

# The RT Review

The Latest on Environmental Issues From Your Solution-Oriented Environmental Services Firm

• Environmental Engineers & Scientists • Geologists • Remedial Contractors



## PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION SECRETARY MCGINTY ANNOUNCES FINALIZATION OF FILL POLICY

On April 13, 2004, DEP Secretary Kathleen McGinty announced the finalization of the Pennsylvania Department of Environmental Protection Fill Policy, which sets benchmarks for when materials excavated at sites are sufficiently contaminated that they must be managed as waste. The Final Policy was developed following a series of intensive discussions and meetings between November and mid-March, after Secretary McGinty set specific final regulatory goals in light of comments submitted in January, and reached out to industry as the final language was crafted, to assure that the Program was workable in the field. Gary Brown, President of RT Environmental Services, and Michael Meloy, Esq. of Manko Gold Katcher and Fox worked with Tom Fidler of the Pennsylvania Department of Environmental Protection as the Final Policy was crafted. The policy became effective April 24.

Under the Final Policy, appropriate due diligence, which may include analytical testing, needs to be completed, before materials are moved from sites. Materials which are below Unregulated Fill Policy Limits (which in nearly all cases are the same as the Act 2

Residential Statewide Health Standards) can be moved as **“Unregulated Fill”**, Materials which fail certain definition requirements for being unregulated fill, or which have concentrations above the residential Statewide Health Standards but below non-residential Statewide Health Standards (Regulated Fill Limits) can either be moved to an Act 2 site if certain procedures are followed, or, have to be managed as Regulated Fill under a General Permit. The General Permit must be applied for and approved on a site by site basis, which will take anywhere from 1 to 3 months to complete.

Virtually all construction industry concerns about the workability of the program have been addressed, and RT has already trained more than 250 construction industry representatives on the key elements of the new program. In the coming weeks, RT will also be finalizing a **Best Management Practices Manual for Earthwork and General Construction**. This document, which contains practical information on identifying and managing regulated, unregulated fill materials, and waste materials which may be encountered during construction activities, will also contain criteria on when a 20 mg/kg arsenic limit for certain construction

materials can and cannot be used. For releases of arsenic, 12 mg/kg remains the Statewide Health Standard, but DEP has recognized that certain construction materials may qualify for using a higher limit, so long as direct contact is addressed.

A Flow Chart reflecting the Final Fill Policy can be found in Figure 1. RT is working at a number of sites throughout Pennsylvania, to complete “screening testing”, and, where impacts are found that exceed unregulated fill limits, the most common approach will be to manage impacted materials onsite under Act 2. The cost impact of the final program is clearly in the tens of millions of dollars, but organizing and designing projects to properly manage materials and careful consideration of using the Act 2 Land Recycling Program where impacted materials are found will minimize financial impacts of the Final Fill Policy.

Contractors trained to date include the Members of the Pennsylvania Asphalt Pavement Association, Associated Pennsylvania Constructors, Pennsylvania Utility Contractors Association, and the Pennsylvania Aggregate and Concrete Association. At *RT Review Press Time*, due to the tireless and technically focused efforts of DEP’s Secretary Kathleen McGinty, a commendation letter to the Governor was being sent by Executive Director Ronald Cominsky, P.E. of the Pennsylvania Asphalt Pavement Association commending Secretary McGinty’s efforts to achieve a workable program. Additionally, the Pennsylvania Chamber of Business and Industry has informed its Members that their key concerns regarding the Program have been addressed.

There are a number of surface mines throughout Pennsylvania who receive “Clean Fill”, and the Pennsylvania Aggregates and

*(continued on page 2)*

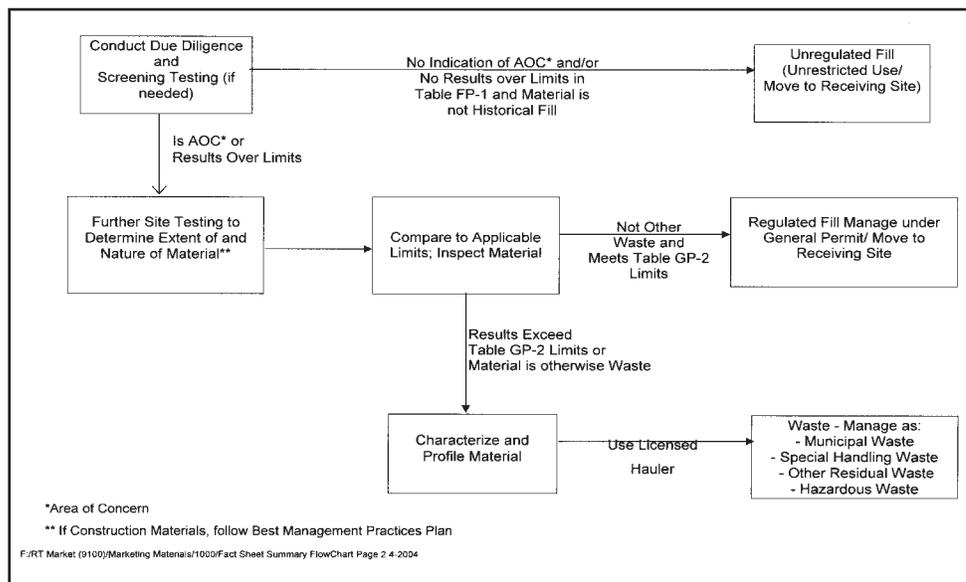


FIGURE 1 - FILL POLICY FLOW CHART

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## PA DEPARTMENT OF ENVIRONMENTAL PROTECTION SECRETARY ANNOUNCES FINALIZATION OF FILL POLICY

(continued from page 1)

Concrete Association requested DEP to issue a letter confirming that clean fill materials can be continued to be received until a General Permit is issued for surface mine receipt of fill materials generated offsite, which is expected to be issued in the next several weeks or months. Had a transition letter not been issued, there was concern that large volumes of materials would be diverted to landfills, even though most of the materials present minimal environmental threat. RT will be assisting key industry associations and finalizing and commenting on the Surface Mine General Permit, and we will keep *RT Review* readers informed as the Surface Mine General Permit, and Best Management Practices Plan, are finalized. Updates can also be found on our web page, at RTENV.COM (scroll to the bottom of our home page for a link to the latest Fill Policy information).

We at RT have never believed that Pennsylvania could not have both a strong and award winning Brownfields Land Recycling Program, and, a strong Waste Management Program, which has, as one its goals, discouraging large volumes of out of state waste from coming into Pennsylvania. We think that the Final Fill Policy strengthens both Programs, because, regardless of how far - reaching the Waste Management Program should be, it is not practical or possible to regulate impacted soils and other material to regulatory limits below common background soils concentrations. The Final Fill Policy achieves that goal to a very large degree,

incorporating Statewide Health Standards, and limits with a special provision for arsenic in construction materials (20 mg/kg); this limit is actually somewhat more stringent than DEP Waste Management Programs Beneficial Use Limit, so an excellent balance has been achieved.

Performance standards which were added to the Policy and General Permit make it clear that in moving fill materials, releases to the Waters of the Commonwealth (which includes surface and groundwater) are not permissible, and, similarly, mixing of soils is not allowed. Going forward, we believe that owners and developers as well as contractors will use the Fill Policy protocols to confirm that materials are "Unregulated" (or clean), and will make heavy use of the Act 2 Land Recycling Program when impacted areas are found. It is through this procedure, as well as designing of future building projects of all types to minimize the generation of impacted soils, that overall program objectives will be achieved. Secretary McGinty made sure that these final incentives were included in the Fill Policy, which we are confident, even though it is groundbreaking in terms of regulatory precedent, will not impose undue financial burdens on development and redevelopment projects in Pennsylvania.

Visit our web page for a summary and a Fact Sheet on the Final Policy. Should you have any questions on the Final Fill Policy, call Gary Brown at 800-725-0593, Ext. 34.

### RT STAFF AND PROJECT NEWS

Spring 2004 is exceptionally busy for RT. Current projects include:

- A Western PA project to assess environmental conditions at a 9/11 airplane crash memorial site prior to develop a national park by Peter Malik and Justin Lauterbach.
- South Jersey work to address nursery operations wetlands / stream encroachment concerns by Walter Hungarter.
- Tank removal activities at several sites by Paul Moscatello and Tom Brady.
- Work at a former glass manufacturing site being considered for Act 2 Land Recycling and residential development by Peter Malik.
- Expert witness work on several mold projects by Gary Brown.
- Work at NJ ISRA and MOA petroleum release sites by Tom Brady and Craig Hopkins.
- NJ Brownfields site work at a major former equipment manufacturing facility, including landfill closure work by Gary Brown.
- Vapor barrier QA/QC and design at several PA sites by Walter Hungarter and Tony Alessandrini.

- Facility Contingency Plan inspections and upgrades by Gary Brown and Larry Bily.

