



**State and Regional Environmental  
Cooperation Committee Newsletter  
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**Kirstin M. Etela, Editor  
Robinson & Cole, LLP  
Stamford, Connecticut**

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This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association, 321 N. Clark St., Chicago, IL 60610.



- During remediation activities, do states generally follow U.S. Environmental Protection Agency policies regarding activities in “areas of contamination,” with respect to when contaminated media are considered listed hazardous wastes, and on disposal of “conditionally exempt, small quantity generator” wastes in municipal solid waste landfills?
- What are the emerging kinds of “special” solid wastes of concern to states, and how are they responding to these concerns?

The survey was a joint project of two committees of the ABA Section of Environment, Energy and Resources—the Waste Management Committee, chaired by Steve Mossman, and the State and Regional Environmental Cooperation Committee, chaired by Michelle Diffenderfer. The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) cooperated by providing the list of solid waste program officials who were invited to participate.

Twenty-three states responded: Alabama, Alaska, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Mississippi, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming.

For those considering a similar survey in the future, consider that February is the time of year when state legislatures typically meet, and thus is a busy time of year for state solid waste policy professionals. In any case, the twenty-three responses received were informative.

**EPA Policies: AOCs, Contained-in Determinations, and CESQG Wastes**

EPA’s policies regarding management of remediation wastes are summarized in *Management of Remediation Waste Under RCRA* (October 1998).

This document by its terms applies to management of solid wastes that could be considered hazardous

wastes (i.e., subject to regulation under RCRA Subtitle C). Under EPA's Area of Contamination (AOC) policy, for example, "consolidation and *in situ* treatment of hazardous waste within the AOC do not create a new point of hazardous waste generation for purposes of RCRA." This means that hazardous wastes may be moved around within a contiguous area that is already contaminated without the need for a RCRA Treatment, Storage, and Disposal (TSD) permit.

The first four survey questions appear in bold font in the sections below.

### **1. Does your state follow EPA's AOC policy with respect to Subtitle C hazardous wastes?**

Twenty states answered "yes;" Alabama answered "no," and Colorado and Ohio did not answer the question.

Virginia qualified its answer—the site has to be under a Department of Environmental Quality program that constitutes active remediation. At a minimum, this means that the site is entered into the Voluntary Remediation Program. The respondent added, "we recommend caution if general application is tried due to the language of the policy."

### **2. Does your state follow a similar policy (allowing contaminated soils, for example, to be consolidated within a contiguous area of contamination) with respect to non-hazardous solid wastes?**

Only seventeen states responded "yes;" Alabama and Illinois answered "no," and Indiana, Kansas, North Carolina, and Ohio did not answer the question.

In its comments, Illinois noted that such a policy is not needed because in that state, non-hazardous waste management on the site where it was generated is exempt from solid waste permit requirements. Virginia provided the same clarification it gave for hazardous waste AOCs—the site has to be under some active remediation authority. Utah provided a similar caveat.

## **Contained-in Determinations**

The *Management of Remediation Wastes Under RCRA* also provides that "Where a facility owner/operator makes a good faith effort to determine if a material is a listed hazardous waste but cannot make such a determination because documentation regarding a source of contamination, contaminant, or waste is unavailable or inconclusive, EPA has stated that one may assume the source, contaminant or waste is not listed hazardous waste and, therefore, provided the material in question does not exhibit a characteristic of hazardous waste, RCRA requirements do not apply."

### **3. Does your state follow EPA's policy concerning determinations of when contamination is caused by listed hazardous wastes?**

Twenty states said "yes." Iowa said "no," and Idaho and Ohio did not answer the question.

Illinois added that those who want to use this policy "must document that the waste is not from a listed source." New Hampshire has a similar requirement that a due diligence report be approved regarding the determination.

West Virginia noted that the state might disagree with a waste generator's determination. Iowa explains that hazardous waste from businesses may not be landfilled in Iowa. However, Iowa also notes that it does not have hazardous waste regulations and, thus, follows EPA's hazardous waste rules.

## **CESQG Wastes**

Under RCRA Subtitle C (40 C.F.R. 261.5), those who generate less than 100 kg per month of non-acutely hazardous wastes (CESQG) may dispose of such wastes in municipal solid waste landfills that meet Subtitle D (40 C.F.R. 258) criteria.

