

State and Regional Environmental Cooperation Committee Newsletter

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May 2005

CHAIR'S COLUMN

William Penny
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The State and Regional Environmental Cooperation Committee continues to be one of the more active committees in the Section. This year we have two regional stand-alone conferences scheduled (Region 4 and Region 6), we held a state bar idea exchange at the 12th Section Fall Meeting in San Antonio and at the time of writing this article, we had plans for a committee roundtable at Keystone. We have had stellar attendance from committee members and in particular from our committee vice chairs at both the Section Fall Meeting and the Annual Conference on Environmental Law (Keystone). This is our second newsletter of the year and we hope to squeeze another in before the end of the year. We have updated our list of state bar association leaders and have updated our list serve to better coordinate activities with state environmental law sections. We have undertaken initial discussion with the energy side of our Section, and we are discussing ways that we can duplicate the state bar environmental coordination concept for energy lawyers. Our membership has grown steadily and now stands at 128 – an increase of approximately thirty members. For a non-media specific committee, I am pleased with our progress.

Despite what I believe is good progress, we still have so much to accomplish or that can be accomplished. And, I believe there is a role for anyone who wants to

get involved. We would like to host teleconferences/ brown bags on a regional basis as well as cooperate with other committees on teleconferences. We are hoping to initiate a program to recognize state bar environmental section newsletters. The committee Web site also will be updated to provide a regional homepage for each EPA region and associated states. For next year the committee is evaluating the feasibility of additional regional stand alone conferences, perhaps in Region 1, 2 and/or 5.

We have not yet scratched the surface of all of the activities for which our members can be involved. If you are interested in helping out in any of our activities or have any ideas for new ones, please let me know.

DID COOPER INDUSTRIES V. AVIALL SERVICES SUGGEST A NEW CONTRIBUTION CLAIM UNDER CERCLA § 113(f)(3) FOR VOLUNTARY RESPONDERS?

David G. Mandelbaum
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If you read the trade press, you know the sad story for the nation's Brownfields. In December, the Supreme Court held in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S. Ct. 577 (2004) that a contribution plaintiff under section 113(f)(1) of the Comprehensive Environmental Response,

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Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-75, or some closely related entity must have been the subject of a prior or concurrent “civil action” under section 106 or section 107(a). *See* 42 U.S.C. §§ 9606, 9607(a), 9613(f)(1). As a result, contribution claims by those who conduct voluntary remediation are made more difficult. According to the alarums and cries of doom, no one will ever participate in a voluntary cleanup program again, because the very notion of a voluntary cleanup program is antithetical to a prior enforcement action under CERCLA.

But Justice Thomas’ *Cooper Industries* majority opinion carries an important suggestion of an alternative avenue for recovery by voluntary remediators that warrants close scrutiny. He observes that section 113(f)(3)(B) establishes a separate right of contribution for a “person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement” If participation in a voluntary cleanup of a Brownfield qualifies as a resolution of liability “for some or all of a response action . . . in an administrative or judicially approved settlement[,]” then perhaps the Court has offered a roadmap to *enlarged* contribution rights for voluntary responders.

**Voluntary Cleanup Programs and
Section 128(b)**

Each of the 50 states has some form of Brownfields program. *See* http://www.epa.gov/swerosps/bf/state_tribal.htm#links. While some of these programs consist entirely of grants and other inducements to encourage redevelopment of Brownfield properties, in many states, the legislature has enacted a program for streamlining the remedy selection and liability resolution process. Typically, that program provides that if a voluntary responder takes certain steps, it will have satisfied its obligations to the state, at least under state law, arising from the contamination at the site. Some states have programs that require submissions and site-specific approvals from the state environmental agency. Most programs, however, have been “privatized” to a significant degree. The voluntary responder merely certifies that it has complied, subject to a subsequent state audit.

Congress sought to reinforce these state voluntary cleanup programs (VCPs) when it enacted the Small Business Liability Relief and Brownfield Revitalization Act of 2002 (SBLRBRA or 2002 Amendments), Pub. L. No. 107-118, 115 Stat. 2356 (2002). The 2002 Amendments are familiar territory to readers of this newsletter, but *Cooper Industries* suggests that we all revisit the language of new section 128 of CERCLA. See *esp.* 42 U.S.C. § 9628(b).

