Defending Liberty
Pursuing Justice

ABA SECTION OF ENVIRONMENT ENERGY AND RESOURCES

State and Regional Environmental Cooperation Committee Newsletter

Vol. 5, No. 1 **October 2008**

MESSAGE FROM THE CHAIR

John R. Jacus
Davis Graham & Stubbs LLP
Denver, Colorado
john.jacus@dgslaw.com

The State and Regional Environmental Cooperation Committee ("SRECC" or "shreck") is pleased to publish this first committee newsletter of the new ABA year. In it you will find an article reviewing the new ASTM Vapor Intrusion Standard Practice by Gail Wurtzler, as well as regularly featured regional updates on developments within the states and EPA regional offices monitored by our regional vice chairs. We are fortunate to be able to communicate with directors and upper-level managers in state and EPA offices around the country in order to highlight those issues and developments of greatest interest to the regulated community and environmental practitioners in the private bar. Even if your practice is fairly narrow in subject matter focus, we think you will find our periodic regional updates interesting and potentially useful to you in your practice. Since you are reading this newsletter, please also let us know if you find this issue interesting, helpful, or needing improvement; we will do our best to be responsive.

As you probably know, each member of ABA Section of Environment, Energy, and Resources can easily become a member of multiple committees of the Section simply by going to the Section's Web site at http://www.abanet.org/environ/. Once there you click on "Committees" from the menu listed upper left and are then able to check boxes for those committees you would like to join. Thereafter, for each committee that you join, you may receive e-mail notication of new committee newsletters and also messages sent via the committee's list serve, if the ABA has a current e-mail address for you and you have no restrictions for receiving such e-mail. We hope you will consider joining SRECC as a good committee to keep you updated more broadly on general environmental developments, in addition to any subject matter-specific or program-specific committees that may relate more closely to your day-to-day practice. And if you enjoy receiving the SRECC newsletter, please share it with friends and colleagues via e-mail, and encourage them to consider joining the committee as well. Lastly, if you would like to author an article for the newsletter or contribute in other ways to committee activities (check out the committee Web page at http://www.abanet.org/environ/committees/stateandregion/), please do not hesitate to contact me or any of the committee's leaders, accessible via the committee Web page. We appreciate your interest in SRECC and hope you will consider getting more involved with us in the activities of the committee.

Visit the
State and Regional Environmental Cooperation Committee
Web site at:
www.abanet.org/environ/committees/

State and Regional Environmental Cooperation Committee Newsletter
Vol. 5, No.1, October 2008
Edward M. Callaway, Editor

In this issue:

This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association, 321 N. Clark St., Chicago, IL 60654.

ASTM SEEKS GREATER CONSISTENCY IN VAPOR INTRUSION ANALYSIS WITH NEW ASTM STANDARD

Gail Wurtzler
Davis Graham & Stubbs LLP
Denver, Colorado

Intrusion into building interiors of vapors from certain types of subsurface contamination (largely, petroleum products and chlorinated solvents) is a relatively new environmental issue. Nonetheless, it has received a great deal of detailed attention by state and federal agencies. Several agencies have generated extensive materials regarding potential risks, methods, and action levels. Those materials vary markedly between state agencies and the U.S. Environmental Protection Agency and among different state agencies. In addition, almost all materials seem to have "draft" status and are anticipated to change, often substantially, as the agencies' thinking on this issue evolves. Similarly, there is substantial variation in the practices and recommendations of environmental consultants as well as in the tolerances and concerns of real estate owners and investors regarding this potential issue.

In an effort to bring some uniformity to this area, ASTM International issued its Standard E2600-08 entitled "Standard Practice for Assessment of Vapor Intrusion into Structures on Property Involved in Real Estate Transactions" in March 2008. The stated purpose of the standard is to define "good commercial and customary practice" for real estate transactions in the United States for conducting vapor intrusion assessments for properties with, or in proximity to, contamination of soil and groundwater by certain volatile compounds. The stated goal is to identify whether there is a potential for a vapor intrusion condition to exist.

Contents of Standard E2600-08

The standard specifies a relatively conservative four-tier screening process to identify whether a property has a vapor intrusion potential. The process is site-specific and requires collection of information about the specific property and neighboring properties. The four tiers are:

- Tier 1—Initial (non-invasive) Screening
- Tier 2—Semi-Site Specific Numeric Screening
- Tier 3—Vapor Intrusion Condition Assessment
- Tier 4—Mitigation

Tiers 1 and 2 should be conducted by an "environmental professional" as defined in ASTM Standard E1527 addressing Phase I Environmental Site Assessments or ESAs. Tiers 3 and 4 should be conducted by such an environmental professional who has specific vapor intrusion experience.

At any point in the screening process, the property owner may elect to avoid potential vapor intrusion issues by implementing preemptive mitigation.

In Tier 1, the environmental professional uses non-numerical information typically collected during a Phase I ESA to determine whether a potential vapor intrusion condition is unlikely to occur because of the site conditions or physical setting. Information to be considered includes: existing/planned uses of the site, site and neighboring property histories, physical setting (soil type, geological, hydrological, hydrogeological, and topographic information), existence of natural or man-made conduits, types of contamination (i.e., likely to have soil vapor). The distance from potential sources of volatile contamination must be considered. Standard E2600-08 presumes a potential for vapor intrusion is unlikely when the lineal distance between the nearest edge of contamination and the nearest planned or existing structure is greater than or equal to 100 feet for volatile contaminants other than dissolved petroleum hydrocarbon chemicals and 30 feet for those petroleum chemicals. The types of structures planned or existing on the site are also important. If there are intrinsically safe building designs such as well-ventilated underground parking garages or multifamily units with first floor open parking, a potential for vapor intrusion is unlikely.

The screening moves on to Tier 2 if the potential for vapor intrusion cannot be ruled out as a result of the Tier 1 screening and if the property owner does not choose to implement preemptive mitigation. Tier 2 compares site-specific groundwater and/or soil vapor concentrations to applicable government-established generic and semi-site-specific Risk Based Concentrations (RBCs). Site-specific soil, soil vapor, and groundwater data from previous sampling and analyses may be used. If such data are not available, sampling is required. If the applicable RBC is exceeded, a potential vapor intrusion condition exists. The next step is either Tier 3, vapor intrusion assessment, or Tier 4, preemptive mitigation.

Tier 3 uses interior or exterior measurements and predictive modeling or attenuation factors (whichever procedure is accepted by relevant lead agency) to assess vapor intrusion potential. A "multiple lines of evidence" approach is recommended to determine whether vapor intrusion exists.

Tier 4 is selection of mitigation alternatives. Mitigation may include one or more of institutional controls, engineering controls, or intrinsically safe building design. Institutional controls in this context are like those used in other environmental contexts and include deed restrictions and other legally enforceable conditions placed on property to reduce the likelihood of exposure. Engineering controls may include source removal and treatment, barriers and venting to prevent subsurface vapors from entering a building, pressurization of building interior to direct vapors away from enclosed spaces, and indoor air treatment systems.

Limits on Standard E2600-08

First, the new standard is not intended by the ASTM to represent the standard of care by which the adequacy of an environmental professional's service is judged. However, as a practical matter, it is likely that courts and litigants in negligence cases involving vapor intrusion will nonetheless regard Standard E2600-08 as evidence of conduct that meets the standard of care.

Second, Standard E2600-08 does not replace, expand, or otherwise change Standard E1527 addressing Phase I ESAs. ASTM intends that Standard E-2600-08 may be used independently of Standard E1527 or as a voluntary supplement to that standard. It is not intended to be a substitute for a Phase I environmental assessment under Standard E1527.

