

**Advanced Commercial Real Estate Leases Conference**  
**Emerging Issues in Environmental Law: Concerns and Remedies**  
**Gregory C. Brandt**  
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**I.** Indoor air, vapor intrusion and reopening sites with “No Further Action” letters

**A.** Background

1. Vapor Intrusion is the process by which volatile chemicals move from a subsurface source into the indoor air of overlying or adjacent buildings. Sources include buried wastes, contaminated soil and contaminated groundwater. In November 2002, as a result of the growing awareness of the potential adverse health effects resulting from vapor intrusion, the United States Environmental Protection Agency (“EPA”) published its “Draft Guidance for Evaluating the Vapor Intrusion to Indoor Air Pathway from Groundwater and Soils (Subsurface Vapor Intrusion Guidance).” EPA noted that the science and policy of vapor intrusion is a rapidly evolving subject, and stated that the draft guidance would be updated, as appropriate, as the state-of-the-science improves. As of late 2006, approximately 30 states had developed their own vapor intrusion standard or adopted the EPA standard.

2. The use of risk-based cleanups and institutional controls are becoming more frequently used methods to address environmental contamination. These methods allow a party to obtain a No Further Action letter (or other documentation of “closure”) and proceed with development, even if contamination is left in the soil or groundwater.

3. Historically, most regulatory agencies believed that vapor intrusion was only an issue where the source of the contaminants was very shallow and the magnitude of the contamination was very large. Agencies are now re-evaluating the previous assumptions, knowledge and analytical techniques used to address vapor intrusion.

**B.** New York’s decision to reopen previously closed sites

1. Sites like the former IBM manufacturing facility in Endicott, New York have focused regulators on vapor intrusion issues. At that site, investigation and cleanup of the groundwater began shortly after IBM reported a trichloroethylene (“TCE”) spill in 1979. Since 1980, more than two billion gallons of groundwater have been pumped up and passed through one of six groundwater treatment systems. The level of contaminants, including TCE, in the groundwater is now very close to drinking water standards (i.e., five parts per billion). Based on the concentration of contaminants in the groundwater, it had been assumed that vapor intrusion into buildings above or near the contaminated groundwater would not pose significant health risks. However, further investigation revealed that elevated levels of TCE and perchloroethylene (“PCE”) vapors had migrated into nearby homes and the owners of approximately 480 down-gradient properties have been offered a vapor mitigation system.

2. Endicott is one of several well-publicized instances in New York highlighting issues surrounding vapor intrusion and its link with contaminated properties. In response, New York State Department of Environmental Conservation and the New York State Department of Health are evaluating the vapor intrusion pathway at *all of the past, current and future remedial sites* in the State. The New York DEC estimated that solvents or other volatile organic compounds have been disposed at over 750 sites (chlorinated and non-chlorinated),

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resulting in contaminated soil or groundwater. This includes 421 sites where “final” remedial decisions were previously made and where chlorinated VOCs (e.g., TCE, PCE) were detected.

**a.** If the prior remedial decisions did not address vapor intrusion, then the responsible parties will be required to conduct vapor intrusion evaluations.

**b.** This will involve a review of existing environmental data to see if sufficient information is already available to assess possible vapor impacts. If a vapor intrusion problem is suspected, the agency may recommend additional sampling, monitoring or mitigation actions.

**3.** On August 1, 2007, New York Governor Eliot Spitzer vetoed a bill (A. 2742) that would have required residential property owners to disclose certain environmental test information to tenants and prospective tenants. Sponsors of the bill said the measure was necessary to protect tenants in cases involving vapor intrusion. Gov. Spitzer, in his veto message, said the bill did not specify the types of tests covered by the legislation or how far back in time property owners must go in disclosing test results. He was also concerned that the bill was limited to tests performed by the State Department of Environmental Conservation.

**C. Addressing vapor intrusion in California**

**1.** The United States EPA recently used its five-year performance review under CERCLA to re-evaluate subsurface vapor intrusion pathways at sites where prior assessments either did not evaluate the pathway or determined that they did not pose a significant health risk. One such site is the Middlefield-Ellis-Whisman (“MEW”) site in Mountain View, California, where nearby homes have been impacted by a TCE plume.