### **4. Does your state follow EPA's regulation regarding disposal of CESQG wastes in municipal solid waste landfills?**

Only fourteen states answered "yes." Illinois, Nevada, New Hampshire, North Carolina, Oklahoma, and

Utah answered “no.” Three states (Colorado, Ohio, and West Virginia) did not answer.

Kansas considers those who generate less than 25 kg per month (not 100) to be CESQG.

Tennessee and Virginia require written approval before CESQG waste can be accepted, and Virginia also requires that the landfill permit specifically include acceptance of CESQG wastes.

Colorado notes that theirs is a dual-authority program, and that local governing bodies may preclude disposal of certain waste streams (including CESQG wastes) at their discretion.

New York requires CESQG wastes to be delivered to the facility separately.

## **Special Wastes of Concern, and State Responses**

We asked survey respondents to consider a list of some twenty-eight different special wastes (Figure 1), ranging alphabetically from antifreeze to used oil, and we provided space for “other” special wastes of concern to be noted.

For each, we asked that the waste be ranked for the degree of concern it presented to the state, with choices for low (1 point), moderate (2 points) or high (3 points) concern. We then asked if the state had any specific guidance or regulations to address the special waste at issue.

Near the top of the list in terms of degree of environmental concern are mercury devices, asbestos, and ash from burning municipal solid waste.

EPA and a number of state agencies have increased efforts to control mercury emissions, and these efforts are evident in the survey. Fluorescent light bulbs, number 4 on the list in terms of concern, also contain mercury.

Rounding out the top ten wastes of concern are ash from burning medical waste, petroleum contaminated

soils, tires, lead paint, sewage sludge, and other contaminated soils.

With all of the concern reported in the media regarding electronic wastes, it is interesting that none appear in the top ten. Cathode ray tubes, batteries, personal computers, light ballasts, and wire insulation appear relatively far down the list.

Two states mentioned wallboard (gypsum drywall) as being of concern, presumably because when wallboard is disposed under some conditions it can produce significant amounts of hydrogen sulfide gas. Other special wastes that were added by respondents included phosphogypsum wastes, medical research wastes, mercury switches, pesticides, pharmaceuticals, aluminum dross, treated wood, industrial solid waste, animal carcasses, and paint containing polychlorinated biphenyls.

Some of the special wastes added by survey respondents are the result of concerns of the moment. Animal carcasses were mentioned in the context of preparing for a possible pandemic, and many government agencies have given this general subject much thought. Ohio mentioned aluminum dross, perhaps as a result of a highly-publicized problem involving elevated temperatures at an Ohio landfill that received such materials.

It is important to note that this survey asked broad questions, and that just because a special waste is of relatively low concern does not mean that regulations do not apply. As noted in the response from Tennessee, the agency “considers all waste areas to be of concern or we would not bother with them in the first place.”

A surprising number of states have published guidance or regulations or both to deal with essentially all the special wastes included in the survey. Space precludes covering every regulation and published guidance document here; however, a complete copy of the survey results is available on request.

For mercury devices and switches, Iowa requires appliance de-manufacturers to have a permit. The

<b>Type of Waste</b>		<b>Composite Degree of Concern</b>
1	Mercury Devices	2.50
2	Asbestos	2.47
3	MSW Ash	2.47
4	Fluorescent Bulbs	2.22
5	Medical Waste Ash	2.21
6	Petroleum-contaminated soil	2.20
7	Tires	2.11
8	Lead Paint	2.10
9	Sewage Sludge	2.05
10	Non-Petroleum Contaminated Soils	2.05
11	Cathode Ray Tubes	2.00
12	Used Oil	2.00
13	Coal Combustion Waste	1.94
14	Shredder Residue (e.g., Auto Fluff)	1.94
15	Lead-Acid Batteries	1.89
16	Manure	1.89
17	Personal Computers	1.84
18	Light Ballasts Containing PCBs	1.78
19	Nickel-Cadmium Batteries	1.74
20	Oil-Water Separator Sludge	1.61
21	Industrial Slags	1.61
22	Oil-based Paint	1.61
23	Foundry Sand	1.59
24	Spent Grit Blast Abrasive	1.56
25	Antifreeze	1.53
26	Grease	1.50
27	Wire Insulation	1.28
28	Latex Paint	1.20

Figure 1.

state's mercury-free recycling act requires that mercury switches be removed and recycled before shredding. Salvage yards can collect a \$5 bounty on mercury switches in vehicles. Many other states have similar programs often coordinated through the End of Vehicle Life Solutions Corporation ([www.elvsolutions.org](http://www.elvsolutions.org)), which was formed by the automotive industry to address problems presented by recycling old automobiles.