Third, Standard E2600-08 states that it is not a requirement for "all appropriate inquiry" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and does not "constitute, expand, or in any way define" the scope of CERCLA all appropriate inquiry. Compliance with Standard E1527 is generally regarded as sufficient to satisfy CERCLA's all appropriate inquiry rule, and Standard E2600-08 was developed specifically to address a gap in Standard E1527. In light of these circumstances, prospective brownfields developers may well conclude that it is prudent to include Standard E2600-08 in their environmental consultants' scope of work.

Fourth, Standard E2600-08 does not address requirements under federal, state, or local law regarding vapor intrusion. For example, it does not address action levels, required remediation, or possible legal obligations such as disclosure.

Finally, Standard E2600-08 does not address whether a potential vapor intrusion pathway is a complete exposure pathway or whether potential vapor intrusion poses an unacceptable risk to human health. Those determinations require further analysis under federal and/or state guidance documents identified in appendices to the standard.

Benefits of Standard E2600-08

The Standard E2600-08 process does not purport to address, let alone resolve, all vapor intrusion issues. For example, it does not address risk or action levels, both of which are anticipated to continue to be controversial and subject to differing regulatory agency views. Instead, the new standard focuses on determining whether issues regarding such levels even need to be addressed for a specific site. If a vapor intrusion condition is not likely under the ASTM's tiered analysis, then risk and action levels are not relevant.

As a practical matter, the new standard provides a mechanism to quickly and inexpensively screen out properties that are unlikely to have a vapor intrusion condition. This process is not intended to be exhaustive or eliminate all uncertainty. Consistent with good commercial practice, the process will be guided by the type of property, the risk tolerance of the buyer, and the information already available or developed in the screening process.

Standard E2600-08 also confirms that a commercially reasonable option for owners of properties that are not screened out at Tier 1 is to choose preemptive mitigation and thereby avoid the expense and time to proceed through the Tier 2 and 3 activities. Preemptive mitigation also would allow a property owner to avoid time-consuming and costly issues about complete or incomplete exposure pathways and risk and action levels.

EPA REGION RESOURCE PAGE

The State and Regional Environmental Cooperation Committee has created a comprehensive source of information, providing direct links to various environmental Web sites organized by each of the 50 states, the EPA regions, Puerto Rico, and the Virgin Islands at

www.abanet.org/environ/epa/

By clicking on a state or a region, one has access to links for state and local government agencies, basic legal research materials, state and federal courts, offices of the federal government with environmental law offices and more.

REGIONAL ROUNDUPS

REGION 1: Connecticut, Massachusetts, Maine, New Hampshire, Rhode Island, Vermont, and Ten Tribal Nations

Philip Ahrens, Esq.
Brian Rayback, Esq.
Pierce Atwood LLP
Portland, Maine

Region 1 includes the states of Connecticut, Massachusetts, Maine, New Hampshire, Rhode Island, and Vermont, as well as ten tribes. Among the most significant regional developments in Region 1 are the following.

Regional Greenhouse Gas Initiative Auction

The first cap-and-trade carbon dioxide allowance auction in the nation resulted in a clearing price of $3.07 per ton. The Regional Greenhouse Gas Initiative (RGGI) auction conducted on Thursday, Sept. 25, had strong participation from regulated entities (those electricity generators which are required to reduce carbon dioxide (CO_2) emissions over the course of the program). Fifty-nine entities submitted bids to purchase more than four times the available supply of allowances in the auction. The $3.07 auction price is about 65 percent higher than the $1.86 reserve price. As a result, all 12.56 million allowances were sold, raising $38.5 million that will be distributed to member states for, among other things, energy efficiency projects.

The market monitor, Potomac Economics, announced that regulated entities "purchased most of the allowances in the auction," although the identities of the buyers were not released. Six of the ten RGGI states (Maine, Maryland, Massachusetts, Rhode Island, Vermont, and Connecticut) participated in the auction, and the allowances purchased can be used by a regulated facility in any of the RGGI states. The four other states, Delaware, New Hampshire, New Jersey, and New York, are expected to participate in the next auction, scheduled for Dec. 17, 2008.

It is likely that the December auction will give a better indication of the market for allowances for two reasons. First, as noted above, two of the biggest participants, New Jersey, and New York, did not participate in the initial auction. Second, it is unclear at this time how the national financial situation, including at hedge funds and investment banks, may have affected the auction.

New England Reports Cleaner Air

According tothe Environmental Protection Agency (EPA), New England had fewer poor summer air quality days this year, compared to 2007. According to preliminary data, there were twenty-eight days when ozone monitors recorded concentrations above the health standard, compared with fifty-three such days in 2007.

EPA believes that the decrease was related to the decrease in the number of hot days, combined with a longer trend of declining air pollution emissions that cause ozone smog.

In related news, EPA also announced grants for clean diesel projects across New England of $2.4 million. These grants will fund school bus and waste collection truck emission control retrofits, natural gas-fueled school buses, purchasing hybrid vehicles for municipal fleets, and other initiatives in all six New England states.

REGION 2: New Jersey, New York, Puerto Rico, the United States Virgin Islands, and Tribal Nations

Kirstin Etela
Robinson & Cole LLP
Stamford, Connecticut

New Jersey

Natural resource damages (NRD) claims continue to make the news in New Jersey. The state announced in

June that it had collected almost $4 million in damages and preserved more than 700 acres of open space during the past year through settlement of NRD claims. Some of the settlements New Jersey reached over the last year include:

- Lucent Technologies agreed to pay $1.2 million for groundwater contamination at nine facilities;
- Bayer Corporation, as a successor to a number of industrial manufacturers, agreed to pay $1 million for groundwater contamination at a number of manufacturing sites in Passaic County;
- South Jersey Gas Co. paid $549,000 to preserve 159 acres in three townships to settle groundwater contamination from coal-gasification facilities from predecessor companies;
- 3M Company paid $315,000 for resources damages and donated 154 acres of woodlands as groundwater recharge area.

For more information, see the New Jersey Department of Environmental Protection's Web site: http://www.state.nj.us/dep/newsrel/2008/.

New Jersey recently won another court decision in the ongoing NRD litigation against ExxonMobil Corporation. In September, a superior court judge ruled that ExxonMobil Corporation is liable for causing a public nuisance by polluting waterways, wetlands, and marshes on and near former refinery sites through disposal and releases. A trial will be held to determine the specific amount of damages. The superior court had previously ruled that ExxonMobil is liable under New Jersey's Spill Act for restoring natural resources, and the Appellate Division ruled that New Jersey is entitled to seek compensation for loss of use damages under the Spill Act. For information on the most recent ruling and to read the decision, see: http://www.nj.gov/oag/newsreleaseo8/pr20080910b.html.

New York

This summer, New York passed much-anticipated legislation reforming the Brownfields Cleanup Program, which had run into criticism from the New York State Department of Budget for, in some cases, awarding developers tax credits in amounts that exceeded cleanup costs. The previous program did not cap the amount of credits an applicant could receive. Under the new program credits are capped as follows:

- Projects that achieve cleanups to levels permitting unrestricted use will be able to claim a tax credit for 50 percent of site preparation costs (those costs that are chargeable to a capital account, not including costs of acquiring the property);
- Projects that achieve cleanups to levels meeting restricted residential soil cleanup objectives can claim a tax credit of 40 percent of site preparation costs;
- Projects achieving cleanup to commercial use levels can claim a tax credit of 33 percent of site preparation costs;
- Projects achieving cleanup levels for industrial use can claim a tax credit of 27 percent of site preparation costs.
- If projects follow Track 4, instead achieving restricted use levels through site-specific soil cleanup objectives, tax credits drop to 28 percent for sites that planned to achieve restricted residential use, 25 percent for sites that planned to achieve commercial uses, and 22 percent for sites that planned to achieve industrial use.