**2.** The California Department of Toxic Substances Control (“DTSC”) issued a February 7, 2005 Interim Final Guidance for the Evaluation and Mitigation of Subsurface Vapor Intrusion to Indoor Air.

**3.** California’s attempt to require the Cal/EPA to compile a list of sites with known or potential vapor intrusion issues, develop a strategy for identifying other sites with potential vapor intrusion issues and prepare a report on the potential for developing a uniform strategy for addressing the sites was vetoed by Governor Schwarzenegger (AB 2092 (2006) Hancock)

**D. Lowering the acceptable level of chlorinated solvents in the air and water**

**1.** Chlorinated solvents, like TCE and PCE, have been widely used in a variety of industrial processes and in dry cleaning. Current toxicity and health risk standards that provide guidance for assessing exposure to chlorinated solvents often vary from state to state and from agency to agency and require a thorough understanding of their intended use. For example, the Federal OSHA Permissible Exposure Limit for TCE is 537,000 micrograms of TCE per

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cubic meter of air ( $\mu\text{g}/\text{m}^3$ ) while the risk-based concentration for TCE in EPA's 2002 Subsurface Vapor Intrusion Guidance is  $0.022 \mu\text{g}/\text{m}^3$ .

2. A draft EPA Risk Assessment in 2001 found TCE to be as much as 40 times more carcinogenic than previously thought, but no revised standards have been promulgated. The National Research Council issued a final report in 2006 that found that "the evidence on carcinogenic risk and other health hazards from exposure to trichloroethylene has strengthened since 2001." The NRC report recommended that the federal agencies "finalize their risk assessment with currently available data so that risk management decisions can be made expeditiously." According to EPA's website, EPA does not plan to release a revised standard until the end of 2010.

3. The U.S. House of Representatives passed legislation that directs additional funds to the United States EPA for the agency to expedite work on developing a revised and final TCE risk assessment (as recommended by the National Research Council)

4. On August 1, 2007, Senator Clinton (D-NY) introduced the TCE Reduction Act to require the EPA to set tougher standards to protect the public from exposure to the carcinogenic chemical TCE. The bill sets a timeline for EPA to issue revised health advisories for TCE in drinking water and inhalation (vapor intrusion), issue revised drinking water standards for TCE and establish a reference concentration for hazardous levels of TCE vapor. The legislation is co-sponsored by Senators Boxer (D-CA), Dole (R-NC), Lautenberg (D-NJ) and Kerry (D-MA). Similar legislation is being introduced in the House of Representatives.

E. ASTM International (originally known as the American Society for Testing and Materials) approved the formation of a task group (E50.02.06) for development of a standard for assessing vapor intrusion in real property transactions. The draft standard, titled Standard Practice for Vapor Intrusion into Structures on Property Involved in Real Estate Transactions, is in final draft form and may be approved by the end of 2007 or early in 2008.

1. The purpose is to define good commercial and customary practice for conducting a vapor intrusion assessment on a property involved in a real estate transaction

2. The standard is intended to supplement a Phase I environmental site assessment conducted in accordance with ASTM E 1527, which is the standard for purchasers looking to establish their entitlement to the limited liability protections available under CERCLA and the All Appropriate Inquiries ("AAI") rule.

**II. Liability for Environmental Cleanup**

A. Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")

1. Background: Section 107 of CERCLA sets forth the parties (known as potentially responsible parties or "PRPs") that can be held liable for contamination. CERCLA

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has been widely used in environmental cost recovery actions because a PRP is faced with strict liability, liability for necessary costs of response can be joint and several and defenses are relatively limited. In 1986, Congress adopted amendments to CERCLA that authorized one PRP to sue another for contribution under § 113(f) of the statute. As CERCLA case law evolved, many Courts of Appeal held that a contribution claim under § 113(f) was the exclusive remedy for a PRP seeking to recover its costs.