Management of asbestos wastes has been regulated for many years at the federal level (e.g., 40 C.F.R. 61.154). Most states either follow the federal rules or have similar requirements. Colorado mentioned in their responses that they have published an Asbestos-Contaminated Soil Guidance Document (Draft) to address management of sites where asbestos has mixed with soil. The guidance also discusses naturally-occurring or ambient asbestos (see [www.cdphs.state.co.us/hm/asbestosinsoil.pdf](http://www.cdphs.state.co.us/hm/asbestosinsoil.pdf)).

## Conclusions

The several states retain their sovereignty in the federation known as the United States. Within broad constraints, each state is free to regulate waste management as it sees fit. In some cases, settled policies at the national level do not translate well to the needs of specific states, so they do not follow policies adopted by U.S. EPA.

Creative regulations and guidance apply to particular special wastes in a number of states. Surveys such as that reported here can serve to help stakeholders identify alternative approaches used in other jurisdictions that could be better for a particular special waste problem.

Copies of the survey are available from the author on request.

**Mike McLaughlin** *is a senior vice president of SCS Engineers in the firm's Reston, Virginia office. He is a vice chair of the Waste Management Committee and the State and Regional Environmental Cooperation Committee.*

**Wilson Buntin** *of the General Counsel's office of the Tennessee Department of Environment and Conservation, and* **Ralph Bohn**, *who manages the solid waste program for the Utah Department of Environmental Quality, both provided invaluable assistance in the preparation and conduct of the survey.*

## REGIONAL ROUND-UPS

### Region 1 Round-Up

**Philip Ahrens**  
**Brian Rayback**  
**Pierce Atwood LLP**  
**Portland, Maine**

The states of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont, and ten tribal nations, are covered by Region 1, headquartered in Boston.

The State and Regional Environmental Cooperation Committee held a successful conference, Key Environmental Issues in U.S. EPA Region 1, on May 8, 2007, in Boston. The seminar brought together policy makers and representatives of the legal profession involved in environmental issues in New England. Speakers emphasized program initiatives and priorities both in Region 1 and in the six states, as presented by EPA Regional Administrator Robert Varney, Massachusetts Secretary of Energy and Environmental Affairs Ian Bowles, and representatives of the six New England state environmental agencies. The program also included a keynote address from EPA Acting General Counsel Roger Martella.

EPA Region 1 has rolled-out a program called the Community Energy Challenge for New England cities and towns to identify measures that will increase energy efficiency and renewable energy use while reducing air pollution and costs. Municipalities that join the program will receive training and support from EPA in identifying measures to improve energy efficiency

through better facility management as well as upgrades to lighting, HVAC, controls, and other building systems and equipment. Additionally, EPA will assist with efforts to increase the use of renewable energy through renewable energy credits and the development of small-scale renewable energy projects. In return, participating municipalities will establish a benchmark of the energy performance of all municipal buildings, schools and/or drinking water and waste water treatment facilities in the community and then set a goal of reducing energy use by at least 10 percent.

EPA Region 1 appears to be making oil spill contingency planning an enforcement priority, as evidenced by multiple settlements announced in recent months. One of the latest cases involved seven C.N. Brown facilities in both New Hampshire and Maine, and led to a settlement requiring more than \$150,000 in penalties and over \$1 million in facility improvements. This is just one more in a recent string of enforcement actions from Region 1 involving the oil spill prevention, control, and countermeasure rules, including actions against a blueberry processor in Maine, a tank farm in Connecticut, a fuel-supply company in Massachusetts, and a lobstering facility in New Hampshire.

