A continuing complaint of environmental lawyers involved in business and real estate transactions is that they are frequently brought into a deal at the last minute after the business deal has been negotiated and the contract has been drafted. Often times, a real estate or corporate lawyer will contact ask the environmental lawyer to take a quick look at an environmental report that is “clean” or just make sure there are no “deal killers.” Indeed, this practice is so commonplace that I once drafted the Ten Commandments with the first being “Don’t Wait To Contact the Environmental Lawyer Until The Night Before the Closing.”

Sometimes, the deal lawyers in a firm do not contact their environmental colleagues because they do not recognize there is an environmental issue. Other times, the “business people” do not want to involve the environmental lawyers because they fear that they will kill the deal. The irony is that environmental lawyers have more tools in their toolbox now to address environmental issues if the issues are identified and addressed early enough in the deal negotiations.

In this issue, we illustrate some of the ways that environmental lawyers can actually help extract value in transactions. Our issue editor, Cynthia Retallick, has done a wonderful job of assembling an outstanding roster of experienced practitioners who have written cutting edge pieces on many of the key environmental issues encountered in transactions.

This issue illustrates how environmental lawyers in general and our committee in particular can serve as an important resource to business lawyers. During the past year, our committee has hosted a highly successful environmental law basics webinar series that was designed for business lawyers and environmental lawyers who needed a refresher course. At the spring meeting, we sponsored a program on identifying and allocating environmental liabilities in transactions. This summer, we will be hosting a program that will focus on drafting and negotiating environmental issues in business transactions.

Speaking of our committee, we have some exciting news to announce. First, our current program vice chair, David Roth, has been approved to assume the reins of the committee beginning with the summer meeting. David has done a wonderful job reviving our committee’s programming and interaction with other Business Law Sections.

I am also pleased to announce that our committee book “Environmental Issues in Business Transactions” is in the final galley proofing stage. The book will be published in time for the summer meeting. Thanks to all of our authors and editors for their hard work and outstanding contributions.

The next committee project will be a forms project where we will cobble together examples of environmental provisions that are used for a wide range of contracts and deal structures. This project would be an excellent opportunity for younger lawyers to learn about contract drafting and negotiating. If you are interested in working on this project, please let me know.

Finally, by the time David Roth takes over as committee chair, we will have a new committee name that will be less a mouthful and more memorable than the current name. Look out for the announcement over the coming weeks.
lead corporate lawyer, who often sits at the apex of the legal team, is often equally unaware—except, perhaps on a general level—of the environmental landscape. Accordingly, within the “deal team,” the environmental business lawyer must be equal parts educator, hand-holder, Wikipedia, advocate, and negotiator. In this article, we discuss ten discrete issues that we, as environmental business lawyers, encounter with some frequency. The list is, by no means, exhaustive, but it hits a number of the highpoints.

1. The first, and perhaps most important, issue for an environmental business lawyer is time. It is all-too-common to receive the following call from the deal lawyer: “Hey, the deal is closing in a week, can we get the environmental due diligence done in time for closing?” The answer is “No.” Simple as that. Ordinarily, environmental due diligence includes the performance of a Phase I Environmental Site Assessment (a Phase I). A Phase I is a standardized type of environmental assessment that is characterized and distinguished from other types of environmental investigation because it does not involve any invasive testing. If you push a consultant, they may be able to complete a Phase I in 10 days, sometimes even less. Of course, the faster a Phase I is done, the more likely it is that corners are cut and/or information is missed. And, if the Phase I suggests problems, it may be necessary and appropriate to do some form of limited soil or groundwater testing. Obviously, this takes even more time to accomplish. Accordingly, it is imperative that a rigorous environmental due diligence begin as soon as possible and not be postponed until the waning days of the deal (some clients will purposefully delay the environmental due diligence, not wanting to expend the money until the deal is far enough along that it has some confidence the deal will not collapse).

2. Unfortunately, there are still many clients who prefer to forego a Phase I entirely in order to save money. We tell our clients that this is a bad idea (“Penny wise, pound foolish” goes the old saying). Phase I’s serve two important purposes. First, they provide a good environmental profile of the property that helps a purchaser understand the basic environmental condition of the property and also to decide whether invasive sampling is warranted. It will also help shape representations, warranties, and indemnities in the transaction agreement as well as the disclosure schedules attached thereto. Second, and equally important, completion of a Phase I that meets certain standards is, under EPA regulations, “all appropriate inquiry” (AAI). Completion of AAI allows a property purchaser to have access to a number of important statutory defenses to environmental liability. If the client fails to have the Phase I done, it could lose the ability to invoke those defenses when it needs them most. We generally leave decisions regarding assumption of financial risk to the business side of the deal but, on this issue, we are willing to affirmatively advise clients to do the Phase I. Perhaps there are situations where it makes sense for a prospective purchaser to not have a Phase I completed pre-closing, but it is as rare as a blue moon.

3. Speaking of cost-savings, another issue that often arises is when the client attempts to select an environmental consultant to prepare the Phase I solely, or at least primarily, because that consultant submitted the lowest bid. Recently, it has seemed that there has been an increase in impossibly inexpensive Phase I bids submitted by environmental consultants. There is no bright-line rule, but it’s fair to say that a Phase I should not, barring really exceptional circumstances, cost less than $1,500. If it does, there is a risk that the client has found a consultant who is saving money by omitting aspects of the investigation. As discussed above, any time a corner is cut, it heightens the risks to the person who is receiving and relying upon the Phase I. Clients and lawyers should try to use consultants who others have used in the past and recommended and should request and review the curriculum vitae of the individuals who are actually going to conduct the assessment. Ultimately, if the proposal looks too good to be true, it usually is.

4. With regard to proposals, it is amazing how many clients receive a proposal from a consultant, look at the price, and then sign it without even glancing at the terms and conditions. The contract with the environmental consultant should always be reviewed with care by counsel. Remember that, if the consultant gets something wrong and the client finds itself in the middle of a particularly messy environmental clean-up, then one of the most likely targets the client can turn to for indemnification is the consultant. Because the extent of liability protection afforded to the client depends upon the language of the contract, the lawyer must carefully review the contract or else the client may miss out on this source of protection. Among the items to be considered in environmental consulting agreements are the following: (a) Does the consultant try to cap its liability at a fixed amount? At the greater of a fixed amount or the amount the consultant is paid by the client (this structure is pretty common)? At the lesser of those two amounts (this is a significant reduction in the customer’s protection because it usually means the consultant’s liability has a pretty low cap)? (b) What, if any, representations and warranties does the consultant make about the services it is providing? (c) What level of insurance coverage does the consultant maintain? (d) Does the consultant agree to keep the information it obtains confidential?

5. Some clients who want to avoid the costs of a Phase I think that the solution to the problem is to rely upon a Phase I completed by a consultant hired by someone else. That may actually be ok, subject to a number of extremely important caveats: First, most Phase I reports contain language stating that only the
person who received the report may rely upon it. In almost every instance this occurs, the solution is to have the consultant issue something called a reliance letter that allows the client to rely upon it. It is a relatively simple letter, but it still should be reviewed and some consultants will charge a nominal fee for issuance of the letter. Second, in order to meet the “AAI” defenses discussed above, the Phase I cannot be stale. Before anything else is done, the client should check the date of the Phase I and the dates of certain activities described therein. If certain information was collected more than 180 days prior to the date of acquisition, the Phase I will be considered stale and will likely need to be redone to preserve the CERCLA “AAI” defenses. Third, if the client is obtaining the right to rely upon an existing Phase I, the client should make sure that it completes a Phase I User Questionnaire (a relatively simple one-page document that lists questions the client must ask itself under the EPA’s AAI regulations). Finally, never forget that the client did not hire the consultant and the consultant owes no loyalty to the client. Once it reads the Phase I, the client likely is going to want to ask the consultant various follow-up questions. That may be problematic where the other side or some unrelated third party hired the consultant. Additionally, the client will want the consultant preparing the Phase I to always have the client’s interests in mind. Where someone else paid the consultant to perform the Phase I, that is not going to be true. For these reasons, it is preferable that the client order a new Phase I with a consultant the client selects and whom the client pays.

6. As important as Phase I’s are to environmental due diligence, it is equally important not to lose sight of their limitations. As mentioned above, Phase I’s do not involve soil or groundwater testing. Rather, the Phase I will ordinarily simply address potential environmental issues (referred to in the Phase I as “recognized environmental conditions”) and then recommend further testing to more fully investigate the nature and extent of those issues. To avoid delays, some clients have a Phase II investigation commenced contemporaneously with the Phase I (some large developers require these sort of hybrid Phase I/Phase II’s). This does save time, but, on the down-side, it is possible that the Phase I will uncover an issue not known at the time the Phase II was conducted and thus not built into the scope of the Phase II. We still think that, in an ideal world, the Phase I should be started early enough in the due diligence to allow for completion of the Phase I before the Phase II work is commenced. At times, when the client does not have the luxury of time, it may be necessary to pursue this sort of integrated Phase I/Phase II investigation. Another limitation of Phase I’s is that they may not address environmental issues that may profoundly impact the planned site use. Among the issues not considered in the Phase I are asbestos-containing materials, lead-based paint, wetlands, indoor air, and others. To avoid missing one of these so-called non-scope issues, the party ordering the Phase I should conduct its own, independent site review to see whether there is concern about any non-scope issues. If such an issue is identified, it can be more fully investigated, outside of the Phase I process, by someone with knowledge of that particular area.

7. If you are representing a prospective buyer, do not be surprised if the seller opposes any Phase II testing or, if it allows such testing, does not want to see the results. This reluctance to see testing data may initially seem strange, but the seller’s concern is that specific information about on-site releases may trigger reporting and/or remediation obligations. The concern is best illustrated by the following hypothetical: (A) a prospective buyer is interested in a developed piece of commercial property, (B) the prospective buyer does Phase II testing and shares those results—which do, in fact, disclose the existence of a historical release, (C) the prospective buyer decides not to go forward with the transaction, and (D) the seller is thus left with an issue that it may well be compelled to report and remediate without the benefit of having the buyer’s money to undertake the work. In other words, the seller is arguably in a much worse position than when it started. On the other hand, if the deal moves forward, the seller will eventually need the testing information to properly assess and contractually allocate the liabilities described in the report. Some clients try to circumvent this problem by having the report disclosed to a third-party who, in turn, discusses the issues in a general enough way with the client. By doing this, the hope is that the seller can get a sense of the degree of the environmental issues without obtaining enough specific information to trigger reporting or remediation obligations. This is an awfully fine line to walk and there are some questions about whether it actually, as a legal matter, accomplishes its goal.

8. We are living in a new credit landscape, and many lenders have become a great deal more involved and demanding in terms of environmental due diligence in transactions where the plant or property is going to serve as collateral. Some order their own Phase I using an approved bank vendor. We have seen situations in which a deal is pushed off track because the lender, who was not adequately consulted, demands additional investigation. To minimize these sorts of problems, clients are well-advised to involve the lender early on in the environmental due diligence process so that it knows the scope of the diligence activities and can make whatever demands or requests it feels are appropriate given the nature and condition of the real property. It is also not a bad idea for the client to tell the lender the name of the consultant it intends to use in order to protect against the possibility that the lender will, late in the transaction, say that the consultant is unacceptable.
9. Some clients view the consultant merely as an expert who prepares a report and provides it to the client. This is way too narrow a perspective and deprives the client of a potentially important asset. The right consultant can not only prepare a good Phase I, it can also help the client to monetize the extent of environmental risk likely associated with the site. Many clients will receive a Phase I with six issues noted and be at a total loss to understand the financial ramifications of those conditions. If the property is ordinarily worth $10,000,000, do those problems reduce the value to $9,000,000? To $5,000,000? To $1,000,000? Those are also often questions that counsel has difficulty answering. Some consultants will, if pushed, provide the client with some form of basic cost-analysis to help the client make a reasoned decision. The consultant will include all sorts of qualifiers to its opinion but, at the end of the day, it will still use its best professional judgment to offer substantive guidance on the nature and extent of the site environmental issues and the broad range within which it thinks the costs of addressing those issues will fall. It is not a foolproof opinion, but it is still valuable information with which the client can more closely measure the potential value of the property and negotiate the relevant business terms.