Tangible property credits under the new law will be calculated as they were under the prior law, except that they will be limited as follows:

- The tangible property credit will be limited to $35 million or three times the amount of site preparation costs and on-site groundwater remediation credits, whichever is less.
- Sites that are redeveloped primarily for manufacturing use will be able to receive a tangible property credit of up to $45 million or six times the amount of site preparation costs and on-site groundwater remediation credits, whichever is less.
- The tangible property credit increases by 2 percent if the project if located in a Brownfields Opportunity Area and satisfies stated goals and objectives for the area.

Once a successful applicant enters into a cleanup agreement with the state, it is required under the new legislation to submit a Brownfield Credit Report to the New York Department of Environmental Conservation (DEC) for the next eleven years, which must detail the amount of state and local taxes that the project generates and was projected to generate. The amended program applies to sites accepted after June 23, 2008, and the DEC commissioner becomes the administrator of the program as of April 1, 2009. To review all the legislation and all program changes, visit: http://www.assembly.state.ny.us/leg/?bn=S08717.

Update on New York's Efforts Regarding the Regional Greenhouse Gas Initiative

We previously reported that New York would not take part in the first auction of carbon credits conducted on Sept. 25, 2008 under RGGI. Although New York did not participate in that first auction, in which the credits cleared a price of $3.07 per allowance (ton of CO_2), it allowed New York based entities to bid for allowances offered by other RGGI states. New York's State Environmental Board approved New York's regulations promulgated under RGGI on Aug. 11, 2008, and it will participate in the next auction, scheduled for Dec. 17, 2008.

Region 2 News

On Sept. 26, 2008, EPA Region 2, in conjunction with EPA Region 1 and the National Fish and Wildlife Foundation, announced the award of $914,994 in grants to state, local, and community groups working to improve water quality, restore habitat, and conserve the wildlife of Long Island Sound. The award will fund thirty-five grants made under the Long Island Sound Futures Fund, with seventeen of the grants going to New York and eighteen going to Connecticut. The Sound Futures Fund was established in 2005 through EPA's Long Island Sound Office and that National Fish and Wildlife Foundation. For more information on the grants, the projects they will fund, and the additional funds grant recipients have raised, please visit: http://yosemite.epa/gov/opa/admpress.nsf/.

A New Superfund Site for Region 2?

In August, EPA announced that it has agreed to develop a sampling plan over the next six months to determine whether Newtown Creek in New York City should be designated a federal Superfund Site. Numerous oil storage facilities and refineries existed along Newtown Creek for more than 100 years. The owner of one of those facilities, ExxonMobil, had entered into a consent decree with DEC in 1990 to cleanup oil and chemicals that were released after a tank explosion that occurred in the fifties. In 2004, the environmental group Riverkeeper filed an action against ExxonMobil, BP, and ChevronTexaco in federal court under the citizen suit provisions of the Clean Water Act and the Resources Conservation and Recovery Act alleging that approximately 17 million gallons of oil underlying Greenpoint, Brooklyn, and the vicinity were seeping into Newtown Creek, polluting the waters and posing an imminent and substantial endangerment to human health and the environment. Residents in the area then filed a property damage lawsuit against the companies for property damage alleged to result from toxic fumes from petroleum product releases. Since that time, local lawmakers and DEC have become increasingly involved, and ultimately Region 2 Administrator Alan Steinberg announced in a letter to lawmakers that EPA would test four properties cited by lawmakers as possible sources of contamination and review existing information from past investigation to identify data gaps, develop a sampling plan, and review the information to determine whether actions are warranted under Superfund. For more information on EPA's decision to review the matter, visit: http://www.nytimes.com/2008/08/26/nyregion/26creek.html.

REGION 3: Delaware, District of Columbia , Maryland, Pennsylvania, Virginia, and West Virginia

Kelly A. Gable
Hangley Aronchick Segal & Pudlin
Philadelphia, Pennsylvania

The states of Delaware, Maryland, Pennsylvania, Virginia, and West Virginia, as well as the District of Columbia, are covered by U.S. EPA Region 3, which is headquartered in Philadelphia. Some of the more significant developments and initiatives of the past few months in each state and EPA Region 3 are set forth below.

Region 3

SEPTA Settles Alleged Violations

EPA and the Southeastern Pennsylvania Transportation Authority (SEPTA) settled alleged violations of hazardous waste and underground storage tank regulations, which involved nine SEPTA facilities. The settlement requires SETPA to pay a $169,527 civil penalty and spend $1.1 million to purchase wind-powered energy instead of fossil fuel energy.

2008 EPA Mid-Atlantic Environmental Achievement Awards

EPA Region 3 announced the winners of the 2008 EPA Mid-Atlantic Environmental Achievement Awards, which recognize significant contributions to reduce pollution and/or protect public health and the environment in the Region 3 states. The ten winners were: (1) Frito-Lay Aberdeen Green Team, (2) Elizabeth River Project, (3) Hensel Phelps Construction Company, (4) Kent County Wastewater Treatment Facility, (5) Lehigh Valley Land Recycling Initiative, (6) Lower Makefield Township, PA, (7) Philly CarShare, (8) Joan D. Plisko, PhD, (9) Virginia Port Authority, and (10) Waterside Mignatti Companies.

Delaware

Delaware Energy Office Launches CFL Bulb Recycling Program

The Delaware Energy Office announced a compact fluorescent light (CFL) bulb recycling program beginning on Oct. 1 whereby CFL bulbs can be brought to one of seven drop-off locations for disposal and recycling. Residents are asked to place the CFL bulb(s) in a plastic sandwich bag before dropping it off. In addition, the Delaware Solid Waste Authority will hold household hazardous waste collection days at various locations throughout the state.

Mispillion Wetland Site Restored

The Mispillion Wetland Site restoration is complete, thanks in part to a public-private partnership. The site contains 56 acres of marshland with over 2,000 feet of river frontage. The restoration is a Natural Resource Damage Assessment and Restoration (NRDAR) project for the DuPont Newport Superfund Site located in Wilmington. The restoration site will be held by private ownership; the Delaware Department of Natural Resources and Environmental Control (DNREC) will hold a conservation easement and will be responsible for the project upon conclusion of a five-year monitoring program.

District of Columbia

Fort Reno Park Closed Due To Arsenic

Fort Reno Park is closed indefinitely due to the presence of arsenic. On May 14, 2008, the National Park Service issued a press release stating that arsenic concentrations had been discovered at Fort Reno Park. Fort Reno Park will be closed pending further testing. The District Department of the Environment was listed as the lead agency in coordinating the District of Columbia's response.

Settlement Reached Between CSX and DC

CSX Transportation, Inc. has entered into a settlement with the District of Columbia regarding the Nov. 9,

2007 train derailment that spilled coal into the Anacostia River. The settlement includes payment of a $50,000 civil penalty, reimbursement of the District of Columbia for approximately $60,000 in costs, and $550,000 for the creation of the Anacostia River Endowment Fund and to support a natural resources restoration project.