The seven New England states, plus New York, have entered into a regional agreement designed to reduce mercury concentrations in fish in order to meet water quality standards. The plan, called the Northeast Regional Mercury TMDL, is designed to establish a regional Total Maximum Daily Load, known as a TMDL, which is a calculation of the maximum amount of pollution that a water body can receive and still meet water quality standards. The plan attributes 75 percent of mercury in the region's water bodies to anthropogenic sources, including coal-fired power plants, much of which is generated by sources located outside of the northeast. The TMDL, which is not yet final, is expected to call for at least 90 percent control of out-of-region coal-fired power plants, the continuation of various in-region programs such as air emission limits that control 90 to 95 percent of mercury emissions, and requirements for dental amalgam separators.

## **Region 2 Round-Up: Focus on Recent Brownfield Caselaw**

**Lawrence P. Schnapf  
Schulte, Roth & Zabel LLP  
New York, New York**

When states began launching their brownfield programs ten years ago, they touted the financial incentives such as tax credits, loans, and grants that were available to assist developers of contaminated sites. Not surprisingly, the brownfield incentives have become popular with developers and are increasingly being viewed as one of the entitlements to obtain in development projects.

To ensure that the costs of the brownfield programs do not spiral out of control, some states are beginning to review applications with greater scrutiny and are starting to reject applications for financial assistance involving projects that are only moderately contaminated or where the contamination does not pose a significant obstacle to redevelopment. Naturally, developers are challenging these administrative decisions and creating a field of brownfield case law.

A recent example of this trend was *JDN Real Estate-Hamilton, L.P. v. State of New Jersey*. No. A-3138-05T5 (App. Div. Oct. 16, 2006). In this unpublished decision, the plaintiff filed an application to enter into a reimbursement agreement with the Commerce, Economic Growth and Tourism Commission State of New Jersey (Commerce Commission) under the state brownfield law formally known as the Brownfield and Contaminated Site Remediation Act (Brownfield Act). Under this law, developers are eligible to receive up to 75 percent of the cleanup costs based on the amount of taxes generated by a redevelopment project. The law also provides that applications must be approved by both the Commerce Commission and the State Treasurer.

In this case, the project involved a retail center known as Hamilton Marketplace that was to be constructed on a site consisting of woodland and agricultural land. The applicant requested financial assistance because of the presence of pesticides. The Commerce

Commission approved the application but the State Treasurer rejected the application on the grounds that that there was no evidence of contamination at the site that posed a health risk to residents and the financial assistance was not required to commence or complete the project. In addition, the Treasurer ruled that the proposed project was not the type of development project contemplated by the Brownfields Act. The State Treasurer said the financial assistance under the Brownfield Act funded through dedicated tax revenues and must be reserved for projects that clearly require State financial assistance. Because the site was not formerly zoned or used for commercial or industrial purposes, the contamination was limited to relatively a small portion of the overall site, and was not included on a priority list established by the Brownfields Redevelopment Task Force, the Treasurer ruled it was not in the public interest to allow the project to receive brownfield financial assistance. Moreover, by the time the Treasurer made its final decision, the retail center had already been completed.

The developer then sought review of the application denial. The court held that the agency decision was afforded a presumption of validity and reasonableness and that it could not substitute its judgment for that of an administrative agency when the findings of the agency are supported by credible evidence. Because the court found that the conclusion of the State Treasurer was supported by the record, and that it had applied the appropriate factors and properly interpreted the Brownfield Act, it affirmed the decision of the state treasurer court.

A New York state court summarily dismissed a petition filed by a developer whose application to enroll in the state Brownfield Cleanup Program (BCP) was denied by the New York State Department of Environmental Conservation (NYSDEC). In *Jopal Enterprises LLC, and Belmont Villas LLC v. Sheehana* (No. 00803-06 (July 31, 2006)), the developer planned to construct an affordable housing project for seniors on a vacant parcel that was believed to be contaminated because of the evidence of illegal dumping in the form of abandoned automobiles, household waste, and construction debris, as well as its proximity to a state superfund site. The developer performed a Phase 2

Environmental Site Assessment, and the analysis of the groundwater samples revealed concentrations of heavy metals, semi-volatile organic compounds (SVOCs) and volatile organic compounds (VOCs). Eight of the twenty-eight groundwater samples exceeded state groundwater standards. The NYSDEC initially prohibited the developer from renewing a dewatering permit until a groundwater investigation was completed.

