

New York Becomes First State to Require Landlords to Disclose Environmental Test Results to Tenants*

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By Jeff Kray¹

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New York has become the first state to pass a law requiring property owners to disclose to current and prospective tenants the results of environmental sampling on property they lease—including tests conducted on indoor air, and also on air, groundwater, and soil beneath buildings. Although many states require property owners and operators to notify regulators when they discover that

hazardous substances have been released to the environment,² New York is the first state to require that this information be disclosed to tenants.

The law takes effect in December 2008. It requires landlords and property owners to disclose test results that exceed federal Occupational Safety and Health Administration (“OSHA”) or New York Department of Health (“NY Health”) indoor air guidelines³ or face fines up to \$500 per violation and \$500 per day they are in violation.⁴

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Dear Subscribers:

In this issue of *The Environmental Counselor*, we are pleased to include a number of concise articles that touch on a variety of environmental issues ranging from the tax treatment of Supplemental (Beneficial) Environmental Projects, to an update on the European Union’s (EU’s) REACH Regulation governing the registration of chemicals in the EU. We would like to express our thanks to all of these authors and their law firms for allowing us to share their articles with our readers.

Very truly yours,
Jeanne D. Wertz
Senior Attorney Editor

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Background on Vapor Intrusion

When a group of chemicals known as volatile organic compounds (“VOCs”) are released into soil or shallow groundwater they can evaporate, producing vapors that travel up through the soil column.⁵ These vapors can potentially enter structures, including homes and businesses, through crawlspaces and cracks or other openings in the foundation. This process is known as vapor intrusion.

Solvents such as tetrachloroethylene (“PCE or Perc”) and trichloroethylene (a common solvent used for cleaning and degreasing, also known as “TCE”) have been commonly used for many years as industrial cleaners and degreasers, and are highly volatile.⁶ Petroleum products, including gasoline, diesel fuel, and home heating oil, can also volatilize. Although odors are usually associated with petroleum spills or leaks, they are not usually associated with solvent leaks or spills unless large amounts are released.⁷ They may, therefore, go unnoticed for many years, yet be entering enclosed spaces where they can exceed health-based standards.

An investigation for vapor intrusion typically involves testing soil, groundwater, and soil gas (air trapped between soil particles).⁸ This testing helps to determine if volatile chemicals might pose an indoor air quality problem. At many contaminated sites, volatile chemical levels are low and are not considered a threat or potential threat to human health.⁹ Sometimes, however, these levels in soil, groundwater, or soil gas are high enough to raise concerns about indoor air quality in nearby homes or businesses.

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EPA Guidance and Report on Vapor Intrusion

One recent report estimated that there may be more than 400,000 sites in the United States where vapor intrusion exceeds health-based levels.¹⁰ In 2002, the U.S. Environmental Protection Agency (“EPA”) published guidance on evaluating vapor intrusion that described a three-tiered evaluation process: primary screening, secondary screening, and site-specific pathway assessment. Since 2002, EPA has been collecting additional information from vapor intrusion sites.

Regulators are beginning to re-evaluate vapor intrusion at many sites that have already been remediated. New York, for example, has over 400 such “legacy” sites where it is revisiting vapor intrusion risks. For more on information see *Vapor Intrusion—An Evolving Concern at Sites with Buildings Over Contaminated Soils or Shallow Groundwater*, Marten Law Group Environmental News (June 28, 2006).

In February 2008, ASTM International¹¹ published a “Standard Practice for Assessment of Vapor Intrusion into Structures on Property Involved in Real Estate Transactions.” The intent is that environmental professionals use the standard to conduct vapor intrusion assessments and as a supplement to Phase I environmental assessments.¹² The vapor intrusion standard was designed by a work group of consultants, regulators, attorneys, and industry representatives to complement then existing state and federal vapor intrusion policy and guidance.¹³

Similarly, EPA has now developed a database to store and analyze data collected from such sites and provide information to help environmental professionals understand vapor intrusion pathways and risk. In March 2008, EPA released a draft report on that information.

The New York Law’s Requirements

The New York law was sponsored by two legislators from the Binghamton, New York area, which has seen several vapor intrusion cases involving TCE. State Assemblywoman Donna A. Lupardo and state Senator Thomas W. Libous sponsored and passed similar measures in 2006 and 2007.¹⁴ Two previous New York governors vetoed those bills.

New York Governor David Paterson signed the 2008 notification bill on September 5, 2008. It takes effect on December 3, 2008. Under the new law, where test results exceed OSHA or NY Health guidelines for indoor air quality, property owners must provide all tenants and building occupants with a fact sheet and timely notice of any public meetings to be held to discuss such results.¹⁵ Property owners have fifteen days to provide such notice.¹⁶ These requirements apply to both residential and commercial properties.

The new law only applies to test results that a property owner has been provided by an “issuer.” The law defines “issuer” to include the New York Department of Envi-

ronmental Conservation (“NY DEC”),¹⁷ a municipality that has entered a contract with NY DEC to undertake an environmental restoration project¹⁸, and a “person subject to an order issued pursuant to” New York’s hazardous waste and oil spill cleanup laws.¹⁹

Most notably, the new law’s definition of “issuer” includes a “participant” as defined in New York’s Brownfield Cleanup Program (“BCP”)²⁰ but does not include a “volunteer” under the BCP.²¹ Parties enter the BCP by submitting an application to determine the party’s and the site’s eligibility. A “participant” in the BCP is an applicant who is liable as an owner or operator or otherwise responsible for site remediation.²² A “volunteer” is an applicant who is not liable for the known or suspected contamination, or whose liability arises solely from ownership after the contaminants were released, provided the applicant has taken reasonable steps to stop continuing releases, prevent future threatened releases, and prevent or limit exposure to the contamination.²³ Thus, a “volunteer” under New York’s BCP is analogous to a “bona fide purchaser” under the federal Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”).²⁴

Once N.Y. DEC approves an application to enter the BCP, the parties enter a Brownfield Cleanup Agreement (“BCA”) which requires the applicant to undertake, under N.Y. DEC oversight, cleanup activities appropriate to the site and the prospective redevelopment plan.²⁵ A volunteer is required to identify the onsite contamination’s nature and extent and develop a remedial work plan or determine that remediation is unnecessary.²⁶ A participant must meet the same requirements as a volunteer except that their investigation and remedial reports and work plans must also address offsite contamination. Just as BCP volunteers are not required to address offsite contamination, they are also not required to notify tenants of their test results.

For properties which have an engineering control in place or are subject to ongoing monitoring under an ongoing remediation program, landlords must provide additional notice. Such notice must include fact sheets, test results if requested, and site closure letter. Landlords must also provide notice to prospective tenants before they sign a binding lease or rental agreement and notice shall be included in rental or lease agreements in bold on the first page.²⁷

The law directs NY Health to prepare generic fact sheets that “identify at a minimum the compound or contaminant of concern, reportable detection levels established by [NY Health or OSHA guidelines] for indoor air quality and health risks associated with exposure to such compound or contaminant and a means to obtain more information on the compound or contaminant.”

The NY Health “permissible exposure limits” (“PELs”) are lower than the OSHA PELs. For example, the NY Health PEL for PERC is 15 parts per billion (“ppb”)²⁸ as compared to the OSHA PEL for PERC which is 100 parts per million

(“ppm”).²⁹ This is because the NY Health PELs are based on “continuous lifetime exposure and sensitive people.”³⁰ The OSHA PELs were developed based on acute exposure over an eight hour time weighted average.³¹ As a practical matter, the NY Health standards will, therefore, generally control whether landlords will be required to report test results.

NY Health currently only has fact sheets prepared for PCE, TCE, and Radon.

They describe the chemicals, potential methods of exposure, health effects from short and long-term exposure, background levels, NY Health’s guidelines for the chemical, when to see a physician, and how to obtain more information. Notably, NY Health does not have a fact sheet for benzene, a common constituent of concern associated with current and former gas station sites, or methane, a common constituent of concern associated with former landfill sites.