Section 128 bars federal enforcement under CERCLA against any person who has complied with a VCP that qualifies under the 2002 Amendments. EPA has entered into memoranda of agreement with most states confirming the circumstances under which compliance with the state program constitutes compliance with a VCP for purposes of the enforcement bar of section 128. EPA posts a list of those memoranda. See <http://www.epa.gov/swerosps/bf/html-doc/statemoa.htm>. However, nothing in CERCLA requires a memorandum of agreement in order to invoke the enforcement bar of section 128.

Section 128(b) and Contribution under Section 113(f)(3)

If the ability to invoke the enforcement bar of section 128(b) counts as “resolving [one’s] liability” to the United States and if some process counts as administrative or judicial approval of that resolution, then the ability to invoke section 128(b) should support a contribution action under section 113(f)(3) of CERCLA. That claim would be independent of the requirement of section 113(f)(1) that the contribution action be brought “during or after” an enforcement action under section 106 or 107(a). Moreover, and perhaps more importantly, no apparent reason exists why that contribution action should require proof of the remedy’s consistency with the national contingency plan, as is typically required for a contribution claim under section 113(f)(1).

Resolution of Liability

A state VCP typically resolves the voluntary responder’s liability for cleanup to the state. Many programs only purport to resolve liability under state

law. Therefore, ambiguity exists as to whether merely satisfying the VCP is resolution of “liability . . . for some or all of a response action or some or all of the costs of such action . . .” If the resolution is only for liability under state law, it is a resolution of liability for an action that may not qualify as a “response action” as defined under CERCLA. See 42 U.S.C. § 9601(23)-(25).

A voluntary responder seeking contribution will argue that the ability to invoke a bar on enforcement of claims by the United States is a resolution of liability under CERCLA, and therefore must support a claim for contribution under section 113(f)(3). The claims may theoretically continue to exist, but if no one can recover on those claims, then the liability of the voluntary responder is “resolved.”

In contrast, a contribution defendant would argue that section 128(b) offers only a bar on federal enforcement; it does not create or authorize a *release* of the federal claim. While attractive on the surface, this argument ignores the fact that the section of CERCLA authorizing formal settlements does not *ever* direct or authorize the United States to release its CERCLA claims. Rather, section 122, 42 U.S.C. § 9622, authorizes various forms of covenants not to sue, but no releases. Covenants not to sue do not extinguish claims, they are merely promises not to pursue them. Therefore, if the distinction between a release from a claim and a promise not to pursue a claim does not affect the application of section 113(f)(3), then why should a distinction between a self-executing enforcement bar and a self-executing release under section 128(b) make a difference?

A contribution defendant might also argue that section 128(b) contains a number of reopeners to the enforcement bar. That again would suggest that compliance with section 128(b) cannot count as resolution of a claim for purposes of section 113(f)(3), except that section 122, again *mandates* reopeners in the very covenants not to sue that everyone agrees count as “resolutions of liability” under section 113(f)(3). Compare 42 U.S.C. § 9622(f)(6) with *id.* § 9628(b)(1)(B); see also EPA Revised Model CERCLA RD/RA Consent Decree, 60 Fed. Reg.

38,817 (July 28, 1995), *revised as of current date*, <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/mod-condec-mem.pdf>. Indeed, the exceptions to the section 128(b) enforcement bar look markedly similar to the reopeners mandated under section 122.

“Administrative or Judicially Approved Settlement”

The conventional CERCLA settlement involves either an administrative order on consent (ACO) or a consent decree (CD). *See* 42 U.S.C. § 9621. The former requires administrative approval, and the latter requires judicial approval. Compliance with a state VCP may not require either an ACO or a CD, and therefore no analog to the federal settlement vehicles may exist. A contribution defendant will argue that that absence of administrative or judicial approval means that any resolution of liability under section 128(b) is not covered by section 113(f)(3).