Maryland

Regional Greenhouse Gas Initiative Holds First CO_2 Auction

The Regional Greenhouse Gas Initiative (RGGI) held its first auction of carbon dioxide (CO_2) emissions allowances, selling all of the 12,565,387 allowances offered. The auction generated $38,575,783 in proceeds, which will be distributed to the six RGGI states that offered allowances for auction: Connecticut, Maine, Maryland, Massachusetts, Rhode Island, and Vermont. The next allowance auction is scheduled for Dec. 17, 2008. RGGI also intends to hold quarterly auctions during the first three-year compliance period, which will run from Jan. 1, 2009 through Dec. 31, 2011. The ten RGGI states are Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, New Hampshire, New York, Rhode Island, and Vermont.

Six Maryland Agencies Pledge To Go Green

Six Maryland agencies signed an agreement to have 168 of their transportation facilities undergo environmental checks, including the airport, the port, and highways. The six agencies are the Maryland State Highway Administration, the Maryland Port Administration, the Maryland Aviation Administration, the Maryland Motor Vehicle Administration, the Maryland Transportation Authority, and the Maryland Department of Transportation Secretary's Office. The compliance audits will be conducted by the state and are expected to be completed by 2011.

Pennsylvania

PADEP Adopts Voluntary Registries To Track Emissions and Offsets

The Pennsylvania Department of Environmental Protection (PADEP) adopted voluntary registries that businesses can use to voluntarily collect information about their greenhouse gas emissions and to document their reductions or offsets in emissions. PADEP adopted The Climate Registry as the emissions registry and adopted The Climate Action Reserve, The Voluntary Carbon Standard, and The Gold Standard as offset registries.

PADEP Designates Delaware County Site for Redevelopment

PADEP designated a former industrial site along the Delaware River in Chester, Pennsylvania, as a Brownfield Action Team project. This site will be home to a Major League Soccer stadium and mixed-use development. The designation ensures that the project receives priority review. The project is expected to create substantial numbers of jobs in both the short and long term, and is estimated to create approximately $335 million in tax revenues over thirty years. Since 2004, the Brownfield Action Team has fast-tracked thirty-six projects in twenty-three counties in Pennsylvania.

Virginia

Virginia Expands Biosolids Inspections

On Jan. 1, 2008, management of biosolids, or sewage sludge, became the responsibility of the Virginia Department of Environmental Quality (VADEQ). Last month VADEQ reported that, in its first six months of operation, the VADEQ's biosolids program inspected more than 42 percent of the fields (636 out of 1,496) and 73 percent of the farms (262 out of 355) where biosolids were spread in Virginia. Of the farms inspections, 206 of the 262 occurred during actual application of biosolids.

Virginia Issues 2008 Water Quality Report

The Virginia Department of Environmental Quality (VDEQ) issued its 2008 Water Quality Report in June of this year, which provides detailed information on more than 1,100 watersheds in the Commonwealth of Virginia. With this report, the total amount of assessed watersheds in Virginia is 95 percent—1,188 of 1,247.

West Virginia

West Virginia To Begin Electronic Mine Permitting

The West Virginia Department of Environmental Protection (WVDEP) reported that, beginning Jan. 1, 2009, it will require permit applications submitted to the Division of Mining and Reclamation to be filed electronically. In addition, it will accept electronic discharge monitoring reports submitted to both the Division of Mining and Reclamation and the Division of Water and Waste Management. Training on how to file permits and reports electronically will be offered free for the next three months at WVDEP headquarters, located at 601 57th St. SE in Charleston.

West Virginia And West Virginia University Study Switchgrass

WVDEP and West Virginia University (WVU) have partnered to study the potential for growing switchgrass on former surface mine sites. Switchgrass has many potential uses, including rehabilitation of croplands and conversion to ethanol for fuel production. The WVU Water Research Institute will manage the project over a seven-year period.

REGION 4: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, and Six Tribal Nations

Edward M. Callaway
Waller Lansden Dortch & Davis LLP
Nashville, Tennessee

In support of the Environmental Protection Agency's (EPA's) National Enforcement Priority for Wet Weather/Storm Water, Region 4 issued twenty-seven administrative actions requiring injunctive relief for Clean Water Act and storm water violations at construction sites. These actions were brought against developers and homebuilders in Alabama, Georgia, Kentucky, North Carolina, and Tennsessee. The total average annual amount of pollutants reduced for the actions was 31.9 million pounds/year. The violations ranged from failure to obtain a National Pollutant Discharge Elimination System (NPDES) permit to failure to follow the NPDES permit conditions. The NPDES permit conditions that were violated included: failure to properly design, implement, or maintain best management practices; failure to maintain records; failure to inspect; and failure to take all reasonable steps to prevent or minimize discharges that may cause harm to the environment. Each of the administrative orders required that the violations be corrected within a specified period of time and that documentation be provided to the government to demonstrate that the violations were corrected.

EPA Region 4 has focused compliance assistance resources for the fiscal year ending Sept. 30 on hospitals. EPA has identified hospitals as an industry sector with environmentally significant operations, but that has not in the past been a focus of agency compliance efforts. Hospitals often generate hazardous waste through lab work, chemotherapy, or pharmacy operations, and many do not realize that the same rules that regulate hazardous waste generation at manufacturing facilities apply to them. In addition, hospitals generally have air emissions point sources that require permits, and may have wastewater discharges that are subject to permit limits as well. After a year of compliance seminars held throughout the region, and voluntary compliance assistance visits at hospitals in

several states, hospitals will be encouraged to self-audit and disclose discovered violations, and to be prepared for compliance inspections.

Similarly, colleges and universities have been the subject of recent compliance out reach efforts in Region 4. A letter was sent to all known colleges and universities in the region, encouraging self-auditing and disclosure. Reportedly, a number of institutions have undertaken audits, resulting in improved compliance throughout the sector. The region recently held a sold-out conference on environmental sustainability in the university sector, at Atlanta's Spelman College, home of a "Green Residence Hall."

Tennessee

The state Solid Waste Advisory Committee (SWAC), which is charged by the General Assembly with investigating methods for solid waste reduction and reducing reliance on landfill disposal, produced a report on July 29, with sweeping recommendations for reducing solid waste disposal. The SWAC recommended that the Tennessee Department of Environment and Conservation (TDEC) require local governments to produce solid waste reduction plans with annual benchmarks; that e-waste, yard clippings, metals, and cardboard be banned from landfills; that construction and demolition landfills be required to report the origin and tonnage of waste disposed; and that fees be increased on construction waste disposal. TDEC drafted rules for presentation to the state board responsible for their promulgation, including creating a detailed multi-tier solid waste reduction plan requirement, and imposing a number of new waste screening requirements on landfills. While TDEC had planned a series of public hearings on the draft rules, the board determined that the rules were "not ready," and were pulled from the promulgation process on Sept. 30.

Georgia

Severe drought conditions in Georgia dominate environmental headlines in the state. Level four water use restrictions, which prohibit most types of outdoor water use, are in effect for fifty-five counties in northern Georgia. State officials were pleased with citizens' compliance and cooperation this summer, despite the March 30 expiration of state directive on water conservation. Water use rates in affected areas declined 20 percent between June 2007 and June 2008.

* * * * *

EPA Region 4 and SRECC are planning a joint conference on environmental issues in Region 4, tentatively scheduled for May 2009. Please be on the lookout for updates as planning progresses. If you have questions about the regional conference, e-mail Beverlee Silva of Alston & Bird, the planning chair, at Beverlee.Silva@alston.com.

REGION 5: Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin

Patricia Power
Vice President, Bose Public Affairs Group
Indianapolis, Indiana and Washington, D.C.