2. In *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 125 S.Ct. 577, 160 L.Ed.2d 548 (2006), the Supreme Court held that § 113(f)(1) of CERCLA permits private parties to seek contribution only after being sued under § 106 or § 107. The Supreme Court also stated that § 113(f)(3)(B) permits private parties to seek contribution after they have settled their liability with the Government in an administrative or judicially approved settlement. Because many courts had previously held that PRPs could not sue under § 107, the decision in *Cooper Industries, Inc.* left many wondering if PRPs would be able to use CERCLA to recover their costs from other PRPs.

3. In *United States v. Atlantic Research Corporation*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 2331, 168 L.Ed.2d 28 (2007), the Supreme Court held that § 107(a)(4)(B) authorizes cost recovery actions by any private party, including PRPs. Section 107(a) permits a PRP to recover only the costs it has “incurred” in cleaning up a site and the remedies in § 107 and § 113 complement each other. “Section 113(f)(1) authorizes a contribution action to PRPs with common liability stemming from an action instituted under § 106 or § 107(a). And § 107(a) permits cost recovery (as distinct from contribution) by a private party that has itself incurred cleanup costs. Hence, a PRP that pays money to satisfy a settlement agreement or a court judgment may pursue § 113(f) contribution. But by reimbursing response costs paid by other parties, the PRP has not incurred its own costs of response and therefore cannot recover under § 107(a). As a result, though eligible to seek contribution under § 113(f)(1), the PRP cannot simultaneously seek to recover the same expenses under § 107(a). Thus, at least in the case of reimbursement, a PRP cannot choose the 6-year statute of limitations for cost-recovery actions over the shorter limitations permit for § 113(f) contribution claims.” (*Atlantic Research*, 127 S.Ct. at 2338 (footnote omitted).)

4. Owner’s liability for contamination by a lessee: Under CERCLA, the current owner of a facility (§107(a)(1)) and the owner of the facility at the time of the disposal of any hazardous substance at that facility (§ 107(a)(2)) are PRPs. One recent District Court decision, *Ameripride Services, Inc. v. Valley Indus. Service, Inc.*, 2007 WL 656850, \*4 (E.D.Cal.) (February 28, 2007), supported prior decisions such as *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 846 (9th Cir.1992) that held that “[t]he trigger to liability under § 9607(a)(2) is ownership or operation of a facility at the time of disposal, not culpability or responsibility for the contamination.”

5. Lessee’s liability under CERCLA as an owner: Some courts have held that a lessee that did not participate in the contamination, but otherwise exercised a significant amount of control over the site is liable under CERCLA as an owner. Examples include *Nestle USA Beverage Division, Inc. v. Overmyer*, 1998 WL 321450 (N.D. Cal.) (Mar. 27, 1998) (master

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lessee was liable as an owner under CERCLA with regard to contamination caused by its sublessee); *Commander Oil Corp. v. Barlo Equipment Corp.*, 215 F.3d 321 (2nd Cir. 2000) (setting forth a non-exclusive list of factors under which a lessee might be liable as an owner under CERCLA and indicating that the critical question is whether there is sufficient indicia of ownership and not simply control over the property).

**6.** Liability for passive migration: It may also be possible for a property owner, lessor or lessee to be found liable under CERCLA for contamination that was caused by another party, but that migrates through the soil or groundwater of the leased property during its ownership or operation of a facility. In *Redevelopment Agency of the City of Stockton v. Burlington Northern and Sante Fe Railway Corporation*, 2007 WL 1793755, \*3 (E.D. Cal.) (June 19, 2007), the District Court reiterated that the Ninth Circuit's decision in *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 870, 879 (9th Cir. 2001) did not create a bright-line rule that passive migration can never create a basis for CERCLA liability, but instead required an analysis of the various terms used to define "disposal" under CERCLA in relation to the facts of each case.