The NY DEC’s Division of Environmental Remediation and NY Health’s Bureau of Environmental Disclosure each have a role in effectuating the new law. Those agencies reportedly are not planning any administrative regulations under the new law but are working on a formal policy. NY DEC will frequently be involved in conducting or approving sampling plans for affected properties. When NY Health receives sample results from NY DEC, other agencies, or private consultants then it will forward those results to the property owners with a reminder that they are required to disclose the results to their tenants under the new law.

The new law raises several important questions. First, does it apply retroactively? If it were retroactive, then landlords would be required to review historic test results and provide notice to existing tenants. Second, are property owners only required to report actual indoor air quality violations? The law does not definitively state whether property owners must report sub-slab samples from which an environmental professional could infer indoor air quality violations. N.Y. DEC and N.Y. Health will need to clarify this uncertainty.

For more information on vapor intrusion issues and Marten Law Group’s waste cleanup and property development and acquisition practices please contact Jeff Kray. Jeff is a partner at Marten Law Group. His practice focuses on water resources and environmental, civil, and appellate litigation. He can be reached by telephone at 206-292-2608, or by e-mail at jkray@martenlaw.com.

Notes

1. Our thanks to Lawrence Schnapf at Schulte Roth & Zabel for his comments on this article and insights on New York’s environmental laws.
2. See e.g., Washington Administrative Code 173-340-300 which requires that property owners and operators report to the Washington Department of Ecology when they discover that hazardous substances have been released.

3. For information on OSHA’s indoor air quality standards see <http://www.osha.gov/SLTC/indoorairquality/standards.html>. For information on New York’s indoor air quality standards see http://www.health.state.ny.us/environmental/air_quality/.
4. E. Reinagel, Governor signs renters notification law, Press & Sun-Bulletin (September 5, 2008).
5. Vapor Intrusion Fact Sheet, Washington State Department of Health, March 2007.
6. Vapor Intrusion Fact Sheet, Washington State Department of Health, March 2007.
7. Vapor Intrusion Fact Sheet, Washington State Department of Health, March 2007.
8. Vapor Intrusion Fact Sheet, Washington State Department of Health, March 2007.
9. Vapor Intrusion Fact Sheet, Washington State Department of Health, March 2007.
10. N. Gronewold, Environmental lawyers see ‘vapor intrusion’ spurring litigation, E&E News (August 11, 2008) (subscription required).
11. Formerly American Society for Testing and Materials.
12. EnviroGroup Limited, Vapor Intrusion Newsletter (February 2008).
13. EnviroGroup Limited, Vapor Intrusion Newsletter (February 2008).
14. E. Reinagel, Governor signs renters notification law, Press & Sun-Bulletin (September 5, 2008).
15. New York State Assembly Bill A10952 (September 15, 2008); N.Y. Evtl. Conserv. Law § 27-2405(2).
16. New York State Assembly Bill A10952 (September 15, 2008); N.Y. Evtl. Conserv. Law § 27-2405(2).
17. N.Y. Evtl. Conserv. Law § 27-2405(1)(B)(IV).
18. N.Y. Evtl. Conserv. Law § 27-2405(1)(B)(III) (citing N.Y. Evtl. Conserv. Law § 56-0501 et seq.).
19. N.Y. Evtl. Conserv. Law § 27-2405(1)(B)(I) (citing N.Y. Evtl. Conserv. Law § 27-1313 and N.Y. Pub. Health Law § 12A-1389B et seq., and N.Y. Navigation Law § 12-173 et seq., respectively).
20. A.9120, effective October 7, 2003 and codified into various sections of New York laws; see e.g. N.Y. Conserv. Law § 27-1400 et seq.
21. N.Y. Evtl. Conserv. Law § 27-2405(1)(B)(II).
22. N.Y. Evtl. Conserv. Law § 27-1405(1)(A).
23. N.Y. Evtl. Conserv. Law § 27-1405(1)(B).
24. 42 U.S.C.A. §§ 9601 et seq.
25. N.Y. Evtl. Conserv. Law § 27-1409.
26. N.Y. Evtl. Conserv. Law § 27-1409.
27. N.Y. Evtl. Conserv. Law § 27-2405(3).
28. See NY Health Fact Sheet.
29. See OSHA’s Reducing Workers Exposure to Perchloroethylene (PERC) in Drycleaning at <http://www.osha.gov/Publications/osh3253.html>.
30. NY Health Fact Sheet on PERC at p. 5.
31. OSHA’s Reducing Workers Exposure to Perchloroethylene (PERC) in Drycleaning.

Tax Treatment of Supplemental (Beneficial) Environmental Projects*

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On July 3, 2008, the Internal Revenue Service ("IRS") announced its current legal theory regarding costs incurred or amounts paid for the performance of Supplemental (Beneficial) Environmental Projects ("SEPs") or similar environmentally-beneficial projects under federal or state law that involve the acquisition or construction of property to be owned by the taxpayer ("SEP-related costs"). Using a public policy argument, the IRS has concluded that these SEP-related costs are analogous to nondeductible fines and penalties and, therefore, the costs cannot be added to the tax basis of the asset produced. In other words, the IRS is denying a corporation the right to recover certain SEP-related costs either through a current deduction, through annual depreciation deductions, or upon ultimate disposition of the property.

Overview of SEPs

In settling environmental enforcement cases, the U.S. Environmental Protection Agency ("EPA") requires the alleged violators to achieve compliance with Federal environmental laws and regulations and, in many cases, to pay a monetary penalty in order to deter noncompliance. To further the goals of protecting and enhancing public health and the environment, the EPA encourages the use of SEPs as part of settlements and, if a SEP is performed, EPA may reduce the proposed monetary penalty. However, the SEP must be consistent with EPA's SEP Policy (eff. May 1, 1998). The SEP Policy provides that the SEP must be voluntary. In other words, the SEP must be in addition to what the alleged violator is required to do to return to compliance and must not be otherwise required by federal, state or local law or regulation. Also, the SEP must be undertaken as part of the settlement; projects that have already begun or that the alleged violator had previously committed to perform are not eligible for consideration. Further, while the EPA usually provides oversight over the SEP to ensure that the project is fully implemented, EPA may not receive, manage, or control any funds set aside for the SEP and may not manage or administer the SEP. Last, there must be some relationship

between the underlying violation being settled and the health or environmental benefit that will result from the SEP.

The EPA recognizes seven categories of projects that can be acceptable SEPs: pollution prevention, pollution reduction, public health, environmental restoration and protection, environmental audits, environmental compliance training, and emergency planning and preparedness. Examples of pollution prevention and reduction SEPs include modifications to production processes and the replacement, improvement, or addition of pollution control technologies. Environmental restoration and protection SEPs may include, among other things, purchasing property for conservation purposes or restoring damaged habitat.

Many state environmental agencies have adopted policies and procedures similar to EPA's SEP Policy and allow for SEPs as part of the settlement of a state environmental enforcement action.

IRS' Classification of SEP-Related Costs as a Tier 1 Issue

The tax treatment of SEP-related costs has been classified by the IRS as a "Tier I" issue as part of its initiative to identify, prioritize, and resolve what it believes to be significant compliance issues. Tier I issues (as opposed to Tier II or Tier III issues) are considered to be of the highest strategic importance and to have a significant impact on one or more industries. Typically, an issue is classified as a Tier I issue because it may affect a large number of taxpayers, it represents a significant dollar risk, there is a substantial compliance risk, and the issue is highly visible.

Because the IRS believes that the resolution of a Tier I issue is of critical compliance importance, all audits of SEP-related costs will be conducted under the oversight and control of an Issue Management Team and all audit teams are required to address the SEP issue in accordance with established guidance and strategies. In July 2008, the IRS issued this guidance in the form of a "coordinated issue paper," which sets forth the IRS' current legal position and which is intended to ensure uniform application of this position by the audit teams to all SEP-related costs.

IRS' Current Position Regarding the Taxation of SEP-Related Costs

Under the most basic tax principles, a corporation is entitled to take a current deduction for expenses incurred in the ordinary course of its trade or business. I.R.C. § 162. However, in lieu of a current deduction, a corporation must capitalize the costs incurred for new buildings or permanent improvements and the direct and certain indirect costs of

producing property. I.R.C. §§ 263 and 263A. These capitalized costs are added to the tax basis of the property and recovered either through amortization or depreciation deductions over time or upon the ultimate disposition of the property.