Linda Mindrutiu
Schottenstein Zox & Dunn Co., LPA
Columbus, Ohio

St. Lawrence River Basin Water Resources Compact

For the states in Region 5 (Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin), the biggest environmental news of the day is The Great Lakes—St. Lawrence River Basin Water Resources Compact (The Compact). Bert Frey, chair of the Illinois State Bar Association Environmental Law Section Council and Deputy Region Council for Region 5 of the U.S. EPA, provided an update on The Compact:

The Compact, which Congress consented to in a joint resolution on Sept. 24, 2008, currently awaits signature by the president. Based on the president's July 28, 2008 press release urging Congress to approve The Compact, it is expected that the president will sign the resolution.

The Compact derives from a 2005 cooperative agreement among the eight Great Lakes states (Illinois, Indiana, Michigan, Minnesota, New York, Pennsylvania, Ohio, and Wisconsin) and two Canadian provinces (Ontario and Quebec) to limit diversions from the Great Lakes—St. Lawrence River basin and regulate within-basin withdrawals and consumptive uses.

The Compact's purpose is to protect, conserve, restore, improve, and manage the waters of the basin, which directly provides water for consumption, transportation, power, agriculture, and industrial development and supports tourism and water-based recreation for over 33 million people living in the basin. The Compact creates a council, consisting of the governors of the eight Great Lakes states, to implement The Compact. The Compact also sets stewardship roles for the eight Great Lakes States, which include, among other things, periodic assessments of cumulative impacts of the withdrawals, diversions, and consumptive uses. Among other matters, The Compact prohibits "new and increased" diversions, subject to limited exceptions, and certain consumptive uses of basin water.

The Compact divides withdrawals into four major categories. New and increased diversions, which are defined as transfers of water outside the Great Lakes—St. Lawrence basin or between watersheds of one lake to another, are prohibited, subject to limited exceptions. (In particular, The Compact bans exports of basin surface and groundwater in quantities larger than 5.7 gallons, except under very limited circumstances.) New or increased *intra-basin* withdrawals less than 100,000 gallons per day over a ninety-day period are regulated only by the jurisdiction from which they originate. Proposed *intra-basin* uses between 100,000 and five million gallons per day over a ninety-day period must meet stringent basin-wide standards. Proposed *intra-basin* withdrawals over five million gallons per day over a ninety-day period must meet the same standards and are subject to regional review. The only *inter-basin* transfers allowed are those for cities or counties that straddle the basin, and all of the water so transferred shall be used solely for public water supply purposes within the straddling community. The Compact also contains additional requirements for a straddling community concerning return of the withdrawn basin water back to the source basin watershed, but authorizes an allowance for consumptive public water supply use.

The Great Lakes Compact remains of great political and legal interest at the state level as well. While some states, Illinois for example, see implementation of The Compact more as a policy than legal issue right now, others, like Ohio, are still dealing with basic legal issues. There is a ballot referendum proposing to amend the Ohio constitution to clarify that private property rights to groundwater as established under Ohio law have not been affected by the Great Lakes Compact. This ballot vote is not intended to show a lack of support in Ohio for The Compact, but a concern to ensure that water rights under Ohio law are clear.

Water

Minnesota has been focusing even more attention on its Great Lake: recently the Minnesota Pollution Control Agency (MPCA) adopted rules pertaining to ballast-water discharges from ships in the Minnesota waters of Lake Superior. As part of the new rules, the MPCA will be issuing a general permit that applies to both ocean-going and lakes-only vessels. The permit has two components—a requirement to follow a ballast/sediment management plan (immediate) and a requirement to install ballast-water treatment technology (over time). The legislation and rules were adopted, in part, due to concern about a fish virus (viral hemorrhagic septicemia) which is believed to be carried by ballast water. Minnesota has also revised its general permit for stormwater discharges at construction sites and is working on a new industry-specific industrial stormwater program. As for more water-related news, Ohio's Environmental Protection Agency has begun to implement a policy of requiring more stringent phosphorous limits in National Pollutant Discharge Elimination System (NPDES) permits for wastewater treatment works.

Energy

On the energy front, in May, 2008, as part of the state's Energy Omnibus bill, Minnesota passed a "high

Global Warming Potential gas" reporting law. The law recognizes that "high GWP" gases (particularly chemicals used in refrigerants, propellants, insulation, and fire extinguishers) have the potential to trap a much greater amount of heat in the atmosphere than carbon dioxide does. As a result of the law, Minnesota is requiring certain manufacturers and purchasers to report releases, sales, and purchases of "high GWP" gases. Minnesota has also joined other states in lawsuits against the federal EPA to challenge EPA's interpretation that it does not have the legal authority to use existing Clean Air Act authority to regulate greenhouse gas emissions. In Wisconsin, Alliant Energy has sought Wisconsin Public Service Commission (PSC) approval for a new coal-fired generating plant at Cassville, in southwest Wisconsin on the Mississippi, but the PSC has concluded that a coal-fired plant is not the least-cost alternative. In Ohio, the state continues in its status of an observer in the Midwestern Governor's Association's Greenhouse Gas Reduction Accord. The town of Lakewood, Ohio, recently passed Ohio's first wind power zoning ordinance, which extends 2 miles into Lake Erie.

Air

Regarding other Clean Air Act issues, Ohio's lawyers are very concerned about the impact of the D.C. Circuit's decision to invalidate the EPA Clean Air Interstate Rule (CAIR), an action that leaves a significant regulatory gap. With low expectations that Congress will address this air issue before it recesses for the election, Ohio questions, "What's next?" Air news from Wisconsin is that the state legislature is about to finalize for the Secretary of the Department of Natural Resources' signature a mercury rule. This new mercury rule requires cuts to mercury emissions, by 90 percent by 2015, from coal-fired power plants. The rule provides the option for an additional six years to meet this 90 percent reduction level if the plant also reduces SOx and NOx emissions.

Finally, some news on what is always a big issue in Region 5, concentrated animal feeding operations. While noted as an issue of concern in many states, specifically, Minnesota is working to control hydrogen sulfite releases from large feedlots.

Region 5 is gearing up for a Region 5 Environmental Conference in Chicago, Illinois, in July 2009, bringing together speakers from the various states and attorneys from EPA's Region 5. Stay tuned for updates over the coming months. If you have any thoughts on topics or speakers, please contact Patty Power at ppower@bosepublicaffairs.com or Linda Mindrutiu at lmindrutiu@szd.com.

REGION 6: Arkansas, Louisiana, New Mexico, Oklahoma, and Texas

Matt Paque
Tronox, Incorporated
Oklahoma City, Oklahoma

Arkansas

On Sept. 23, 2008 the public comment period closed on a draft air-quality permit for a proposed $1.5 billion coal-fired power plant in southwest Arkansas. The Arkansas Department of Environmental Quality will now review the comments for the proposed Southwestern Electric Power Co. plant, near Fulton, Arkansas. Last year, the utility won approval from the Arkansas Public Service Commission (PSC) to build the 600-megawatt plant. Arkansas opponents appealed the PSC decision to the Arkansas Court of Appeals, and also sued in federal court. The federal judge refused to halt the project, however. Public service commissions in Texas and Louisiana also have approved the proposed power plant.

Louisiana

On Sept. 16, 2008, the Environmental Protection Agency (EPA) approved a revision to the Louisiana State Implementation Plan (SIP) concerning the maintenance plan addressing the 1997 8-hour ozone standard for the New Orleans Ozone Maintenance Area (73 Fed. Reg. 53,373–53,378). The revision ensures continued attainment of the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS) through the year 2014.