10. As more and more information is uploaded and placed in various federal, state, and local regulatory databases, it becomes increasingly easy to get a basic overview of the environmental issues at a site by searching public websites on the internet. We do this as soon as we get involved in a case, often even before the initial environmental due diligence has begun. As with so many things, you can never assume that the Internet contains all the relevant information about a site. Indeed, particularly when venturing into the murky waters of the blogosphere, the possibility exists that the information may not be accurate. But, with that said, there is still benefit to doing a Google search for the site and site owner and searching the EPA Envirofacts Website and any state environmental agency databases. You never know what critical piece of information may reside in one of these files. Moreover, the ability to have near instantaneous access to this wealth of information is an easy way to impress a client with your ability to quickly gather helpful information about a site. Ultimately, if left until the last minute, environmental issues can become the tail wagging the proverbial dog. It is never a good thing for a lawyer to be perceived as the road-block holding up the entire transaction. Conversely, no lawyer wants to be called eighteen months after a deal has closed and asked why they failed to identify an environmental issue that has, post-closing, become a million dollar issue. To avoid this, the environmental lawyer must forcefully advocate, within the transaction team, for an early and robust environmental due diligence. The expenditure of funds up front, even though those funds are at risk if the deal fails to advance, will, in the long run, almost certainly prove to be an extremely wise investment.

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Climate Change Nuisance Litigation: The Tip of the Melting Iceberg or a Flash in the Pan
By Steven M. Siros, Esq.¹

I. Introduction

The issue of global warming and the impact it has on the climate has rapidly moved from the legislative to the judicial and executive arenas. Congress’ continuing inability to craft comprehensive federal climate regulations has resulted in plaintiffs increasingly turning to the courts to obtain redress for perceived harms caused by climate change. In 2004, states, cities, land owners, and land trusts began to bring suits against oil, energy, and utility companies for nuisance, alleging that these companies’ greenhouse gas (“GHG”) emissions caused or will cause climate change, which has injured or will adversely affect these plaintiffs. In the district courts, these claims were typically dismissed on political question and standing grounds. On appeal, the results have been mixed and one of these cases has now reached the United States Supreme Court. The Court’s decision will have far-reaching ramifications and should answer the question of whether climate change nuisance litigation represents the tip of a melting iceberg or is merely a flash in the proverbial litigation pan.

II. Global Warming Nuisance Cases

The three primary climate change nuisance cases are: (1) Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009), rehearing en banc granted, 598 F.3d 208 (5th Cir. Feb. 26, 2010), order dismissing appeal, 607 F.3d 1049 (5th Cir. May 28, 2010), petition for writ of mandamus denied, 131 S. Ct. 902 (2011); (2) Connecticut v. Am. Elec. Power Co., Inc., 582 F.3d 309 (2d Cir. 2009), certiorari granted, 113 S. Ct. 813 (2010); and (3) Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), appeal docketed, No. 09-17490 (9th Cir.). Each of these cases will be discussed below.

A. Native Village of Kivalina v. ExxonMobil Corp.

In a case pending before the Ninth Circuit, plaintiffs asserted federal common law nuisance claims against twenty-four oil, energy, and utility companies (plaintiffs also asserted conspiracy claims). Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d at 868. Plaintiffs alleged that due to global warming, the Arctic sea ice that protects the Kivalina coast from winter storms has diminished, and that the resulting erosion requires the relocation of Kivalina’s residents. Id. The complaint sought no injunctive relief, but rather sought relocation damages. Id. at 869. Defendants filed motions to dismiss on political question and standing grounds. Id. at 868.

1. Non-Justiciable Political Question Analysis

Defendants argued that allowing plaintiffs to use nuisance law as a mechanism to regulate GHG emissions would interfere with the President’s authority to manage foreign relations. The court noted that merely because a judicial decision could affect foreign affairs does not necessarily mean that the issue presents a non-justiciable political question. Id. at 873. However, the court reasoned that in order to evaluate plaintiffs’ nuisance claims, the court would be required to assess whether a reasonable person would consider the emissions to be unreasonable. Id. at 874-75. In making this reasonableness determination, the fact finder would be required to determine an acceptable emission level and who should bear the cost of global warming. The court found these to be initial policy determinations not within the discretion of the judiciary. Id. at 876-77. The court therefore concluded that plaintiffs’ claims presented non-justiciable political questions. Id. at 877.

2. Standing Analysis

The court also evaluated whether the plaintiffs had standing, focusing on the causation element of Article III standing. In order to show causation, plaintiffs must demonstrate a causal connection between the injury and the conduct complained of – the injury has to have been fairly traceable to the actions of the defendants. Kivalina, 663 F. Supp. at 877. The court acknowledged that traceability of plaintiffs’ harms to the defendants’ action need not rise to the level of proximate causation but did require “proof of a substantial likelihood that the defendant’s conduct caused plaintiffs’ injury in fact.” Id. at 878, quoting Habecker v. Town of Estes Park, Colo., 518 F.3d 1217, 1225 (10th Cir. 2008). The court found that the discharge, alone, was insufficient to establish injury. Id. The court also was skeptical of plaintiffs’ ability to trace the “seed” of their injury to any defendants, stating that “[e]ven accepting the allegations of the Complaint as true and construing them in the light most favorable to Plaintiffs, it is not plausible to state which emissions – emitted by whom and at what time in the last several centuries and at what place in the world – ‘caused’ Plaintiffs’ alleged global warming related injuries.” Id. at 880-81. The court held that plaintiffs were unable to show causation and therefore did not have standing to bring the action. Id. at 881-82.
Plaintiffs’ appealed to the Ninth Circuit. The matter has been fully briefed but no oral argument date has been set at the time of printing. It is unlikely that the Ninth Circuit will take further action on this case until the Supreme Court issues a decision in American Electric Power.

B. Comer v. Murphy Oil USA

In Comer, residents and property owners along the Mississippi Gulf Coast filed a putative class action against oil and energy companies alleging that their GHG emissions contributed to global warming, which in turn caused the sea levels to rise, which in turn exacerbated the intensity of Hurricane Katrina, which in turn destroyed private and public property. Comer, 585 F.3d at 859. The Comer plaintiffs sought compensatory and punitive damages under Mississippi common law public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy. Id. at 859-60. The district court granted defendants’ motion to dismiss, finding that plaintiffs lacked standing and that their claims presented non-justiciable political questions. The Fifth Circuit initially reversed the district court’s decision and defendants sought an en banc hearing, which was granted. Comer v. Murphy Oil USA, 598 F.3d 208 (Feb. 26, 2010). However, in an unexpected procedural twist (see discussion below), the Fifth Circuit dismissed the appeal, reinstating the district court’s dismissal of plaintiffs’ claims. Comer v. Murphy Oil USA, 607 F.3d 1049 (May 28, 2010). Although the original decision from the Fifth Circuit was vacated, the reasoning applied by the three-judge panel is instructive.

1. Non-Justiciable Political Question Analysis

The three-judge panel (“Panel”) held that plaintiffs’ nuisance, trespass, and negligence claims were not barred by the political question doctrine. First, the Panel determined that there were no federal, constitutional, or statutory provisions committing any of the issues to an exclusive federal branch, noting that the only issues in the matter were state common law and tort claims. Comer, 585 F.3d at 875. Second, the Panel rejected defendants’ argument that there was an absence of judicially discoverable or manageable standards, reasoning that Mississippi and other states have “long-established standards for adjudicating nuisance, trespass, and negligence claims.” Id. at 875. Finally, the Panel held that the policy determinations underlying tort claims did not present a need for non-judicial discretion. Id.

2. Standing Analysis

In reviewing whether plaintiffs had standing, the Panel found that plaintiffs’ nuisance, trespass, and negligence claims met the injury in fact and redressability requirements necessary for Article III standing. Comer, 538 F.3d at 863. Injury in fact was met because plaintiffs alleged actual, concrete injuries to their land from Hurricane Katrina. Id. Redressability was met because of the availability of compensatory and punitive damages. Id. The Panel noted that a showing of causation under Article III need not be a showing of proximate cause and that an “indirect causal relationship will suffice.” Id. at 864. Relying on the fact that plaintiffs presented scientific reports and alleged a chain of causation between defendants’ emissions and plaintiffs’ injuries, the Panel held that plaintiffs’ allegations were sufficient to establish standing. Id. at 864-65.

3. Lack of Quorum

The case then took an interesting procedural turn. Defendants filed a motion for rehearing en banc, which was granted. However, shortly thereafter, the Fifth Circuit ruled that it no longer had the requisite quorum to decide the case due to the recusal of one of the nine judges that had originally agreed to the en banc review. Instead of letting the original Panel’s decision stand, the Fifth Circuit held that its decision to grant the en banc hearing vacated the original Panel’s decision. The subsequent loss of the requisite quorum required plaintiffs’ appeal to be dismissed in its entirety. Comer v. Murphy Oil USA, 607 F.3d 1049 (5th Cir. May 28, 2010). Plaintiffs’ request for mandamus relief from the Supreme Court was rejected. As such, the district court’s dismissal of plaintiffs’ lawsuit stands.


1. Appellate Court Decision

The Second Circuit reversed the district court’s dismissal of plaintiffs’ claims, finding that (i) plaintiffs had standing, (ii) plaintiffs had stated a claim under
the federal common law of nuisance, and (iii) plaintiffs’
claims did not present non-justiciable political
questions.

a. Non-Justiciable
Political Question
Analysis

The Second Circuit rejected defendants’ argument
that plaintiffs were impermissibly interfering with the
President’s ability to manage foreign affairs, noting that
plaintiffs’ complaint did not ask the court to draft a far
reaching solution to global warming. Id. at 325. With
regard to whether there were judicially discoverable
and manageable standards for resolving such a case, the
court noted that federal courts have “successfully
adjudicated complex common law public nuisance
cases for over a century.” Id. at 326. Further, the court
reasoned that well-settled principles of tort and public
nuisance law provide appropriate guidance to district
courts in a case such as this. Id. at 329. In addition, the
court reviewed whether it would be impossible to decide
the case without making an initial policy determination
that is clearly beyond the scope of judicial discretion.
Id. at 330. The court concluded that the case, although
complex, appeared to be an ordinary tort suit. Id. The
Second Circuit concluded that the district court erred
in dismissing plaintiffs’ claims on the ground that they
presented a non-justiciable political question.

b. Standing Analysis

Since the district court dismissed plaintiffs’ claims
on political question grounds, the district court never
addressed the issue of standing. The Second Circuit
elected to address this issue. As part of its evaluation,
the court analyzed the state plaintiffs’ parens patriae
standing, as well as each of the plaintiffs’ proprietary
standing. Id. at 334. The Second Circuit found that the
states met the parens patriae standing requirements
because: (1) their interest in safeguarding public health
and resources was distinct from the interests of the
individual private entities; (2) their quasi-sovereign
interest was to protect the health and well-being of
their residents; and (3) carbon dioxide emissions
would affect almost the entire states’ population. Id. at
338. Finally, the court found that it was doubtful that
an individual plaintiff could achieve complete relief
on her own. Id. at 338. With respect to proprietary
standing, the court reiterated that at the pleading stage,
plaintiffs must merely show that their alleged injury
was fairly traceable to the actions of the defendants. Id.
at 345. Plaintiffs’ allegation that defendants’ emissions
contributed to global warming, which caused both
current and future harm, was sufficient to establish
Article III standing. Id. at 347.

c. Federal Common
Law Nuisance

The Second Circuit also considered whether plaintiffs
had stated a claim for federal common law nuisance.
The court looked to the Restatement’s definition of
nuisance, noting that the Restatement defines a public
nuisance as “an unreasonable interference with a
right common to the general public.” Restatement
(Second) of Torts § 821B. The court found that the
state-plaintiffs stated a claim for nuisance because they
alleged that defendants’ emissions constituted a
“substantial and unreasonable interference with public
rights,” including the right to public comfort and safety,
and the right to “preserve the aesthetic and ecological
values of the natural world.” Id. at 353. The court
also found that the non-state plaintiffs stated a claim
for nuisance because they alleged that defendants’
emissions interfered with rights common to the general
public and that the interference was unreasonable. Id.
at 370. New York City alleged interference with public
health, such as increased respiratory illnesses from
smog, and interference with public comfort, such as
flooding of airports and subways. Id. The land trusts
alleged interference with the public’s right to “use,
enjoy, and preserve the aesthetic ecological values of
the natural world.” Id. These claims were deemed
sufficient by the Second Circuit to propel plaintiffs past
the pleading stage.