RT senior staff also completed a series of presentations at seminars in late winter and spring, including:

- Presentations on the Fill Policy at a PA Utility Contractors Association, PA Aggregates and Concrete Association and PA Chamber of Business and Industry Seminars by Gary Brown and Peter Malik.
- Presentations on mold at American Institute of Architects and Apartment Association of Greater Philadelphia seminars.
- A presentation on Vapor Pathway issues at Brownfields sites to an Air and Waste Management Association seminar, by Walter Hungarter.

Walter Hungarter and Gary Brown are also working on finalizing a PA Fill Policy Best Management Practices Plan for Earthwork and General Construction.

We look forward to be of further service to our clients in 2004!

## PA UPDATES

### RENDELL ADMINISTRATION PAVES THE WAY FOR NEXT GENERATION OF BROWNFIELD REDEVELOPMENT

On behalf of Gov. Edward G. Rendell, Environmental Protection Secretary Kathleen A. McGinty unveiled the next chapter of the state's highly acclaimed and nationally recognized Land Recycling Program to pave the way for a new generation of redevelopment projects that will help Pennsylvania simulate the productive reuse of abandoned industrial sites and generate sustained economic growth.

The effort includes streamlining permitting processes for reclamation projects to hasten development and cleanup, ensuring dedicated funding to redevelop blighted areas and strengthen communities, and enhancing outreach with local governments to ensure Pennsylvania achieves its economic and environmental protection goals.

Among the initiatives is the creation of a Brownfield Action Team (BAT) that will help to revitalize towns and cities across Pennsylvania by hastening the return of abandoned industrial sites to productive use, moving projects from the cleanup phase to full redevelopment in record time. Playing off the new initiative's acronym, Secretary McGinty handed a symbolic Louisville Slugger baseball bat to Allentown Mayor Roy Afflerbach during a news conference at Lehigh Landing, a downtown brownfield site now being redeveloped.

The Rendell administration already has launched some ambitious efforts to build on the success of Pennsylvania's brownfields program, including the creation of an Office of Community Revitalization and Local Government Support, marking the first time DEP has had an executive office, headed by Eugene DePasquale, focused on jobs and growth. In addition, Thomas Fidler, who has overseen the state's Land Recycling Program for the past eight years, now will assume the added position of Community Revitalization Program Executive in charge of the Brownfield Action Team.

Pennsylvania has a significant track record of making environmental protection work for businesses and employees. Since the Land Recycling Program's inception in 1995, cleanups have been approved at more than 1,350 properties in 63 of Pennsylvania's 67 counties, creating and/or retaining 30,000 jobs. Nearly 500 additional Notices of Intent to Remediate have been filed for future remediation projects.

The Governor's budget, which he unveiled February 3, will provide \$40 million over four years to clean up brownfields and rebuild towns and cities across the Pennsylvania. The state's vast industrial heritage has left somewhere between 10,000 and 12,000 brownfield sites-some 100,000 to 120,000 acres of prime real estate sitting vacant and ready for redevelopment.

Secretary McGinty convened a series of meetings last summer with focus groups made up of officials from individual companies, a variety of cities and municipalities, environmental groups, statewide associations and organizations, and other entities involved with brownfield site the remediation and redevelopment. The "Land Recycling Program Enhancements Report," which the Secretary unveiled, highlights a number of additional initiatives crucial to the program's success. They include the following:

- Extend the benefits of the brownfields program to abandoned mine lands, what some now call "grey-fields." At the federal level, progress has been made in this regard: New federal legislation expands the definition of "brownfield" expressly to include mine scarred land.
- Make Pennsylvania's land recycling program a one-stop shop for cleanup efforts. DEP is pursuing an agreement with the U.S. Environmental Protection

Agency to clarify that sites remediated under the state's Act 2 also satisfy requirements for the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response Compensation Liability Act (CERCLA) and the Toxic Substances Control Act (TSCA).

- Launch an initiative to provide special incentives for smaller brownfield sites that often fail to attract investor interest because costs associated with assessment, characterization and remediation are too high for a small project to bear.

- Enhance enforcement as a way to curtail the practice of mothballing properties. Many property owners are reluctant to offer for sale or initiate the remediation of properties with likely environmental liabilities. Rather than face the ramifications of disclosing contamination liabilities, owners often "mothball" or simply abandon the properties. This practice is contradictory to redevelopment efforts.

- Examine potential revisions to regulations to afford greater consistency in assessment and attainment requirements across the Commonwealth.

Collectively, the Land Recycling and Environmental Remediation Standards Act (Act 2 of 1995), the Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act (Act 3 of 1995), and the Industrial Sites Assessment Act (Act 4 of 1995) make up the Pennsylvania Land Recycling Program.

For a copy of a recent DEP report on the new initiatives, visit DEP's website at : [www.dep.state.pa.us](http://www.dep.state.pa.us). Keyword: "Land Recycling."

### PENNSYLVANIA GOES TO BAT FOR PUBLIC ACCESS TO RIVER

The Commonwealth of Pennsylvania says the Little Juniata River is an historically navigable waterway the public should have access to all of it, including a 1.3 mile stretch cabled of a fly fishing company. In January, Pennsylvania won a preliminary round in the case, but says the fight is not over yet.

The case for public access brought by the Department of Environmental Protection (DEP), the Department of Conservation and Natural Resources (DCNR), and Pennsylvania Fish and Boat Commission relies on evidence from as long ago late 1700s.

The case was allowed to proceed by the Huntingdon County Common Pleas which issued an order January 13 denying preliminary objections by the fly fish company defendants who attempted to have the agencies' case dismissed.

"The court's decision allows the Commonwealth to move ahead and demonstrate that there is no legal basis for any individual to be excluded from the lawful use of this stretch of the Little Juniata River," DEP Secretary Kathleen McGinty said.

Pennsylvania's complaint, filed in June 2003, alleges that Donald Beaver has operating various exclusive fly fishing services on the Little Juniata River below its confluence with Spruce Creek in Huntingdon County and is keeping the public off the river.

The suit alleges that Beaver and his employees have excluded the public from river, posting "no trespassing" signs and erecting cables across the waterway upper and lower ends of the 1.3 mile stretch.

*(Env. News Service - 1/28/04)*

### PITTSBURGH SEWER, STORMWATER OVERFLOW ADDRESSED

Local governments in the Allegheny County Sanitary Authority (ALCOSAN) service area received special recognition for participating in a regional effort to clean up the discharge of billions of gallons of

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sewage into Western Pennsylvania waterways.

Each year, an estimated 16 billion gallons of raw sewage are discharged from hundreds of outfalls in the region's sewage collection system into Pittsburgh area waterways when storm water infiltrates sanitary sewers or from combined sewers that handle both rain runoff and household sewage.

Overflows into stream and rivers occur during wet weather because the amount of storm water flow within the system during storms exceeds the designed capacity for wastewater treatment.

The federal Clean Water Act prohibits such discharges unless they are in compliance with the terms of a permit, including water quality requirements.

By signing agreements with local regulators - the Allegheny County Health Department and the Pennsylvania Department of Environmental Protection - municipalities agree to maintain sewers and take the first steps toward a massive project to control sewer overflows in southwestern Pennsylvania.

Under the agreement, each municipality will inspect its sewage collection system and repair deficiencies identified through the inspection.

The municipality will also monitor the flow in the sewers, eliminate sources of excessive storm water inflow, and work with ALCOSAN and the other municipalities/sewer authorities in their drainage basins to identify controls needed to bring their wastewater collection system into compliance with the Clean Water Act.

*(Env. News Service - 2/23/04)*

### PADEP, EPA SIGN AGREEMENT TO INCLUDE FEDERAL LIABILITY RELIEF IN STATE BROWNFIELDS PROGRAM

Environmental Protection Secretary Kathleen A. McGinty in April signed an agreement with the U.S. Environmental Protection Agency that will make Pennsylvania's land Recycling Program the first in the nation to serve as a "one-stop shop" for state and federal standards guiding the cleanup of Brownfields sites.

The Memorandum of Agreement (MOA) that Secretary McGinty signed with EPA Region III Administrator Donald Welsh at the Philadelphia Naval Business Center, which is the former Philadelphia Naval Yard, clarifies that sites remediated under the state's Brownfields program also satisfy requirements for three key federal laws: the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response Compensation Liability Act (CERCLA), commonly referred to as Superfund, and the Toxic Substances Control Act (TSCA).

Secretary McGinty convened a series of meetings last summer with representatives from companies, cities and municipalities, environmental groups, economic developments groups and others involved with Brownfields redevelopment to enhance the land Recycling Program. One of the suggestions was to remove the threat of federal legal action once a site meets Pennsylvania's stringent cleanup standards.

Information furnished to RT indicates that Act 2 Cleanups to Residential Statewide Health Standards will qualify for federal liability protection under the MOA. However, cleanup sites where the site specific standard is used could require EPA involvement on a site specific basis.