This argument points up a difficulty in the statutory language. Section 113(f)(3) authorizes a contribution claim by any person “who has resolved its liability to the United States or a State . . . in an administrative or judicially approved settlement” The natural reading of this language would *not* call for administrative “approval” of the settlement. “Administrative” is an adjective, and in order for it to modify “approved” it would have to be in adverbial form – that is, the language would have to read “administratively or judicially approved”. Instead, the language seems to contemplate two categories of acceptable settlements – those that are “administrative settlements” and those that are “judicially approved settlements.” Arguably, administrative settlements do not require any case-specific approval in order to serve as the basis for a contribution action under section 113(f)(3). In that case, the absence of any affirmative state administrative decision-making under a privatized VCP would not matter. If compliance results in resolution of liability to the state under CERCLA or invocation of the enforcement bar of section 128(b) of CERCLA, then it is an administrative settlement that supports a claim under section 113(f)(3).

A voluntary responder seeking contribution may argue further that no state VCP has an entirely private process. Even if the cleanup is privatized, a voluntary responder must make some filing with a state agency and its cleanup is subject to some level of auditing. Section 113(f)(3) does not specify the vehicle by which a settlement is administratively approved; whatever supervision a state offers may suffice as “administrative” approval.

Even we were to agree that section 113(f)(3) required affirmative administrative approval of a resolution of liability and that a state did not have enough administrative process to count as “approval” of the settlement under section 113(f)(3), in states that have entered into a memoranda of agreement with EPA, the MOA itself would seem to count as a blanket administrative approval of the application of the section 128 enforcement bar. Moreover, the voluntary responder will argue that the MOA constitutes a determination by EPA that the state administrative process satisfies section 128(a)(2), and therefore includes elements of case-specific administrative oversight adequate to make resolve liability under section 113(f)(3). In principle, EPA may enter into an MOA for purposes of confirming the application of the enforcement bar of section 128(b) without determining that the state program qualifies for grants under section 128(a). However, in practice, I am not aware of any cases where either EPA or the state has made that distinction. Section 128(a)(2)(D) requires the state program to include:

[m]echanisms for approval of a cleanup plan, and a requirement for verification by and certification or similar documentation from the State, an Indian tribe, or a licensed site professional to the person conducting a response action indicating that the response is complete.

42 U.S.C. § 9628(a)(2)(D). Thus, satisfaction of a state VCP in a state whose program EPA has endorsed in an MOA seems to imply administrative approval of the resolution of liability.

Consistency with the NCP

A contribution claim under section 113(f)(3) should not require proof that the costs actually incurred by the contributions plaintiff were incurred consistently with the national contingency plan. Section 107(a)(1-4)(B) requires a private cost recovery plaintiff to plead and to prove consistency with the NCP. 42 U.S.C. § 9607(a)(1-4)(B). However, one can resolve one's liability through a settlement by doing anything, so long as the settlement meets muster under section 122. There is no requirement that a settlement involve NCP-consistent costs.

Indeed, a VCP's very rationale depends upon its *lack* of consistency with the NCP. CERCLA requires elaborate studies and remedy selection procedures. VCPs seek to induce rapid recycling of land by allowing voluntary responders to avoid the costly CERCLA process. Accordingly, section 128(b) clearly intends that the United States will not enforce against private parties that have completed a cleanup *inconsistent* with the NCP. Thus, section 113(f)(3) provides a vehicle for recovery of inconsistent costs, something that section 113(f)(1) apparently did not permit.

For this important reason, even though the Supreme Court's *Cooper Industries* decision turned more than a decade of CERCLA jurisprudence on its head, perhaps it is not entirely without redeeming features. Justice Thomas' endorsement of an independent section 113(f)(3) action may clear the way for voluntary responders in most states to pursue CERCLA contribution claims without proof of consistency with the NCP. That has to mitigate some of the disincentive to Brownfield remediation perceived in the conventional reading of *Cooper Industries*.

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WASTE LITIG. REP. 137 (Jan. 2005). Contact him at mandelbaum@ballardspahr.com.

THE UNIFORM ENVIRONMENTAL COVENANTS ACT: WHAT DOES IT MEAN FOR YOUR STATE?