2. United States Supreme Court
Review

Not surprisingly, defendants appealed to the United
States Supreme Court. On December 6, 2010, the
Supreme Court granted certiorari on three specific
questions: (1) whether states and private parties
have standing to seek injunctive relief in the form of
GHG caps; (2) whether a cause of action to cap GHG
emissions can be implied under federal common
law; and (3) whether plaintiffs’ claims present non-
justiciable political questions. One of the more
interesting briefs submitted was the brief submitted
by the United States on behalf of the Tennessee Valley
Authority in which the United States advanced the
position that these types of nuisance cases did not
belong in federal court. The Solicitor General argued
that the Supreme Court should vacate the Second
Circuit decision, and remand the case to answer two
very narrow questions: (1) whether, independent of
Article III standing, plaintiffs’ suits should be barred
as a matter of prudential standing; and (2) whether
in light of recent actions taken by U.S. EPA since the
court of appeals issued its decision, plaintiffs’ common
law claims have been displaced.
The United States argued that plaintiffs’ common law nuisance claims are “quintessentially fit for political or regulatory – not judicial – resolution, because they simultaneously implicate many competing interests of almost unimaginably broad categories of both plaintiffs and defendants.” Establishing appropriate levels for the reduction of GHG emissions would entail “multifarious policy judgments, which should be made by decision makers who are politically accountable, have expertise, and are able to pursue a coherent national or international strategy . . . .” As such, the United States continued, the “confluence in this case of several factors, including the myriad of potential plaintiffs and defendants, the lack of judicial manageability, and the unusually broad range of underlying policy judgments that would need to be made – demonstrates that plaintiffs’ global-warming nuisance claims should be resolved by the representative Branches, not the federal courts,” and, therefore, plaintiffs cannot demonstrate that they have prudential standing to pursue this appeal.

Alternatively, the United States argued that U.S. EPA’s recent actions to regulate GHG emissions displaced plaintiffs’ common law nuisance claims. More specifically, since the Second Circuit had issued its decision, U.S. EPA has (1) issued its final GHG reporting rule for emission sources in excess of 25,000 tons per year; (2) issued a final endangerment finding for GHGs; (3) promulgated its final light-duty vehicle GHG emission standards and corporate average fuel economy standards; (4) issued its tailoring rule for PSD and Title V permitting; and (5) agreed to promulgate NSPS for new and existing power plants by May 2012.

Oral arguments were held on this case on April 19, 2011.

III. The Future of Climate Change Nuisance Litigation

By granting certiorari in American Electric Power and denying the request for mandamus in Comer, there is an expectation that the Supreme Court will at the very least limit plaintiffs’ ability to bring climate change nuisance cases. However, even if the Supreme Court leaves the door open for climate change nuisance cases, plaintiffs still face additional hurdles. For example, plaintiffs will need to prove proximate cause, which is obviously a much stricter standard than the “fairly traceable” test employed by the courts at the pleading stage. Plaintiffs may also be disappointed by the amount of monetary damages they can recover. Historically, the damages that are recoverable in collective nuisance suits are several rather than joint, and defendants are not obligated to pay for shares of nonparties. Defendants may very well be able to show that they are only responsible for a very small percentage of overall damages (in American Electric Power, for example, the defendants collectively were alleged to have contributed no more than 2.5% of the overall world-wide GHG emissions).

In conclusion, even if plaintiffs are able to clear the initial procedural hurdles in global warming nuisance litigation, there will still be many more hurdles to overcome before plaintiffs will see any relief, be it injunctive or monetary damages. Regardless of which side prevails at the trial court level, these cases will invariably be appealed all the way to the Supreme Court. Notwithstanding these obstacles, the scope of potential damages that might be awarded if these cases are ultimately successful will likely lead to an explosion of climate change nuisance cases if the Supreme Court rules in plaintiffs’ favor in American Electric Power.

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2. The U.S. Supreme Court, in Baker v. Carr, established six factors which, if any one of the factors exists, indicate the presence of a non-justiciable political question. 369 U.S. 186, 210 (1962). These factors are: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; (4) the impossibility of a court’s undertaking independent resolution without expressing lack of the respect to coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; and (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. Id.
Creating a Results-Focused Sustainability Program for Your Business
By Pamela K. Elkow, Esq. and Kirstin M. Etela, Esq.¹

In the uncertain arena of climate change legislation, many companies recognize that the corporate world must lead on this issue because the federal government, paralyzed by politics, cannot. Pressure from shareholders and consumers is increasing, and EPA continues to move forward with regulations. State programs also continue, perhaps with more force and urgency. Companies are not waiting. Instead, they are recognizing cost savings and efficiencies, responding to various state (and international) requirements with a company-wide sustainability plan, and are prepared for the federal government to catch up. So, how do your clients put themselves in the same place? Our clients have asked the same question.

Many companies recognize that it makes long-term economic sense to have a sustainability program, but with so many economic pressures on their businesses, it can be hard to focus on sustainability. Even when there is broad agreement on sustainability, it is difficult to take specific actions to further sustainability goals. Businesses without programs feel overwhelmed about where to start and wonder whether the implementation costs will be worth it. What to do when the company cannot seem to get its sustainability program off the ground? What to do when the concern is that the business’s sustainability program is anything but sustainable? Go back to organizational basics and build the sustainability program from the ground up: define the goals; build the organization; implement the program.

First, we all know that sustainability can mean many things: reducing greenhouse gas emissions, conserving energy and natural resources, recycling, using alternative chemicals, using biodegradable packaging, upgrading buildings and equipment. What sustainability means to your clients likely depends, at least in part, on the type of business, where it is located, or the corporate responsibility policy it has. The way to be successful is to define and pursue sustainability in a way that makes sense for that business.

The first step in building a sustainability program is to identify those sustainability goals that are consistent with the business’s goals. If the long-term business goal is to make more widgets at a lower cost, then it makes sense to ensure that scarce energy resources continue to be available at reasonable prices. Therefore, the sustainability goal may be to use less energy to produce the same product at the same price. Perhaps widget parts are expensive and difficult to dispose of; the goal in that case could be to take them back from customers for reuse and recycling. Maybe customers have their own sustainability goals that can be bolstered through the company’s efforts. These goals may have potential risks, such as short-term increased costs, but may lead to greater rewards, such as long-term customer loyalty or reduced energy costs. Analyze the viability of the sustainability goals by weighing the risks against the rewards. That calculation will reveal those sustainability goals that make sense for the business.

The next step is to develop a structure for the program, identifying the people who will fill those roles, and putting in place the policies and ground rules that will allow the sustainability organization to work towards implementing the company’s goals. Because leadership is key, a champion at the executive or board level is necessary. Because execution is critical, someone who understands metrics as a means to achieve compliance, such as your EHS director, is necessary. Because resources are necessary, look to someone in finance who can articulate the value proposition of the sustainability program to the financial decision makers. Because implementation on the ground is the difference between a program on paper and actual results, identify partners at each facility who will be responsible for delivering on the sustainability goals. In other words, define roles, staff the roles, and put in place the rules that guide their actions.

Finally, step three: implementation. Implementation requires ensuring that the necessary tools are in place. Take a look at the laws, policies, and regulations that may or will affect the goals, how they are measured, and how they are reported. Evaluate technologies to measure progress. Take a second look at financial performance measurements such as return on investment analyses to ensure that they are flexible enough to accommodate and anticipate longer-term outcomes. Communicate the importance of the sustainability goals to employees and customers. And fund the program. A sustainability program will not be sustainable without funding!

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Businesses of all types and sizes are developing or improving existing sustainability programs as a means to stay ahead of the curve, anticipate change, remain profitable, and have a say on what sustainability means for all of us.

As Times (And The Environment) Change, So Does Environmental Insurance
By Robin Kelliher & Michael Balmer, The Willis Group

The first-generation environmental insurance policies were developed to fill the gap created by the introduction of “pollution exclusions” under commercial general liability (GL or CGL) policies in the 1980s. Initially these environmental policies were used to address more traditional environmental exposures tied to operations, and their purchase was driven in large part by statutory requirements.

In the late 1990s and through the 2000s, the use of environmental insurance changed dramatically. Instead of merely insuring traditional operational exposures, these policies evolved into risk management tools used to facilitate various forms of transactions by “backstopping” environmental indemnifications or offsetting other forms of security for environmental risks.

Fast forward to 2011. We have been through a major recession that restricted transaction flow and a financial crisis that threatened the viability of some of the mainstream environmental insurers. As we emerge from this chaotic period and the deals are starting to flow again, what is the state of the insurance market and, in particular, the environmental insurance market? Can it still play a meaningful role in supporting transactions?

The short answer is yes, but there have been many changes, significant changes, to the environmental insurance market. Long gone are the days of 30-year insurance policy terms and affordable Cost Overrun insurance for smaller-scale cleanup projects. We are now faced with very different realities and risk appetites. Notwithstanding these developments, the dynamics of a creative and competitive environmental insurance market can still work to deliver valuable coverage at surprisingly reasonable cost.

Preconceptions are hard to shake off, however, and people have long memories. Mainstream product offerings and policy forms have evolved in both favorable and not-so-favorable directions. The purpose of this article is to bring readers up to speed with the current marketplace realities for site-specific pollution insurance. This will help you to set realistic expectations for deal teams and position your client to take maximum advantage of current market conditions.

THEN AND NOW

Perhaps the most effective way to highlight changes in the environmental insurance marketplace is to juxtapose what was available then and what is available now and walk through the reasons for these changes.

To understand this evolution and potential future trends, we must understand the driving factors of some of these changes.
MATURING MARKET SECTOR FOCUSED ON PROFITABLE UNDERWRITING

Environmental insurance was originally a specialty niche product developed to address specific needs. The early product forms and underwriting protocols were essentially experimental, since the available loss experience was non-existent or, at best, very limited. However, strong investment performance was driving insurer profitability at this time and this further encouraged some carriers to focus on top-line growth rather than underwriting performance. Various insurers entered and exited the market, while others evolved and prevailed.