We will keep you informed of implementation steps in future editions of the *RT Review*.

## NJ UPDATES

### NEW JERSEY CREATES LEAD ABATEMENT FUND FOR LANDLORDS

New Jersey landlords will get financial help to control hazardous lead paint in their buildings, and lead poisoned children will get emergency relocation assistance to move out of buildings that are making them sick under a new measure that became law in January.

Governor James McGreevey signed legislation that will create a statewide lead abatement fund for landlords in New Jersey. Under the new law, the Department of Community Affairs (DCA) will establish a Lead Hazard Control Assistance Fund to provide low interest loans to the owners of housing units for lead based paint hazard control work.

The Governor also proposed giving every new mother a lead detection kit before she leaves the hospital. "We must protect our children where they spend the most time - in their home," said McGreevey. "Every mother and father, myself included, wants their children to grow up in a home that is safe and lead-free."

Funding for these loans will be generated from inspection fees and a portion of the tax revenue from the sales of paint containers. Additional grants will be made for owners of single family and two family homes, and multiple dwellings with no more than four separate dwelling units.

The DCA will also establish and maintain a registry of lead safe housing to track the state's progress of lead hazard control programs, as well as to identify lead-safe housing in multiple dwelling units.

Additionally, DCA's Division of Codes and Standards will now be required to inspect multiple dwellings for lead based paint hazards, over and above regular inspections.

The new law will also require the DCA to create the Emergency Lead Poisoning Relocation Fund, which in its first year will appropriate \$2 million from the Catastrophic Illness in Children Relief Fund for emergency relocation assistance for lead poisoned children.

*(Env. News Service - 1/23/04)*

### NEW JERSEY FARMERS GET \$100 MILLION TO SAFEGUARD WATER

New Jersey Governor James McGreevey signed an agreement with agriculture federal officials to establish the Conservation Reserve Enhancement Program. Signed at the annual State Agricultural Convention in Long Branch, the deal brings the state into line with 24 others who offer the voluntary program to farmers.

The \$100 million program will provide financial incentives to New Jersey farmers to install stream buffers to reduce nonpoint source pollution. Under the Conservation Reserve Enhancement Program, farm landowners install and maintain approved practices through 10 to 15 year rental contract agreements.

New Jersey's goal is to enroll 30,000 acres of agricultural lands into this state-federal program over a 10 year period. Types of buffers that will be installed include trees, shrubs, vegetative strips used to filter water, contour grass strips and grass waterways. Fencing may be used in conjunction with these practices.

The program will pay landowners annual rental and incentive payments for participating in the program, as well as 100 percent of the cost to establish approved practices.

The governor's action is part of an overall strategy to protect New Jersey's water. In January, McGreevey adopted rules that will place 300 foot buffers around more than 6,000 miles of waterways - the most comprehensive water protections in the nation. Most recently, he proposed the strongest drinking water standard for arsenic of any state in the nation.

*(Env. News Service - 2/4/04)*

### A HIGH-FLYING COUNT OF NEW JERSEY BALD EAGLES

A survey in January counted 178 bald eagles in New Jersey, a record for modern times and another indication of the bird's population rebound, the state said.

In releasing the results of the annual midwinter survey, Environmental Commissioner Bradley Campbell credited the protection of bald-eagle nests to the work of volunteers who monitor them for state wildlife biologists.

Despite its continued endangered status, the bald eagle is one of New Jersey's great success stories in endangered-species protection and management," Campbell said.

The January count was the highest since the surveys began in 1978, the Division of Fish and Wildlife said. Volunteers also observed nine golden eagles.

In 1978, the state counted 10 bald Eagles, their numbers reduced by years of exposure to pesticides that affected reproduction.

*(Phila. Inquirer. 3/19/04)*

### OCCIDENTAL CHEMICAL WILL INVESTIGATE NEWARK BAY DIOXIN

Occidental Chemical Corporation (OCC) has agreed to conduct an investigation in Newark Bay to determine the extent of dioxin and other industrial contamination in bay sediment and develop a cleanup plan.

The study will be undertaken with oversight by the U.S. Environmental Protection Agency (EPA), the agency said. Occidental Chemical is a successor corporation to the former Diamond Alkali Company, which owned and operated a pesticides manufacturing plant on Lister Avenue in Newark from 1951 through 1969.

Operations at the site caused dioxin and other pesticide contamination in the soil and groundwater, which migrated to the Passaic River. Contamination has been found in the sediment of the Passaic River over a 17 mile stretch, as well as in Newark Bay.

In addition to funding the study, Occidental Chemical will reimburse the EPA for the costs of conducting a human health and ecological risk assessment of the bay, and its oversight expenses. The agreement is embodied in an Administrative Order on Consent signed February 13 by the chemical company and the EPA.

*(Env. News Service - 2/24/04)*

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- More on NRD's - Where's the Damage - Pg. 4

### NEW JERSEY STORMWATER REGULATIONS

Stringent Storm water Management Regulations took effect in New Jersey on February 2, 2004. The new regulations provide a 300-foot development buffer for those water bodies designated as "Category One" streams. The Regulations provide some flexibility on the buffer size in areas where stormwater management plans have been approved and for minor disturbances around existing development within the buffer zone.

Currently, there are 3,307 miles of Category One rivers and streams and an additional 2,786 miles of tributaries to those streams. The Regulations also affect requirements for state-issued permits, such as stream encroachment permits.

For more information, go to: <http://www.state.nj.us/dep/newsrel/releases/040105gov.htm>. The regulations are available at: <http://www.nj.gov/dep/rules/adoptions.html>.

*(Wolf Block Env. / Land Use - Vol. 1-04)*

### NEW JERSEY DEP CHIEF VOWS DREDGE ORDER IN PASSAIC NRD CASE

New Jersey's environment chief Bradley Campbell is threatening to order potentially liable companies to dredge contaminated sediment in the state's heavily polluted Passaic River, as well as impose heavy fines, if the companies do not comply with an earlier order to conduct a natural resource damage assessment of the river.

But Campbell's threat may not carry much weight because a pending agreement between EPA and industry to study cleaning up the river as part of a nearby Superfund cleanup could limit the state's ability to target industry. Nevertheless, industry is concerned about the threat because a cleanup proposal on dredging the river developed by the state in 1999 estimates - the cost at approximately \$460 million.

*(Superfund Report - 4/14/04)*

### N.J. SEEKS "LOST USE" DAMAGES

When CBS Records was cranking out hit albums in the 1960s and 1970s, it dumped the nickel-laden wastewater from its Gloucester County factory on the ground and in lagoons.

The company cleaned up its act years ago, and its owners have spent at least \$1.8 million to get rid of the mess.

But now, the state of New Jersey wants the record factory to face the music again.

The plant is one of dozens of New Jersey industrial sites, many of them cleaned up long ago, whose owners now are being asked to pay natural resource damages.

In effect, the state wants the companies to pay back the public for how ever many years it was unable to use a particular natural resource, such as a lake or underground water supply. The concept of compensating the public for "lost use" applies even

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## FEDERAL REGULATORY UPDATES

### VAPOR INTRUSION CONCERNS FORCE EPA TO REFOCUS CLEANUP PRIORITIES

A nationwide survey of Superfund sites contaminated with the ubiquitous chemical trichloroethylene (TCE) is forcing EPA to refocus their cleanup priorities at many National Priority Lists (NPL) sites, since indoor health risks - known as vapor intrusion - are proving more significant than previously thought, according to agency officials.

The survey comes as EPA is poised to add what may be the first new site to the NPL due to vapor intrusion concerns after unveiling a contentious guidance for measuring such risks in late 2002. That addition is raising the possibility of adding numerous sites to the NPL from a pool of over 770 TCE sites where vapor intrusion is a concern at a time when the Superfund program is already facing significant funding constraints.

The possible new listing, at a contaminated site in New York, underscores widespread concern about vapor intrusion, which occurs when contaminants volatilize, contaminating indoor air in buildings. Industry officials say EPA's guidance for assessing vapor intrusion is too conservative, and inflates health risks.

EPA is currently completing a survey of TCE-contaminated NPL sites nationwide in order to determine if the sites need to be reprioritized because of vapor intrusion. Regional officials say the survey may cause the agency to rethink dozens of NPL sites. "It is an emerging issue that the agency is looking at as a whole," an EPA official says.

A survey of one region found that 14 NPL sites posed more risk than previously thought, forcing EPA to rethink cleanup at the sites, a regional official says.

And in another region, EPA is trying to identify sites where vapor intrusion is not an issue. "We're in the process of doing a rudimentary evaluation of whether there are sites that can be ruled out to see what the big universe could be," another regional official says

*(Superfund Report - 3/29/04)*

### EPA POSTS NEW LANDFILL PERMIT

The Environmental Protection Agency has published a rule for Research, Development and Demonstration (RD&D) Permits for Municipal Solid Waste (MSW) Landfills in The Federal Register. The rule allows approved states to waive specific landfill design and operational criteria, with the hope that they will develop "new technologies and alternative operational processes" for MSW landfills, the Washington-D.C.-based EPA states.