Hurricane Gustav created far fewer environmental problems than Katrina and Rita because the storms

were much different. Hurricane Gustav's damage to homes was caused mostly by wind, while much of Katrina's destruction was wrought by flooding. Most of the storm debris will be "green" waste: trees, branches, leaves, and other vegetation. Temporary storage sites were chosen ahead of time to use for collected debris. Also, disposal methods were selected to keep debris from being dumped whole into landfills. Much of the tree and plant debris will be disposed of through grinding, chipping, composting, and burning.

New Mexico

On Sept. 23, 2008, the Western Climate Initiative (WCI), issued "Design Recommendations for the WCI Regional Cap-and-Trade Program." WCI, launched in February 2007, is a collaboration of seven U.S. governors and four Canadian premiers, including the governor of New Mexico. WCI was created to identify, evaluate, and implement collective and cooperative ways to reduce greenhouse gases in the region, focusing on a market-based cap-and-trade system.

Oklahoma

A federal judge has denied Oklahoma's request for a preliminary injunction to stop thirteen Arkansas poultry companies from disposing of poultry waste in the Illinois River watershed. U.S. District Judge Gregory K. Frizzell ruled that Oklahoma "has not yet met its burden of proving that bacteria in the waters" are "caused by the application of poultry litter rather than by other sources, including cattle manure and human septic systems." He also said that "the record reflects levels of fecal bacteria at similar levels in rivers and streams throughout the state of Oklahoma, including waterways in whose watersheds the record does not evidence similar application of poultry waste." The judge also labeled as "not sufficiently reliable" the testimony of two of the state's expert witnesses because their work had not been peer reviewed or published. *State of Oklahoma v. Tyson Foods Inc. Case No. 05-CV-329-TCK-SAJ.*

However, a U.S. Government Accountability Office (GAO) report states that large-scale animal farms nationwide may pose a threat to human health and the environment. The report says large animal farms may pose greater threats to the environment and human health when they are concentrated in small geographic areas, and specifically mentions the Arkansas-Oklahoma border. However, federal agencies don't monitor air and water quality well enough to assess nationwide trends and possible threats posed by industrial-scale animal farming, the GAO report concludes. The GAO report says efforts by farmers to store waste and limit the manure they put on their land is helpful but should be supplemented with more thorough government pollution monitoring. Concentrated Animal Feeding Operations: EPA Needs More Information and a Clearly Defined Strategy to Protect Air and Water Quality, GAO-08-1177T Sept. 24, 2008.

Texas

Recovery from Hurricane Ike continues in Houston. Local utilities blamed fallen trees for much of the power line damage that knocked out power to some neighborhoods for more than two weeks. After the hurricane passed, some 250,000 Houston-area residents made due without a home source of running water, according to the Texas Commission on Environmental Quality. Many public water systems were impaired due to the lack of electricity.

On July 11, 2008, EPA proposed approval of rules for the control of NOx emissions into the Texas State Implementation Plan (SIP) (73 Fed. Reg. 39,900–39,911). The Texas Commission on Environmental Quality (TCEQ) submitted this revision to the SIP to EPA on May 30, 2007. The May 30, 2007 SIP revision is a substantive and non-substantive recodification and reformatting of the NOx rules currently approved in the Texas SIP. This revision also includes a part of the NOx reductions needed for the Dallas/Forth Worth (DFW) area to attain the federal 8-hour ozone NAAQS. In a separate action, EPA proposed approval of rules concerning control of emissions of NOx from cement kilns (73 Fed. Reg. 39,911–39,915). Also on July 11, EPA proposed to determine that the DFW 1-hour ozone nonattainment area is currently attaining the 1-hour ozone NAAQS.

The comment period on these proposals closed Aug. 11, 2008.

On July 14, 2008, EPA proposed to conditionally approve the 1997 8-hour ozone attainment demonstration SIP revision for the DFW moderate 8-hour ozone nonattainment area submitted by the state of Texas on May 30, 2007 and supplemented on April 23, 2008 (73 Fed. Reg. 40,203–40,228). EPA also proposed to approve the associated attainment Motor Vehicle Emissions Budgets (MVEBs), the Reasonably Available Control Measures (RACM) demonstration, and two local control measures relied upon in the attainment demonstration. The proposed approval of the attainment demonstration is conditioned on Texas adopting and submitting to EPA prior to March 2009, a complete SIP revision to limit the use of Discrete Emission Reduction Credits (DERCs), beginning in March 2009. Final conditional approval of the DFW 1997 8-hour ozone attainment demonstration SIP is contingent upon Texas adopting and submitting to EPA an approvable SIP revision for the attainment demonstration SIP's failure-to-attain contingency measures plan. EPA also proposed to fully approve the DFW area SIP as meeting the Reasonably Available Control Technology (RACT) requirement for volatile organic compounds (VOCs). The comment period on these proposals closed Aug. 13, 2008.

On July 17, 2008, EPA approved a SIP revision submitted to EPA on Dec. 13, 2006, extending requirements to reduce volatile organic compound (VOC) emissions in the DFW area (73 Fed. Reg. 40,972–40,977). Specifically, the revision extends requirements for control of VOC emissions to the five counties that were added to the DFW nonattainment area under the 1997 8-hour ozone standard designation. As a result of this action, these new VOC control requirements will be consistent for all nine counties in the DFW ozone nonattainment area.

On Aug. 4, 2008, EPA issued a notice that exemptions to the land disposal restrictions under the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act have been granted to Solutia, Inc, Chocolate Bayou Facility (Solutia) for two Class I injection wells located at Alvin, Texas (73 Fed. Reg. 45,220). The decision allows the underground injection of the specific restricted hazardous wastes identified in these exemptions, into Class I hazardous waste injection wells.

On Aug. 4, 2008, EPA approved a SIP revision to request redesignation of the El Paso carbon monoxide (CO) nonattainment area to attainment for the CO NAAQS (73 Fed. Reg. 45,162–45,170). The submittal also included a CO maintenance plan for the El Paso area and associated Motor Vehicle Emission Budgets (MVEBs).

On Aug. 15, 2008, EPA approved portions of revisions to the SIP submitted by the state of Texas on May 13, 2005, to meet the 5 percent Increment of Progress (IOP) requirement for the DFW nonattainment area (73 Fed. Reg. 47,835–47,841). EPA approved the 2002 base year inventory for the DFW 8-hour ozone nonattainment area. EPA also approved emissions reductions from energy efficiency measures implemented within the DFW 8-hour ozone nonattainment area, and revisions to 30 TAC, Chapter 117, Control of Air Pollution From Nitrogen Compounds, concerning stationary reciprocating internal combustion (IC) engines operating within the DFW 8-hour ozone nonattainment area. EPA also approved incorporating into the SIP a federal consent decree and subsequent amendments thereto.

On Sept. 17, 2008, EPA approved a revision to the Texas SIP that would require decreased newspaper notice for proposed air quality Standard Permits with statewide applicability TCEQ will publish notice of a proposed air quality Standard Permit in the Texas Register and will issue a press release (73 Fed. Reg. 53,716–53,718). In addition, TCEQ may also use electronic means to inform state and local officials of a proposed air quality Standard Permit.

REGION 8: Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming

John Jacus
Davis Graham & Stubbs LLP
Denver, Colorado

The states of Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming are covered by U.S. EPA Region 8, headquartered in Denver.

