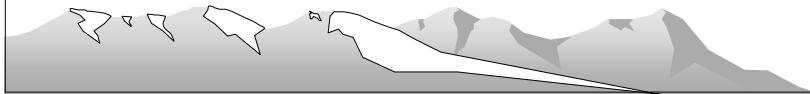


Emerging Issues in Environmental Law

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April 23, 2007



Overview

- Cleanup Liability
- Cleanup Allocation
- Air Developments
- Stormwater Developments
- CWA 404 Developments
- Enforcement Cases



Cleanup Liability

- CERCLA Liability
 - General rule: the current owner/operator of property is liable for remediation costs
 - Joint, strict and several – meaning subsequent purchaser can be liable for cleanup costs regardless of contribution to contamination



Cleanup Liability

- Defenses to CERCLA Liability
 - Bona fide prospective purchaser
 - Contamination occurred pre-acquisition
 - Conducted “all appropriate inquiry”
 - Provide all notices of releases of hazardous substances
 - Exercise “appropriate care” to stop releases
 - Provide access and cooperation with cleanup agency
 - No affiliation with liable party
 - Comply with land use restrictions



Cleanup Liability

- Defenses to CERCLA Liability
 - Innocent purchaser defense
 - Must conduct “all appropriate inquiry”
 - Must not know or have reason to know of contamination on the property
 - Must take reasonable steps to stop any continuing release, prevent future releases, limit exposure to releases



Cleanup Liability

- Response Costs
 - Four categories of responsible parties: current owner/operator; former owner/operator; arrangers; transporters
 - Historically, could seek response costs from any of these
 - *Aviall* case limits recovery from responsible parties for voluntary cleanups (§113 allows recovery only where EPA compels cleanup)



Cleanup Liability

- Response Costs
 - Since *Aviall* several cases have come up in which parties sought to recover response costs under §107
 - Courts have split on whether §107 allows seeking response costs for voluntary cleanups



Cleanup Liability

- State Cleanup Programs
 - Some states have version of Superfund (i.e., Arizona, New York)
 - Look for differences
 - Not joint and several
 - Prospective Purchaser Agreements
 - Operates in addition to federal CERCLA liability



Cleanup Liability

- How to Protect Yourself
 - Representations and Warranties
 - Ex.: no hazardous substance disposal on-site
 - Look for “as is” language
 - Should be supported by an indemnification
 - No releases have occurred
 - No threatened or existing litigation
 - Compliance with environmental laws



Cleanup Liability

- How to Protect Yourself
 - Covenants
 - Right to conduct an environmental investigation (i.e., Phase I)
 - CERCLA defenses depend on this
 - Purchase/lease pending outcome
 - Option to correct environmental issues discovered
 - If seller does this, may want to get a release from liability
 - Indemnification for liability
 - Usually capped and with a term



Cleanup Liability

- How to Protect Yourself

- Insurance

- Generally CGLI policies include a “pollution exclusion”
 - States are split on whether exclusion actually applies to pre-existing contamination (depends on policy language)
 - “Environmental insurance” can be obtained to cover various liabilities
 - Response costs (removal)
 - Remediation costs (long term)
 - Toxic tort costs



Brownfields Cleanup

- Comfort Letters

- EPA issued revised policy on issuance of Comfort/Status Letters (similar to PPAs)

- EPA stated that it wishes to “provide a measure of comfort by helping an interested party to understand the potential for or actual EPA involvement at a brownfields property.”
 - Intended to allow prospective purchaser to determine whether to go forward with transaction based on whether EPA may proceed with action
 - Letter obtained will depend on status of site: no previous interest, no current interest, Superfund interest, state action
 - Not a rule and not binding



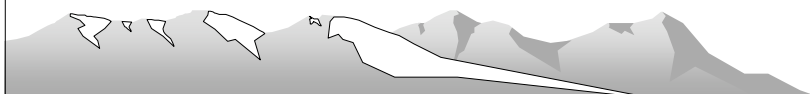
Indoor Air Quality

- Mold
 - No federal standards for mold indoors
 - Industry standards (IICRC)
 - State building codes (Texas)
 - New York City Guidelines (cleanup)
- Radon
 - No federal standards but there are recommendations