*(Waste Age Wire - 3/29/04)*

### COURT RULES EPA MUST KEEP POWER PLANTS FROM KILLING FISH

The U.S. Environmental Protection Agency (EPA) exceeded its authority by allowing industrial facilities to opt for restoration of aquatic resources in lieu of installing technology to prevent fish kills, a federal appeals court ruled.

U.S. power plants and factories withdraw more than 279 billion gallons of water daily from reser-

voirs, rivers and lakes to cool their turbines a practice that can take a heavy toll on aquatic environments.

EPA rules finalized in 2002 call on new systems that draw 10 million gallons of water or more a day from natural water bodies to use cooling systems with recirculated water, known as "closed cycle cooling."

The agency's regulations permitted the use of other technologies in lieu of closed cycle cooling if they resulted in the same or less environmental impact, but this included "restoration measures."

Although closed cycle cooling has become the industry standard over the past two decades, some 500 power plants still use once through cooling.

While the ruling was handed down in New York, it has application across the country. Within days of the ruling, Southern California Edison notified the Nuclear Regulatory Commission (NRC) that it had removed about six tons of sardines from the Units 2 and 3 water intake structure of its San Onofre Nuclear Power plant on the Pacific coast.

While the NRC has not specified a reporting limit for an unusual fish kill, the company has internally defined this quantity as 4,500 pounds.

Southern California Edison believes the unusual influx of sardines may be related to winter storm conditions.

Riverkeeper and other groups will now ask EPA Administrator Michael Leavitt to reconsider the agency's plans to include "restoration measures" as a compliance option in its cooling water regulation for existing facilities.

*(Env. News Service - 2/9/04)*

### EPA ISSUES GUIDANCE ABOUT LANDOWNERS WHOSE PROPERTY MAY BE CONTAMINATED BY NEIGHBOR'S ACTION

EPA has issued a new policy that provides guidance on liability protection under the Comprehensive Environmental Response, Compensation and Liability Act (also known as Superfund) for landowners who own property that is or may be contaminated by a neighbor's actions.

This interim guidance discusses a new section added to the Statute by the Brownfields Amendment of 2002, Section 107(q), that is directed at contiguous property owners: landowners who own property that is or may be contaminated by hazardous substances but is not the original source of the contamination.

To meet the contiguous property owner liability protection requirement, a landowner must meet statutory criteria that include but are not limited to: demonstrating that he did not cause, contribute or consent to the release of hazardous substances; is not affiliated with a liable party in any way (familial, financial, contractual); and has taken reasonable steps to stop any continuing release, and prevent or limit human and environmental exposure to the hazardous substances.

EPA's interim guidance also addresses three other issues: (1) the application of section 107(q) to current and former owners of property; (2) the relationship between new section 107(q) and EPA's Residential Homeowner Policy and Contaminated Aquifers Policy; and (3) the mechanisms EPA may

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provide, in its discretion, to resolve the liability concerns of contiguous owners.

This policy is available on EPA's website at: [www.epa.gov/compliance/news2000](http://www.epa.gov/compliance/news2000)

*(Env. Protection - 1/29/04)*

### SUPREME COURT RULES EPA CAN BLOCK STATE CLEAN AIR PERMITS

The U.S. Supreme Court ruled in January that the federal government has the authority to override decisions by state officials that afford less environmental protection than mandated by the Clean Air Act.

By a 5 to 4 margin the court upheld a lower court ruling that found the U.S. Environmental Protection Agency (EPA) followed the law when it blocked construction at an Alaskan zinc mine because of concerns about the laxness of state pollution control permits.

The case centered on the Red Dog Mine, which is located in northwest Alaska some 100 miles north of the Arctic Circle and five miles from the Noatak National Preserve.

In 1999, the Alaska Department of Environmental Conservation granted the company a pre-construction permit allowing it to add another large diesel generator to its operation.

The company estimated the additional generator would have increased the mine's production by some 40 percent and its nitrogen oxide emissions by some 40 tons per year.

Under the Clean Air Act, such pre-construction permits are required for large industrial sources of pollution and must call on these facilities to use "best available control technology" (BACT) in order to curtail harmful emissions.

Although state officials determined BACT capable of reducing emissions by some 90 percent was feasible and affordable, its permit required pollution controls only one third as effective.

This prompted the EPA to issue an enforcement action to revoke the state's permit and block construction of the new generator.

The ruling upholds a decision by the 9th Circuit Court of Appeals decision that upheld a ruling in favor of the EPA. Some 11 states filed in support of Alaska's view, but at least 14 filed in opposition.

*(By J.R. Pegg, Env. News Service - 1/22/04)*

### EPA PLANS TO BOOST PERFORMANCE STANDARDS' USE AT SEDIMENT CLEANUPS

Following similar efforts at the Hudson River site, EPA's pending sediment remediation guidance will encourage regulators to increase their use of performance standards, which evaluate the effectiveness of dredging and other cleanup technologies and a host of other factors, according to an EPA source. The guidance, due out this spring, will include a general discussion encouraging regions to increase their use of site-specific cleanup perfor-

## FEDERAL REGULATORY UPDATES (CONTINUED)

mance standards at major sediment cleanups. However, regional officials and environmentalists fear using performance standards could delay some cleanups and require additional resources.

*(Superfund Report - 1/19/04)*

### FIELD ANALYTIC TECHNOLOGIES ENCYCLOPEDIA (FATE) - AN ONLINE RESOURCE (FATE.CLU-IN.ORG)

The Field Analytic Technologies Encyclopedia (FATE) is an online encyclopedia, developed jointly by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers, that provides a wealth of information about the many tools that are now available to streamline the site investigation and cleanup process. Motivated by a need to accomplish cleanups in a more timely and cost effective manner, the scientific and engineering communities have been working to develop technologies and approaches for improving the acquisition, use, and interpretation of data to provide smarter solutions to environmental problems. FATE includes up-to-date information about technologies that can be used in the field to characterize contaminated soil and groundwater; monitor the progress of remedial efforts; and support decisions about site cleanups.

FATE provides a central location for valuable information (links, documents, photographs, and diagrams) about various techniques used in the field to characterize contaminated sites. FATE has been developed for use by a wide audience ranging from highly technical users such as engineers, field technicians and site managers to the general public and non-technical users. Information about technologies is presented in a way that can be easily understood and used by a broad audience.

FATE can be accessed through the World Wide Web at [fate.clu-in.org](http://fate.clu-in.org).

### EPA TO CUT MERCURY, LEAD, OTHER AIR EMISSIONS FROM HAZARDOUS WASTE COMBUSTORS

EPA signed a proposed rule designed to significantly reduce air pollutant emissions from five types of combustion sources that burn hazardous waste. This proposal could cut up to 4000 tons yearly of such hazardous pollutants as mercury, lead, dioxin, arsenic, soot and sulfur dioxide.

The five types of combustion sources are: incinerators cement kilns, lightweight aggregate kilns, steam and heat generation boilers, and hydrochloric acid production furnaces. EPA estimates the proposal would affect 150 facilities operating 276 existing hazardous waste-burning sources.

The Federal Register notice, the database, a fact sheet and background support documents on this proposed rule are available at:

<http://www.epa.gov/hwcmact/>.

*(Env. Tip of the Week - 4/4/04)*

### EPA EYES NOVEL CLEANUP PACT FOR REDEVELOPING TRANSFERRED DOD SITE

EPA may develop a novel agreement to ensure that the first-ever Defense Department (DOD) Superfund site being transferred to a developer is cleaned up after the transfer occurs because federal

Superfund and brownfields laws do not address private party cleanups of federal sites.

While the agreement's form is still under discussion, EPA wants it to ensure a stringent cleanup and guarantee that if the redeveloper does not complete the remediation at the Massachusetts site, DOD will return to fulfill its cleanup obligations, according to Region I documents on the proposed transfer.

DOD is touting the transfer's success to EPA as an example of how the department can "privatize" the cleanup of its many former military installations now listed on the Superfund National Priorities List, whose number may increase as the department seeks to close additional facilities in the coming years. DOD Assistant Deputy Under Secretary for Environment, Safety & Occupational Health Alex Beehler discussed the site's transfer with Acting EPA Deputy Administrator Steve Johnson in a meeting the two officials held this month, according to an agency source.

And in February testimony before a House subcommittee, DOD Deputy Under Secretary for Installations & Environment Raymond DuBois said the department would seek to increase its use of such transfers in its upcoming round of base closures.

A Region I source says EPA is developing what it calls a post-transfer plan to layout cleanup responsibilities at the site, which could contain elements from a typical Superfund consent decree or a prospective purchaser agreement or take another form. The source says EPA has already indicated it wants the agreement to be modeled on elements of a consent decree.