EPA Developments

Region 8 Issues Legacy Report

In October 2008, EPA Region 8 issued its Legacy Report, a summary of EPA's achievements and shared successes in the Rocky Mountains and Plains Region from 2001 to 2008. The report covers EPA efforts to clean up some of the most contaminated waste sites in the nation and send them towards productive reuse, to leverage enforcement agreements with companies that reduce pollution and provide a necessary deterrent against future violations of environmental laws, and to clean up harmful emissions from school buses and take steps to remove dangerous chemicals from schools. EPA action to provide safe drinking water to migrant farm worker camps and reduce exposure to toxics in environmental justice communities is also covered. These are examples of just some of the successes outlined in the report. The report can be downloaded via the Web at http://www.epa.gov/region8/about/legacyreport.html.

$PM_{2.5}$ Non-Attainment Designations Recommended for Parts of Montana and Utah

In August 2008, EPA Region 8 recommended that areas of Montana near the town of Libby and in Utah be designated non-attainment for fine particulate matter ($PM_{2.5}$). These recommendations are based on ambient air quality data from 2005-2007 that show certain counties in Montana and Utah are violating the federal health-based standard for $PM_{2.5}$.

Sites Considered For CERCLA Response Action

EPA Region 8 has made a number of decisions regarding sites considered for Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) response action in recent months, and announced the completion of a 20-year cleanup at the Uravan uranium mill site in Colorado. Region 8 proposed adding the U.S. Magnesium site in Tooele County, Utah, to the National Priorities List (NPL), withdrew an earlier proposal to list the Kennecott South Zone as an NPL Site, and added the Nelson Tunnel Site near Creede, Colorado, to the NPL. More information can be obtained on these decisions by searching EPA Region 8 News Releases.

Colorado

Office of Environmental Integration and Sustainability Created

In the spring of 2008, the Colorado Department of Public Health & Environment (CDPHE) created this office to centralize and enhance the department's oversight of its cross-cutting and non-traditional environmental protection programs and initiatives. The office works closely with the Environmental divisions to assure that these programs and initiatives are coordinated with and integrated into the department's traditional environmental protection efforts in an efficient and effective manner. The office does this by:

- Promoting innovative efforts to develop and implement environmentally sustainable practices in Colorado.
- Integrating environmental sustainability and innovative concepts into department activities, and regulatory programs,
- Building partnerships to achieve improved compliance and encourage beyond compliance outcomes, and to foster environmental leadership among Colorado businesses, the public, and government entities.

Programs and initiatives now addressed by this office include: climate change, cross media and sector initiatives, energy development, environmental

agriculture, environmental audit privilege, environmental justice, environmental management system permitting, greening government, pollution prevention, SARA Title III, Small Business Assistance, and Supplemental Environmental Projects.

End of Post-Closure Care Policy Adopted

In August 2008, CDPHE's Hazardous Materials and Waste Management Division adopted this policy to define the criteria by which the department will determine that requirements for closure of facilities under the Resource Conservation and Recovery Act and the Colorado Hazardous Waste Act have been satisfied and post-closure care may cease. The policy contains criteria for other than clean closures of these facilities. The policy also specifies conditions for the release of facilities from long-term post-closure care.

Waste Impoundment Regulations Stakeholder Process

Proposed modifications to Section 9 of the Colorado Solid Waste Regulations for a wide range of waste impoundments were recently deferred so more information may be gathered to understand the water and energy utility sectors waste streams. The department will continue to meet with these stakeholder groups to define data needs and subsequent modifications to Section 9. These efforts are likely to delay the adoption of modified Section 9 surface impoundment rules by about a year, but will result in a more integrated rule.

Ozone SIP Development Rulemaking

The Colorado Department of Public Health and Environment, Air Pollution Control Division (Division), in coordination with the Regional Air Quality Council (RAQC) and the Northern Front Range Metropolitan Planning Organization (NFRMPO) as the Lead Planning Agencies, has asked the Colorado Air Quality Control Commission (Commission) to revise the requirements set forth in Regulation Number 7 and Regulation Number 3, to address ozone formation in the 8-hour ozone non-attainment area (a 9-county area referred to as the Denver Metro Area/North Front Range (DMA/MFR) Non-Attainment Area (NAA) and state-wide. Specifically, the Division's proposed revisions would serve to reduce volatile organic compound (VOC) emissions, an ozone precursor, and thus reduce ozone concentrations in ambient air. These revisions are believed to be necessary to ensure attainment with the current 8-Hour Ozone National Ambient Air Quality Standard (NAAQS) set at 0.08 parts per million (ppm), and to otherwise achieve ozone reductions in light of both the new 8-Hour Ozone NAAQS set at 0.075 ppm and a July 27, 2007 directive from Colorado Gov. Ritter to proactively and pragmatically reduce ozone levels. Also, the Division is proposing revisions to Regulation Number 3 to revise Air Pollution Emission Notice (APEN) reporting requirements to improve the Division's emissions inventory, and to facilitate planning for development of additional emissions reductions strategies that may be needed to meet the EPA's new ozone NAAQS that lowers the standard from 0.08 ppm to 0.075 ppm.

Colorado Sues DOD to Expedite Chemical Weapons Destruction

The Colorado Department of Public Health and Environment filed suit in U.S. District Court in September requesting the court require the U.S. Department of Defense (DOD), its Assembled Chemical Weapons Assessment Program and the Department of the Army to treat and destroy chemical weapons stored at the Pueblo Chemical Depot by Dec. 31, 2017. The lawsuit came after the respondents notified the state of their intention to appeal an Administrative Order issued by the state on June 17, 2008. The lawsuit requests the court grant the same remedies as were indicated in the order. The state's order called for the destruction of the chemical weapons stockpile by Dec. 31, 2017, four years earlier than DOD's current proposed date of Dec. 31, 2021. The order also required that secondary waste currently stored under a separate permit be treated and destroyed by the same date of Dec. 31, 2017.

North Dakota

Changes to North Dakota Air Regulations Proposed

In connection with the proposed adoption of federal changes to New Source Performance Standards (NSPS), National Emissions Standards for Hazardous Air Pollutants for Source Categories, Prevention of Significant Deterioration (PSD) and startup/shutdown rules under the Federal Clean Air Act, the North Dakota Department of Health and the North Dakota Air Pollution Control Advisory Council held a public hearing in October. In addition to adopting federal revisions to Clean Air Act regulations, the proposed changes will also incorporate revisions to eliminate the annual air permit fee for local governments and to extend the time for permit applicants to respond to public comments.

2008 Devil's Lake Outlet NPDES Permit Reissuance

The North Dakota Department of Health approved the Devils Lake outlet permit in July 2008, after review of all public comments. The department determined that the permit will be reissued as originally drafted. The permit allows the North Dakota State Water Commission to discharge surface water from Devils Lake to assist in addressing flooding concerns in the Devils Lake Basin while ensuring water quality and maintaining beneficial uses of the Sheyenne and Red River systems. The Department of Health approved the permit with the knowledge that new federal rules were scheduled to go into effect Aug. 12, 2008, that would not require a permit for the Devils Lake outlet to operate. EPA recently issued a regulation clarifying that water transfers are not subject to regulation under the National Pollutant Discharge Elimination System (NPDES) permitting program. This rule defines water transfers as an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal or commercial use. This rule focuses exclusively on water transfers and does not affect any other activity that may be subject to NPDES permitting requirements.