Meanwhile, the developer filed an application to enroll in the BCP, which defines a brownfield site has real property where the presence or potential presence of contamination complicates the reuse of the land. However, because the contamination was only marginally above the groundwater criteria and there was no evidence in the record that the contamination was a result of prior industrial or commercial use of the property, the NYSDEC denied the application. Had the application been accepted into the BCP, the developer would have been eligible for tax credits of up to 22 percent of the \$32 million cost of the project.

The developer then filed a lawsuit known as an Article 78 proceeding seeking an order voiding the denial of its BCP application and ordering the agency to admit the project into the BCP. The petitioner also sought damages for construction delays associated with the delayed renewal of the dewatering permit that allegedly caused the project to incur additional interest costs of \$68,250 for each month's delay and to lose \$300,000 in capital contributions from tax credit investors and \$192,700 in lost rent each month until the units are placed in service.

In a two-page decision, the court summarily rejected the petition. The court said it could not substitute its judgment for that of the agency responsible for making the determination and must give great weight and judicial deference to factual evaluations in the area of the agency's expertise that are supported by the record. The court then found that there was substantial evidence in the record to support the NYSDEC determination that the contamination on the petitioner's property was minimal and did not complicate its redevelopment or reuse.

The petitioner had also argued that the NYSDEC had acted arbitrarily and capriciously by relying on using the non-statutory eligibility criteria contained in a NYSDEC guidance document. The petitioner argued that the agency could not use the criteria to determine if the site was eligible for the BCP because the criteria were not contained in the statute and had not been adopted pursuant to formal rulemaking procedures. However, the court ruled that NYSDEC did not have to formally adopt the criteria as rules or regulations to be valid, noting that the state administrative procedures act specifically excluded from formal rulemaking requirements for any forms and instructions, interpretive statements and statements of general policy that in themselves have no legal effect but are merely explanatory. Accordingly, the court ruled that NYSDEC properly denied the petitioners' application.

In *377 Greenwich LLC v. New York State Department of Environmental Conservation* (No. 101617/06 (N.Y. Sup. Nov. 15, 2006)), the owner of property located in Manhattan sought to overturn a decision by the NYSDEC denying its application to participate in the BCP. In this case, the owner/petitioner acquired a 10,080 square-foot parcel that was currently being used as a parking lot to construct an eighty-room hotel and 100-seat restaurant. In July 2003, a consultant retained by a prior owner uncovered the presence of two unregistered 500-gallon underground storage tanks (USTs) associated with a former use and a limited area of soil contaminated with semi-volatile organic compounds (SVOCs). A petroleum spill was reported to the NYSDEC.

In April 2004, the NYSDEC approved a workplan calling for excavation of the contaminated soil. Because the property was also subject to the New York City Department of Environmental Protection (NYCDEP) "e" designation program, the petitioner also had to get approval from the NYCDEP. In June 2004, the NYCDEP issued a Notice to Proceed to the NYC Department of Buildings (NYCDOB) authorizing NYCDOB to issue a construction permit for the project. However, the NYCDOB could not issue a certificate of occupancy until the NYCDEP received a closure report and issued a Notice of Satisfaction to the NYCDOB.

The petitioner acquired the property on June 29, 2004 and submitted a BCP application to the NYDEC the next day. Two weeks later, the petitioner submitted a workplan calling for the excavation of mercury-contaminated soils and fill material that was present over roughly half the property to a depth of 14 feet.

During the period that the petitioner's BCP application was under review by the NYSDEC, the agency issued new guidance that tightened the eligibility criteria for the BCP. The NYSDEC did not render a decision on the petitioner's application until 15 months later. Given the extraordinary administrative delay and its need to maintain its construction schedule, the petitioner proceeded to implement its proposed workplan and incurred approximately \$1 million in remediation costs.

In October 2005, the NYSDEC denied the application on the basis that the site had relatively low levels of contamination and that the costs attributable to the contamination were not significant when compared to the total cost of development and the value of the property. In addition, the agency indicated that the contamination was not a result of past uses of the property. Based on these facts and the other criteria set forth in its guidance, the NYSDEC concluded that the reuse or redevelopment of the property was not complicated by the presence or potential presence of contamination.