Amy L. Edwards
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The Brownfields redevelopment movement has been successful in large part because regulators, property owners and communities have accepted the premise that contamination can be left in place under certain circumstances without presenting any risk to human health or the environment. For this movement to continue to grow, the public needs better legal tools to ensure that future generations are aware of and understand the rationale behind limiting property to certain land uses or requirements for monitoring and maintenance. In addition, regulators, responsible parties and the community need to have confidence that these restrictions and requirements will be enforced over time. We do not have adequate tools or the degree of confidence in these tools at the present time.

A solution is on the horizon, however. A national body (the National Conference of Commissioners on Uniform State Laws, or NCCUSL) has enacted a uniform model law that will provide a better tool for implementing and enforcing land use restrictions. This tool, called an environmental covenant, is one method of restricting activities and imposing affirmative obligations when contamination has been allowed to remain in place. Similar land use restrictions are sometimes called institutional controls, land use controls, environmental easements, proprietary controls, and activity and use limitations. These tools are necessary to protect human health and the environment against inadvertent exposures to residual contamination while encouraging economic redevelopment.

Risk-based cleanups are an important aspect of efforts to clean-up contaminated property and return that

property to economic use. While the goal of most cleanups is to return the site to a condition where it can be safely used for *any* purpose, this is not always technically possible or economically practical. When a site is not cleaned up completely, land use restrictions may be used to supplement affirmative cleanup measures. However, many states do not have laws providing them with power to create, enforce, or modify these legal restrictions, while the laws in other states may not be adequate to ensure that these restrictions will last as long as they are needed.

In those instances where there are no state laws, parties are forced to rely on “common law” – property law that has been developed and interpreted by the courts over a very long period of time. The common law has substantial limitations in terms of who may enforce the restrictions, how long the restrictions may last, and the formalities that must be followed in order to create the restrictions in the first place.

Beginning in 2001, a Task Group in NCCUSL began to develop a model law, fondly known as UECA, that would strengthen practices in an area that involves elements of both real estate and environmental law. (NCCUSL is a body of legal professionals that represent all 50 states. In drafting uniform laws like the UECA, NCCUSL considers feedback from federal and state regulators, parties legally responsible for environmental clean-up, property owners, environmental groups, real estate and environmental lawyers, title companies, potential property buyers, banks, and municipalities. In August 2003, the UECA was adopted by the entire Conference as a model law to be recommended to state legislatures in order to improve current practices and procedures in this area of environmental law.) The model law would establish a process for creating, modifying and enforcing environmental covenants and thereby eliminate some of the common law barriers that have prevented land use restrictions from enduring over time.

Why Do We Need a Uniform Environmental Covenant Act?

Very few states have enacted laws that allow them to impose restrictions on land when contamination

remains. Even in those states where some legal authority exists, the laws are frequently limited to a specific area (such as underground storage tanks) and do not anticipate other issues that may arise under the law. For example, assume the following: a local government wants to condemn industrial property in order to build a day care center. The regulatory agency determined that residual contamination left at this former manufacturing site would not be harmful to humans as long as it was used for industrial purposes, and the site was restricted to industrial uses as part of a voluntary cleanup action. Will those restrictions be eliminated when the condemnation action has been completed? Without the benefit of a statute like UECA, that is precisely what would happen.

In states with no legislation to address land use restrictions, the parties seeking to do so are forced to rely on the common law. Using the common law to impose these restrictions can be difficult for several reasons: only a limited number of parties may become a party to the restriction (“dominant and servient estates”), the restrictions lapse after a certain period of time (the Marketable Title Act), and it is difficult to impose affirmative obligations (sometimes referred to as “spurious” easements), such as the duty to operate a pump and treat system or to inspect an engineering cap. In many states, environmental agencies do not currently have a direct right to enter, inspect and enforce compliance with environmental covenants, particularly after land has been sold. Because the environmental agency has no way to ensure that the restrictions will remain in place and be enforced as long as they are needed, it is difficult to use the restrictions to promote economic development and protect the community

What Would the Uniform Environmental Covenants Act Do?

If a state adopts the model law, many of these archaic common law rules will be overcome by statute. UECA would create a statutory mechanism for creating, modifying, enforcing, and terminating environmental covenants. The environmental covenants created under UECA would be based upon traditional property law principles and would be recorded on the local land

records and bind successive owners of the property. State and local governments, and potentially others, would have clear rights to enforce the land use restrictions and thereby ensure with greater certainty the protection of human health and the environment throughout the life of the land use restriction and through various real estate transactions or legal snags.