The source says the novel agreement may be needed because the Superfund law may prevent the agency from asking the developer to sign a consent order or prospective purchaser agreement, which EPA usually signs with parties who are liable for a site's contamination under the law.

Moreover, the site cannot be cleaned up under the brownfields law - which is designed to allow the redevelopment of lesser-contaminated sites while exempting the developer from cleanup liability - because federal facilities like defense sites were excluded from the legislation, an agency source says.

At issue is Region I's plan to transfer to a private redeveloper the South Weymouth Naval Air Station, located in Rockland, MA. The site was closed in 1997 under the Defense Realignment Act of 1990.

*(Superfund Report - 3/15/04)*

### COLORADO, AIR FORCE BATTLE OVER RISK OF ASBESTOS IN SOIL ESCALATES

A nearly year-long argument between Colorado regulators and the Air Force over the appropriate cleanup of asbestos-contaminated soil at a former Air Force base has reached a new level of intensity with the release last week of an Air Force site-specific risk assessment finding no imminent health risk on a portion of the base. The state is finding fault with the assessment, while the Air Force is questioning Colorado's approach to asbestos contamination.

The asbestos issue at Lowry Air Force Base has drawn national attention because there is no EPA

standard for asbestos in soil, and military officials and state regulators believe the problem of asbestos-contaminated soil could arise at other closing military bases. Regulators and the military have discussed the possibility of developing a national risk assessment for asbestos in soil, but that effort could take up to nine months.

The asbestos at Lowry - both on land now under private ownership and on land still under Air Force control is believed to come from a former hospital that was demolished in the 1950s or 1960s by bulldozing it into the ground.

The assessment does not include the risk of encountering asbestos debris, or large chunks of the substance, focusing instead on trace amounts in soil, the source says. This remains one of the state's biggest concerns because asbestos debris could be a major exposure pathway for children playing in the dirt. The state is also raising concerns that the risk assessment only dealt with chrysotile asbestos and did not address the more toxic form of asbestos, amphibole.

The Air Force spokesman says the military, in conducting the risk assessment, purposely took soil samples from areas that were expected to be hot spots for asbestos but did not find any chunks, although asbestos debris has been found at other locations at Lowry. Additionally, while some amphibole asbestos has been discovered at the base, more than 95 percent of the detections have been of chrysotile, he says. As the Air Force moves ahead with plans to conduct the broader risk assessment, it may address the issue of amphibole asbestos risk, he says.

*(Defense Environmental Alert - 3/9/04)*

### FOUR NEW RULES WILL REDUCE HAZARDOUS AIR EMISSIONS

Rules requiring four industries to upgrade their facilities by installation of Maximum Achievable Control Technologies (MACTs) were announced by EPA. The new MACT standards are estimated to reduce national emissions of toxic air pollutants by 88,000 tons per year within five years.

The four rules complete the application of technology based national emissions standards called for under the 1990 Clean Air Act. With these rules, EPA has issued 96 MACT standards to reduce toxic emissions from over 160 categories of industrial sources. When fully implemented, these rules collectively will reduce 1.7 million tons per year of toxic air emissions compared to the 1990 baseline emissions.

The MACT rules announced cover: Industrial, Commercial and Institutional Boilers and Process Heaters; Plywood and Composite Wood Products; Stationary Reciprocating Internal Combustion Engines (RICE), and Automobile and Light Duty Trucks Manufacturing (Surface Coating).

Covered Are:

Boiler MACT: Boilers and process heaters are used at facilities such as refineries, chemical and manufacturing plants, and paper mills and may stand alone to provide heat for shopping malls and university heating systems.

Plywood MACT: The plywood MACT covers about 220 facilities that manufacture plywood and veneer; particleboard; medium density

## FEDERAL REGULATORY UPDATES (CONTINUED)

fiberboard; hardboard; fiberboard; oriented strand board; and engineered wood products.

Auto Coatings MACT: Automobile and light-duty truck surface coating operations refer to the application of decorative, protective, or functional coatings to new automobile and light-duty truck bodies and body parts.

RICE MACT: Stationary reciprocating internal combustion engines (RICE) are used at facilities such as pipeline compressor stations, chemical and manufacturing plants, and power plants. EPA estimates that 1,600 new stationary RICE will be affected each year.

Copies of the recently signed standards and fact sheets are available at

<http://www.epa.gov/ttn/oarpg> under "Recent Actions".

(*Env. Tip of the Week - 3/2/04*)

### EPA SUPPLEMENTS PROPOSAL TO REDUCE POWER PLANT MERCURY EMISSIONS

EPA has released a supplement to its proposed Utility Mercury Reductions rule. The supplement provides rule language for a model cap-and-trade approach that will reduce mercury emissions by 70 percent when fully implemented.

In 2018, the second phase of the mercury program sets a cap of 15 tons. The program includes a banking provision that allows for early reductions, as early as 2010, (benefitting health and the environment) and a later date when the cap will be achieved. The Utility Mercury Reductions Rule would permanently cap emissions from coal-fired power plants. EPA also proposes requirements for monitoring and reporting mercury emissions from power plants in states choosing to adopt the cap-and-trade program.

EPA took public comments on the supplemental mercury proposal for 45 days after publication in the Federal Register.

(*Env. Tip of the Week - 3/2/04*)

### NESHAP FOR ORGANIC LIQUIDS DISTRIBUTION BECAME FINAL FEBRUARY 3rd

The national emissions standards for hazardous air pollutants (NESHAP) for new and existing organic liquids distribution (OLD) (nongasoline) operations became final February 3, the date they were published in the *Federal Register* (69 FR 5038). These and 12 other NESHAPs were issued by the U.S. Environmental Protection Agency (EPA) August 25, but their actual publication was delayed.

OLD operations are conducted at storage terminals, refineries, crude oil pipeline stations and various manufacturing facilities. The NESHAP requires all OLD operations at plant sites that are major sources to meet hazardous air pollutant (HAP) emissions standards based on the application of maximum achievable control technology.

### LEAD IN DC DRINKING WATER COULD SIGNAL NATIONAL PROBLEM

The U.S. Environmental Protection Agency lacks enough information to know if the elevated lead levels found in the District of Columbia's drinking water are indicative of a national crisis.

The federal agency has no current information on lead levels from 78 percent of the nation's public drinking water systems and has no data from as many as 20 states.

Federal regulations enacted in 1991 under the Safe Drinking Water Act known as the Lead and Copper rule require states to inform the EPA every three months whether or not utilities meet the agency's safe lead level of 15 parts per billion.

The EPA has initiated a national compliance review "to determine whether or not there is a national problem - and to determine how well the current rule is being implemented," Benjamin Grumbles, the chief EPA water official told a Senate panel.

Congress is calling for rapid action to reduce lead levels in the city's drinking water.

Children exposed to lead experience low birth weight, growth retardation, mental retardation, and learning disabilities, and it is harmful to pregnant women.

To date, water has tested unacceptably high for lead in more than 5,000 homes and schools in three districts in the DC metropolitan area - a few have tested as high as 6,000 parts per billion.

Federal and local officials say the high lead levels are the result of efforts by the Washington Aqueduct, which supplies water to the District and parts of Northern Virginia, to comply with federal regulations to control corrosion of pipes.

In 2000 the Washington Aqueduct, which is run by the U.S. Army Corps of Engineers and supplies the Washington Water and Sewer Authority (WASA) with water, to which is added chloramines - a combination of chlorine and ammonia - to the water to limit corrosion. But, this caused the lead to leach from lead service pipes that has resulted in the elevated lead levels in drinking water. Tests in 2002 by WASA revealed elevated lead levels in more than 50 percent of test samples.

Additional tests in 2003 found that 4,075 of 6,188 residences tested had levels above the EPA's safe lead level.

EPA officials say WASA violated federal law by failing to properly sample water and to use the correct language to notify the public about high levels of lead in the water.

"It is clear that WASA was inadequate in conveying to the public the severity of the problem," said EPA Region III Administrator Don Welsh. "It is unacceptable to us that many families in the District live in fear of the quality and safety of the water they drink."

The solution for the District may come from Washington Aqueduct, which is analyzing a chemical fix to the problem that could be tested by June and implemented system wide by September.

But, DC residents are wary of another chemical fix and many want stronger action - including replacement of lead service lines and better oversight by the federal government.

(*Env. News Service - By J.R. Pegg 4/8/04*)

### EPA MULLS SPCC EXTENSIONS, ENFORCEMENT LEeway FOR KEY OIL SPILL RULE

EPA may grant thousands of facilities that store oil more time to comply with already-delayed spill prevention rules or order regions to exercise

"enforcement discretion" in targeting violators as EPA works to clarify mandates industry calls confusing and burdensome.