The petitioner then challenged the denial, arguing that the NYSDEC had too narrowly interpreted the definition of what constituted a brownfield site, that the agency could not enforce its eligibility criteria because the guidance document had not been promulgated pursuant to formal rulemaking procedures, and that the guidance document was inconsistent with prior agency interpretation of the BCP law. The court ruled that NYSDEC acted rationally in considering various factors in this case, including the hazardous level of the contaminants, the issue of comparative cost, and the steps already taken toward facilitating the underlying project (such as obtaining the construction loan in determining if the contamination had complicated reuse). The court said the agency's interpretation was consistent with the overall objective of the BCP law which was to restore brownfield sites to productive use. Since the construction of the project proceeded

without the benefit of being admitted into the BCP, the court held, then it was entirely rational for NYSDEC to conclude that the contamination had not complicated the redevelopment.

The court also found that the NYSDEC had acted rationally when it determined that the contaminants at the site did not rise to the level of making it a brownfield site. The court noted that the agency had particular expertise in this area, and had persuasively argued that a certain amount of contaminants are ubiquitous and that the mere existence of low levels of contaminants is not sufficient to trigger automatic acceptance into the BCP. The court noted that the presence of contamination above state cleanup goals was just one factor that NYSDEC considered when determining if remediation is necessary for any particular site. The judge also found noteworthy NYSDEC's conclusion that since the development plans called for excavating the site to a depth of 25 feet, a large part of what the petitioner called remediation costs were actually excavation costs that were otherwise necessary for the petitioner to construct the building foundation.

In support of its denial, the NYSDEC argued that the proceeding had been rendered moot because the petitioner had already remediated the site and completed construction of the hotel project before a final decision was made on its BCP application. The petitioner countered that the matter was not moot because this court could find that the application should have been accepted into the BCP and, therefore, the petitioner would be entitled to significant tax benefits. Moreover, the petitioner argued that it was placed into the conundrum by the NYSDEC's delay in processing its application.

The court rejected the petitioner's analysis because acceptance into the BCP was only the first step in establishing entitlement to the tax benefits. The court said that the petitioner would also have had to perform a cleanup according to a cleanup plan approved by the NYSDEC as well as with appropriate community input. By moving forward with the remediation and the hotel project before being accepted into the BCP, the court held that the petitioner could not satisfy these

requirements and, therefore, could not be entitled to the tax benefits. Regarding the delays, the court said the petitioner had remedies available to it, including the right to file a writ of mandamus to compel NYSDEC to render a decision on its application. In deciding to go forward with remediation and other aspects of the hotel project without DEC approval, the court said the petitioner either did or should have made its own cost/benefit analysis of the risks involved. The consequences of its own decision cannot be attributed to the DEC, the court concluded.

## **Other Recent Brownfield News**

According to statistics released by the Spitzer administration, the first twenty-five brownfield projects that have been issued certificates of completion under the New York Brownfield Cleanup Program (BCP) will generate approximately \$447 million in tax credits to the developers. Another twenty-nine BCP projects that are underway are estimated to generate \$552 million in tax credits. According to the Spitzer administration, just four projects—the Cappelli development plus three in New York City—alone are getting \$574 million in credits. The largest, an \$800 million industrial project in Queens, is due \$163 million. A \$770 million project on 19th Street in Manhattan is due \$157.6 million from state taxpayers. And a \$700 million project on 42nd Street in Manhattan will get a \$144 million.

The analysis did not estimate any economic benefits from the BCP projects. However, a preliminary study performed by the Brownfield Task Force of the Environmental Business Association of New York State (EBANYS) indicated that BCP projects are averaging \$1 to \$10 million in cleanups with some New York City projects incurring cleanup costs as high as \$20 million. According to the EBANYS figures, over \$100 million in cleanup has been accomplished in NYC alone. The study also found that the average BCP site generated between 300-700 construction jobs and between fifty to 100 permanent jobs depending on the type of project. The transactional costs for qualifying for the BCP (engineering and legal fees) appear to be between \$25,000-\$50,000.

## **Region 8 Round-Up**

**John R. Jacus**  
***Davis Graham & Stubbs LLP***  
***Denver, Colorado***

The states of Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming are covered by U.S. EPA Region 8, headquartered in Denver. Some of the more significant developments and initiatives of the past year in each state and EPA Region 8 are set forth below.