The act addresses a number of circumstances where the restrictions might otherwise be accidentally eliminated, including:

- Foreclosure and bankruptcy
- Eminent domain
- Adverse possession
- Marketable Title Act

The act also addresses important legal issues, such as:

- Third party enforcement
- Notice
- Recording and tracking

Additionally, the model law would apply to cleanups conducted under a state voluntary cleanup program, as well as to cleanups conducted under the direct supervision of a federal or state environmental agency.

What Will the Model Law Mean for Communities?

UECA provides a viable structure for creating and maintaining environmental land use restrictions as long as they may be needed, thereby reducing the risk that people will be inadvertently exposed to contamination left in place. Knowing that the restrictions can be properly created and maintained over time, environmental regulators, property owners, local governments, environmental groups, developers, lenders and title companies will be more willing to rely on, and have confidence in, environmental covenants as part of the cleanup. Creating viable state laws to create these restrictions will encourage the reuse of property that might otherwise lie underutilized or abandoned, providing a benefit to all parties involved.

The public would have notice of the existence of the environmental covenant, either through the local land

records, where the covenant must be recorded, or through a registry to be maintained by the state environmental agency. Thus, the community can become involved in monitoring these environmental covenants over time – sometimes called “long-term stewardship” of the land.

Can UECA Be Used Now?

The benefits of UECA would not automatically apply to land use restrictions previously adopted under current state laws or the common law. The passage of the model law would similarly not invalidate any of those existing land use restrictions. However, adoption of the model law in any given state would give that state CLEAR AUTHORITY to implement, monitor, modify and enforce environmental covenants. It would also give third parties the right to monitor and enforce these controls. Given the importance of these controls to the success of the Brownfields movement, it is critically important to fill this gap in the current law.

The text of this article is based upon a brochure developed by Ms. Edwards, David Borak, and others for the National IC Coalition (NICC). Members of the Coalition include the International City/County Management Association (ICMA), the American Chemistry Council (ACC), the American Petroleum Institute (API), Holland & Knight LLP, the U.S. Navy, the National Governors Association (NGA), the National Brownfields Association (NBA), the Environmental Bankers Association (EBA), the Environmental Law Institute (ELI), and Energy Communities Alliance (ECA). For further information about NICC, please contact David Borak at ICMA (202/962-3506) or Lorraine Krupa-Gershman at ACC (703/741-5219).

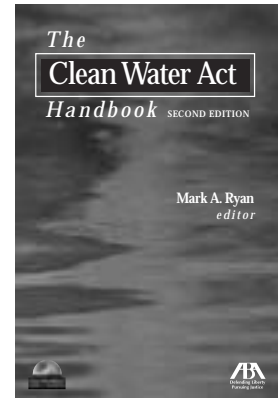
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Best Seller from ABA Publishing and The Section of Environment, Energy, and Resources

The Clean Water Act Handbook, Second Edition **Mark A. Ryan, editor**

This updated guide is the definitive resource to the provisions and complexities of the federal Clean Water Act and how it continues to evolve. Recent court rulings and the change of administration have resulted in significant changes that dramatically affect practitioners working in the area. This new edition provides detailed explanations of these changes and considers the impact of recent court decisions, including the Supreme Court's decision in *SWANCC* and the Court of Appeals decisions in *American Mining Assoc.*, *Talent Irrigation*, and *Forsgren*, among others.



Beginning with an overview of the law's provisions and pertinent regulation and enforcement issues, the subsequent chapters address specific issues, such as:

- NPDES permits
- Control of publicly owned treatment works
- Requirements applicable to indirect discharges
- The regulation of wetlands and the impact of recent judicial decisions
- Oil and hazardous substance spills
- Enforcement options under Section 309
- Judicial review

Chapters begin with a section on applicability and scope. Within each fully annotated chapter, clear explanations of specific statutory and regulatory provisions and court decisions applicable to the issue are presented in the order needed for full and accurate analysis – a virtual checklist of requirements and considerations. Making this new edition more useful than ever, the authors reference URL addresses for quick, up-to-the-minute information on government documents that are often difficult to locate.