Toward the end of the 2000s, the industry’s understanding of loss potential and associated development started to improve. Further, investment returns were starting to decline, forcing insurers to accentuate profitable underwriting.

The loss data was revealing. Insurers were better able to identify the specific factors that negatively affected underwriting performance and took steps to tighten underwriting protocols, modify coverage and adjust pricing. This led to many changes, including the introduction of coverage restrictions for certain key issues (e.g., mold and emerging contaminants). It also led to major changes to some product lines that had proved to be very unprofitable for some insurers, notably Cost Overrun and Secured Creditor insurance.

Another major trend related to the policy term. Throughout the 1990s and early 2000s real estate and corporate transactions were driving much of the environmental insurance market’s growth. Transactional lawyers were pushing for longer policy terms to protect their clients’ interests and underpin indemnity agreements. However, insurers’ auditors insisted on unfavorable revenue recognition and loss reserving procedures for these long-term policies. With the focus on profitability and incorporating the lessons learned from loss statistics, the market started to encourage shorter policy terms. Policy terms over 10 years all but ceased to be available and insurers looked to rely less on one-off, long-term, project-specific placements and placed more emphasis on increasing the proportion of short-term, renewable programs.

NEW MARKET DYNAMICS SIGNAL A NEW PARADIGM

The insurance industry has been going through a comparatively profitable phase, even allowing for the recession. Not surprisingly this has attracted investor attention and resulted in a net influx of capital into the industry and a push to find profitable ways to deploy this new capital.

Reflecting the optimism about the growth potential in the environmental insurance area and the improved predictability of losses, more and more insurers have entered the highly competitive market. More than 30

<table>
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<th>Late 1990s – early 2000s</th>
<th>2011</th>
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<td>Small number of viable environmental insurers</td>
<td>Market expansion and fragmentation – more than 30 potential insurers</td>
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<td>Focus on transaction-enabling programs</td>
<td>Emphasis on renewable, operational programs</td>
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<td>Longer (more than 10 years) policy terms available</td>
<td>Pressure to reduce policy term – maximum policy period available – 10 years</td>
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<td>“Top line” underwriting mentality predominates</td>
<td>Established carriers driving profitable underwriting models</td>
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<td>Limited loss experience</td>
<td>Significant loss experience and established claim record</td>
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<td>Widespread application of Cost Overrun insurance</td>
<td>Very limited Cost Overrun insurance options</td>
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<td>Widespread application of Secured Creditor insurance</td>
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insurers now offer environmental products in North America. This rapid growth in environmental carriers has many positive implications (increased competition encourages favorable pricing and enhanced coverage) but also some negative implications (such as a dilution of underwriting expertise).

WHERE ARE WE NOW? WHAT ARE THE PREVAILING MARKET CONDITIONS?

The wider insurance and reinsurance market has been in the soft phase of its cycle for a number of years – largely due to a lower-than-average incidence of major losses, such as catastrophic weather events. As a result, insurers’ claim-paying capacity, as measured by policyholders’ surplus, has increased to record levels. The recent disasters in Japan and New Zealand sparked speculation that reinsurance and therefore insurance prices may begin rising again, after several years of decline.

However, WillisRe (Willis’s reinsurance brokerage) has reported that relatively orderly price movements at the April 1 Japanese reinsurance renewals reveal that the Tohoku Earthquake is not the catalyst that will bring about a hard market. Nonetheless, if the recent earthquakes are not by themselves sufficient to drive up market-wide pricing, it appears that reinsurers have exhausted their 2011 catastrophe loss budgets, thus an additional accelerant, such as another major natural catastrophe loss, an inflation spike or wider financial issues affecting investment income, could well trigger a market hardening.

What does this mean for the pollution insurance industry? We have experienced several years of significant pricing declines on some of the more commoditized product lines. Pricing on more complex, deal-specific, long-term policies has remain relatively firm, but we still expect a 5% to 10% relative decrease in 2011. However, policy pricing is directly affected by reinsurance rates, and, depending on how things turn out in 2011, it is quite possible that the market may turn soon.

Aggregate capacity in the industry remains relatively stable; however, the “per policy” aggregate limit of the major carriers is generally less than it was 5 to 10 years ago. Many of the leading carriers can still provide $25M to $50M limit for a single placement. In order to address situations where more limit is required, some carriers can increase their “per policy” limit further, possibly on a “net of reinsurance” basis. It is rare that significantly higher insurance limits are required, but if the need arises, the capacity of multiple insurers can be combined to provide a layered program. Depending upon the length of policy period, the nature of the risk and complexity of the coverage, program limits as high as $250M have been achieved and there is the potential for even higher limits with the direct involvement of reinsurers.

Regarding terms and conditions, it is beyond the scope of this article to provide a detailed analysis of the coverage available from different markets. It is important to note however, that there are material differences among carriers and policy forms. In fact, creativity, appetite, and therefore outcomes, vary considerably among individual underwriters within the same company. However, it is worth re-emphasizing that it is a highly competitive marketplace with many new players looking to gain market share. This can present opportunities and dangers (see below). Nevertheless, we are seeing some encouraging trends.

There has been a progressive improvement and simplification of specimen environmental insurance policy forms with many enhancements, previously only available through endorsement, built into the forms (e.g., coverage is available for illicit abandonment or biological terrorism). There has also been significant product innovation to address some of the specific risk issues facing specific industry sectors (e.g., in the health care sector, coverage is available to address disinfection response costs associated with hospital-acquired infections).

MISSION CRITICAL – HOW CAN YOU GET THE BEST OUT OF THE MARKET?

The most competitive terms and conditions are generally achieved when underwriting teams have the confidence to push the boundaries of their authority. Numerous factors encourage a creative and compelling market response. One of the most critical is the quality of the underwriting information and its communication during the submission process. Equally important is a thoughtful approach to designing a program that helps insurers to navigate some of their internal limitations, such as reinsurance treaty restrictions.

It is important to partner with a broker that has direct experience and genuine capabilities in the environmental insurance sector. This encompasses technical capabilities, market leverage, and importantly, claims and service infrastructure.

When evaluating the coverage offerings from the various environmental carriers, consider these factors:
1. Policy Form: Each policy form is different – Not one environmental insurance policy form is exactly the same as another. This difference extends to common terms, basic definitions and policy exclusions that materially affect the scope and quality of the underlying coverage (e.g., the definition of “bodily injury” in one policy form is not necessarily the same as in another form).

2. Insurer Financial Viability: Coverage and pricing for long-tail pollution exposures needs to be examined in the context of insurer security factors, as claims leading to long-term clean-ups or toxic tort class-action lawsuits may take several years to conclude. Insureds need the confidence that their Insurer will remain viable throughout the policy term.

3. Insurer Commitment: When determining the viability of a more recent market entrant, assess whether they are investing for a long-term market commitment. Will they have the staff and incentive to manage your client’s service and claim needs for the duration of the policy?

4. Renewal terms: 10-year policies that are renewing today are renewing on different policy form editions. Coverage terms and conditions have changed significantly between the different policy form editions. Insureds should assess carefully these changes in order to assure that they maintain the scope and quality of coverage that they require.

IN CONCLUSION

The environmental insurance market has changed dramatically over the past 10 years. It has continued to grow, and by virtue of the creative talent in the industry, has proved remarkably resilient. While it is important for lawyers to adjust their expectations, plenty of evidence demonstrates that environmental insurance can play a meaningful role in the allocation of transaction-related environmental liabilities.

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Lender Liability Year-In-Review: 2010
By Larry Schnapf, Esq.¹

With the country still reeling from the effects of the Great Recession and suffering from unprecedented levels of foreclosures, financial institutions have become popular targets in lawsuits seeking to share the pain of busted transactions. Not surprisingly, lenders were involved in a number of notable environmental lawsuits in 2010. This article will review those cases and provide some lessons learned for lawyers representing lenders with sites that have environmental issues.

I. OVERVIEW OF LENDER LIABILITY UNDER ENVIRONMENTAL LAWS

Many non-traditional lenders who never thought they would have to foreclose on collateral are now finding themselves confronted with that option. Thus, it is useful to review the liabilities and protections available to lenders and investors under environmental laws.

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

The federal Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”)¹ law imposes strict and joint liability on past and current owners and operators of properties contaminated with hazardous substances as well as generators and transporters of hazardous substances.²

CERCLA contains a secured creditor exemption that excludes from the definition of “owner or operator” any person who “holds indicia of ownership primarily to protect the security interest” in a vessel or facility which person will not be liable as an owner or operator if that person does not “participate in the

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management” of the facility or vessel. This exemption can insulate a secured creditor from liability during the administration of a loan, including workouts, so long as the lender’s actions during the life of a loan do not constitute exercising managerial control over the operations of its borrower.

It is important to emphasize that in order to qualify as a secured creditor, the lender only has to show that it holds “indicia of ownership” PRIMARILY but not SOLELY to protect its security interest. The mere fact that a secured creditor derives some profit or income from the transaction will not cause the lender to forfeit its immunity so long as the security interest is primarily to secure repayment of a loan or performance of some obligation. An example of a situation where a holder of a lien might not be considered to be having indicia of ownership primarily to protect a security interest could be purchasers of discounted or distressed notes who are taking the notes primarily for the income stream or investment potential.

What about a bank that acquires shares in its borrower, high interest subordinated notes, or other debt instruments as part of a financing arrangement, workout or bankruptcy reorganization? Would a bank be deemed to no longer be primarily protecting its security interest and therefore lose its safe harbor by virtue of holding stock? Unfortunately, there are no objective criteria for determining when a secured creditor holds “indicia of ownership primarily to protect its security interest.” Courts will examine the facts of a particular transaction to determine the reason why the lender held indicia of ownership. Moreover a bank seeking to take advantage of the secured creditor exemption would have the burden of proof to initially establish that it was entitled to the exemption. A decision by the Court of Appeals for the Second Circuit following a series of complicated rulings illustrates how an investment bank which simply held stock in a reorganized company can be drawn into a CERCLA contribution action in In Re Duplan Corp. et al. v. Esso Virgin Islands, Inc. Some financial institutions have also had to guarantee the environmental obligations of non-banking subsidiaries.

Originators of loans that are to be securitized have assumed that they could benefit from the safe harbor provided by the secured creditor exemption if forced to buy back defaulted loans. Although there are no published or known cases addressing these issues, it is quite possible that banks that originate and sell loans like commercial mortgage-backed securities (“CMBS”) may not qualify for secured creditor exemption as they are not holding indicia of ownership primarily to protect security interest but instead are being driven by fee profits. This potential exposure was illustrated in LaSalle Bank National Association v. Lehman Brothers Holdings, Inc.

The CERCLA secured creditor exemption also provides limited protection to lenders during foreclosure. After foreclosure, a secured creditor may maintain business activities, wind up operations, undertake a response action in accordance with the National Contingency Plan (“NCP”) or under the direction of an on-scene coordinator, or otherwise take any other actions to preserve, protect or prepare the vessel or facility prior to sale or disposition provided the lender tries to sell, release or otherwise divest itself of the facility or vessel at the earliest practicable, commercially reasonable time, and on commercially reasonable terms after taking into account market conditions and legal or regulatory requirements.

Many real estate investors are purchasing distressed debt or acquiring rights to property through tax sales without actually taking title to the land. This strategy is not without risk as illustrated in United States v. Capital Tax Corporation. A lender foreclosing on a mezzanine loan also needs to be concerned about environmental compliance since it will be taking an interest in the entity that owns or controls the land. In other words, if that entity has liability, the lender could succeed to that liability as the owner of that entity.