### **Colorado**

Colorado Department of Public Health and Environment (CDPHE) has a new executive director since our last update. Jim Martin is an attorney and former director of the Natural Resources Law Center at the University of Colorado School of Law, as well as a former attorney for Western Resource Advocates. He also recently served as a member of the Colorado Air Quality Control Commission until his appointment by Gov. Ritter.

Of particular note recently in Colorado's environmental regulatory framework is the passage of legislation regulating oil and gas development. House Bills 1341 and 1298 were signed into law this past June and have significantly altered the composition and purposes of the Colorado Oil and Gas Conservation Commission (while increasing the role of the CDPHE in oil and gas regulation). The new laws require rulemaking later this year to implement legislative changes.

Colorado's Water Quality Control Division appears to be active in its storm water discharge permitting enforcement activity through June of this year, having issued over a dozen notices of violation since January. These actions include those for discharges associated with construction activity at oil and gas exploration and production sites. Such sites disturbing less than five acres remain exempt at the federal level and in most states, but Colorado has, since last year, had a state-only storm water permit requirement for construction activity at oil and gas sites disturbing between one and five acres.

The CDPHE's Air Pollution Control Division solicited comment recently on a report of the Four Corners' Air Quality Task Force, in which Colorado and New Mexico, and local governments and Indian tribes participated. The Air Pollution Control Division is also working on its Regional Haze State Implementation Plan for submission to EPA Region 8 later this year, and a high-emitting motor vehicle enforcement program for the Denver metropolitan area, among other things.

### **Montana**

The Montana Department of Environmental Quality (DEQ) has updated its Spill Management and Reporting Policy in an effort to assist in the implementation of multiple Montana environmental laws. The policy describes those spills that must be reported to the state's Disaster and Emergency Services (DES) program or to DEQ, and also lists spills that "should" be reported to DES/DEQ, including spills that may enter state water, cause a film, sheen, or change of color and spills that are twenty-five (25) gallons or more of any petroleum product.

Montana DEQ also recently issued a new general permit for storm water discharges associated with construction activity. The 2002-2006 general permit remained effective until April 15, 2007. A summary of general permit changes is available on the Montana DEQ Web site.

### **North Dakota**

The Air Quality Division of the North Dakota Department of Health recently issued a notice of change in major source designation for ethanol production facilities, concurring in the U.S. EPA's revisions at 40 CFR § 52.21, whereby ethanol production plants are no longer considered "chemical process plants" for purposes of Prevention of Serious Deterioration (PSD) and Title V permitting.

The Water Quality Division of North Dakota Department of Health has posted a number of presentations from a March 2007 North Dakota storm water conference. These presentations include preparation of a storm water pollution prevention plan,

preparing for site inspections, and maintaining best management practices, among others. The Water Quality Division also has current storm water permitting forms available for download via the department's Web site.

## **South Dakota**

The South Dakota Department of Environment and Natural Resources (DENR) issued public notices of its total maximum daily load (TMDL) proposals for impaired waters in four water sheds, including Geddes Lake, North Buffalo Lake, South Buffalo Lake, and Nine Mile Lake. DENR will accept comments on proposed TMDLs through July 23, 2007.

South Dakota DENR has also more recently issued guidelines for meth lab contamination reduction. The guidelines provide links to other information sources, sensitize the public to the need for proper decontamination of structures previously used as meth labs, and also contain a list of meth lab remediation companies servicing the South Dakota area. Required legal disclosures regarding meth labs are also catalogued.

## **Utah**

The Utah Department of Environmental Quality (DEQ) has a new executive director, Rick Sprott. Rick replaced former Executive Director Dianne Nielsen, after she was appointed Gov. John Huntsman's new Energy advisor.

In May, the State of Utah joined the Climate Registry, an organization of thirty states, Indian tribes, and two Canadian provinces. The registry will assist in measuring, tracking, and verifying emissions of greenhouse gases (GHGs) and provide the measurement and reporting infrastructure to support voluntary, mandatory, and market-based GHG emission reductions. The registry will begin to accept reporting data in 2008.