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REGIONAL ROUND-UPS

REGION 1 ROUND-UP

Philip Ahrens
Brian Rayback

EPA Region 1 has reported that nearly all of the states in the region are in compliance with the fine particle air-quality standards promulgated in 1997. Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine, as well as all but two counties in Connecticut (Fairfield and New Haven), meet the standard for fine particulate matter, frequently referred to as PM_{2.5}. The annual standard is 15 micrograms per cubic meter, while the 24-hour standard is 65 micrograms per cubic meter. States that comply with the standard will not be required to develop plans to achieve attainment with the standards. Connecticut, on the other hand, will be required to submit a plan in early 2008 to outline how it will achieve standards in Fairfield and New Haven Counties by 2010. Possible options include power plant regulations, cleaner fuels and vehicle emission testing.

In enforcement actions, Region 1 continues to address concerns involving lead-based paint in residential real estate. Two recent examples are settlements with two different landlords that own apartment buildings in New Haven, Connecticut and Lewiston, Maine. In both cases, EPA claimed that the landlords failed to notify tenants about the health hazards associated with exposure to lead paint, such as by providing notification language in the rental contracts and disclosing known lead-based paint in the apartments. To settle the New Haven case, the landlord agreed to pay a fine of more than \$8,000 and spend approximately \$80,000 to replace over 200 windows in 31 apartment units. Similarly, to settle the Lewiston case, the landlord agreed to a fine of \$2,880 and to spend \$26,565 to replace windows and doors.

At a time when EPA is moving to codify its position that the application of pesticides in compliance with FIFRA does not require NPDES permits (see [\[a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/pdf/05-1868.pdf\]\(http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/pdf/05-1868.pdf\)\), multiple projects in the New England region are receiving EPA grant money to study how to reduce the risks of pesticide use. Among the projects awarded funding are a University of Vermont study to reduce pesticide risks in wine grape production, a Cape Cod Cranberry Grower's Association study to control a parasitic weed called dodder, and a marketing and education program run by non-profit Red Tomato that focuses on apple producers in Massachusetts, New Hampshire, Connecticut and Vermont.](http://</p></div><div data-bbox=)

REGION 2 ROUND-UP

Lawrence Schnapf

New Jersey Enacts NRD Legislation

New Jersey Acting Gov. Richard J. Codey signed legislation designed to ensure that a recent enforcement initiative by the New Jersey Department of Environmental Protection will not discourage redevelopment of Brownfield sites. The legislation provides that purchasers of contaminated property who acquired title on or after Jan. 6, 1998 will not be liable for claims for natural resource damages. The owner must have purchased the property after the discharge of a hazardous substance occurred. In addition, the owner cannot be responsible for the discharge of a hazardous substance at the property or be a corporate successor to the discharger or any other liable person. However, the law will not apply to purchasers of contaminated property who have already agreed to make natural resource damages payments.

The bill also provides that Brownfield developers will not be responsible for remediating contamination that may have migrated off-site. To qualify for this relief, the property owner must show the discharge occurred prior to the time it acquired title, it is not responsible for any contamination at the site, that the off-site contamination is from more than one source and that it will not pose a risk to public health or the environment if it is not remediated.

New York Issues Draft Vapor Intrusion Guidance

In November, the New York State Department of Environmental Conservation (NYSDEC) issued draft policy for evaluating potential vapor intrusion (VI) at contaminated sites. The proposed policy will apply to all sites that are currently under investigation and currently being reviewed by NYSDEC as well as sites that will be reviewed in the future. However, the primary policy is to establish a process for investigate potential VI pathway at sites where remedial decisions were made prior to Jan. 1, 2003. In its background statement, the NYSDEC defined VI as the migration of volatile organic chemicals (VOCs) from the subsurface into overlying or adjacent buildings. In extreme cases, the vapors may accumulate in buildings to levels that may pose near-term safety hazards (*e.g.*, explosion), acute health effects or aesthetic problems (*e.g.*, odors). Typically, however, if vapors do migrate into buildings, the levels are considerably lower and health concerns are more likely to relate to chronic effects based on long term exposure to low chemical concentrations.