Where a corporation has incurred costs to construct an environmental project, such costs should qualify as capital expenditures under I.R.C. §§ 263 and 263A. The IRS, however, takes the position that the SEP-related costs cannot be added to the tax basis of the property because of an exception in I.R.C. § 263A. Under this exception,

any cost which (but for section 263A and the regulations thereunder) may not be taken into account in computing taxable income for any taxable year is not treated as a cost properly allocable to property produced or acquired for resale under section 263A and the regulations thereunder. Thus, for example, if a business meal deduction is limited by section 274(n) to 80 percent of the cost of the meal, the amount properly allocable to property produced or acquired for resale under section 263A is also limited to 80 percent of the cost of the meal.

Treas. Reg. § 263A-1(c)(2); *see also* I.R.C. § 263A(a)(2). According to the IRS, the Internal Revenue Code provision that precludes SEP-related costs from being considered in the computation of taxable income is I.R.C. § 162(f), which provides that there is no deduction for “any fine or similar penalty paid to a government for the violation of any law.” The IRS, however, concedes that I.R.C. § 162(f) applies only to current deductions and not to capital expenditures such

as SEP-related costs and, by its own terms, cannot apply to deny a tax benefit for these costs.

As a result of this concession, the IRS position hinges on two presumptions: (i) SEP-related costs are “analogous” to nondeductible fines and penalties under I.R.C. § 162(f) and (ii) an analogy is a sufficient basis for applying the statutory exception to deny a corporation’s right to recover its costs. As to the first presumption, the costs at issue are not paid to the government as required under I.R.C. § 162(f). Indeed, under EPA’s SEP Policy, a project that provides funding or resources to EPA or another federal agency is not eligible for consideration as a SEP. More importantly, the IRS’ position ignores the fact that the SEP Policy states that the purpose of monetary penalties is to “deter noncompliance” and that the legislative history of I.R.C. § 162(f) states that payments made to ensure compliance are deductible. As to the second presumption, the clear statutory language of I.R.C. § 263A(a)(2) is not satisfied and this provision does not otherwise include or rely on a public policy based argument. As a result, the merits of the IRS’ current position are not well established, and no court has agreed with this position.

Precaution

Corporations that are engaging in SEPs or have engaged in SEPs should be aware that the IRS is likely to challenge the tax treatment of the SEP-related costs upon audit of the applicable tax returns. In either instance, corporations should consult with counsel to discuss the IRS position and any developments in the tax law.

Insurer Has Duty to Defend Claims Arising Under “Modified” Pollution Exclusion*

By Meline MacCurdy**

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In one of only a handful of cases interpreting a “modified” pollution exclusion under a standard form commercial general liability (CGL) insurance policy, the court in *Hussey Copper Ltd. v. Royal Insurance Co.*¹ held that the exclusion did not relieve an insurer from its duty to defend a case involving third-party property damages from releases of pollutants. The decision is based on Pennsylvania insurance law, but it may have significance in other states, because the modified pollution exclusion language at issue comes from

standard Insurance Services Office, Inc. (ISO) policy forms used nationally. The exclusion appeared in many policies issued in the early 2000s, but has rarely been interpreted by the courts. In fact, the *Hussey Copper* court stated that its decision was being issued “essentially in a vacuum”² of reported decisions.

Factual Background to *Hussey Copper*

The case grew out of two suits alleging property damage from lead-coated copper roofing panels that Hussey Copper Ltd. (Hussey Copper) supplied and used on the Kane County Judicial Center in Kane County, Illinois. As the roofing materials deteriorated, they released lead and copper that allegedly contaminated a nearby stormwater retention pond. The Kane County Public Building Commission (PBC) identified the contamination in 2003, and the Illinois Environmental Protection Agency required the

PBC to investigate and remediate the contamination. In the first suit, the PBC sought compensation for the repair and replacement of the roof, the property damage stemming from the contamination of the pond, and cleanup costs. In the second suit, the Kane County state's attorney sought remediation costs from Hussey Copper for violations of the Illinois Environmental Protection Act.

Hussey Copper sought coverage for the claimed damages from Royal Insurance Company of America (Royal) and Federal Insurance Company (Federal) under CGL policies issued by the two insurers. In addition to seeking indemnity coverage for those damages, Hussey Copper claimed that both insurers owed Hussey Copper a duty to defend.³

The insurance industry began in the mid-1980s to write an "absolute pollution exclusion" into standard-form CGL policies. Courts have consistently interpreted the absolute pollution exclusion to bar coverage for property damage arising from environmental contamination.

The insurance policies at issue in this case had three different provisions governing the coverage sought by Hussey Copper: (1) an absolute pollution exclusion, which applied to all of the Royal policies, but only until 2002 in the Federal policies; (2) "personal injury" provisions in the Royal policies; and (3) a "modified" pollution exclusion in the Federal policy issued for the two-year period between 2002 and 2004.⁴ Hussey Copper limited its claims for property damage coverage to the PBC's allegations of damages regarding the soil, groundwater, and pond.⁵ The two suits against Hussey Copper were consolidated, and both the insurers and Hussey Copper filed cross-motions for summary judgment regarding the effect of the pollution exclusions.

The Court's Decision

The court rejected Hussey Copper's argument that the policies provided coverage for "damages" caused by the insured's products after that product has been sold or put to use.⁶ It also rejected the insured's argument that tort claims such as nuisance and trespass fall into the "personal injury" coverage.⁷

However, the court sided with the insured in interpreting the modified pollution exclusion in the Federal policy. That language stated that coverage did "not apply to liability for damages, for property damage, that the insured would have in the absence of such request, demand, order or regulatory or statutory requirement, or such claim or proceeding by or on behalf of a governmental authority."⁸ The court acknowledged that "[v]ery little case law address[ed] this new provision, so the parties' briefing reache[d] it essentially in a vacuum."⁹

Relying on a recently-issued decision from a Massachusetts appellate court¹⁰ (the only cited authority interpreting this exception), the court held that, while the modified pollution exclusion barred all of Hussey Copper's claims relating to remediation or cleanup, claims for property

damages unrelated to the government-ordered cleanup were not excluded. The potential damages that fell outside of the exclusion were the PBC's claims regarding the damage to the pond, the impaired use of the pond, damage to streams on and off the PBC's property, and the fish kills that resulted from the contaminated pond.

Even while acknowledging that the state-ordered remediation would likely address many of the PBC's damages, the court also stated that the PBC alleged "pre-remediation impairment in its use of the Pond, as well as injuries that may not be remedied by the cleanup (e.g., the fish kills)"¹¹ that might be subject to coverage under the policy. As a result, the court found that Hussey Copper's claims "may potentially come within the coverage of the policy," and that, consequently, Federal had a duty to defend Hussey Copper against the PBC's claims under the 2002 to 2004 policy.¹² The court held that this obligation continues until the insurer shows that the claims are "confined to a recovery ... the policy does not cover."¹³

Conclusion

By finding that a duty to defend exists under the modified pollution exclusion, the *Hussey Copper* decision opens the door to possible coverage for defense costs under post-2002 policies using that clause. The view that an insurer's duty to defend under such policies exists unless and until the insurer can establish that the damages sought are really remediation or cleanup costs and not property damages has broad significance.

Notes

1. No. 07-758, 2008 WL 2906899 (W.D. Pa. July 29, 2008).
2. 2008 WL 2906899 at *6.
3. An insurer under a CGL policy has two overlapping but distinct duties under a CGL policy: a duty to indemnify, and a duty to defend. A duty to indemnify arises when a claim falls within the policy, and the insurer is obligated to cover that loss. A duty to defend, which flows from but is broader than a duty to indemnify, requires the insurer to defend against a "suit" against the insured. The scope of these duties and when they are triggered are frequently litigated issues in environmental law.
4. Briefing in the case by the insurers characterized the modified exclusion as "an exception to the absolute pollution exclusion" contained elsewhere in the policies. See Memorandum of Law in Support of Federal Insurance Company's Motion for Summary Judgment, 2008 WL 898673 (January 29, 2008) at *9.
5. *Hussey Copper*, 2008 WL 2906899 at *3-4.
6. *Hussey Copper*, 2008 WL 2906899 at *5.
7. *Hussey Copper*, 2008 WL 2906899 at *5-6.
8. *Hussey Copper*, 2008 WL 2906899 at *6 (emphasis added).
9. *Hussey Copper*, 2008 WL 2906899 at *6 (emphasis added).
10. *Clean Harbors Envtl. Servs., Inc. v. Boston Basement Techs., Inc.*, 2008 Mass. App. Div. 72, 2008 WL 534536 (Mass. App. Ct. Feb. 26, 2008).
11. *Hussey Copper*, 2008 WL 2906899 at *8.
12. *Hussey Copper*, 2008 WL 2906899 at *8.
13. *Hussey Copper*, 2008 WL 2906899 at *8 (quotation omitted).

