the last few decades, specifically, the Internet.

Historically, parties satisfied the NCP public notice and opportunity to comment requirements by publishing notice of the proposed cleanup and remedial alternatives in a major local newspaper. Notice was followed by public meetings, the distribution of fact sheets to addresses within a certain radius of the proposed activity, and/or the establishment of document repositories at local libraries or other public buildings. The inherent assumptions in these methodologies are that each, or all, of these steps are

effective, necessary, and preferable to provide the public with notice and opportunity for comment. The reality, however, is that nowadays many, if not most, Americans get notice of, and information about, current events and local issues online. Cyberspace is where they look for answers to their questions about everything from how to roast a chicken to the name of that one kid in the Gooneys. It's where people look for additional information about whatever piques their curiosity. The Internet and associated developments, such as Twitter and Facebook, also allow people to provide immediate input, while the information is fresh in their minds or even still on their screen. Given the current state of information technology, historic methods for NCP compliance are either no longer relevant, or much less relevant, than they once were. Taken as they are, these historic methods also make participation by the public more difficult than necessary, and thereby deny the public opportunities to meaningfully participate. In order to help ensure that the public has the notice, information, and opportunity for meaningful participation envisioned in the NCP, the methods that responsible parties use to satisfy the public participation aspects of the NCP, and what courts will accept as satisfaction of these requirements, should change.

Assume people are most interested in cleanups near their homes, workplaces, and their kids' schools. The first task is to give people notice of the existence of the site and the proposed remedial or removal measure. Effectuating actual notice may be the most difficult task parties face.

The historic notice by publication method obligates interested parties to first cull through the "Legal Notices" section of their local newspaper. People reading the newspaper, whether interested or not, may or may not stumble across the proper notice during the few days of publication. Thus, notice by publication was, and is, likely to be only moderately successful with respect to people that read newspapers in print. Given that these days fewer people than ever read newspapers in print, and the number of newspaper presses nationwide is declining and expected to continue to decline, it stands to reason that fewer people than ever actually see the notices that are

published in their local newspaper. In instances where a member of the public reads her or his major local newspaper online, as opposed to in print, the chances are minimal that the reader will happen across a particular public notice unless he or she is looking for it. Thus, the historic publication method, whatever its past relevance and effectiveness, likely fails to provide most of the potentially interested public with actual notice of proposed cleanups.

Compared to notice by publication, the historical method of mailing fact sheets to addresses within a set radius of a site is likely more effective at providing actual notice to a significant portion of all potentially interested parties. Fact sheet mailings actually deliver notice to residences and businesses within a set radius of the site, which are most likely the ones that would be interested in the proposed activity. That is not to say that the fact sheet method is without downsides. Given the number of remedial and removal actions ongoing or proposed in the United States, especially in population-dense areas, mailing notice in every instance would likely overwhelm and desensitize the public. The result would be that the notice might often be ignored, much as some would argue is the case with California's Proposition 65, and other ubiquitous notices. Consider also that fact sheet mailings and newspaper publication are fairly expensive. Both also consume paper resources and create solid waste, which is contrary to the intent of CERCLA to repair and preserve the environment. Alternatives, specifically alternatives that increase the likelihood of notice reaching a greater percentage of likely or potentially interested members of the public, while conserving paper resources and the resources of the potentially responsible party providing notice, should therefore be considered.

Alternatives could include site-specific options, such as posting notices or hanging banners around the site that give notice to passersby, the idea being that the target audience is more likely to receive and register notice tied to the site. Additional alternatives that should at least supplement, if not supplant, newspaper publication are posting notice on popular Web sites, such as Craig's List, which maintains a "Local News" list within the larger "Community" list, and/or posting

notices in houses of worship, community centers, and/or other gathering places. Theoretically, word of mouth, including Internet chat groups, would fill in the gaps in the initial notice dissemination. Given that, among the public, degrees of technical savvy and use vary widely, fact sheet mailings may still be required to effectuate actual notice. However, regardless of the method by which an interested member of the public receives the initial notice, it is certainly possible, and perhaps likely, that the only information he or she will have thereafter is an address and/or a site name. From this point on, the Internet is clearly superior to the historic methods.

Historically, if interested members of the public happened to find what they were looking for in the "Legal Notices" section of the paper, they were directed to the local library, or other public building. There, they had to dig through binders in an attempt to absorb enough information during business hours to meaningfully participate. If they wanted to comment, they had to track down the address to which they could send comments, write a letter, address and stamp an envelope, and send it off. Alternatively, they had to attend a public meeting on a date they had no control over and on which they may or may not have other commitments, childcare obligations, and the like. By comparison, if the information were provided online, that same person could sit down at any computer and type the site address or name into a search engine. A few seconds later, he or she could click on a link and read about the site history and cleanup options. A comments feature included in the Web site would allow that same interested member of the public to enjoy meaningful participation before his or her coffee cools. The ability to forward the Web site address via e-mail would also add to the number of people that ultimately received notice of the site and proposed activities.

Allowing the alternate methods of notice discussed above should be accompanied by a requirement to provide information online, at least for the near term, as a supplement to brick-and-mortar document repositories and community meetings. When people receive notice online, they want and expect to be able to find information in just a few clicks. While this

perhaps seems burdensome at first glance, it is quite simple in reality. Web site hosting is ubiquitous and cheap. Some sites will host Web sites for less than \$20 a month, significantly less than the cost of publication in major newspapers. Site Web sites can provide notice and up-to-date information, as well as links to online document repositories. Online document repositories are also inexpensive, and sometimes free. Many environmental agencies, such as the California Department of Toxic Substances Control and the California Regional Water Quality Control Boards, already maintain them. Thus, a requirement to provide information online to supplement either traditionally or alternatively provided notice imposes minimal burden on parties. Further, Web sites allow people to hone in on the materials they are interested in more quickly than culling through rows of binders. As such, providing online information and comment pages is more likely to provide the public with information necessary for meaningful participation, and more opportunities to participate, than the current system.

In considering whether a party has complied with the public participation aspects of the NCP, courts should at least give significant weight to, if not require, the provision of information and opportunity to comment online. Although the above perhaps does not offer a complete substitute for historic methods, it's time to reconsider and revise the ways parties can and must provide the public with notice and opportunity for comment in compliance with the NCP. NCP compliance is a factual balancing test to be undertaken in each case. Thus, courts have the ability to give appropriate weight to the methods used by parties to inform, include, and involve the public in the decision-making process. Allowing private parties to use realistic, effective, albeit alternative means of notice, coupled with a requirement to provide information about sites and proposed cleanups online, streamlines the process, saves resources, saves money and, most importantly, allows for truly meaningful public participation. Moreover, as state and federal environmental agencies have already begun using online resources to communicate site information to the public, they should seriously consider approving and using electronic and other alternative methods for compliance with NCP notice and public participation

requirements. Courts, regulatory agencies, and parties should take it upon themselves to help the NCP catch up with technological reality by realizing and accepting that newsprint, mail, and meetings are no longer the only game, nor necessarily the most desirable or effective game, in town. The objective in each case should be the provision to the public of notice and information about cleanups, proposed remedial alternatives, and an opportunity to comment. In most instances, where information and opportunity for comment are provided via the Internet, it should be considered appropriate to give these methods the same or greater weight than is currently allotted to print and mail media and public meetings.

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