NYSDEC estimates that 750 sites in New York may be impacted from VOCs. For ongoing sites where final remedial decisions have not been made, the agency policy will be to evaluate the VI pathway during the site investigation process like any other media. NYSDEC will be issuing guidance document for evaluating the soil vapor intrusion pathway that will describe the appropriate investigation methodology and how to evaluate the investigation data.

Many of the 750 sites have already been remediated and are either in the long-term monitoring phase or were closed once remedial objectives established for the cleanup were met. However, the agency said that recent evidence and a better understanding of vapor intrusion has led it to conclude that the VI pathway may need to be re-evaluated at these sites. For the pre-2003 sites where remedial actions have been completed, NYSDEC has developed screening criteria and prioritization score sheets to help identify if there may be a potential for subsurface vapor intrusion at a site. The screening document is a series of questions

that address the nature of VOCs known or reasonably suspected to be present in the subsurface.

To expedite the screening process, NYSDEC generated a list of sites where chlorinated volatile organic compounds (CVOCs) were disposed or detected in soil or groundwater. NYSDEC decided to target CVOC sites first because CVOCs are found at the vast majority of contaminated sites, do not readily biodegrade and they may accumulate indoors without being noticed by the occupant because of their high odor threshold.

While the NYSDEC recognized that non-chlorinated VOCs (such as benzene and toluene) also have some potential for vapor intrusion, they represent less of a concern for several reasons. In addition, the agency said that non-chlorinated volatile compounds generally have an odor or taste when they are present in drinking water or breathing space and that sites below the odor threshold are generally below levels of concern and do not represent a threat to public health. Moreover, non-chlorinated VOCs also readily biodegrade in the presence of oxygen, which is readily available in the vadose zone (zone above the groundwater table) that contaminants must pass before entering a basement or crawl space. For these reasons, the agency decided to defer taking action on sites with non-chlorinated VOCs until further monitoring is evaluated and used to verify these assumptions.

Based on this effort, NYSDEC has developed a list approximately 400 closed sites that may be subject to further remediation for VI. Sites meeting the screening criteria will be ranked and prioritized using a score for soil and a groundwater score sheet. The score sheets will evaluate sites based on site-specific information such as chemical concentration, depth to contaminated groundwater and soil, soil type, land use above impacted areas at or near the site, presence of NAPL, preferential vapor flow paths and proximity to sensitive receptors (*e.g.*, daycare facilities, schools, and hospitals). A weighting factor will be assigned to each condition depending on the answer. For instance, if the depth to contaminated groundwater is between 15 and 50 ft below grade, then that condition will be given a weight factor of 4. Sites with soil contamination and

sites with groundwater contamination will be prioritized separately.

After the initial list has been reviewed by DER staff as a check on the validity of the screening process and to find out about other potential sites which for one reason or another did not rank highly, a manageable number of pre-2003 sites will be targeted initially for further study to determine whether indoor air impacts associated with site contaminants actually exist. This determination will require a certain amount of field sampling and characterization to supplement any existing information. The scope of the sampling will be determined on a site-specific basis but will generally involve soil gas sampling between any remaining on-site sources of VOCs and the nearest occupied buildings to estimate the extent of any vapor plumes associated with the site that could impact these structures. If soil gas contamination is not found within 100 feet of an existing occupied structure or one that is planned, then the site will be given a low priority and further investigation of vapor impacts will be deferred. If soil gas sampling indicates that vapors have migrated beneath an occupied building, then sub-slab and indoor air sampling will be necessary to further evaluate potential impacts.

If groundwater within 100 feet of or beneath an occupied building is contaminated with VOCs, then sub-slab and indoor air sampling will be initiated. If recent groundwater quality data is not available, a limited groundwater investigation may be required to evaluate current groundwater conditions (*i.e.*, nature and extent) downgradient of any remaining on-site sources of VOCs and make this determination. If groundwater contaminated with VOCs is not found within 100 feet of an occupied building, then the site will be given a low priority and further investigation of vapor impacts will be deferred.

Communicate with your colleagues using the State and Regional Environmental Cooperation Committee list serve at environ-state-rgnl@mail.abanet.org.