REACH Update: Importer or Only Representative Options for (Pre-)Registration of Multinational Groups*

By Philip Bentley, Scott Megregian, Andrea Hamilton, and Raminta Dereskeviciute

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Registration Options for Non-EU Companies¹

At the core of the REACH Regulation is the requirement that all substances² imported into the European Union (EU)³ must first be registered with the European Chemicals Agency (ECHA). REACH, however, prescribes that only a company established in the EU can register. This requirement raises important compliance questions for multinational company groups with multiple non-EU entities importing substances into the EU—whether traders or manufacturers. In such cases, the EU-based group companies can register their substances, while the group companies based outside the EU cannot register their substances themselves.

A non-EU company in a multinational group must ensure the registration of its substances under REACH in order to continue marketing and selling those substances in the EU. Such a non-EU company has essentially three options to secure the registration of its substances:

- It could use an Only Representative to register the substances (typically a group company in the EU would be used, but an unrelated third party could also be contracted).
- It could rely on its customers in the EU to register the substances as importers.
- The group could utilize an EU-based company within the group to undertake the role of importer for the group.

In most cases, it is unlikely that customers will be willing to incur the time, effort and cost to register substances they import from non-EU manufacturers or traders. Moreover, obtaining customer commitments to register where a company markets and sells a range of substances to numerous customers in the EU would prove prohibitively impractical.

Appointing an EU company within the group as an Only Representative is a straightforward option for non-EU group companies involved in manufacturing. On the other hand, this option would appear unavailable for non-EU group companies involved only in trading or distribution activities. Even where this option is available, however, it would require that the EU company submit to ECHA one registration per substance for every non-EU manufacturer in the group. In addition to administrative burden, this would result in higher registration fees, as each substance

manufactured by each non-EU company would have to be registered separately by the Only Representative, and a filing fee would be payable for each registration (*i.e.*, aggregation of tonnages among all non-EU group companies is not possible).

In contrast, designating an EU company in a multinational group to act as an importer and assume the REACH registration obligations for all the non-EU subsidiaries—manufacturers or traders—could be a third available option. Indeed, this approach may be the only viable option for a group of trading companies that cannot use an Only Representative.

The choice of designating a group company as importer is straightforward where the EU-based company that is chosen to register for the group is included in the “chain of title” for the substances imported into the EU. Where the ownership of the substances passes directly from the non-EU subsidiary to its EU customer, however, the choice may be more complicated. In those cases, registering the EU company as an importer may at first raise a concern that the commercial relationship between the non-EU company and the EU customer must be disrupted to enable the EU entity to take over the role of importer under REACH. However, given the broad definition of an “importer” under REACH, in many cases it may be possible for group companies to designate an EU company as an importer without materially changing the business relationships within the supply chain.

An Importer for REACH Purposes Need Not Take Ownership of the Substances

Importer under REACH means any natural or legal person established within the EU that is responsible for import. REACH defines “import” as the physical introduction of goods (*i.e.*, substances) into the customs territory of the EU. These definitions do not include a requirement that the importer owns the substance. Instead, under the definitions in REACH, it appears possible for a multinational group to satisfy the group’s REACH registration obligations by appointing an EU-based group company to be the importer, so long as that company assumes the “responsibility for import.”

According to the Guidance for Registration, establishing the responsibility for import depends on many factors. These specifically include who orders the substances, who pays for the substances, who pays the customs duties and who deals with the customs formalities.⁴ Ownership of the goods appears to be only one of the optional criteria rather

than a legal prerequisite to demonstrate “responsibility for import.”

It can also be seen from other contexts within REACH that “ownership” of the substance is not the determining factor for establishing REACH registration obligations. For example, the “Only Representative” concept contemplates that the Only Representative is not obliged to own the substance in order to fulfill the REACH requirements. Moreover, the definition of a “manufacturer” under REACH is concerned with what entity is responsible for producing or extracting substances, not whether the entity owns the raw materials or finished goods and is simply purchasing a conversion or tolling service.⁵

Responsibilities of the Importer

Even though ownership of the goods does not appear to be a necessary requirement for an EU company to be an importer under REACH, REACH requires the importer to nevertheless take some responsibility with respect to the import of the substance. It is probably not enough for the EU-based company simply to declare itself to be the importer and comply with REACH registration requirements.

No bright line rule currently exists for establishing the level of responsibility required of an importer. Rather, each company group will need to evaluate its operations in order to determine what activities are sufficient to satisfy REACH obligations. There are variety of actions that could enable the EU-based group company to demonstrate the necessary “responsibility for import” required by REACH. Possible measures include: taking over the logistics of the import (*e.g.*, being the declarant of the customs declaration, directing the customs agent or arranging customs clearance); executing the bill of lading in the name of the EU-based company; having the EU-based company arrange insurance under a global policy for the substances as importer; charging a nominal service fee to the group companies for “importing services”; and documenting by written agreement among the entities of the group that the EU entity is the “importer for REACH purposes” and bears responsibility for registering the substances. In addition, it will be important for the EU-based group entity undertaking the importer role to affirmatively hold itself out as importer and ensure compliance with the communication and information/records maintenance requirements under REACH. Measures such as these would be useful in demonstrating that the EU group company has the “responsibility” for the import and would help the EU company substantiate that it is the importer if a customs authority raises questions.

Consistent with the Spirit of REACH

The approach of designating an EU-based group company as an importer to ensure REACH compliance for the non-EU members of the multinational group is

consistent with the underlying goals of REACH. REACH is fundamentally concerned with human health, safety and environmental protection. As such, REACH aims to ensure that responsibility is taken for the management of risks associated with substances. For this reason, in order to comply with REACH, specified information on substances manufactured in or imported into the EU must be collected or developed and information conveyed to those in the supply chain who need it. The central issue is not the ownership of the substances. Rather, the key to achieving the goals of REACH is confirming that someone involved in its manufacture or importation takes the responsibility for ensuring that information on safe use and handling as well as health or environmental risks is communicated through the supply chain so that proper precautions can be taken. If an EU-based group company of a multinational group affirmatively takes the responsibility for this, it should not ultimately matter whether that company is in the chain of title in order to achieve the aims of REACH.

Implications of Registering Through an EU-Based Company as an Importer

A company group may derive benefits from designating a member company to act as the importer for all of the non-EU group companies with only limited disadvantages as compared to other options identified above.

- *Ensuring control.* A non-EU company can exercise greater control, and will have greater flexibility, over the activities and REACH compliance efforts of the EU entity within its group that serves as the importer, than if it uses an independent Only Representative or relies on others to register.
- *Lower costs.* Importers will incur lower registration and administrative costs. An EU company serving as an importer can register on behalf of all of its non-EU companies and aggregate the tonnages of the substance that is being imported. Therefore, unlike the situation that arises with an Only Representative, only one registration fee per substance will have to be paid to ECHA. This is also likely to simplify internal administration and reduce costs as record keeping could be consolidated.
- *No need to change the commercial transaction.* In many cases, an EU-based company can take responsibility as an importer for meeting the REACH obligations without necessitating a change to the underlying transaction between the non-EU company and the EU customer. The imported substances would all reference the EU-based company’s registration numbers, and the EU company would declare itself as the importer of the substances, but should not need to take ownership. Note, however, that it may be advisable in some cases for the EU entity to charge its

non-EU group companies a services fee for importing services.