**B.** California Underground Storage Tank ("UST") Cleanup Fund ("Fund")

**1.** Background: The Fund allows the owner or operator of a UST to obtain reimbursement for certain costs to address petroleum contamination from the UST. The Fund will pay up to \$1.5 million per occurrence for qualified costs. The owner or operator must satisfy certain statutory requirements, including the permit requirement under California Health & Safety Code § 25284 (which was effective as of January 1, 1984, but which a claimant did not have to comply with for Fund purposes until January 1, 1990). The Fund allows a seller of real property to assign its rights under the Fund to a buyer. Also, one party (which may not be eligible) can incur costs on behalf of another party that is eligible to receive reimbursement from the Fund.

**2.** In *Kelsoe v. California State Water Resources Control Board* (2007) 153 Cal.App.4th 569, the issue was whether a Fund claimant could obtain a permit waiver even if the claimant failed to obtain a permit by the January 1, 1990 Fund deadline. The court held that a party who filed a claim after January 1, 1994 could qualify for a permit waiver if they can establish that they were unaware of the compliance requirement prior to January 1, 1990 and satisfy the other statutory requirements under Health & Safety Code § 25299.57(d) for a permit waiver.

**3.** California AB 1437 (Aghazarian) was sent to Gov. Schwarzenegger on September 17, 2007. AB 1437 allows a party who acquires real property on which a UST is situated and, despite the exercise of reasonable diligence, was unaware of the existence of the UST to obtain a waiver of the Fund's permit requirement if the party also obtained the required permit within a reasonable period, not to exceed one year, from when the party should have become aware of the existence of the UST.

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**III. Storm Water Management**

**A.** Background: In November 1990, the EPA adopted Phase I regulations requiring National Pollutant Discharge Elimination System (“NPDES”) permits for storm water discharges from certain industrial and construction sites. In December of 1999, EPA adopted Phase II regulations to address sites that were not covered under the Phase I regulations. The California State Water Resources Control Board (“SWRCB”) is responsible for administering California’s storm water management program. The SWRCB oversees 9 Regional Water Resources Control Boards that develop storm water requirements for their particular regions. Municipalities and counties must comply with the requirements established by their regional boards. Many of California’s large municipalities have storm water programs of their own with additional treatment requirements. To date, the majority of California’s storm water programs require that storm water be treated to the maximum extent practicable, but numeric treatment requirements have not been established at the state or regional level.

**B. Water quality data is now available online**

**1.** Every two years, states submit water quality reports to the EPA under Section 305(b) of the Clean Water Act. In the past, states submitted these reports in hard copy, and the EPA compiled them in a Report to Congress. Under Section 303(d) of the Clean Water Act, States also provided a separate prioritized list of waters that were impaired or require pollution controls. Beginning in the 2002 reporting cycle, EPA urged states to combine these two reporting requirements into one Integrated Report submitted electronically.

**2.** The 2002 National Water Quality Assessment Database summarizes electronic information submitted by the states to EPA in 2002. This website is EPA's first-ever interactive summary of state-reported water quality information and allows the user to view assessments of individual waterbodies. It presents data in a format designed for quick reference by water quality professionals and those familiar with water quality reporting.

**3. San Diego (2002) National Water Quality Assessment Database:**

**a.** Seventy (70) lakes, creeks, reservoirs, marshes, bays and ocean shoreline locations in San Diego are included in the current version of the National Water Quality Assessment Database available on EPA’s website.

**b.** Sixty-two (62) of the seventy assessed sites were identified as “Impaired.” Impaired signifies that the water quality conditions do not support at least one designated uses (such as public water supply, recreation or aquatic life harvesting) of the water.

**c.** Three (3) were identified as threatened. Threatened signifies that water quality conditions currently support all uses, but they appear to be declining.

**d.** Five (5) were identified as good. Good (or fully supporting), signifies that the water quality conditions fully support all water uses.

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**C.** Three types of storm water permits:

**1.** Industrial: Facilities that engage in regulated industrial activities are typically required to develop and implement storm water pollution prevention plans (“SWPPP”). Many industrial storm water discharges may be covered under general permits.

**2.** Construction: Owners of construction activities which disturb more than one acre must develop and implement construction site erosion control and storm water management plans. Most construction activities are eligible for coverage under state-issued general permits. The SWRCB is currently working on a revised general permit.