Indoor Air Quality

- Vapor Intrusion
 - No regulatory standards for soil-gas
 - Guidance on pathway to indoor air
 - Soil Gas Screening Levels (benchmark for potential issues with exposure)
 - Regions & states have developed cleanup standards which are applicable (PRGs & SRLs)
 - Based on use of property (residential v. commercial)
 - While focus appears to be on residential property now, may change to commercial property in future



Maricopa County Air Quality

- March 23, 2007 – 72 Fed. Reg. 13723
 - EPA proposed that the Phoenix nonattainment area failed to attain the 24-hour NAAQS for PM₁₀
 - PM10 standard allows one exceedance per year
 - 5 sites with greater than one exceedance
 - If finalized, Arizona must revise SIP to allow for 5% annual reductions in PM₁₀
 - Revision deadline: December 31, 2007
 - Public Comment deadline April 23, 2007

Maricopa County Air Quality

- 2005 Emission inventory: 49% compliance rate with County Rule 310 on dust control at construction sites.
- Recent Compliance Focus:
 - Since January 2007, 75% of all settlements have involved dust control
 - Engle Homes: settlement agreement for \$59,660 fine and \$11,505 SEP for 9 dust violations: Feb. 2, 2007
 - DR Horton signed a \$62,500 settlement agreement on February 13, 2007 for 15 alleged dust violations

Construction Stormwater

- Construction stormwater general permit was re-issued in 2005 with several important changes
 - Added uncontaminated excavation dewatering and irrigation runoff as allowable non-stormwater discharges
 - Added documentation and demonstration requirements where activity takes place near a TMDL
 - Applies to 1+ acre project
 - Beware if project less than 1 acre but “part of a common plan of development or sale”
 - Can waive if between 1 and 5 acres (no effect on water quality)



Construction Stormwater

- Changes to General Permit
 - Reduced frequency inspections
 - Construction in area that:
 - Receives less than 20 inches average rainfall
 - Construction in seasonal dry season
 - Frequency:
 - Once per month;
 - Before a predicted storm event; and
 - After storms of ½ inch or more



Construction Stormwater

- Example BMPs
 - Designated maintenance area
 - Secondary containment for fueling area
 - Concrete washout
 - Waste management
- Post-construction BMPs
 - How stormwater will be managed after construction ends (stabilization)



Construction Stormwater

- Stabilization
 - All soil disturbing activities completed and either:
 - Uniform perennial vegetative cover with a 70% density; or
 - Permanent stabilization measures (e.g., riprap, gabions)
 - Residential construction
 - Builder established temporary stabilization for individual lot
 - Informed homeowner of need for final stabilization
 - Agricultural: disturbed land returned to preconstruction state



404 Developments

- **Rapanos & Carabell Cases**
 - U.S. Supreme Court limited Army Corps jurisdiction over “waters of the U.S.”
 - Court stated that method Corps was using to determine if it had jurisdiction over a water (OHWM) was not valid, must be a “significant nexus” to navigable waters
 - This ruling could exclude intermittent/ephemeral waters
 - Effect: Regional Corps offices have been instructed to delay making jurisdictional determinations in 404 waters until the Corps and EPA issue joint, substantive guidance



404 Developments

- “De minimis” discharges
 - D.C. district court recently held that developers and others using earth moving equipment in wetlands *are not* required to obtain a 404 discharge permit if the work results in only a *de minimis* incidental discharge of dredged material
 - Factors: (1) time material is held; (2) where it is re-deposited in relation to where it originates
- Revised NWPs reissued on March 12, 2007
 - Changes to pre-notification, acreage requirements



Enforcement

- Stormwater
 - EPA entered into settlements with three construction companies in NY that were hit for failure to maintain BMPs and develop SWPPPs
 - \$150,000 in fines and \$100,000 in SEPs
- Air
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