- *Option for non-EU traders.* This option may prove particularly attractive to trading groups or non-EU traders of groups involved both in trading and manufacturing. Non-EU traders cannot themselves register nor can they appoint an Only Representative. They could request that all of their customers register, but this has the difficulties described previously. They could seek to have their supplying manufacturer register, but in many cases this will be impossible or impractical because of difficulty in tracing origin or lack of cooperation by the manufacturer. Therefore, utilizing an EU-based group entity to act as importer may be the only viable way in order for many non-EU traders to comply with REACH and continue to trade in the EU.
- *Obligations for passing information.* As an importer, the EU-based company will be responsible for maintaining and updating copies of the Safety Data Sheets (including any other relevant health and safety information) and ensuring that they are passed on to the non-EU companies' customers. They will also need to maintain records of imports (volumes and customers). Thus, the EU entity will have to maintain a certain level of involvement with respect to the imports into the EU. The obligations of the importer will in practice be similar to those of an Only Representative.
- *Risks in the event of a structural change to the group.* The most significant risk with respect to this approach over the use of an Only Representative arises in the event of the disposition by the group of a non-EU entity. If the non-EU entity were to use an Only Representative, it is likely to have certain rights to the underlying registration, including the ability to transfer it. If the non-EU entity relies on an importer to register, then it would have no rights to the underlying registration for its substances. In the event of

a sale of a non-EU group company, this could leave the non-EU company in a position where it has no registration. It would then need to cease exporting to the EU until it could obtain access to the registration materials and establish its own registration through an Only Representative, importer or customer.

Conclusion

Multinational groups looking to establish an efficient strategy for complying with the REACH registration obligations should assess whether to designate an EU-based group company to act as importer instead of using an Only Representative. Indeed, appointing an EU-based group company to be the importer may be the only viable solution for trading groups that cannot use an Only Representative.

Notes

1. This article is for information purposes only and does not constitute legal advice. Companies should seek independent legal advice before relying on any of the ideas articulated in this article. Moreover, the analysis contained in this article is based on current guidance on the REACH Regulation. It cannot be excluded that the Authorities might clarify the requirements for importers under REACH so that a closer link would be required between the "importer" and the ownership of the substances.
2. "Substance" for purposes of this article includes substances on their own, in preparations or in articles.
3. Since REACH is deemed to apply in the whole European Economic Area (EEA), all references to the EU shall include all EEA Members—the 27 EU Member States, Iceland, Liechtenstein and Norway.
4. Point 1.5.3.3 on p. 21 of the Guidance on Registration (May 2008).
5. This view is also supported by EUROALLIAGES in "Q&A Guidance document on traders under REACH" (May 2008). REACH defines manufacturers as "any natural or legal persons established within the Community who manufacture a substance within the Community" (Article 3(9)). "Manufacturing" means production or extraction of substances in the natural state (Article 3(8)). Therefore, ownership is not a defining criteria.

The Impact Of The Exxon Valdez Decision On Future Maritime Cases*

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The U.S. Supreme Court's decision in *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008), unquestionably is

a major development in maritime law. But whether the court's ruling and the several concurring and dissenting opinions issued by the justices will have a significant impact on the law of punitive damages generally remains to be determined. The court, acting in its capacity as an admiralty court, ruled that, as a matter of maritime law, the ratio between compensatory and punitive damages may not exceed 1-to-1. The court did not decide, however, whether the same outer limit on punitive damages applies as a matter of due process mandated by the Constitution.

Supreme Court Decision

At the end of its 2007-2008 term the Supreme Court let stand the 9th U.S. Circuit Court of Appeals' ruling that Exxon was liable for punitive damages because of the 1989 oil spill of the Exxon Valdez tanker in Alaska's Prince William Sound. Writing for the court, Justice David Souter noted at the outset the court's 4-4 divide on whether Exxon was liable for punitive damages resulting from the 11-million-gallon oil spill that resulted when Captain Joseph Hazelwood left the bridge at a critical time in the tanker's voyage. Because Justice Samuel Alito recused himself, the court was left with eight justices to decide the case. The 9th Circuit previously had found Exxon liable for Hazelwood's actions. *In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001). Since the court split equally, the 9th Circuit's ruling remained intact.

Justice Souter then addressed the question Exxon raised for the first time on appeal concerning whether the Clean Water Act, 33 U.S.C.A. § 1251, preempted the jury's award of punitive damages. The appeals court rejected Exxon's position and held that the Clean Water Act contained no such preemption.

The final matter before the high court concerned the amount of punitive damages to award. The jury initially awarded \$5 billion. After several rulings back and forth between the District Court and 9th Circuit, the appeals court reduced the award to \$2.5 billion. Justice Souter said the high court would consider the assessment of punitive damages *ab initio* because the spill was a matter of common maritime law over which the court has original jurisdiction. He said the appropriate standard was expressed by Justice Oliver Wendell Holmes: would a "bad man" be deterred by the award? From this standard he concluded that the appropriate deterrent would be a 1-to-1 ratio of compensatory to punitive damages. Applying this admiralty law standard, the high court reduced the appeals court's punitive damages award to \$507.5 million. This triggered dissents from Justices John Paul Stevens, Ruth Bader Ginsburg, and Stephen Breyer, who suggested that Congress, not the court, should be making this decision.

A key unresolved issue is whether the high court's determination that punitive damages may not exceed compensatory damages will have any effect outside maritime law. Justice Souter's opinion clearly was based on the court's role as an admiralty court, which gives it supreme authority to establish maritime law. However, the ruling left open the question of whether the Constitution's due-process clause mandates a 1-to-1 ratio of compensatory to punitive damages. Justice Souter's inclusion of detailed research and analysis on punitive damages suggests that the limits due process allows should be no different from those permitted under maritime law. His opinion, however, does not expressly say so. Instead, the court's 1-to-1 ratio is grounded in maritime law.

Supreme Court's Role in Deciding Maritime Law

A key aspect of Justice Souter's opinion concerns the Supreme Court's role in deciding maritime law. He wrote:

Our review of punitive damages today, then, considers not their intersection with the Constitution but the desirability of regulating them as a common-law remedy for which responsibility lies with this court as a source of judge-made law in the absence of statute.

This statement and others in the opinion clearly indicate that the high court was acting as an admiralty court for which it has supreme authority under the Constitution.

Justice Stevens also recognized the high court's power under the Constitution to establish maritime law as shown by his opinion concurring in part and dissenting in part. Justice Stevens wrote:

While I do not question that the court possesses the power to craft the rule it announces today, in my judgment it errs in doing so.

Justice Stevens took the position that Congress, rather than the court, should determine whether there should be limitations on punitive damages in maritime cases. He cited *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), in which the court said:

An admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation.

Justice Ginsberg's opinion echoed this theme as she concurred in part and dissented in part:

The issue, therefore, is whether the court, though competent to act, should nevertheless leave the matter to Congress. The court has explained in its well-stated and comprehensive opinion, why it has taken the lead. While recognizing that the question is close, I share Justice Steven's view that Congress is the better equipped decision maker.

Despite the justices' disagreement on how best to deal with punitive damages, their recognition of the court's role as an admiralty court with ultimate authority on the Constitution's separation of powers scheme is most notable.

Congress Struggled With Liability Issues, Preemption in the Oil Pollution Act of 1990

The *Exxon Valdez* case was brought under common and state maritime laws. After the spill, Congress enacted comprehensive legislation to address the subject of liability for oil spills. Whether the court will defer to Congress or continue in its role as an admiralty court when a case is brought before it under the Oil Pollution Act of 1990, 33 U.S.C.A. § 2701, remains to be seen.

Specifically, the Exxon Valdez spill prompted Congress to pass the OPA. Oil spill legislation had been languishing in Congress for years before the spill crisis provided a catalyst for Congress to pass new legislation. One of the more contentious issues federal legislators faced was whether and/or how to preempt state law on liability. Section 1018 of the OPA preserves state authority, stating that nothing shall "affect or be construed or interpreted as preempting" state laws. 33 U.S.C.A. § 2718. The OPA sets forth a list of recoverable damages, including removal costs; damage to natural resources and real or personal property; loss of subsistence use of natural resources; loss of government revenues, lost profits and earning capacity; and costs of increased or additional public services occasioned by the unlawful act. *See* 33 U.S.C.A. § 2702(b).