Agency officials told industry representatives at a March 31 meeting that they are seeking to work out a deal well before the spill prevention, control and countermeasure (SPCC) rule's August compliance deadline. "With the implementation date looming in August. . . we do not want to put anyone in an untenable situation. We certainly want to make this do-able for everyone and that is our goal," Debbie Dietrich, director of EPA's Office of Emergency Prevention, Preparedness & Emergency Response, said at the March 31 meeting.

The rule requires steps including creating spill control plans, using "secondary containment" structures and other mechanisms to prevent spills from reaching waters, testing of storage tank integrity, security measures, and reporting requirements.

The agency already had extended the rule's compliance deadline by 18 months last year and, absent new extensions, will require facilities to revise SPCC plans by Aug. 17, 2004, and implement the new preventive steps next February. DOD had pressed for even greater delays, saying its two-year facilities and budget planning process may render the deadline extension inadequate.

EPA officials are considering three options for helping industry meet the rule's requirements, including a blanket extension, implementing the rule but delaying compliance for select provisions, or implementing the entire rule but exercising enforcement discretion while the agency clarifies uncertainties.

If EPA does not offer a blanket extension, it may extend compliance dates for certain provisions as the agency seeks to clarify the rules. However, Evans said this approach may be difficult because of the "entanglement" between allowing some portions of the new rule to take effect while others are delayed and the old version of the rule that remains in effect. "It's not a simple matter but it's an option on the table," he said.

Evans also indicated that EPA may offer no new extensions but instead employ "enforcement discretion" to ensure limited inspection and enforcement resources target the most significant problems as facilities implement the rule and EPA pursues modifications.

The agency recently settled litigation on most issues with three litigants who sued EPA over various aspects of the rule in 2002. EPA has agreed to clarify several rule provisions.

For instance, the agency has agreed to state that certain requirements imposed around areas where fuel is loaded and unloaded apply only to sites with loading "racks" specifically. Industry had expressed concern that EPA's use of the broader phrase "loading and unloading" areas had expanded provisions meant only to apply to the racks. However, EPA notes that other containment requirements are applicable in some cases for loading and unloading operations.

The agreement also addresses security fencing requirements and circumstances under which facilities may use cost as a factor when determining whether they must meet containment requirements or adopt alternative contingency plans.

## FEDERAL REGULATORY UPDATES (CONTINUED)

In addition, settlements will waive requirements for "integrity testing" of above-ground storage tanks. In some cases, shop-built tanks of 30,000 gallons and less will not require the integrity testing procedures, with EPA instead allowing visual inspections alongside other steps, such as placing a barrier between tanks and the ground, designed in a way that ensures leaks are detected immediately. RT has a summary of the new requirements - call us for a complimentary copy.

*(Defense Environment Alert - 4/6/04)*

### CALL US FOR A FREE SUMMARY OF THE SPCC REVISIONS!

#### NEW STANDARD FOR ENVIRONMENTAL DUE DILIGENCE: THE EPA'S ALL APPROPRIATE INQUIRY

The All Appropriate Inquiry Negotiated Rulemaking Committee a federal advisory committee, reached consensus on a draft regulation for "all appropriate inquiry" under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (as amended, "CERCLA" or "Superfund"). Abbi L. Cohen, a partner with the international law firm of Dechert LLP, represented the Mortgage Bankers Association of America on the Committee.

If adopted in its current form, this new regulation would lead to significant changes in the way environmental due diligence is conducted in the commercial real estate market.

The Committee sought information from a broad cross section of its members as to each of the criteria Congress required the EPA to include in its regulation. The Committee determined that "the identification of conditions indicative of releases and threatened releases of hazardous substances on, at, in or to the subject property" is the primary objective of all appropriate inquiry. In seeking to meet this objective, the draft regulation provides that the following information about the subject property should be sought:

- Current and past property uses and occupancies;
- Current and past uses of hazardous substances;
- Relevant waste management and disposal activities;
- Current and past environmental corrective actions and response activities;
- Engineering and institutional controls; and;
- Properties adjoining or nearby the subject property that have relevant environmental conditions.

During the performance of all appropriate inquiry, the person seeking the Superfund liability defense and the Environmental Professional must seek to:

- Gather the required information that is publicly available, obtainable from its source within reasonable time and cost constraints and which can be reviewed practicably;
- Review and evaluate the thoroughness and reliability of the information gathered; and
- Consider the extent that data gaps remain after the foregoing activities are completed and document such data gaps, the sources of information consulted to address them and their perceived impact on the ability to identify conditions indicative of releases or threatened releases of hazardous

substances.

The draft regulation relies on the judgment and discretion of the environmental consultant. As a result, the draft regulation is less prescriptive than the current ASTM Phase I Standard.

A primary thrust of the draft regulation is that you must retain a competent environmental consultant. The inquiry must be conducted by an Environmental Professional and, for the first time under Superfund, minimum qualifications would be established for this role.

Persons who do not meet the minimum qualifications may assist in the conduct of the inquiry but must do so under the supervision of a qualified Environmental Professional.

The draft regulation requires the Environmental Professional to provide a written declaration in the environmental report that they meet the defined specifications and have the required experience to be an Environmental Professional.

The draft regulation includes some steps in the investigative process that are not currently obligatory under the interim ASTM Phase I Standard, such as:

For abandoned properties, interviews with one or more (as necessary) owners or occupants of neighboring or nearby properties;

Examination of records across increased search distances for certain database searches; and

Reviews of registries of recorded institutional and engineering controls for the subject property and properties within one-half mile.

The proposed regulation does not require sampling nor intrusive investigations to establish all appropriate inquiry. Under the draft regulation, all appropriate inquiry continues to focus on so-called Phase I site assessment activities. The draft regulation acknowledges that sampling can be used to fill a data gap but does not mandate that sampling be performed even under circumstances where there is a data gap.

The results of the inquiry by an Environmental Professional must be documented in a written report that, at a minimum, includes:

- An opinion whether the inquiry has identified conditions indicative of releases or threatened releases of hazardous substances;
- An identification of data gaps;
- A description of the qualifications of the Environmental Professional; and
- A declaration from the Environmental Professional that he or she in fact meets the eligibility requirements outlined above.

The data gap documentation requirements are not imposed under the current ASTM Phase I Standard.

Investigations conducted or updated in compliance with the regulation within 180 days of the purchase of the subject property would be presumed to be current and therefore valid if over 180 days, an update would be required:

- Interviews with past and present owners, operators and occupants;
- Reviews of federal, tribal, state and local government records;
- Visual inspections of the facility and adjoining properties;
- The declaration by the Environmental Professional that he or she meets the eligibility

requirements for Environmental Professionals and that the inquiry was performed in conformance with the all appropriate inquiry standard; and

- Documentation of relevant changes in the conditions of the property and relevant specialized knowledge of the applicable Environmental Professional or the person intending to utilize the report.

All appropriate inquiries conducted more than one year prior to the purchase date of the property must be fully updated in accordance with the objectives and performance standards of the proposed regulation.

Members of an ASTM task force are currently revising the ASTM Phase I Standard to incorporate the anticipated changes reflected in the proposed regulation.

This proposed Federal Regulation is expected to be noticed in the Federal Registry shortly and be effective later this year.

*(Dechert Update - 1/04)*

#### GUIDELINES WARN OF MERCURY IN SOME FISH

Worried that mercury in some fish poses a hazard to youngsters while still trying to stress seafood's health benefits, the government issued new guidelines for eating fish.

The new guidelines, say the fish most likely to contain mercury are shark, swordfish, king mackerel and tile fish. Albacore tuna has more mercury than light tuna, the federal agencies report, so it should be limited to one meal a week.

On the other hand, the guidelines suggest eating up to two meals a week, totaling 12 ounces, of fish known to be low in mercury such as shrimp, canned light tuna, salmon, pollock and catfish.

In recent years fish has become increasingly popular because of the omega-3 compounds it contains, which can benefit the heart

*(Wall Street Journal - 3/22/04)*

#### INSURERS SEEK RCRA REFORM TO LIMIT APPELLATE RULING ON TANK LIABILITY

Insurance giant Zurich American and gas station owners are seeking a legislative fix to federal waste law to limit a recent appellate ruling upholding insurance coverage for contamination from a leaking underground storage tank (UST) even though the policyholder failed to disclose preexisting contamination, according to industry sources.

Limiting the ruling is important because the decision could undermine the government's increasing emphasis on financial assurance mechanisms - including insurance policies - to ensure that polluters, rather than the government, pay to clean up contaminated sites.

While the company has been circulating legislative language on the issue for over a year, according to several industry sources, the recent ruling by the U.S. Court of Appeals for the 9th Circuit has reignited its effort to amend financial assurance requirements for UST's issued under the Resource Conservation & Recovery Act (RCRA) so that insurance companies will not be required to honor UST policies issued after the policyholder committed a material misrepresentation.

## FEDERAL REGULATORY UPDATES (CONTINUED)

At issue is the 9th Circuit's January 29 decision in *Zurich American Insurance Co. v. Whittier Properties Inc.*, which held that the insurer must honor an UST policy even though the policyholder did not reveal pre-existing contamination.