The CERCLA secured creditor exemptions do not provide liability relief for other federal laws such as for the cleanup of polychlorinated biphenyls (“PCBs”) or for complying with the lead-based paint disclosure rules promulgated under the Toxic Substance Control Act. Similarly, the CERCLA secured creditor exemption does not provide any liability relief for state or common law claims.

A lender who fails to qualify for the secured creditor exemption may seek the protection of a number of CERCLA statutory defenses. The most commonly asserted defenses are the Third Party defense and the Innocent Landowner defense. Most courts have narrowly construed the Innocent Landowner defense and if a purchaser did not discover contamination prior to taking title but contamination is subsequently discovered, courts will usually conclude that the purchaser did not conduct an adequate inquiry and, therefore, not be eligible for the defense.

Since 2002, a lender may also seek liability protection as a Bona Fide Prospective Purchaser (“BFPP”). Un-
under the BFPP, a purchaser may knowingly acquire contaminated property and not be liable for remediation if it conducts a pre-acquisition “all appropriate inquiry” (“AAI”) into the past use and ownership of the property and complies with post-acquisition “continuing obligations.” The post-acquisition obligations are similar to the “due care” obligations under the Third Party Defense.

If a lender’s collateral is affected by an off-site source of contamination, it might also qualify for the Contiguous Property Owner (“CPO”) defense. Like the BFPP, a lender seeking CPO protection will have to conduct AAI to establish that it did not know or have reason to know of the existence of contamination.

B. Resource Conservation and Recovery Act (“RCRA”)

The federal Resource Conservation and Recovery Act (“RCRA”) regulates the generation, storage, handling, transportation and disposal of hazardous waste. Owners or operators of facilities that treat, store or dispose of hazardous wastes (“TSDF”) must comply with certain operating standards and may also be required to undertake corrective action to cleanup contamination caused by hazardous or solid wastes pursuant to a permit or a corrective action order. The government may also issue orders for injunctive relief to address hazardous wastes posing an “imminent and substantial endangerment” to public health and the environment. However, unlike CERCLA, private parties are not entitled to recover their cleanup costs.

The RCRA secured creditor’s exemption is similar to the CERCLA provision, but it is limited to underground storage tanks (“USTs”). The RCRA secured creditor’s exemption provides that a lender who has indicia of ownership in a UST system (i.e., one or more USTs) or property containing a UST system will not be liable as an owner or operator of the UST system if:

- The indicia of ownership is held primarily to protect a security interest;
- The lender does not participate in the management of the UST system; and
- The lender is not engaged in petroleum production, refining or marketing.

The RCRA secured creditor exemption will not insulate a lender from liability as an owner or operator of a RCRA TSDF or a generator-only facility. Thus, it is important for lenders to properly manage any wastes left when foreclosing or taking over control of borrower’s operation that is regulated under RCRA.

The RCRA secured creditor exemption also does not insulate lenders from potential liability under the citizen suit provision of section 7002. This section allows private parties to seek injunctive relief to compel persons who contributed to the past or present handling, storage, treatment, transportation or disposal of hazardous waste that is posing an “imminent and substantial endangerment” to public health and the environment.

C. Clean Water Act (“CWA”)

The federal Clean Water Act (“CWA”) has been a surprising source of liability to lenders during the Great Recession. The law requires owners or operators of facilities that discharge pollutants into the nation’s waters to obtain permits. The CWA not only applies to traditional wastewater discharges but also properties that present storm water discharges from construction sites. Unlike CERCLA or RCRA, the CWA does not have a secured creditor exemption. Thus, banks will be considered owners or operators of these properties and are responsible for complying with the full panoply of environmental laws associated with their development.

Despite this potential CWA liability, banks have not historically addressed environmental compliance prior to foreclosing on these abandoned construction projects. Under the CWA and state versions of that law, developers and builders are required to obtain storm water permits, develop storm water pollution prevention plans (“SWPPPs”), and implement erosion and sediment control measures. These requirements are the reason that construction projects have those ubiquitous black and orange silt fences. Often times, builders will erect temporary control measures and will not construct permanent storm water management structures until the entire project is completed. The temporary storm water measures can deteriorate during the time it takes for a bank to take control of a defaulted construction project. Thus, it is important for lenders foreclosing on unfinished construction projects to ensure that these sites are stabilized and that storm water controls are maintained to avoid incurring fines that can quickly accumulate.

Some states have implemented specific policies directed at foreclosing lenders. For example, Georgia requires a
lender or other secured creditor that acquires legal title to a construction site to file a new Notice of Intent either seven days before beginning work at the construction site or 30 days prior to acquiring legal title to the construction site. North Carolina expects lenders to contact the Department of Environment and Natural Resources (“DENR”) immediately upon taking control of property. If remedial measures are required, the bank would be expected to enter into an administrative order.

Another area of potential liability is construction projects that require dewatering to prevent shallow groundwater from infiltrating into foundations or subsurface parking structures. The dewatering systems usually collect the groundwater and discharge it into the storm water system. Such discharges will likely require obtaining and complying with a National Pollutant Discharge Elimination System (“NPDES”) permit from the state environmental agency or the EPA if the state has not been approved to issue such permits. The NPDES permits may contain ongoing monitoring and treatment conditions for discharges containing metals, petroleum or other contaminants that may be present in the groundwater regardless of the source of the contamination. Prior to foreclosing on such projects, the lender should determine if such permits are required, have been obtained, and if the property is in compliance. If not, it would be advisable for the lender to contact the appropriate regulatory agency to make sure the lender does not inadvertently become responsible for past violations associated with the permit. It may also be possible that the permit may no longer be necessary.

Lenders should also verify if the property contains or contained wetlands prior to the start of construction activities. Developers may have engaged in unauthorized filling or dredging of wetlands. A foreclosing lender could be required to restore illegally destroyed wetlands. In addition, a developer that did obtain a wetlands permit may have had obligations to create replacement wetlands (known as mitigation) or make mitigation payments to a mitigation bank. In a recent case, a Florida bank had to enter into a consent order where it had to develop and implement a wetlands mitigation plan.

D. Clean Air Act (“CAA”)

Lenders taking control or foreclosing on abandoned construction projects may need to implement measures to reduce airborne dust under the CAA. Renovation or demolition projects that disturb certain amounts of asbestos-containing building materials (“ACBM”) have to comply with certain notification and workpractice procedures and use asbestos-licensed contractors. Lenders taking control of partially demolished structures or buildings with ACBM must ensure that the ACBM workpractices are followed to minimize emission of asbestos fibers into the air.

E. Toxic Substance Control Act (“TSCA”)

Under TSCA, owners and operators of certain properties constructed prior to 1978 may have to comply with a number of requirements relating to lead-based paint (“LBP”). In general, foreclosure sales are exempt from the LBP disclosure requirements. However, once a lender takes title to such property it may have to comply with the full panoply of LBP requirements. This will include providing mandated notices to tenants and purchasers about the existence of LBP and complying with certain workpractices when performing repairs, renovations or painting that will disturb painted surfaces containing LBP.

F. Liability for Environmental Conditions Under State Environmental and Common Laws

Many states have adopted their own secured creditor exemptions for their state superfund laws. These state exclusions will vary in terms of the scope of the protection and the permitted activities. Like the CERCLA and RCRA secured creditor exemptions, most states do not provide protection against other statutory or common claims. Lenders should carefully review the provisions of state lender liability laws and the scope of environmental disclosure laws as part of their loan due diligence.

G. Liability of Lenders for Inadequate Disclosure of Environmental Conditions

Many states have statutes that require owners of property to disclose the existence of contamination to prospective purchasers. Lender liability statutes in those states generally do not provide protection for common law claims or for failing to comply with the disclosure requirements. Borrowers often confuse a lender concluding that a Phase 1 was acceptable with a determination that a property is “clean.” The Phase 1 may identify environmental conditions that fall within a lender’s risk tolerance. Indeed, during the credit bubble, many loan originators were not concerned about environmental issues since they knew they would be selling the loans to the CMBS collective and thus were not exposed to collateral or payback risk.
H. Environmental Liability Associated with Bank Offices

Financial institutions can also face environmental risk associated with properties the banks themselves acquired pursuant to a bank’s mergers or acquisitions activities. The poster child for such potential liability is the Swan Cleaners/Sun Cleaners Area Ground Water Plume site in Wall Township, New Jersey. Two dry cleaners had formerly operated at the site that is currently a bank branch office owned by Bank of America (“BOA”). The dry cleaners discharged tetrachloroethylene (PCE) into the on-site septic system where it eventually migrated into the groundwater that serves public and private drinking water wells within a four-mile radius. PCE was detected at concentrations of up to 200 parts per million (ppm) in the groundwater. The PCE-contaminated groundwater also affected surface water. In addition, following indoor air sampling of 300 residential and commercial properties in 2001, EPA had to install ventilation systems in the basements of nine homes and one ventilation system on a commercial property. This property was acquired by Summit Bank. Fleet Bank then took title to the property when it acquired Summit Bank. Fleet then merged with BOA. The Swan Cleaners/Sun Cleaners Area Ground Water Plume site suggests that banks should perform the kind of environmental due diligence that they customarily expect from their borrowers.

II. 2010 Lender Liability Cases

In Palmtree Acquisition Corp. v. Evers, PCE from a dry cleaner contaminated the soil and groundwater beneath the Livermore Arcade Shopping Center (“LASC”) and Millers Outpost Shopping Center (“MOSC”) in Livermore, California. The Grubb & Ellis Realty Income Trust, Liquidating Trust (“GERIT”) owned and operated LASC from 1989 through 1996.

In February 1993, GERIT brought an action under CERCLA against the former owners of LASC, the current and former owners of MOSC as well as the operators of the dry cleaning businesses. In February 1994, the parties to the earlier action entered into a settlement agreement where the settling parties appointed Ellis Partners, Inc. (“EPI”) as the Project Manager to oversee the remediation efforts. In April 1996, the San Francisco Water Quality Control Board (“RWQCB”) issued an order establishing a Containment Zone. The order required further groundwater monitoring and set trigger levels of PCE for outside the Containment Zone, which could prompt further investigation and/or remediation. The RWQCB then issued a no further action (“NFA”) letter to GERIT. Thereafter, GERIT sold LASC to the Anderson Marital Trust and Anderson Tax Deferral Trust and GERIT’s assets were distributed in their entirety.

However, the RWQCB reopened the matter in 2008 and the current landowner filed a contribution action against the former owners, among others. As co-trustee of GERIT, Ellis held legal title to LASC under California law. A third party complaint named Harry Ellis as a former owner of the site. Since Ellis died in 2009, the complaint was amended to add his estate.

The estate argued that Ellis fell within the fiduciary protections that were added to CERCLA in 1996. The third-party plaintiffs alleged that Ellis benefited from his position as co-trustee of GERIT by selecting EPI to serve as GERIT’s Liquidating Agent and by maneuvering for EPI to serve as project manager for the PCE remediation efforts. The court granted Ellis’ motion to dismiss, finding that the complaint did not state any actions taken by Ellis that were not pursuant to his responsibilities as co-trustee. The court said Ellis’ dual role as co-trustee of and manager of the remediating firm did not necessarily remove Ellis from CERCLA’s fiduciary exemption. Note that the third-party plaintiffs did not allege that Ellis was liable under CERCLA due to his management role with EPI.