Although the Supreme Court since has addressed the issue of preemption for vessel design and construction, it has yet to rule on the preemption of punitive damages. In *United States v. Locke*, 529 U.S. 89 (2000), the high court ruled that Congress did intend to preempt certain vessel and manning requirements such as those enacted by Washington State.

The circuit courts have begun to address preemption of punitive damages. For example, the 1st Circuit has ruled that punitive damages are not available under the OPA, however, it seems clear that Congress did not intend to bar the imposition of additional liability by the states. *S. Port Marine v. Gulf Oil P'ship*, 234 F.3d 58 (1st Cir. 2000).

State Laws on Punitive Damages May Survive the OPA

Some states have passed legislation allowing or allowing as a matter of common law, punitive damages for oil spills in state waters. California, Alabama, and Ohio statutes contain provisions allowing for recovery of punitive damages in cases involving water pollution. California's Fish and Game

Code allows punitive damages for criminal or administrative civil violations of its oil- and petroleum-discharge provisions. Cal. Fish & Game Code § 13011(a). Alabama allows punitive damages to be assessed "in a case where pollution resulted from willful or wanton conduct on the part of the defendant." Ala. Code § 22-22-9(m). Ohio law allows punitive damages "for injury, death or loss to person or property or for relief in the form of the abatement of a nuisance, civil penalties, cleanup costs, cost recovery, an injunction or temporary restraining order, or restitution that arises, in whole or in part, from contamination or pollution of the environment or a threat of contamination or pollution of the environment, including contamination or pollution or a threat of contamination or pollution from hazardous or toxic substances." Ohio Rev. Code Ann. § 2307.72(D)(1).

Whether these three state laws signal a trend or will survive a future OPA preemption challenge remains to be seen. These cases may prompt the court to review its holding on the proper amount of punitive damages in a maritime case where a state legislature has addressed the matter.

Derivative Liability Unresolved

The court was split on the question of attributing liability for punitive damages to Exxon for Hazelwood's negligent acts. The 9th Circuit had decided that Exxon was liable and, as a result, its decision remains the law in that circuit.

However, other circuits have ruled that an employer is not liable for the acts of its employee. *In re P&E Boat Rentals*, 872 F.2d 642 (5th Cir. 1989) ("We hold simply that punitive damages may not be imposed against a corporation when one or more of its employees decides on his own to engage in malicious or outrageous conduct."); *U.S. Steel Corp. v. Furhman*, 407 F.2d 1143 (6th Cir. 1969) ("We think the better rule is that punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can be shown that the owner authorized or ratified the acts of the master either before or after the accident.").

This matter too is left to be addressed later by a full court.

Conclusion

It remains to be seen how the court will apply Justice Souter's analysis of punitive damages when the issue returns to the court as a matter of constitutional due process or pursuant to a case brought under the OPA. Of key interest will be if the court continues to assert its role as an admiralty court in these cases. Until then, the lower courts have been left to predict as best they can how the court ultimately will resolve the issue.

Federal Legislation Calls for Increased Nanotechnology Health Research*

By Orlyn O. (Skip) Lockard, III and Meaghan G. Boyd**

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As federal legislation calls for intensified research into nanotechnology’s potential health risks and federal agencies continue developing strategies for studying nanotechnology’s health and environmental impacts, government interest in nanotechnology’s potential risks clearly continues to rise. Yet despite this growing federal concern, activist groups claim that the government is moving too slowly to regulate what they describe as “the next asbestos.”

Federal Legislative Developments and Research Plans

On June 5, 2008, the U.S. House of Representatives approved the National Nanotechnology Initiative Amendments Act of 2008 (H.R. 5940) by an overwhelming 407 to 6 margin. On July 16, 2008, John Kerry and others introduced the same act in the United States Senate. If enacted, the legislation will reauthorize and expand the multi-agency federal nanotechnology research and development program originally authorized in 2003. Importantly, the Act will increase federal research in several key areas of interest to toxic tort practitioners, including nanotechnology’s environmental, health and safety implications.

Legislative efforts to expand nanotechnology health research via the Act continue a trend of increasing federal interest in nanotechnology risks. The Agency for Toxic Substances and Disease Registry (ATSDR), for example, is considering the development of a full toxicological profile for “nanomaterials.” Although the specific “nanomaterials” that ATSDR might include in a toxicological profile remains unclear, plaintiffs’ attorneys could rely on the results for years to come.

Similarly, the National Institute for Occupational Safety and Health (NIOSH) is implementing a strategic plan for investigating potential nanotechnology health risks. NIOSH’s latest iteration of the plan features an aggressive research agenda, including multi-year investigations of (1) nanomaterial dispersion in the workplace; (2) possible worker exposure routes; (3) nanoparticles toxicities and particular health effects within the human body, including carcinogenicity assessments; (4) development of toxicity models for use in human risk assessments and (5) the feasi-

bility of industry-wide epidemiologic studies of employees exposed to nanomaterials. Like ATSDR’s anticipated “nanomaterial” toxicological profile, the information and data generated by NIOSH research activities over the next few years will likely be of substantial interest to toxic tort and environmental law attorneys.

Activist Groups Rally Support for Immediate Regulation of Nanomaterials

Amidst these intensifying efforts to study and research the effects of nanotechnology on human health and the environment, the International Center for Technology Assessment (ICTA) has threatened to “take all legal and regulatory actions necessary to force our federal agencies to prevent this potential asbestos-like nightmare.”¹ In early May 2008, ICTA filed a petition demanding that the Environmental Protection Agency (EPA) use its pesticide regulation authority under the Federal Insecticide Fungicide and Rodenticide Act (FIFRA) to stop the sale of over 200 consumer products containing nanoparticle silver (nano-silver), including household appliances and cleaners, clothing, children’s toys and personal care products.²

In May 2006, ICTA filed a similar petition demanding that the Food and Drug Administration (FDA) issue a formal opinion on nanoparticle safety, amend current FDA regulations to encompass nanotechnology and enact comprehensive nano-product regulations.³ The 2006 petition also demanded an FDA recall of all sunscreens containing nanomaterials until premarket testing demonstrates that they are safe for human use. Such a recall would require FDA to retreat (at least temporarily) from its presumption that sunscreens containing nanomaterials are as safe for human use as other kinds of sunscreens.

Both EPA and FDA are members of the National Nanotechnology Initiative, the federal research and development program established to coordinate the multi-agency efforts in nanoscale science, engineering and technology, which will likely be reauthorized by the National Nanotechnology Initiative Amendments Act of 2008.

The escalating federal focus on nanomaterials’ health and environmental effects shows that questions about the safe development and use of nanomaterials are unlikely to wane in the near future. To the contrary, calls for extensive research, activist petitions for federal regulation and media discussion of nanotechnology’s potential risks are sure to follow. Companies manufacturing or using nanomaterials will be well-served by staying on top of emerging nanotechnology research and public perception issues. By doing so,

in consultation with experienced counsel, businesses may be able to soften the sting of—or avoid altogether—future complaints by pioneering plaintiffs’ attorneys looking for the “next” asbestos.

Notes

1. <http://productliability.law360.com/Secure/printview.aspx?id=>

56867.

2. *The International Center for Technology Assessment v. Johnson, Administrator*, available at <http://www.icta.org/global/actions.cfm?page=15&type=364&topic=8>.
3. <http://www.icta.org/global/actions.cfm?page=15&type=364&topic=8>.

CERCLA and RCRA

Seller of Property with Asbestos Insulation on Heating System Not in Use Was Not Liable under CERCLA or RCRA

In *Sycamore Industrial Park Associates, v. Ericsson*, — F.3d —, 2008 WL 4613874 (7th Cir. Oct. 20, 2008), the court of appeals affirmed the district court’s decision and held that the sale of real estate with asbestos insulation on an abandoned heating system in the buildings was not the disposal of a hazardous substance by a responsible party under CERCLA; nor was it handling, storage, treatment, transportation, or disposal of hazardous waste under RCRA. The court set out the basic facts of the case as follows.