**a.** Under the current proposal, most construction sites would have increased monitoring requirements, including more extensive inspections and routine sampling and analysis for every storm event. For the first time, numeric effluent limits and action levels will be included in a statewide general storm water permit. Proposed turbidity limits are so low that many construction sites could be found in violation even when the storm water runoff is cleaner than the receiving waters.

**b.** Recording keeping will increase under the revised general permit, with the requirements for a Rain Event Action Plan, Action Level Exceedance Evaluation Report, an Annual Report and site photographs. A new electronic filing process will make documents available for public review and scrutiny. The revised general permit, as proposed, includes best management practices, soil analysis requirements, installation, operation and monitoring of “active treatment systems” (using coagulants or flocculants), credentialed storm water training for key personnel and source control measures.

**c.** Public Workshops were held in April 2007 and the public comment period was extended until May 4, 2007.

**3.** Municipal: Phase I of the program required NPDES permit coverage for medium (serving between 100,000 and 250,000 people) and large (serving 250,000 people) municipal separate storm sewer systems (“MS4s”). As part of Phase II, the State Water Resources Control Board adopted a General Permit for the Discharge of Storm Water from Small MS4s (WQ Order No. 2003-0005-DWQ) to provide permit coverage for smaller municipalities, including non-traditional Small MS4s, which are governmental facilities such as military bases, public campuses, and prison and hospital complexes. The MS4 permits require the discharger to develop and implement a Storm Water Management Plan/Program with the goal of reducing the discharge of pollutants to the maximum extent practicable (“MEP”). MEP is the performance standard specified in Section 402(p) of the Clean Water Act. The management programs specify what best management practices (“BMPs”) will be used to address certain program areas. The program areas include public education and outreach; illicit discharge detection and elimination; construction and post-construction; and good housekeeping for municipal operations. In general, medium and large municipalities are required to conduct chemical monitoring, though small municipalities are not.

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**a.** The Ninth Circuit's decision in *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832 (2003) held that applications for general permit coverage (including the Notice of Intent and the Storm Water Management Program) must be made available to the public, the applications must be reviewed and determined to meet the Maximum Extent Practicable standard by the permitting authority before coverage commences and there must be a process to accommodate public hearings.

**b.** Among other things, the SWMP must address "Post Construction Storm Water Management." The permittee must require long-term post-construction BMPs that protect water quality and control runoff flow, to be incorporated into development and significant redevelopment projects. The SWRCB believes that post-construction programs are most efficient when they stress low impact design, source controls and treatment controls.

**i.** Certain regulated Small MS4s must adopt an ordinance or other document to ensure implementation of Design Standards set forth in Attachment 4 to WQO 2003-0005-DWQ or a functionally equivalent program acceptable to the RWQCB. Among other categories, commercial developments of 100,000 square feet or more of impermeable area (including parking area), automotive repair shops, retail gasoline outlets, restaurants and parking lots of 5,000 square feet or more or with 25 or more parking spaces and potentially exposed to storm water runoff are subject to the Design Standards. These Design Standards can and will vary by jurisdiction.

**ii.** Peak storm water runoff discharge rates must not exceed the estimated pre-development rate for developments where the increased peak storm water discharge rate will result in increased potential downstream erosion.

**iii.** Other specific design criteria are included for loading/unloading dock areas, repair and maintenance bays, vehicle and equipment wash areas. Parking lot design must reduce impervious land coverage of parking areas, allow for the infiltration of the storm water or treatment of runoff and include strategies to limit and/or treat to remove the amount of oil, grease and other petroleum hydrocarbons that would otherwise be transported off-site by the storm water.

#### **IV. Mold**

**A.** According to the Department of Health and Human Services Centers for Disease Control and Prevention ("CDC"): "Mold spores occur in the indoor and outdoor environments. ... When mold spores drop on places where there is excessive moisture, such as where leakage may have occurred in roofs, pipes, walls, plant pots, or where there has been flooding, they will grow. Many building materials provide suitable nutrients that encourage mold growth. Wet cellulose materials, including paper and paper products, cardboard, ceiling tiles, wood, and wood products, are particularly conducive for the growth of some molds. Other materials such as dust, paints, wallpaper, insulation materials, drywall, carpet, fabric, and upholstery, commonly support mold growth."