The complaint also alleged that Ellis was liable under the negligence exception of the CERCLA fiduciary exemption. This section provides that a fiduciary may be personally liable if that person negligently causes or contributed to the release or threatened release of hazardous substances. However, the court said that the complaint did not allege any particular actions taken by Ellis that led to the release of PCE, and any failure by Ellis to prevent others’ pollution was insufficient to qualify Ellis for the negligence exception. Because Ellis’ involvement in the PCE contamination, investigation and remediation was limited to his role as co-trustee of GERIT, he was not personally liable for recovery costs under CERCLA. The court granted the motion to dismiss without prejudice and gave the third party plaintiffs thirty days to file an amended complaint pleading sufficient facts to hold Ellis personally liable.

In Harwood Investment Company v. Wells Fargo National Association, Inc., the defendant bank extended a $16MM loan to Harwood Products, Inc., a lumber mill. The loan was guaranteed by the plaintiff and the promissory note was secured by the property and equipment owned by the lumber mill. After the bank asserted that it was in default of its loan

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in the amount of $2.6MM, Harwood Products, Inc. filed for bankruptcy. In September 2008, the lumber mill defaulted on its loan and the bank retained an auctioneer to conduct a sale of the borrower’s assets.

In December 2008, a contractor retained to provide security and dismantle equipment allegedly caused hydraulic fluid and other hazardous substances to be released. Later, the Mendocino County Department of Environmental Health (“MCDEH”) conducted an inspection and observed abandoned drums without secondary containment and wastewater overflowing from a dip tank, along with evidence of staining on floors and near floor drains. The MCDEH determined the conditions posed an imminent and substantial endangerment and notified the regional water quality control board.

In January 2009, a purchaser of certain equipment located in one of the buildings was using a blow torch to dismantle equipment when a spark ignited that engulfed the building. Water from the fire suppression system and from fire fighting actions of the local fire department caused the hazardous substances to flow into surface water and the storm water system containment system and to spread into the soil and groundwater. Following the fire, the regional water quality control board issued an abatement order requiring the borrower to implement remedial actions.

The bankruptcy case was then converted to a Chapter 7 liquidation and the bankruptcy court authorized the abandonment of the facility to Willits Financial Company, Inc. in April 2009. The plaintiffs then filed a contribution and cost recovery action, alleging the bank and its agents took possession of the lumber mill in September 2008 and were responsible for the releases of hazardous substances. The defendants filed a motion to dismiss and the parties reached a settlement.

In *State of Ohio v. Estate of Roberts*,36 Citizens National Bank of Norwalk (“Citizens”) extended credit to Ultimate Industries, Inc. (“Ultimate”) who manufactured artificial rocks and rock waterfalls at the property. The loan was secured by a mortgage, inventory and equipment.

Ultimate defaulted on its loan obligations in June 2004 and after the company ceased operations, Citizens took possession of the property in the fall of 2004. Approximately 54 drums of chemicals were present when Citizens assumed control of the site, with eight of these drums containing hazardous wastes. The bank sold some of the equipment but was only able to sell two of the drums. The bank commenced foreclosure proceedings in May 2005 and allegedly rejected an offer to purchase the entire building and its contents for $100,000 in late 2005. When one of the paint sprayer’s that Citizen sold was removed, a hole was left in the roof where the vent line had been located. This allowed water to accumulate on the third floor and black mold soon began to grow. Except for putting antifreeze in the toilets, Citizens took no action to winterize or protect the building.

In May 2006, the property was sold at a sheriff’s sale to Citizens for $40,000. However, before the sheriff was ordered to convey the deed to Citizens, Citizens moved to have the confirmation of sale vacated due to “newly discovered evidence.” While Citizens’ motion to vacate was pending, the Ohio Attorney General filed a complaint in October 2006 against Ultimate for injunctive relief and civil penalties, claiming that many of the drums at the site had become unusable in the intervening period.

In January 2007, the trial court granted Citizens’ motion to vacate, finding that Citizens acted within a reasonable time of becoming aware of the newly discovered evidence, which by due diligence could not have been discovered. In July 2007, the state ordered Ultimate to properly dispose of the hazardous wastes at the site. Two weeks later, the owner of the company died and Ultimate was dissolved.

In January 2008, the state filed an amended complaint against the estate of the owner of the company. The estate, in turn, filed a third-party complaint against Citizens in April 2008. The estate (“appellant”) asserted that Citizens committed waste for failing to take steps to adequately protect the real property after it took control of the property. The estate also asserted that it no longer owned or possessed the waste drums since Citizens assumed control of the site.

Citizens subsequently filed a motion for summary judgment arguing it had no obligation to comply with the Ohio EPA order. The trial court agreed, holding that while Citizens had had discretion under the financing statement or loan documents to perform any duty or covenant that appellants failed to perform, the bank was not obligated to do so. The court also noted that responsibility for environmental remediation generally follows ownership and Citizen did not have title to the property. As a result, the trial court dismissed the third-party complaint filed by appellant. A bench trial was then held to determine the amount of the civil penalty to be assessed against appellant.
The court of appeals reversed, finding numerous genuine questions of material facts about the bank’s actions. The court said there was a material question if Citizens had possession of the entire inventory, not just the inventory it sold as it alleged. The court said there was also a material question if Citizens’ disposition of the inventory in which it held a security interest contained viable, marketable, and usable chemicals at the time appellants defaulted on their agreement. Moreover, the court found genuine issues of material fact if Citizens breached its implied duty of good faith and dealing when it allowed the inventory to deteriorate into hazardous waste, thereby allegedly causing appellant’s additional damages in excess of their mortgage obligation to Citizens.

Turning to the secured creditor exemption, the court noted that the statute not only required Citizen to dispose of its collateral in a commercially reasonable manner but that “every aspect of the disposition of collateral, including the method, manner, time, place and other terms, must be commercially reasonable.” Since the bank’s agent was at the property to sell the collateral, the court found genuine issues of material fact if the bank failed to properly dispose of the drums and allowed useful chemicals to deteriorate into hazardous wastes.

In Voelker v. Home Office Realty, home owners in Michigan claimed that banks involved in the FHA loan process failed to sample well water, despite knowledge that a local landfill might have affected the drinking water supply. The plaintiffs noted that the FHA Mortgagee Letter 95-34 (July 27, 1995) required Direct Endorsement Lenders to sample drinking water in accordance with local and state private well regulations as well as for for contaminants of local concern.

The loan originator retained a contractor to test the well for the usual potable water parameters. Years after buying the house, two of the plaintiffs developed cancer. The trial court dismissed the claims on the grounds that alleged lender was just a loan originator and that it had no obligation to test the well water. The appeals court affirmed.

This case illustrates why banks are reluctant to go beyond minimum environmental requirements. In this case, the plaintiff argued that the loan originator had an obligation to interpret the FHA letter to determine if additional parameters had to be tested as part of the water quality sampling. Fortunately for the loan originator, the court found it was not a “lender” for purposes of the FHA loan process and therefore had no obligation to determine what sampling was appropriate.

Presumably, even if the loan originator could have been deemed to be a lender, it could still have avoided liability by arguing that it relied on the expertise of the well tester to determine what parameters had to be analyzed. Of course, the FHA letter seemed to require more than what was required under state or local drinking water regulations if there were local conditions that warranted sampling additional chemicals of concern, and the well tester might not have known about this additional FHA requirement. By ruling that the loan originator was not an FHA “lender”, the court did not have to address the merits of the claims.

In Ironwood Homes v. Bowen, purchasers of farm land subsequently discovered that the property had been used as a disposal site for tannery waste. Plaintiffs asserted a variety of federal and state law claims against a range of defendants, including two banks that had a history of involvement in the site.

One bank served as the trustee that managed the affairs of the tannery owner (“trustee bank”), while the other bank provided financing to the plaintiffs (“lender bank”). The lender bank reviewed an environmental report concerning the property, but misstated the conclusions contained in the report to the plaintiffs. In particular, the bank’s employee incorrectly described the environmental risk associated with the property as “low” and also stated that the report had concluded that no further environmental investigation was warranted.

The court denied the motion to dismiss by bank on claims for fraudulent concealment and reckless misrepresentation, negligent misrepresentation, and non-gratuitous negligent advice. The court also denied the lender’s motion to dismiss that an indemnification in loan modification agreements released plaintiffs’ claims against the bank, ruling that if plaintiffs agreed to the modifications because they had been unaware of the bank’s knowledge about the true environmental condition of the property, the release might be considered unconscionable and therefore unenforceable.

The court also rejected a state contribution claim brought by the trustee bank against the lender bank, holding that the contribution claim was barred because the trustee bank failed to allege that the lender bank “in any way ‘caused, contributed to, or exacerbated the release of contaminants or ‘hinder[ed] or relay[ed] entry to, investigation of, or removal or remedial action at’ the contaminated property.”
**State v. Howe Cleaners** involves a baker, a banker, and a defunct pizza-bread maker. The property had been used as a dry cleaner from 1974-1996. The property was then conveyed to purchaser who converted it to a bakery. When the bakery failed, Granite Savings Bank and Trust (“Granite”) foreclosed and sold the property seven months later to a pizzeria. The sale was “as is” and before acquiring the property, the purchaser reviewed a Phase 1 prepared for Granite.

Sometime after taking title, an EPA inspector spoke with former employees of the dry cleaner and visited the property. When he raised some floorboards, he observed two tanks in the crawl space that had apparently been used to store PCE and that had leaked.

The state implemented response actions and sought cost recovery under the state Waste Management Act (“WMA”). The state argued that the successor to Granite, TD Bank North (“TD Bank”), was liable as a person who owned the site at the time of a release. TD Bank argued it could not be liable because the state did not have any evidence that there had been a release during its ownership. The state responded that it did not have to prove there was a new release but simply migration of an initial release.

The trial court found the potential for liability under the WMA. Because there was a triable issue of fact whether there was a release during the ownership of TD Bank, the court denied the TD Bank’s motion for summary judgment. The TD Bank then sought to depose the state’s expert on the timing of the release. After the state refused to make its expert available for an extended period of time, the court issued a sanction prohibiting the state from introducing evidence of the timing of the release which effectively resulted in judgment for TD Bank.

**III. CONCLUSIONS**

These cases illustrate the heightened risks that lenders face when foreclosing or taking control of the property of defaulted borrowers. The situations where financial institutions have become embroiled in environmental issues have one unifying theme: conditions at the property were allowed to deteriorate. Typical problems have included: roofs have developed leaks that allow water to enter the building; or plumbing and drums in unheated buildings have frozen and burst during the winter, and then leaked during the spring thaw. Unhealthy chemical vapors may build-up during hot summer months from open or leaking containers of chemicals, or deteriorating containers of incompatible chemicals are left behind within proximity, creating risks of explosion.

Clearly, lenders face their greatest risk of liability when in post-foreclosure activities. There are many unreported situations where lenders have been issued administrative orders by governmental agencies and have had to pay to perform a cleanup because of the actions they took following foreclosure. These situations have typically taken place when a borrower has gone out of business and the lender takes control of the facility in order to sell off the inventory, fixtures, machinery and equipment of the borrower subject to the lender’s lien. The lender typically does not take title to the property because of fear that it will lose its exemption, but instead hires an auction to conduct the sale of the personal property. Usually, there are barrels or drums of hazardous waste strewn about the facility and the equipment that is being auctioned off may even contain hazardous wastes. In order to avoid any suggestion that the lender or the auction had any control over hazardous wastes, the auction will often rope off the area where the drums or barrels are found. In some cases, the bidders are actually allowed to cherry-pick barrels containing useful raw materials. After the auction is conducted, the drums and barrels are then left in the abandoned facility. At some point, government authorities find out that there are abandoned drums at the facility and order the lender to pay for the removal of the materials.