In 1985, plaintiff Sycamore Industrial Park Associates bought an industrial property with fixtures, including a boiler-based steam heating system, from defendant Ericsson, Inc. Before it sold the property, Ericsson installed a new natural gas heating system, but it left the old heating system in place. Several years after purchasing the property, Sycamore discovered that the boilers, pipes, and various pipe joints that make up the old system were insulated with asbestos-containing material. Sycamore sued to force Ericsson to remove and dispose of the abandoned asbestos insulation and reimburse Sycamore for alleged response costs it has incurred or will incur in removing the asbestos insulation. This action arises under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9607, and under the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6972. The district court granted Ericsson’s motion for summary judgment, and Sycamore appealed.

Ericsson, 2008 WL 4613874 at *1.

The court began with the CERCLA claim, stating that for CERCLA liability (1) the site at issue must be a “facility” under CERCLA; (2) the defendant must be a responsible party; (3) there must be a release or a threatened release of hazardous substances; and (4) the plaintiff must have incurred costs in response. Only the second and third prongs were in dispute in this case.

CERCLA states that a prior owner of a facility is a responsible party if it controlled the site “at the

time of disposal” of a hazardous substance. 42 U.S.C. § 9607(a)(2). We have held in the past that asbestos is a hazardous substance within the meaning of CERCLA. *G.J. Leasing Co. v. Union Elect. Co.*, 54 F.3d 379, 384 (7th Cir. 1995). Therefore, for Ericsson to be a responsible party, Sycamore only needs to show that a disposal took place before Ericsson relinquished control of the site. CERCLA adopts the definition of “disposal” from the Solid Waste Disposal Act, which defines “disposal” as:

[D]ischarge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 9601(29); 42 U.S.C. § 6903(3).

Ericsson, 2008 WL 4613874 at *3.

Sycamore asserted that by selling the real estate with the abandoned heating system that containing asbestos, Ericsson was disposing of the asbestos and so was liable under CERCLA. The appellate court disagreed, citing *G.J. Leasing v. Union Electric Company*, 54 F.3d 379 (7th Cir. 1995) and *3550 Stevens Creek Associates v. Barclays Bank of California*, 915 F.2d 1355 (9th Cir. 1990). In those cases the courts found that merely selling property containing a hazardous substance is not disposal for CERCLA purposes. The court stated the following.

Our decision in *G.J. Leasing* emphasized that the only exposure to asbestos was inside the building; there was no apparent danger to air, land, or water outside of the building as required for “disposal.” *Id.* at 383. We acknowledged that if the primary purpose and likely effect of the sale was to remove the asbestos in circumstances that would make the release of asbestos to the outside environment inevitable, the transferor could be held liable under CERCLA. But without such intent and likely effect, we concluded that asbestos abandoned in place in a structure did not lead to CERCLA liability. *Id.* at 385.

The Ninth Circuit reached the same conclusion in *Stevens Creek*, 915 F.2d 1355. Our sister Circuit

determined there was no private cause of action under CERCLA for the sale of a building containing materials with asbestos because the defendant never “disposed” of a hazardous substance. It reasoned that asbestos built into a building could not enter the environment or be emitted into the air, as required by the definition of “disposal.” Even if the asbestos broke off, asbestos fibers would remain in the building. *Stevens Creek*, 915 F.2d at 1361.

G.J. Leasing and *Stevens Creek* are on point here. All asbestos insulation at the Sycamore facility is either inside a building or enclosed in a pipe chase or metal case. [Footnote omitted.] There is no real threat that asbestos “or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground water,” as CERCLA requires in § 9601(29). ...For CERCLA liability, the defendant must be a “responsible party,” defined as a party that controlled the site “at the time of disposal” of a hazardous substance. 42 U.S.C. § 9607(a)(2). Without a disposal, Ericsson is not a responsible party.

Ericsson, 2008 WL 4613874 at *4.

The court when on to say that even if it found that Ericsson was a responsible party, there had been no release or threatened release of hazardous substances into the environment.

CERCLA defines a “release” as “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.” 42 U.S.C. § 9601(22). The term “environment” includes any “surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States.” 42 U.S.C. § 9601(8).

The asbestos at the Sycamore facility is contained inside the buildings of the facility or, in the instances when insulated piping runs between buildings, is enclosed in a piping chase or in a metal case. Sycamore has not presented evidence—such as evidence of soil, water or air contamination—showing that the asbestos insulation has been placed “into or on any land or water” or emitted into the air as the applicable definition of “disposal” requires. We have stated that “the release of asbestos inside a building, with no leak outside, ... is not governed by CERCLA.” *G.J. Leasing*, 54 F.3d at 385; *see also Covalt v. Carey Canada, Inc.*, 860 F.2d 1434, 1439 (7th Cir. 1988) (“the interior of a place of employment is not the environment for purposes of CERCLA”). The Ninth Circuit in *Stevens Creek* similarly suggested that when any resulting hazard from emission of asbestos fibers into the air would be confined to the interior of the building, there is no release or threat of release, and CERCLA does not apply. *Stevens Creek*, 915 F.2d

at 1359-60. We reaffirm that *when there is no emission into the outside environment, but rather any hazard resulting from emission of asbestos fibers would be confined inside a building, there is no release or threatened release, and thus there can be no liability under CERCLA*. Even viewing all facts in the light most favorable to Sycamore, Ericsson’s abandonment of the asbestos-laden insulation in place at the Sycamore site does not make it liable under CERCLA. [Emphasis added by editor.]

Ericsson, 2008 WL 4613874 at *5.

The court then dealt with the RCRA claim, stating that

The RCRA citizen suit provision states, in relevant part, “any person may commence a civil action ... against any person, ... who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.” 42 U.S.C. § 6972(a)(1)(B).

To establish RCRA liability, Sycamore must show that Ericsson “handled, stored, treated, transported, or disposed of” solid or hazardous waste. Sycamore first argues that Ericsson “disposed” of the boiler-based heating system when it abandoned the system in place. The definition of “disposal” is the same under RCRA and CERCLA, Because the definition of “disposal” is the same, our reasoning that established that there was no disposal under CERCLA applies to a RCRA analysis as well. Sale of a facility with an abandoned asbestos-containing boiler system does not meet the statutory definition of “disposal.”

Sycamore argues in the alternative that even if Ericsson did not dispose of the asbestos insulation, Ericsson is nonetheless liable because it handled and stored the asbestos insulation. Yet Sycamore presents no evidence that Ericsson handled, stored, or even touched any part of the heating system. In fact, there is no evidence that Ericsson did anything to the asbestos-containing boiler system or its insulation prior to or after closing the sale with Sycamore. A plain reading of the “has contributed or is contributing” language of § 6972(a)(1)(B) compels us to find that RCRA requires active involvement in handling or storing of materials for liability. ... The vast majority of courts that have considered this issue read RCRA to require affirmative action rather than merely passive conduct—such as leaving a heating system in place when selling the real estate that houses it—for handling or storage liability. *See ABB Industrial Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351, 359 (2d Cir. 1997); *Interfaith Cmty. Org. v. Honeywell Int’l*, 263 F. Supp. 2d 796, 844-46 (D.N.J. 2003); *Delaney v. Town of Carmel*, 55 F. Supp. 2d 237, 255-57 (S.D.N.Y. 1999); *Marriott Corp. v. Simkins Indus., Inc.*, 929 F. Supp.

396, 398 n. 2 (S.D.Fla. 1996). Thus, as a matter of law, by leaving equipment that is insulated by asbestos in place and then selling the Sycamore property, Ericsson did not handle, store, treat, transport, or dispose of the asbestos as required for RCRA liability.

Ericsson, 2008 WL 4613874 at *6.

Thus, the Seventh Circuit affirmed the district court's summary judgment in favor of Ericsson.

EPA Can Recover Cleanup Costs for Non-Hazardous Substances

Note: The following case discussion was published previously in the October 15, 2008, Andrews Environmental Litigation Reporter, 29 No. 6 Andrews Env'tl. Litig. Rep. 2. Copyright © 2008 Thomson Reuters/West.