Utah's ozone season began with a mid-May call by DEQ's Division of Air Quality for voluntary actions to help keep ozone levels safe this summer. Unseasonably

warm weather in May led to the action a couple of weeks earlier than the usual June 1 start to Utah's ozone season. Ozone alerts are part of the division's "Choose Clean Air" campaign, a system of color codes that alert the public to air quality conditions and the need for voluntary actions to reduce emissions. On July 9, Utah DEQ announced that it had reached an important agreement with Kennecott Utah Copper Corporation and U.S. EPA for continued remediation of groundwater in a twenty-square-mile area in the southwest portion of the Salt Lake Valley. The agreement is embodied in a consent decree which is undergoing public comment, and extends remediation efforts to contain and reduce the size of a core area of acid plume contamination of groundwater that was begun approximately fifteen years ago by responsible parties at the site. The consent decree can be obtained via the Internet at <http://www.deq.utah.gov/issues/nrd/index.htm>.

## **Wyoming**

The Wyoming Storage Tank Program is undergoing changes as a result of provisions of the Energy Policy Act of 2005. Conforming changes were made by the Wyoming legislature in House Bills 139 and 309 earlier this year. Among the more significant changes to the program are: (1) all storage tank facilities will be inspected once every three years at a minimum, (2) the state has authority for "red-tagging" to stop deliveries of regulated substances to any system not in compliance with applicable regulations, and (3) operator training and certification for regulated tank systems is now required. A more detailed summary of the changes to the Storage Tank Program in Wyoming is contained in Wyoming DEQ's quarterly newsletter, The Environmental Assistant, Volume 11, No. 3 (Summer/Fall 2007).

Wyoming DEQ's Air Quality Division is proposing revisions to Chapter 6, Section 2, "Oil and Gas Production Facilities Permitting Guidance." DEQ's Air Quality Advisory Board approved of the proposed changes at a meeting in late June, and a draft of the proposed revisions to this important oil and gas sector guidance is expected sometime in August. Additionally, a number of changes to improve the oil and gas air

permitting process have been adopted effective Aug. 1, 2007. A checklist has been developed by the Air Quality Division to help minimize in complete applications, and the division requests that such checklists accompany any application submitted after Aug. 1, 2007. These and many other changes to the air quality permitting process for oil and gas facilities were the product of a joint industry-agency permitting process review aimed at paperwork reduction, identification of critical information for necessary technical review, efficiency, and evaluation of reporting requirements. A presentation detailing this effort and its accomplishments is available on the Wyoming DEQ's Web site.

## Region 9 Round-Up

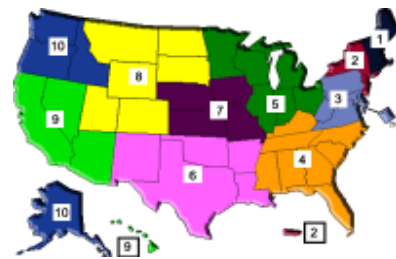
**Jane Kroesch**  
**Skadden, Arps, Slate, Meagher & Flom LLP**  
**San Francisco, California**

Region 9 serves Arizona, California, Hawaii, Nevada, the Pacific Islands, and Tribal Nations. It is headquartered in San Francisco.

One of our "own," Ken Alex, Supervising Deputy Attorney General, Environment Section, Public Rights Division in the California Attorney General's Office, will be receiving the American Bar Association's Award for Distinguished Achievement in Environmental Law and Policy at the ABA Annual Meeting in San Francisco in August 2007. The award is given to those few who are acknowledged to have made significant achievements in environmental law and policy in their careers. Ken has long been a recognized expert in environmental law and enforcement in California, and has been a member of and advisor to the Executive Committee of the State Bar of California's Environmental Law Section for many years. More recently, yet still well before global warming concerns achieved the popular attention they currently receive, Ken undertook leadership roles at the state, national, and international levels in efforts to address climate change, identifying global warming as the most important environmental problem of our time and formulating a comprehensive legal strategy on behalf of

the State of California, including bringing actions in federal and state courts to address global warming and force important changes in law and policy. His efforts have resulted in increased public awareness of this serious issue and have spurred positive action at all levels to confront the problems presented by climate change. For those of us who know and work with Ken, we are immensely proud of his achievements and honored to call him "colleague." Congratulations to Ken on an honor most deserved, with our appreciation of your efforts to our section and field of law and policy.

## EPA REGION RESOURCE PAGE



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

**[www.abanet.org/environ/epa/](http://www.abanet.org/environ/epa/)**

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

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