Lenders will often argue that the drums containing the wastes were not part of its collateral or that the lender never exercised control over the drums because neither it nor its auctioneer ever touched or moved them. However, the definition of “release” under CERCLA includes abandonment of drums. Thus, a lender who has taken control of a facility to conduct an auction and leaves behind drums or equipment containing hazardous wastes could be deemed to have caused a threatened release of hazardous substances. Thus, financial institutions should exercise extreme caution when conducting auctions and should consult with environmental counsel prior to conducting any auction at a manufacturing facility.

If the lender decides to have the hazardous wastes removed, it should try to have a representative of the borrower execute the waste manifests so that the lender would not be considered the generator of the waste. However, if no such representative is available, the lender or one of its agents would have to execute the waste manifests. Since the lender would be considered
a generator of the waste under these circumstances, the lender should have its consultant select a reputable disposal or treatment facility. The financial institution could have its environmental consultant or attorney perform a regulatory review of the facility to minimize the possibility that the lender could incur liability for releases of hazardous substances at that treatment or disposal facility. It is important for purchasers to evaluate the environmental conditions of the collateral prior to purchasing the note or exercising control over the property.

These caveats also apply even when the lender does not foreclose on the real estate but just the inventory and equipment. Once a lender, through its agents, asserts control over a site, it will be an "operator" for purposes of CERCLA and state environmental laws even where the lender does not actually operate the business. Conducting auctions of personal property or authorizing repairs may infer control, and purchasers can face liability as "operators" if they do not qualify for the secured creditor exemption. Purchasers should also consult environmental counsel prior to taking any actions that would be suggestive of exercising control over a potentially contaminated property.

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7. See notice of lodging of proposed consent decree in United States v. The S.W. SHATTUCK CHEMICAL COMPANY, Inc., No. 01-2404, 67 FR 2243 (12/12/01). Shattuck was indirectly owned by Salomon Smith Barney Holdings, Inc. ("Solomon") which, in turn, was owned by CITIGROUP Inc. Solomon had guaranteed Shattuck's compliance with an order issued by EPA. Shattuck ended up agreeing to pay $7.2 million to the federal government and the State of Colorado.
12. 42 U.S.C. 9607(b). To qualify for this defense, a defendant must establish the following four elements: The release was caused solely by the act or omission of a third party; whom the defendant had no direct or indirect contractual relationship; the defendant exercised due care with respect to the hazardous substances due care ("due care element"); and took precautions against the foreseeable acts or omissions of any such third parties ("precautionary element"). Id. at 9607(b)(3).
13. 42 U.S.C. 9601(35)(A). To establish the innocent landowner defense, a purchase must establish that it "did not know or had no reason to know" of contamination. To demonstrate this lack of knowledge, the purchaser must have engaged in an appropriate inquiry into the past use and ownership of the property. EPA has promulgated a rule for satisfying the "all appropriate inquiries" requirement at 40 CFR 312. Performing a phase 1 environmental site investigation that complies with the ASTM E1527-05 standard practice for environmental site assessments satisfies the AAI requirements.
14. Because the innocent purchaser defense is technically a part of the third party defense, a landowner would have to satisfy the due care and precautionary elements of the third party defense as well.
15. 42 U.S.C. 9607(r).
18. 42 U.S.C. 6924(u) and (v).
20. 42 U.S.C. 6973.
24. 33 U.S.C. 1251 et seq.
25. SWPPPs must contain a site map depicting the topography before and after completion of the project, drainage patterns, existing and future buildings, lots, roadways and stormwater collection and discharge. The plan must
also identify the best management practices (“BMPs”) to be used to control runoff and establish a monitoring plan.

CWA fines can range as much as $37,500 per day per violation, depending on the severity of the violations and length of time the properties have been in noncompliance. In addition, the violations run with the land. These costs can quickly add up, especially for banks with numerous defaulted construction properties. For example, a Georgia-based lender was fined in excess of $4 million for inadequate erosion controls for a site that was valued at $1.97 million in 2006.


*Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758 (Mo. 2007).


35. No. C-09-3410 EMC (N.D. Cal. 1/22/10).

36. 935 N.E.2d 450 (Ohio App. 2010).

37. *Id* at 457.


40. *Id* at 1294.

41. 2010 VT 70 (Vt. Aug. 6, 2010).

Environmental Settlements in Bankruptcy: Practice Pointers for the Business Lawyer
By Jeanne T. Cohn-Connor

For business lawyers, the intersection of environmental law and bankruptcy law raises complex legal issues, replete with the fast-paced deadlines and requirements imposed by the bankruptcy process. When settling a case in bankruptcy that involves a substantial number of contaminated properties, there are many issues that must be resolved. This paper will focus on both the bankruptcy process and how that process impacts environmental settlements.

A. Overview of the Bankruptcy Process

1. Commencement of a Bankruptcy Case

A voluntary bankruptcy case commences when a petition is filed by the debtor and a bar date for claims is set. In large cases, the bar date is frequently established as six months or more after the filing of the petition. Proofs of claim, which are written statements setting forth the nature and amount of the creditor’s claim against the debtor, must be filed prior to the bar date established by the court. With respect to environmental claims, proofs of claim can include claims by other potentially responsible parties (“PRPs”), by third parties, and by governmental entities for past and sometimes future costs in connection with the investigation and remediation at a contaminated site. A claim is a right to payment, or an equitable obligation that can be converted into a right to payment, and claims can be contingent and/or unliquidated. Filing a claim before the bar date is critical for a claimant because unless the claim is listed in the debtor’s chapter 11 schedule, the effect of an unsecured creditor’s failure to file a timely proof of claim is for the claim to be disallowed as untimely.

Recent amendments to the Federal Rules of Bankruptcy Procedure require specific disclosures regarding environmental issues at the time of the bankruptcy filing. A debtor is required to identify on an exhibit to the voluntary petition, Exhibit C, those properties it owns that pose a threat of imminent harm to public health or safety.

In addition, there is a requirement that the debtor list on the Statement of Financial Affairs (“SOFA”) in response to Question 17 an array of information concerning environmental matters, including every site for which it has received notice by the government that it may have environmental liability, every site for which notice has been given regarding a release and every judicial or administrative proceeding under environmental law to which the debtor is a party. While Bankruptcy Rule 1007 requires that the SOFA be filed within 14 days of the filing of the petition, it also permits the bankruptcy court to grant an extension for cause shown. Requests for extensions are frequently filed in connection with the commencement of the chapter 11 case, and typically are granted for an additional 30 to 90 days.
The commencement of the bankruptcy case also triggers the automatic stay imposed by section 362 of the Bankruptcy Code, which provides a respite for the debtor from pending litigation or the commencement of new litigation and from other attempts of creditors to control property of the estate. Creditors are generally barred from taking any action to collect on prepetition debts. This is a significant benefit to a debtor attempting to reorganize because it allows the debtor to focus on the rehabilitation of the business and negotiations with creditors. There is, however, an important exception to the automatic stay that permits governmental entities to continue to enforce regulatory requirements against debtors. Section 362(b)(4) of the Bankruptcy Code provides for a police power exception to the automatic stay. As a consequence of this exception, most courts have treated the enforcement of environmental orders as being within the government’s police or regulatory powers. Practically speaking, this means that ongoing environmental remediation work pursuant to a governmental order must continue unabated by the debtor, and this includes compliance with financial assurance requirements. However, the police power exception to the automatic stay does not apply when the government is attempting to enforce a “monetary judgment.”

Shortly after the commencement of a chapter 11 case, an official committee of unsecured creditors is formed. Such a committee monitors the debtor’s ongoing operations and consults with the debtor on major business decisions, and it may also make recommendations concerning administration of the estate. The debtor is responsible for paying the reasonable fees and expenses of creditor committee advisors, including attorneys and financial advisors. For cases involving complex environmental matters, such advisors may also include environmental consultants.

The debtor likely will seek debtor in possession (“DIP”) financing to provide it with sufficient liquidity to continue its operations in the ordinary course of business. Some debtors may determine that they have sufficient cash on their balance sheet to continue to operate without seeking external DIP financing.

In chapter 11, ordinary course of business transactions may continue without court approval. Most environmental remediation activities would fall within this category, including entering into remediation contracts with environmental consultants, maintaining groundwater cleanup programs and undertaking environmental investigations required by governmental orders. Ordinarily, existing management personnel remain in place and run the company, although a debtor may hire a Chief Restructuring Officer, whether at the behest of lenders or of its own volition, to assist with running the company and planning the reorganization strategy.

2. Exclusivity Period-Debtor Determines Strategy/Formulates A Plan

For the first 120 days after filing the petition, which time may be extended up to 18 months from the filing for cause shown, only the debtor is permitted to file a plan of reorganization.

During this time, the debtor determines its strategy. It may formulate a plan of reorganization for a stand-alone reorganization, it may decide to sell its businesses as a going concern or it may liquidate its ongoing business. A sale of all or a part of the debtor’s business is generally conducted pursuant to section 363 of the Bankruptcy Code, which permits a debtor to sell its assets, with approval from the bankruptcy court, outside of the ordinary course of business. Such a sale of assets is “free and clear” of certain liabilities and a buyer obtains clear title to the assets. Other options for the debtor include a liability transfer arrangement where a third party takes on the environmental liability and ownership of some of its properties, or the transfer of sites to a custodial trust, which would receive funding and/or assets to pay for the estimated remediation costs at such properties. A debtor sometimes chooses a combination of these options in formulating its strategy.

The general preference is for a debtor to reorganize rather than liquidate because such a course will rehabilitate the debtor’s business, preserve it as a going concern and allow the debtor to maintain employment and commercial relationships.

From an environmental law perspective, this is the time when the debtor evaluates the environmental issues at its contaminated sites, both owned and non-owned. The debtor addresses claims at multiple categories of sites requiring different approaches (owned, operated, formerly owned, non-owned third-party sites, and sites with existing administrative orders). Depending upon the complexity of the debtor’s real estate portfolio, the debtor may be required to complete a tremendous amount of work in a short period of time.

To the extent that the various parties are in agreement on issues such as the validity and amount of the environmental claims, one approach is to initiate informal settlement negotiations with the government to facili-
tate a global settlement of all environmental claims. The debtor may decide to consider retaining an environmental consultant early in the process to assist in the estimation of environmental claims to present to the government in negotiations. At the same time, the government may resist attempts to come to a quick global settlement and may want to resolve matters on a separate site-by-site basis. Mediation is also an option and serves as an alternative to litigation or formal estimation proceedings. In the case of Asarco LLC, use of formal estimation proceedings was the preferred option due to the large number of unliquidated and/or contingent environmental claims; such a process assisted in defining the claims.

In addition, the debtor will determine the viability of abandoning property. Section 554(a) of the Bankruptcy Code provides that, “[a]fter notice and a hearing, [a debtor] may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.” Property that is abandoned ceases to be a part of the debtor’s bankruptcy estate. However, courts have generally limited the abandonment right in the context of environmentally impaired properties.

3. Plan of Reorganization/Disclosure Statement

The Plan of Reorganization (“Plan”) is a contract among the debtor and its creditors, and it classifies how claims and interests will be treated in the reorganization. The Plan and Disclosure Statement describe the broad outlines of any environmental settlement. A Disclosure Statement is typically filed concurrently with the filing of a Plan. A Disclosure Statement is used to solicit votes from creditors on the Plan, and it must contain “adequate information” regarding the Plan, meaning sufficient information for a reasonable investor typical of holders of claims to make an informed judgment whether to vote in favor or against the Plan. A debtor may not solicit votes on a Plan until the Bankruptcy Court has approved the Disclosure Statement.