REGION 4 ROUND-UP

Michelle Diffenderfer

The State and Regional Environmental Cooperation Committee is holding its “Key Environmental Issues in Region 4” program this year at the Omni Hotel in Atlanta, Georgia, April 21-22, 2005. The program opens the evening of April 21, 2005 with a networking social for all participants. The CLE program begins the next morning and features introductory remarks from the Region 4 Regional Administrator Jimmy Palmer, a Keynote address by Tom Skinner, Acting Assistant Administrator, EPA’s Office of Enforcement and Compliance Assurance and a luncheon update by Joe D. Whitley, General Counsel of the Department of Homeland Security. We will also have updates on Civil Enforcement, Alternative Dispute Resolution with the EPA, Wetlands, Brownfields, New Source Review litigation and the 8-Hour Ozone ”Debate.” That evening the program wraps up with a reception before the group heads out to the Atlanta Braves-Chicago White Sox baseball game. We also hope to coordinate an ABA Section of Environment, Energy, and Resources’ Public Service program at a local school in Atlanta the afternoon of April 21, 2005.

REGION 6 ROUND-UP

Gregg Cooke

The ABA will sponsor a “Get To Know EPA-Region 6” CLE conference on May 26 at the Fairmont Hotel in Dallas, Texas. This informative session will include a presentation by all of the division directors of EPA Region 6, as well as the regional counsel, Chuck Sheehan, about EPA priorities in Region 6 for this next year. The program will include updates on Clean Air Act and Superfund implementation, as well as Clean Water Act priorities.

Superfund Site Declared Ready for Reuse

The Louisiana Army Ammunition Plant site is approximately 20 miles east of Shreveport and includes training facilities for military units. The site also

houses one of the Louisiana Army National Guard's Youth Challenge Programs and more than 20 business tenants. The U.S. Army built the facility in 1941-42 to load, assemble and pack various munitions.

The plant is listed on the Superfund National Priorities List and has undergone a partial cleanup. On Jan. 24, 2005, EPA and the Department of the Army signed an agreement allowing the transfer of the property to the state of Louisiana.

REGION 7 ROUND-UP

Scott Young

Uniform Environmental Covenant Act Proposals in EPA Region 7

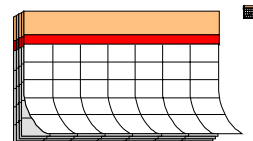
The 2005 Nebraska and Iowa Legislatures are each considering variations of the National Conference of Commissioners on Uniform Laws' proposed Uniform Environmental Covenant Act (UECA). (Also discussed in a more detailed article in this newsletter.)

The Conference formally approved UECA in the fall of 2003. No states adopted UECA during 2004 though it was introduced, as a bill, in the legislatures of Nebraska and Pennsylvania. Ohio has recently become the first state to adopt UECA. A copy of UECA together with background materials, can be found at www.environmentalcovenants.org/ueca/DesktopDefault.aspx.

In both Nebraska and Iowa UECA has been introduced as proposed bills by the state regulators, the Department of Environmental Quality in Nebraska and the Department of Natural Resources in Iowa, in the 2005 legislatures. Nebraska has not, historically, had an effective mechanism to serve as a long-term institutional control under applicable real estate laws. In Iowa, an environmental easement is available under the Land Recycling Act, Iowa's voluntary clean-up program, but it is not otherwise available. EPA Region 7's interpretation of applicable laws has also restricted the availability and utility of institutional controls for clean-ups in these states.

AMERICAN BAR ASSOCIATION SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

Calendar of Section Events



Meet Environmental Protection Agency Region 6

May 26, 2005
Dallas

"Little NEPA" Conference State-Level Environmental Impact Assessment

May 30, 2005
Boston

(Cosponsored with the International Association for Impact Assessment, for information see www.iaia.org)

Wetlands Law and Regulation

June 8-10, 2005
Washington, D.C.

(Cosponsored with ALI-ABA and ELI, for information see www.ali-aba.org.)

ABA Annual Meeting

Aug. 4-9, 2005
Chicago

13th Section Fall Meeting

Sept. 21-25, 2005
Nashville, Tennessee

***For more information, see the
Section Web site at
<http://www.abanet.org/environ> or
contact the Section at 312/988-5724.***