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**B.** The CDC also notes: “While certain molds are toxigenic, meaning they can produce toxins (specifically mycotoxins), the molds themselves are not toxic, or poisonous. Hazards presented by molds that may produce mycotoxins should be considered the same as other common molds which can grow in your house. There is always a little mold everywhere - in the air and on many surfaces. There are very few reports that toxigenic molds found inside homes can cause unique or rare health conditions such as pulmonary hemorrhage or memory loss. These case reports are rare, and a causal link between the presence of the toxigenic mold and these conditions has not been proven. Certain individuals with chronic respiratory disease (chronic obstructive pulmonary disorder, asthma) may experience difficulty breathing. Individuals with immune suppression may be at increased risk for infection from molds.”

**C.** Mold cases typically arise when a leak, water damage, excessive humidity, condensation or flooding give way to a condition that supports the growth of mold that, in turn, causes property damage or claims of personal injury. Legal claims against property owners often allege negligence, strict liability, implied and express contract, constructive eviction, breach of contract, and/or nuisance. Property owners might also be sued on a theory of constructive notice where they should have known of the defect.

**D.** In March 2006, ASTM International issued ASTM E2418-06: Standard Guide for Readily Observable Mold and Conditions Conducive to Mold in Commercial Buildings: Baseline Survey Protocol. This standard is intended to define good commercial and customary for conducting a baseline survey for mold and conditions conducive to mold as part of due diligence in a real property transaction. On April 20, 2007, the American National Standards Institute (“ANSI”), through the Greenguard Environmental Institute, released for comment a proposed standard for moisture management in new construction. The proposed ANSI standard provides mold prevention practices in building design, a protocol for mold prevention construction practices and the verification of their implementation and a protocol for developing an on-going mold operations and maintenance plan following occupancy.

**E.** Insurance coverage for mold claims is generally available only as a part of or as an endorsement to a specialty pollution policy. In 2002, the Insurance Services Office published a “Fungi or Bacteria” exclusion that now appears in most commercial general liability policies, so general liability policies typically no longer provide coverage. Coverage is expensive and virtually all pollution insurers require policyholders to implement a mold operations and maintenance plan as a condition of obtaining coverage. Mold operation and maintenance plans typically address at least three main areas: prevention, detection and remediation.

**F.** The Mortgage Bankers Association’s “Mold: Steps toward Clarity, A White Paper by the Mold Working Group” was updated in July 2007 and provides a comprehensive summary of mold issues as they relate to commercial real estate. The White Paper notes that: “It also is difficult to discern any single response to mold among federal and state legislators and regulators. Congressional efforts to legislate on mold have largely evaporated, and neither EPA nor OSHA has yet promulgated exposure standards for mold. At the federal level, in June 2004, HUD issued a form requiring purchasers of single-family homes to be given basic notification of hazards associated with radon and mold but has gone no further.”

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**V. Climate Change**

**A. The EPA's ability to regulate greenhouse gas ("GHG"):**

**1.** In *Massachusetts v. EPA*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007), Justice Stevens, writing for the majority (with whom Justices Kennedy, Souter, Ginsberg and Breyer joined), found that 1) the state of Massachusetts had standing to challenge EPA's decision not to regulate GHG, 2) GHGs fit within the Clean Air Act's definition of "air pollutant" and, therefore, EPA has the statutory authority to regulate the emission of such gases from new motor vehicles and 3) EPA can avoid taking further action with regard to the regulation of GHGs only if it determines that GHGs do not contribute to climate change or it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.

**2.** Chief Justice Roberts (with whom Justices Scalia, Thomas and Alioto joined) dissented on the grounds that the petitioners lacked standing. Justice Scalia (with whom Chief Justice Roberts and Justices Thomas and Alioto joined) dissented on the merits.