The court ruling relied in part on an EPA opinion that the agency's current regulations only permit prospective cancellation of fraudulently obtained policies, not the retroactive voiding of a policy. Concerns about the ruling's ability to weaken environmental insurance policies led EPA and state officials to file separate *amicus* briefs supporting the policyholder.

However, one insurance industry source says that without legislative changes, UST policies will be increasingly expensive and more difficult to obtain, leaving many small business owners without insurance to pay for costly environmental cleanups.

As a result, Zurich wants to amend RCRA to stipulate that insurance companies must not honor contracts that were fraudulently obtained.

A source with Zurich says the company is still deciding whether to appeal the case to the Supreme Court.

*(Superfund Report - March 1, 2004)*

### EPA TO TIGHTEN LIMITS ON OZONE

Half of Pennsylvania and all of New Jersey do not meet new, tougher standards for ground-level ozone, a throat-burning pollutant that is a key ingredient in smog, federal officials said in April.

The designation is likely to lead to new restrictions on pollution sources large and small oil refineries, power plants, household paints, and nail polish remover, to name a few - as the Philadelphia region and New Jersey try to meet their 2010 deadline for compliance. In general, the nation's air is cleaner than it was a decade ago, but the U.S. Environmental Protection Agency proposed the tougher standard after scientists learned more about the harmful effects of ozone on the lungs.

The EPA said that 474 counties across the country home to 159 million people - did not make the new grade. Previous rules classified the air as unhealthy when ozone levels spiked above 120 parts per billion for an hour: The new rules set the unhealthy level at 85 parts per billion averaged over eight hours, on the theory that chronic exposure at lower levels is the biggest health threat, especially for the elderly, young children, and people with asthma.

It is not uncommon for the Philadelphia region to reach unhealthy eight-hour ozone levels a dozen times a summer.

*(Phila Inquirer - April 16, 2004)*

### EPA IS WARNED OF MERCURY 'HOT SPOTS' IN NEW RULES

Two outside panels of air-pollution experts have warned the Bush administration that proposed rules reduce power-plant emissions but allow emissions trading among companies, could create "hot spots" with concentrations of mercury and other toxic substances particularly harmful to children.

An Environmental Protection Agency's committee wrote EPA Administrator Mike Leavitt warning that two proposals he announced last month don't go far enough to reduce the harm posed by mercury emissions.

The children's health-protection advisory committee, comprising 27 experts from universities, industry, state health agencies and health advocacy groups, urged Mr. Leavitt to "elevate consideration" of the dangers that mercury poses to children. It warned that emissions trading, a pollution-control strategy favored by the Bush administration, might treat "hot spots" in local communities, or concentrations of potentially dangerous substances, because of the uneven impact of such trades.

The group also expressed concern that the regulations would have to be in effect for two decades

to achieve their proposed emissions reductions. One rule aims at cutting power-plant mercury emissions and the other at interstate transport of other power-plant pollutants.

The EPA said the proposals would reduce mercury emissions by 70% by 2018. But a provision allowing companies to "bank" emissions credits might extend the phase-in for an additional five years, said panel member Susan West Maragos of Physicians for Social Responsibility, a Washington health-advocacy group.

Under emissions-trading schemes, companies can meet a cap on their emissions by buying credits from other companies. Those reducing their pollution levels below government-imposed caps will have excess credits that they can sell to help finance expensive pollution control equipment. Overall, the actions would meet a regional cap on pollutants, but the resulting reductions might not be uniform within the region.

Separately, a new report from the National Academy of Sciences says "ecological hot spots" can "increase the number of persons exposed to pollution." The report, requested by Congress, suggests that emissions-trading programs be modified to include zones within regions to reduce the spotty effects of trading. Such a move, it notes, is likely to increase the cost of emissions trading by limiting trades within a given market.

The proposed rules are planned for 2005, and the EPA was receiving comments early this year. Agency officials said comments from the two panels will be made part of the record.

*(Wall St. Journal - 1/30/04)*

**NEW SPCC RULE — THIS  
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## NJ UPDATES (continued from page 4)

to sites where the public was not using the contaminated resource or even planning to do so.

For example, at the former record factory in Pitman, that is now owned by a subsidiary of Sony Corp. and is used to make compact discs, the tainted area of groundwater is a third of a mile from the nearest drinking-water well. Tests show that the remaining contamination is not moving.

"We've never had any high amounts of really anything," said Andrew Eisenhart, the Borough's water sewer superintendent, referring to the lack of contaminants in the well on Linden Avenue.

State officials would not say how much money they are seeking.

Sony officials said that handling any damage claim at the record factory is the responsibility of Viacom Inc., which bought CBS after CBS sold the record division to Sony.

"We don't believe that any additional claims are justified," Viacom spokesman Carl Folta said, "because the site has been cleaned up and the water in question has never been used for any purpose

then or since."

Industry groups warn that starting a damage-recovery program is not a good way to attract business. Business groups also object to the state's hiring of outside council to comb through thousands of old files, looking for cases.

The state has authorized Allen Kanner, a colorful, cowboy boots-wearing lawyer from New Orleans, to file lawsuits and he gets a cut of any money he brings in. That arrangement compromises the state's neutrality, the law suit contends.

New Jersey and other states have pursued natural-resource damages in the past in scattered cases, usually with big chemical spills.

But the state's systematic review of thousands of historic cases is virtually unheard of, said Bruce Katcher, a partner at Manko, Gold, Katcher, and Fox, an environmental law firm with offices in Bala Cynwyd and Cherry Hill. Other states are taking an interest in the effort, but New Jersey is out in front. Pennsylvania officials said they have no plans to start a similar program.

To date, the NJ has filed suit in just one case.

In the record-factory case, letters were sent in November to Summer Redstone, Viacom's chief executive officer, and to Andrew Lack, who heads Sony Music Entertainment.

The water underneath the plant is tainted with nickel, a metal that was used in the record-making process. According to Department of Environmental Protection records, the owners removed more than 4,000 cubic yards of contaminated dirt in the mid-1990s and continue to operate monitoring wells to ensure that remaining contamination does not spread.

David Robinson, a La Salle University economics professor who studies environmental issues, said it would be tricky to figure out the worth of an asset that no one was using.

If Pitman residents had needed to purchase bottled water, for example, that cost would be a starting point. But there were no "avoidance costs" in this case and in many of the other cases, he said after reviewing program materials.

# TECHNOLOGY UPDATES

## CARBON DIOXIDE FIGURES IN ANCIENT TEMPERATURE EQUATION

An international team of geoscientists believes that carbon dioxide (CO<sub>2</sub>), and not changes in cosmic ray intensity, was the factor controlling ancient global temperatures.

The researchers say their new findings, reported in the March issue of "GSA Today," resulted from including the ocean's changing acidity in their calculations.

"Reviewing the geologic records of carbon dioxide and glaciations, we found that carbon dioxide was low during periods of long-lived and widespread continental glaciations and high during other, warmer periods," explained Dr. Dana Royer, research associate in geosciences at Penn State.

Royer said the findings cast doubts on previous suggestions that cosmic ray flux correlated better with ancient temperatures than CO<sub>2</sub>.

The researchers looked at climate changes that occurred over the past 570 million years.

A direct record of global temperature and CO<sub>2</sub> exists for the past 100 years and ice cores provide CO<sub>2</sub> information for the past 400,000 years.

A close correspondence between carbon dioxide and temperature has generally been found for the past 570 million years, Royer explained, and scientists typically use proxies to determine measurements in the distant past.

*(Env. News Service - 3/18/04)*

## EARTH'S MAGNETIC FIELD REVERSES EVERY 7,000 YEARS

Earth's magnetic field at high latitudes, a geologist funded by the National Science Foundation has concluded.

Brad Clement of Florida International University published his findings in the journal "Nature".

The magnetic field has shown to have completely changed direction at irregular times in the geologic past. A compass needle, if one existed then, would have pointed not to the north geographic pole, but to the opposite direction. Such polarity reversals provide clues to the nature of the processes that generate the magnetic field, said Clement.

"It is generally accepted that during a reversal, the geomagnetic field decreases to about 10 percent of its full polarity value," said Clement. "After the field has weakened, the directions undergo a nearly 180 degree change, and then the field strengthens in the opposite polarity direction. A major uncertainty, however, has remained regarding how long this process takes. Although this is usually the first question people ask about reversals, scientists have been forced to answer with only a vague "a few thousand years."

*(Env. News Service - 4/8/04)*

## FLAME RETARDANTS APPEARING IN FISH OIL SUPPLEMENTS

Flame retardant levels have increased during the past four years in dietary supplements based

on cod liver oil, new research has found.

The report by European scientists appears in the April 7 edition of the "Journal of Agricultural and Food Chemistry" a peer-reviewed journal of the American Chemical Society.