The Environmental Protection Agency can recover its costs for cleaning up non-hazardous substances at a contaminated site under the Superfund law, a federal judge in New Jersey has found. *United States v. Sensient Colors Inc.*, No. 07-1275, 2008 WL 4427961 (D.N.J. Aug. 12, 2008). U.S. District Judge Joseph Rodriguez of the District of New Jersey rejected Sensient Colors Inc.'s argument that the National Oil and Hazardous Substances Pollution Contingency Plan prohibits cost recovery for non-hazardous substances.

The plan, commonly called the National Contingency Plan (NCP), is the blueprint for the federal government's Superfund cleanups. According to court documents, Sensient operated a facility that manufactured inorganic and organic pigments and dyes on a site in Camden, New Jersey, from 1922 to 1988. In a complaint filed in March 2007, under Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A. § 9601, the federal government charged that it discovered thousands of tanks, vats, drums, and other containers filled with hazardous materials such as benzene, xylene and mercury. The soil around the drums also was contaminated. The EPA said it incurred more than \$16 million in response costs cleaning up the site, including removing about 125,000 tons of contaminated soil.

In an answer to the EPA's complaint, Sensient denied liability and asserted a variety of affirmative defenses. It argued, among other things, that it could not be held liable for the EPA's cleanup costs associated with non-hazardous materials because the National Contingency Plan only allows for cleanup of hazardous substances. Section 107 of CERCLA requires a liable defendant to pay all costs of removal or cleanup incurred by the federal government "not inconsistent with" the NCP. Judge Rodriguez rejected Sensient's argument, citing *United States v. Glidden Co.*, 3 F. Supp. 2d 823 (N.D. Ohio 1997). In *Glidden*, the defendant argued that it was not liable for the EPA's response costs because the costs were inconsistent with the NCP.

Some of those costs were incurred in removing empty drums and an underground storage tank, neither of which

contained hazardous waste, the defendant said. Therefore, it argued, they posed no threat to the public and the environment. The *Glidden* court determined that the NCP did not mention, much less prohibit, the removal of non-hazardous materials from a site. Judge Rodriguez agreed that nothing in the plan suggests that the EPA may not remove non-hazardous materials from a site during a response action.

Superfund Law Bars RCRA Suit

Note: The following case discussion was published previously in the October 29, 2008, Andrews Environmental Litigation Reporter, 29 No. 7 Andrews Env'tl. Litig. Rep. 3. Copyright © 2008 Thomson Reuters/West.

In a case of first impression, an Illinois federal judge has ruled that a Resource Conservation and Recovery Act (RCRA) citizen lawsuit can be barred under the law's prohibition to challenges to ongoing cleanups administered by the Environmental Protection Agency. *River Village West LLC v. Peoples Gas Light & Coke Co.*, No. 05-2103, 2008 WL 4411557 (N.D. Ill. Sept. 25, 2008). Judge Wayne Andersen of the U.S. District Court for the Northern District of Illinois dismissed a developer's lawsuits against the former operator of eight manufactured-gas plants even though they were filed before the EPA reached an agreement with the operator to clean up the sites.

River Village West LLC filed three citizen suits under the RCRA, 42 U.S.C.A. § 321, against Peoples Gas Light & Coke Co., seeking injunctive relief. The complaints, consolidated in the Northern District of Illinois, contended that the former operator's waste constituted an "imminent and substantial endangerment" to the public health or the environment. After the suits were filed, Peoples Gas entered into an administrative order with the EPA in June 2007, agreeing to implement cleanup actions at 11 former manufactured-gas plants, including the eight at issue in this case. Peoples Gas moved for judgment on the pleadings, arguing that Section 113 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9601, bars any legal challenge to a removal or remedial action selected by the EPA. The company contended that the suits brought under RCRA constituted such a challenge.

River Village West countered that the CERCLA provision only bars citizen suits filed after an administrative agreement has been entered. Judge Andersen granted Peoples Gas' motion. The judge said Section 113 does not reference any timing issues and addresses in general terms federal courts' inability to hear challenges to removal or remedial actions. CERCLA's review bar precludes any challenge to a removal or remedial action, Judge Andersen said.

Under RCRA, the only circumstances under which a citizen suit can be maintained are those cases in which the government has not taken action, he added. Congress intended in enacting restrictions to prevent a multitude of litigation that would stall government action, Judge Andersen held, dismissing River Village West's lawsuit.

Enforcement

CITGO to Pay Record \$13 Million Fine for Clean Water Act Violations

Note: The following case discussion was published previously in the October 29, 2008, Andrews Environmental Litigation Reporter, 29 No. 7 Andrews Env'tl. Litig. Rep. 9. Copyright © 2008 Thomson Reuters/West.

Citgo Petroleum Corp. has agreed to pay a \$13 million fine after pleading guilty to negligently discharging pollutants from its Louisiana refinery into two rivers in violation of the Clean Water Act. *United States v. Citgo Petroleum Corp.*, No. 08-00077, *guilty plea entered* (W.D. La. Sept. 17, 2008). The \$13 million fine was the largest ever for a criminal misdemeanor violation of the Clean Water Act, 33 U.S.C.A. § 1311, according to a statement by the Environmental Protection Agency.

Citgo admitted in the U.S. District Court for the Western District of Louisiana that it failed to maintain storm water tanks and storage capacity at its refinery in Sulphur. The EPA says the company's actions allowed 53,000 barrels of oil to spill into the Indian Marais and the Calcasieu River following heavy rainstorms in June 2006. Along with the fine, the company will implement an environmental compliance plan to prevent similar spills, the EPA said. The company also will install more effective oil removal equipment for the storm water tanks. "Companies cannot make economic choices that sacrifice the environment," Assistant U.S. Attorney General Ronald Tenpas said in a statement. "Sound business decisions must factor in the safeguard of the environment, or companies will face consequences that in the long run are more detrimental to their bottom line," he added.

According to the EPA, Citgo converted a lagoon wastewater system into a tank system in 1994. To save money, the company only constructed two tanks, the agency said. However, it said, as early as 1998 outside contractors and employees warned Citgo that an additional tank was necessary. The company did not approve construction of a third tank until 2005, and only two tanks were operating at the time of the spill, the EPA said. Citgo also failed to remove oil, sludge, and solids from the tanks and failed to repair the skimming equipment, the agency said.

Arizona Developers to Pay \$1.25 Million Fine in Clean Water Act Case

Note: The following case discussion was published previously in the October 29, 2008, Andrews Environmental Litigation Reporter, 29 No. 7 Andrews Env'tl. Litig. Rep. 11. Copyright © 2008 Thomson Reuters/West.

A land developer and a contractor will pay \$1.25 million in fines for bulldozing, filling and diverting a five-mile stretch of the Santa Cruz River without a Clean Water Act permit. *United States v. Johnson et al.*, No. 05-03579, *consent decree filed* (D. Ariz. Oct. 7, 2008). The consent decree was filed in the U.S. District Court for the District of Arizona. The settling defendants are developer George H. Johnson, his companies Johnson International Inc. and General Hunt Properties Inc., and the land clearing firm 3-F Contracting Inc.

According to a statement by the Justice Department, the \$1.25 million fine is one of the largest imposed by the Environmental Protection Agency under Section 404 of the Clean Water Act, 33 U.S.C.A. § 1311. Section 404 prohibits filling and diverting federally protected waterways without a permit.

The alleged violations occurred in 2003 and 2004, when the defendants bulldozed 2,000 acres of the historic King Ranch and La Osa Ranch in Pinal County, Arizona. The bulldozed areas were within the largest active floodplain of the lower Santa Cruz River, the Justice Department said. Before the land-clearing activities, the affected stretch of the Santa Cruz River supported a wide variety of vegetation, including one of the few extensive mesquite forests remaining in Arizona's Sonoran Desert region, the agency said. "The Santa Cruz River is a gem in Arizona's crown, as it flows from Arizona to Mexico [and] back into Arizona, sustaining life, habitat for animals and plants, and providing so many benefits for residents of southern Arizona," Alexis Strauss, director of the EPA's Water Division for the Pacific Southwest region, said in a statement.

The charges were filed after citizens, American Indian tribes, and others complained about the serious flooding dangers and ecological effects brought on by the defendants' bulldozing.