**B. California's approach to the regulation of GHG**

**1.** AB 32: Governor Schwarzenegger signed the California Global Warming Solutions Act of 2006 (AB 32) on September 27, 2006, and it became effective on January 1, 2007. Among other things, it establishes annual mandatory reporting of GHG emissions for significant sources and sets emission limits to cut the state's GHG emissions to 1990 levels by 2020.

**a.** GHGs include carbon dioxide, methane, nitrous oxide, hydrofluorocarbons ("HFCs"), perfluorocarbons ("PFCs") and sulfur hexafluoride. These are the same gases listed as GHGs in the 1997 Kyoto Protocol.

**b.** AB32 does not include a list of affected entities or sectors that will be subject to regulation. Instead, it gives the California Air Resources Board the ability to regulate "any source, or category of sources, that the Air Resources Board determines as significant."

**c. Some of the relevant deadlines set by AB 32 include:**

**i.** June 30, 2007: ARB to publish a list of discrete early action  
GHG reduction measures

**ii.** January 1, 2008: ARB will adopt regulations to establish the state's mandatory GHG reporting and verification program and will determine the statewide 1990 baseline and set the statewide 2020 GHG emissions limit

**iii.** January 1, 2009: ARB will prepare and approve the scoping plan for achieving 2020 statewide GHG emissions limit

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**iv.** January 1, 2010: ARB will implement early action GHG reduction measures, effective immediately

**v.** January 1, 2011: ARB will adopt GHG emissions limits and emission reduction measures based on January 2009 scoping plan, effective in one year and may adopt a market-based cap and trade system with associated limits on the state's GHG sources

**vi.** January 1, 2012: Regulations based on January 2009 scoping plan will become effective and market-based cap and trade regulations may become effective

**2. Addressing GHGs as part of land use planning decisions**

**a.** On April 12, 2007, California Attorney General Jerry Brown filed a petition in San Bernardino County Superior Court against San Bernardino County and the County Board of Supervisors alleging that the General Plan EIR did not adequately analyze the adverse effects of implementation of the General Plan Update on air quality and climate change and did not adopt feasible mitigation measures to minimize the adverse effects of implementation of the General Plan Update on climate change and air quality. The Attorney General has also submitted formal comments under CEQA to San Diego, Sacramento, Orange County, Merced, Kern, Fresno, San Joaquin, Contra Costa, Yuba, Richmond and San Jose.

**b.** On August 21, 2007, the Attorney General entered into a settlement agreement with San Bernardino County that requires the County to embark on a public process aimed at cutting GHG emissions attributable to land use decisions and County government operations.

**i.** The County must adopt measures to control the emissions of diesel exhaust on projects and facilities under the County's discretionary land use jurisdiction, which may require the use of construction equipment running on clean alternative (i.e., non-diesel) fuels or that has been retrofitted with diesel particulate traps or equivalent control technology, limits on the idling of diesel trucks and off-road mobile sources of any type to 10 minutes or requirements that facilities where diesel trucks may reside overnight or for periods of several hours to provide on-site electrical connections to power the heating and air conditions of the cabs or any refrigeration units being pulled by the trucks.

**ii.** The County must also prepare an amendment to the General Plan adding a policy that describes the County's goal of reducing GHG emissions and calling for adoption of a GHG Emissions Reductions Plan. The GHG Emissions Reduction Plan requires an inventory of all known, or reasonably discoverable, sources of GHGs in the County, an inventory of the GHG emissions level in 1990, currently, and projected for the year 2020, and target for the reduction of emissions attributable to the county's discretionary land use decisions and its own internal government operations.

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c. Hours after Attorney General Jerry Brown reached the settlement with San Bernardino County, Republicans sought to limit his power with a bill attached to the state budget. The bill, which was adopted as part of the budget, bars the attorney general and environmental groups from filing lawsuits against transportation and flood protection projects funded by Propositions 1B and 1E. The ban remains in effect until 2010, giving state regulators time to draft guidelines for implementation of AB 32.