The study analyzed 21 fish and vegetable oil dietary supplements commercially available in the United Kingdom. The supplements contained four classes of oils: pure vegetable oils, fish and vegetable oil formulations, cod liver oil and whole body fish oil. Supplements based on vegetable oil and whole body fish oil showed little or no contamination throughout the current and previous studies.

"The cod liver oils have similar levels of PCBs and pesticides compared to samples obtained from the same outlets," Jacobs says. "But the levels of flame retardants are higher."

Flame retardant levels in cod liver oils from the new study ranged from about 15-34 nanograms per gram of fat, while the range was 0-13 only four years ago.

The findings add to a growing number of studies that have found flame retardants in unexpected places, from human breast milk in the United States to peregrine falcon eggs in Sweden. The researchers say the findings are not enough to define new dietary recommendations, but call for further research into the pollutants.

*(Env. News Service - 3/18/04)*

## HIGH LEVELS OF ARSENIC FOUND IN CHICKEN

People who eat chicken may be taking in greater amounts of arsenic than in other meat and poultry products, U.S. government scientists report in the January issue of "Environmental Health Perspectives."

Arsenic is an approved animal dietary supplement and is found in specifically approved drugs added to poultry and other animal feeds. It is fed to broiler chickens in the form of Roxarsone (4-hydroxy-3-nitrophenyl arsenic acid) to control intestinal parasites.

Epidemiologist Tamar Lasky of the National Institute of Child Health and Development led the study.

At average levels of chicken consumption - 2 ounces a day, or the equivalent of a third to half of a boneless chicken breast - people ingest about 3.6 to 5.2 micrograms of inorganic arsenic. People who eat an average of 2.1 ounces a day of chicken, about half a chicken breast, will take in 3.62 to 5.24 micrograms of inorganic arsenic per day, Lasky and her team calculate.

A joint expert committee from the UN Food and Agriculture Organization and the World Health Organization has determined that a tolerable daily intake of inorganic arsenic to be two micrograms per kilogram (2.2 pounds) of body weight per day.

More study is needed to find out exactly how the arsenic consumed in chicken is metabolized in the human body. The scientists say that the chemical forms of arsenic found in chicken muscle "have not been reported in the literature."

*(Env. News Service - 1/11/04)*

### TECHNOLOGY UPDATES

- CO<sub>2</sub> & Global Warming - Pg. 10
- Arsenic in Chicken - Pg. 10
- Water Use Ebbing - Pg. 10
- Magnetic Field Reverses - Pg. 10

## AMERICANS' WATER USE IS EBBING

Despite a growing population and increasing electricity production, the nation's use of water is lower than it was 30 years ago, a sign that "conservation is working," according to a report by the U.S. Geological Survey.

The report, which is issued every five years, showed that Americans used 408 billion gallons of water a day in 2000 virtually unchanged since 1985 and lower than 1975.

USGS chief hydrologist Robert Hirsch said conservation and advances in irrigation techniques and power generation "allow us to do more with less water. ... It's pretty good news for the nation."

Although the public perception, thanks to the widespread brick-in-the-toilet conservation program, centers on household water use, the bulk of the nation's water consumption remains in electric power generation (48 percent) and irrigation (34 percent).

Usage by names and businesses accounts for 11 percent of the nation's water needs. Other users - including livestock, mining and domestic wells, account for 7 percent.

One dark cloud in the otherwise positive USGS report was its finding on the increasing reliance on aquifers. In 1950, 23 percent of America's irrigation water came from aquifers; in 2000, the figure was 43 percent. "In too many places our underground aquifers are already overstressed," one researcher said.

Nationwide, the percentage of the water supply used for crop irrigation has remained relatively unchanged for more than a half century. But the amount of acreage more than doubled from 1950 to 1980, then jumped 7 percent between 1995 and 2000.

*(By Tony Perry/LA Times/Phila Inq. - 3/14/04)*

### PA FINAL FILL POLICY See our Web Page for:

- FACT SHEET
- PROGRAM SUMMARY
- HOT LINKS TO NUMERICAL LIMIT TABLES

COMING SOON - EARTHWORK  
BMP AND SURFACE MINE GP

## FEDERAL REGISTER NOTICES

<http://www.epagov/homepage/fedrgstr>

### Environmental Protection Agency

National Emission Standards for Hazardous Air Pollutants for Lime Manufacturing Plants; Final Rule.

*(Federal Register - 1/5/04)*

### Environmental Protection Agency

Control of Emissions From Highway Motorcycles.

*(Federal Register - 1/15/04)*

### Environmental Protection Agency

Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Interstate Air Quality Rule); Proposed Rule.

*(Federal Register - 1/30/04)*

### Environmental Protection Agency

Proposed National Emission Standards for Hazardous Air Pollutants; and, in the Alternative, Proposed Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units; Proposed Rule

*(Federal Register - 1/30/04)*

### Environmental Protection Agency

National Emission Standards for Hazardous Air Pollutants: Organic Liquids Distribution (Non-Gasoline).

*(Federal Register - 2/3/04)*

### Environmental Protection Agency

National Primary Drinking Water Regulations: Minor Corrections and Clarifications to Drinking Water Regulations.

*(Federal Register - 3/2/04)*

### Environmental Protection Agency

Protection of Stratospheric Ozone; Refrigerant Recycling; Substitute Refrigerants; Final Rule.

*(Federal Register - 3/12/04)*

### Environmental Protection Agency

Guidelines Establishing Test Procedures for the Analysis of Pollutants Under the Clean Water Act; National Primary Drinking Water Regulations; and National Secondary Drinking Water Regulations; Analysis and Sampling Procedures; Proposed Rule.

*(Federal Register - 4/6/04)*

### Environmental Protection Agency

National Emission Standards for Hazardous Air Pollutants for Stationary Combustion Turbines.

*(Federal Register - 4/7/04)*

### Environmental Protection Agency

Notification Requirements for Lead-Based Paint Abatement Activities and Training

*(Federal Register - 4/8/04)*

### Environmental Protection Agency

National Emission Standards for Hazardous Air Pollutants: Proposed Standards for Hazardous Air Pollutants for Hazardous Waste Combustors (Phase I Final Replacement Standards and Phase II).

*(Federal Register - 4/20/04)*

### Environmental Protection Agency

Hazardous Waste Generator Program Evaluation.

*(Federal Register - 4/22/04)*

## PENNSYLVANIA NOTICES

### Proposed Regulations Ensure Extended Life of Vehicle Emission Controls:

Automotive manufacturers would be required to show that new vehicles would meet emissions standards throughout the "useful life period" or 120,000 miles for most cars and trucks, under a proposed rule issued by EPA.

These procedures are part of EPA's vehicle emission certification program, under which vehicle prototypes are tested to demonstrate compliance with the federal emission standards. Upon this demonstration, EPA issues certificates of conformity allowing the manufacturer to produce and sell cars in the U.S.

The proposed aging procedures include methods to accumulate mileage on prototype vehicles on a track and to simulate mileage accumulation using rapid aging techniques.

EPA is undertaking this action to fulfill a court mandate issued on Oct 22, 2002.

*(PA DEP Update - 4/2/04)*

### Final Technical Guidance- Substantive Revision:

Management of Fill. Effective date: April 24.

### Policy for Consideration Plans and Zoning Ordinances in DEP Review of Grants and Funding for Facilities and Infrastructure.

Written comments were being received by DEP on proposed revisions.

*(PA DEP Update - 4/23/04)*

### Draft Technical Guidance:

Policy for Applications for Technical or Final Assistance Proposals Consistent with Multi-Municipal Planning Under Acts 67 and 68. Written comments were being submitted to DEP on proposed revisions.

*(PA DEP Update - 4/23/04)*

### Draft Technical Guidance:

Experimental Onlot Wastewater Technology Verification Program. Comments were being received by DEP on proposed revisions.

*(PA DEP - 2/13/04)*

### Final Technical Guidance:

Proposals to Add or Remove Fluoridation Treatment by a Community Water System. Effective Date: March 13.

*(PA DEP - 3/12/04)*

## KEY HIGHLIGHTS

### FEDERAL UPDATES

- Vapor Intrusion/Superfund Sites Review - Pg. 5
- CERCLA Guidance/Contamination from Neighbors - Pg. 5
- Asbestos in Soil - Pg. 6
- Tighter Ozone Limits - Pg. 9

### PA UPDATES

- Next Generation of Brownfields - Pg. 3
- Public River Access - Pg. 3
- Pittsburgh Addresses CSOs - Pg. 3

### NJ REGULATORY UPDATES

- \$100 Million to Farmers - BMPs for Stormwater - Pg. 4
- NJ Stormwater Regulations - Pg. 4
- More on NRD's - Where's the Damage - Pg. 4

### TECHNOLOGY UPDATES

- CO2 & Global Warming - Pg. 10
- Arsenic in Chicken - Pg. 10
- Water Use Ebbing - Pg. 10
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