South Dakota

Environmental Permitting News from the South Dakota Department of Environment and Natural Resources (DENR)

Big Stone I and II Contested Case Hearings for Air Quality Permits—The Sierra Club and Clean Water Action opposed the draft air quality permits prepared by DENR for a new 600 MGW coal-fired power plant named Big Stone II that is proposed to be built alongside the existing Big Stone I power plant near Milbank, South Dakota. Therefore, the South Dakota Board of Minerals and Environment began the permit hearing process on July 16-17 with a tour and public comment meeting in Milbank. The board has continued to conduct the contested case hearing during Aug. 18-21; Aug. 26; and Sept. 24-26. The board will likely make its final decisions regarding the proposed Title V permit for Big Stone I and the PSD permit for Big Stone II during November 2008.

Hyperion Energy Center—DENR has completed its review of the PSD permit application filed on Dec. 20, 2007, by Hyperion for a new 400,000 barrel per day refinery and an integrated gasification combined cycle (IGCC) power plant in Union County. The public notice for the draft air quality permit was published by DENR on Sept. 11, 2008. To make the permitting process as transparent as possible, DENR has been maintaining a real time permitting file on its web site at http://www.state.sd.us/denr/denr.html.

Underground Pipeline Task Force—The South Dakota Underground Pipeline Task Force established by SB 190 held its first meeting in Pierre on Aug. 14 with all seven members in attendance, and a second meeting was held on Sept. 22. By law, the Task Force has two objectives: (1) review the status of existing and proposed pipelines used in the transmission and distribution of water, natural gas, crude oil, ethanol, and refined petroleum products in South Dakota, and (2) assess the adequacy of state laws and regulations relating to pipelines in South Dakota. The law also specifies the task force is to report its findings to the governor no later than Dec. 1, 2008. A third meeting has been scheduled for Oct. 23, 2008.

PowerTech Uranium Exploration and In Situ Leach Mining Plans—PowerTech is drilling 155 exploration test holes under the first uranium exploration permit issued by DENR during the last 25 years. PowerTech has now submitted a second permit application to drill thirty more holes to make sure planned mine facilities are not located over ore zones. In addition, on Aug. 21, Powertech submitted a Request for Determination of Special, Exceptional, Critical or Unique Lands of its proposed in-situ mining area in Fall River and Custer counties, which is the first step in obtaining a state mine permit. This fall Powertech plans to begin submitting the various permit applications it will need for its in situ leach mining operations. This includes permit applications to EPA for Underground Injection Control, the Nuclear Regulatory Commission for a source material license, and DENR for both a state Underground Injection Control permit and state mine permit.

REGION 9: Arizona, California, Hawaii, Nevada, the Pacific Islands subject to U.S. law, and approximately 140 Tribal Nations

Jane Crue
Sacramento County District Attorney's Office
Sacramento, California

For top stories in 2008, please visit http://www.epa.gov/region09/topstories.html.

Below find a sampling of recent Region 9 decisions.

Hydranautics fined for not following hazardous waste requirements that protect employees, community

LOS ANGELES—The U.S. Environmental Protection Agency recently fined Vista, Calif.-based Hydranautics $10,509 for violating hazardous waste requirements of the Resource Conservation and Recovery Act.

During summer 2007 inspections, EPA investigators found that Hydranautics, an industrial membrane production facility, had numerous hazardous waste violations, including:

- storage of hazardous waste without a permit;
- failure to comply with the requirements of a hazardous waste contingency plan;
- failure to maintain records documenting training;
- failure to meet universal waste requirements; and,
- failure to provide appropriate aisle space required for storing hazardous waste.

Hydranautics has since rectified the violations.

The EPA's hazardous waste rules require facilities to properly store, label and seal hazardous waste containers. Facilities must also have properly trained staff, as improperly stored hazardous waste can potentially spill and pose a risk to workers and the environment.

Nation's 2nd Largest Glass Manufacturer Pays for Air Pollution Violations

SAN FRANCISCO—The nation's second largest glass container manufacturer, Saint Gobain Containers, Inc. is facing a $139,534 fine from the U.S. Environmental Protection Agency. The settlement resolves alleged federal Clean Air Act violations at Saint-Gobain's wine bottle manufacturing facility in Madera, California.

In 2005, Saint Gobain settled with the EPA for $929,000 following Clean Air Act violations and agreed to install $6 million of pollution controls and to complete a $1.2 million environmental project aimed at reducing emissions.

This enforcement action arose from a routine EPA compliance inspection where inspectors discovered violations of monitoring, recordkeeping and reporting requirements.

The Saint-Gobain facility is located in the San Joaquin Valley, an area which does not meet the National Ambient Air Quality Standards for ozone or fine particle pollution.

U.S. EPA fines Exxon Mobil $2.64 million for PCB release

LOS ANGELES—The U.S. Environmental Protection Agency has settled with the Exxon Mobil Corporation for $2.64 million for allegedly disposing of and improperly handling polychlorinated biphenyls (PCBs) on an offshore oil and gas platform in the Santa Barbara Channel, off the Southern California coast, in violation of the federal Toxic Substances Control Act.

"Today's settlement sends a clear signal that companies must follow PCB regulations to protect communities and our environmental resources," said Wayne Nastri, administrator for the EPA's Pacific Southwest region. "The EPA will not hesitate to take enforcement actions against companies that fail to properly handle and dispose of PCBs."

Between 2002 and 2005, two large electrical transformers located on Platform Hondo, part of Exxon's Santa Ynez Unit, leaked nearly 400 gallons of PCB-contaminated fluid. Exxon allowed one of the transformers to leak for almost two years before repairing it. The leaking from the transformers constitutes illegal disposal of PCBs, a violation of the Toxic Substances Control Act.

Additionally, Exxon failed to ensure that workers who cleaned up the leaked fluid were provided protective clothing or equipment to protect against direct contact with and inhalation of PCBs. Exxon replaced the two transformers with non-PCB containing transformers in 2005.

REGION 10: Alaska, Idaho, Oregon, Washington, and 267 Tribal Nations

Krista K. McIntrye
Stoel Rivers LLP
Boise, Idaho

On Dec. 4, EPA Region 10 Regional Administrator Elin Miller, will host a Climate Partnership Forum. Region 10 extended invitations to the Fortune 1000 CEOs within the region. Several goals are identified in EPA's invitation, including exchange ideas on how to enhance EPA/corporate partnerships to get the most for EPA's efforts on reducing greenhouse gases (GHGs), summarize existing EPA partnership programs that have relevance to climate change, listen to ideas from companies in the region, and create an avenue for Region 10 to be able to reach out to Pacific Northwest corporations and accelerate GHG reduction efforts of the private sector.

The region's 2007-2011 priorities include "Support the Core" described by Region 10 as recognition of "the importance of our core regulatory program work." The initiative involves work that will ensure that resource and programmatic decisions maintain these essential efforts. It includes improving strategies to better use existing resources and focusing additional resources where significant shortfalls exist.

Another Region 10 priority is "Enhancing Tribal Environments." Two hundred seventy tribal communities in Region 10 rely on natural resources for their physical, cultural, and economic well-being. EPA will work with the tribes in Region 10 to build environmental management capacity, improve communication and consultation, and protect and restore the natural resources integral to their existence, with specific emphasis on improving air quality and better managing solid waste.

EPA's issuance of the 2008 Construction General Permit for storm-water discharges will cover sources in Idaho, Alaska, and Indian Country in Region 10, where the National Pollutant Discharge Elimination System permit program is not delegated to the state.

LIKE TO WRITE?

The State and Regional Environmental Cooperation 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 the editor Edward Callaway at ed.callaway@wallerlaw.com.