Any creditor or equity security holder whose rights are being altered by the Plan has a right to vote to accept or reject the Plan. The court fixes a deadline for voting on the Plan, which must provide parties voting on the Plan with sufficient time to receive and review the Plan, Disclosure Statement and other materials.

In some cases, other parties, including the creditor’s committee or an official or ad hoc committee of equity security holders, may circulate a proposed Plan of Reorganization or a term sheet setting forth the elements of a proposed Plan.

Development of a Plan is a dynamic process, and in the case of a debtor with a significant environmental liability portfolio, this may be a lengthy and difficult process, as numerous parties, including governmental agencies at multiple levels, negotiate with the debtor and other creditors regarding their treatment under the Plan.

4. Confirmation of Plan and Effective Date

The court must conduct a hearing to consider confirmation of the Plan. Any party in interest may appear and object to confirmation of the Plan. Once confirmed, all parties are bound to the terms of the Plan regardless of how they voted. On the Effective Date of the Plan, the debtor emerges from bankruptcy. At that time, custodial trusts are established, claims are discharged and environmental settlement agreements generally become effective.

C. Key Terms in Environmental Settlement Agreements

In the bankruptcy context, the environmental settlement agreement is the document in which a company settles its environmental liability with the governmental entities. As to the structure of the environmental settlement agreement, some settlements are global where the agreement includes all sites and some settlements involve many separate agreements, each concerning a limited number of sites. The advantage of one global, multi-site settlement agreement is simplicity in its structure, but the difficulty is that many more parties need to be brought on board and the document can therefore be very cumbersome to negotiate. In the Tronox case, there was one global settlement agreement that incorporated the settlement for all sites. One reason for this is that part of the settlement included a share of the potential recovery from Tronox’s fraudulent conveyance litigation against Kerr-McGee and Anadarko; by providing for allocation of those proceeds in one document the settlement process was simplified.

1. Environmental Settlements Generally

Pursuant to Section 122 of CERCLA, EPA is authorized to negotiate settlement agreements with those parties potentially liable under section 107 of CERCLA. EPA has discretion to enter into a settlement agreement with any party to perform a response action at a Superfund site, provided that the agreement is in the public
interest and is consistent with the National Contingency Plan. Section 122 provides that the settlement agreement must be entered in the appropriate United States district court as a consent decree.

2. Covenant not to sue

To encourage settlement in the bankruptcy context, EPA may provide a covenant not to sue to the debtor that covers a variety of sites. From the debtor’s perspective, in some respects, this is the most critical protection in the settlement agreement because it allows its business to go forward without risk of being held further accountable for past environmental liabilities. In the Tronox example, covenant not to sue protection was provided for the owned sites located in each state, and the United States and many of the states provided a covenant not to sue for certain nonowned sites specifically identified by Tronox in the Settlement Agreement.15

When negotiating a covenant not to sue, it is important to consider the breadth of the protection. There are several specific components that will determine how broad coverage will reach: (i) Statutory coverage: while CERCLA, for example, is almost always covered, parties may also seek protection against claims under RCRA, the Clean Water Act,16 other federal statutes and state equivalents; (ii) Entity coverage: Though the debtor will receive coverage, it may have to negotiate to ensure that reorganized debtors, affiliates, subsidiaries, parents, successors, and assigns; and in some cases even officers, directors, shareholders, employees, agents, and consultants may also receive coverage; and (iii) Scope: while owned sites receiving funds pursuant to the settlement agreement will generally receive coverage, debtors may have to negotiate and give additional funds to obtain protection for all owned sites, non-owned sites, and sometimes even sites that have not yet been identified for which debtor could be held liable in the future.

3. Contribution Protection

Section 113(f)(2) of CERCLA states that “a person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement.”17 This provision has been used to protect parties who have settled their liability with the federal government from suit by other parties. However, a recent U.S. Supreme Court decision has now left open the question of whether a party may bring a cost recovery action under Section 107 of CERCLA against a party who has settled its liability under Section 113.18 This area of law continues to evolve. The issue of which provisions of CERCLA, Section 107 and/or Section 113, are available for PRPs to use to recover funds from other PRPs is important because the contribution protection afforded by the government specifically protects only against PRP claims under Section 113(f), but not under Section 107.

4. Comment Period/Notices

The federal government and certain states cannot enter into an environmental settlement agreement without first complying with public notice and comment requirements. In addition, in some instances, public meetings may also be held. It is important to be aware of these requirements in each state that will be covered by a settlement agreement because if the requirements are not met, a party may be able to work around the contribution protection provided in the agreement.

5. Selection of Trustees

If the settlement agreement involves the use of custodial trusts to hold property owned by the debtor, a custodial trustee is usually appointed to manage the trusts. The governmental agencies which are parties to the settlement agreement usually have the greatest influence in the selection of the trustee. The selection process often involves the identification of several potential trustees, a request that each prepare an application or presentation demonstrating its qualifications to serve as custodial trustee, and then an evaluation and decision as to which of the potential trustees is the best candidate. Some custodial trustees are “career” trustees, who serve as custodial trustees in several different matters as the focus of a professional career; others are environmental consulting and engineering firms with technical knowledge of particular properties and where a related entity will be conducting the remediation work at those properties. In either case, it can be helpful to select the trustees prior to the execution of the settlement agreement to enable the trustees to provide input into the agreement. However, this can also provide additional complications because it will involve a new party in the settlement negotiations and such a party may not yet be formally authorized or funded because funding and authorization of custodial trustees usually occur after the settlement agreement has been executed.

6. Other Provisions

Other provisions to consider when negotiating settle-
ment agreements in the bankruptcy context include document sharing provisions, both regarding electronic information and paper files, transfer of environmental permits, treatment of natural resource damage claims, and transfer of existing orders if custodial trusts are involved.

D. Conclusion

Though environmental bankruptcy cases may appear daunting at first, a lawyer’s familiarity with both the bankruptcy process and environmental laws is key to reaching favorable outcomes for clients with environmental liabilities in bankruptcy.

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3. See Fed. R. Bankr. P. 1007(a)(1) and (c).
7. See Safety-Kleen, Inc. (Pinewood) v. Wyche, 274 F.3d 846 (4th Cir. 2001). In Safety-Kleen, the Fourth Circuit held that, in a Chapter 11 bankruptcy case, a state administrative order requiring compliance with RCRA financial assurance requirements remains in effect, even though the debtor had filed a Chapter 11 petition, because the primary purpose of financial assurance requirements is to deter environmental misconduct. EPA has cited to Safety-Kleen to justify seeking enforcement actions against bankrupt entities that are not in compliance with financial assurance requirements.
8. See supra at 6.
9. See 11 U.S.C. § 1121. In rare circumstances, such as fraud or gross mismanagement, the debtor’s exclusive period in which to file a plan of reorganization may be terminated by the court upon motion by a party in interest.
10. In re Asarco LLC, Case No. 05-21207.
12. In re Midlantic Nat’l Bank v. NJ Dept. of Envtl. Prot., 474 U.S. 494, 502 (1986), the Supreme Court ruled that a debtor “may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards.” This case has been read to bar a debtor from abandoning any environmentally contaminated property. Other courts, however, have taken a narrower view of the Midlantic decision, and have prohibited abandonment of property only in instances where the existing environmental violations threaten an “imminent harm” to the public. See In re L.F. Jennings Oil Co., 4 F.3d 887 (10th Cir. 1993) (if there is no immediate and identifiable danger to the public health or safety, property may be abandoned); In re Smith-Douglass, Inc., 856 F.2d 12 (4th Cir. 1988) (same).
15. See In re Tronox Inc.
Renewable Energy Opportunities and Environmental Challenges
By Stephen J. Humes, Esq.¹

Never before have so many economic incentives and renewable energy opportunities lined up for commercial and industry energy consumers especially throughout the Northeast region as businesses consider ways to improve energy reliability, independence and sustainability. For the solar energy industry in particular, which has struggled with higher production costs, renewed tax breaks and more competitive product pricing mean great opportunities for consumers. For energy and environmental lawyers supporting these projects, legal issues include negotiating off-take contracts and pursuing land use and siting approvals while addressing potential adverse environmental impacts. This article explores some of the many programs and benefits available to business customers and identifies some strategies to consider when planning on-site renewable energy projects. Also presented are some of the common environmental issues project developers face these days.

Many states throughout the Northeast and elsewhere in the U.S. have been promoting investments in renewable energy, energy efficiency and conservation for many years but recent concerns about the risks of climate change have added enhanced urgency in the various states to use policies such as a renewable portfolio standard or public utility incentives to achieve three major public policy objectives: (i) reduce greenhouse gas emissions; (ii) increase renewable energy production; and (iii) reduce consumption of energy.

Most recently, on March 29, 2011, the California legislature reaffirmed that state’s ambitious commitment to support renewables with the enactment of Senate Bill X1-2, which expresses the policy intent that the amount of electricity generated per year from renewable energy resources in California be increased to 20% per year by 2013 and 33% by the end of 2020, the second most ambitious state standard in the U.S., second only to Hawaii’s 40% standard. Governor Jerry Brown recently signed the legislation. New Jersey is considered the leading state in the Northeast in implementing market-based solar incentives, which incentives have attracted massive investment, but initiatives in other states are adopting similar approaches. Massachusetts enacted the Green Communities Act with strong support for solar and other renewables and the Connecticut legislature is expected to pass a strong solar program of its own later this spring.

When the state incentives are added to the recently expanded federal tax incentives, end-use business consumers are winning terrific benefits and the renewable energy industry is scrambling to ramp up to satisfy demand while capitalizing on investment opportunities.

Federal Tax Incentives: Recent good news from Washington for the renewables industry generally and the solar industry in particular started in the fall of 2008 as Congress enacted the Energy Improvement and Extension Act of 2008 (as part of the bill informally known as the TARP legislation) and then-President Bush signed the bill into law on October 3, 2008, providing nearly $17 billion in various tax credits to promote clean power generation technologies, alternative fuels, renewable energy and energy efficiency.

The solar industry emerged as one of the clear winners in the legislation as it extended for eight (8) years the existing 30% investment tax credit for solar facilities and eliminated the pre-existing cap on 30% tax credits for investments in residential solar. The law also renewed the production tax credit for other renewable energy sources, such as wind, geothermal, and biomass; provided a new 10% investment tax credit for combined heat and power sources and geothermal equipment that use groundwater for heating or cooling purposes; and increased the tax credit available for investments in fuel cells.

President Obama signed into law the American Recovery and Reinvestment Act (“ARRA”) in February 2009, expanding even more the federal incentives for renewables. Most prominently was ARRA Section 1603, which created a Treasury Grant program that provided the option for renewable project developers to obtain a 30% cash grant in lieu of tax credits, with payment of such grants to be made within 60 days of achieving commercial operation. While the grants were to sunset unless a 5% safe harbor was satisfied for projects in development by December 31, 2010, a year-end legislative scramble extended that deadline to the end of 2011. Also, within that Tax Relief, the Unemployment Insurance Reauthorization, and Job Creation Act of 2010 was a mechanism allowing for renewable developers to claim 100% bonus depreciation for the full value of the project in the year the project was placed in service.²

Overall, the federal tax credit renewals and expansions
represent a major boost to the industry and provide energy consumers with unprecedented access to incentives to support new on-site generation of renewable energy.³

State Renewable Energy Incentives: A growing list of states are adopting legislation that provides state tax incentives and market-based incentives for renewable energy or taking executive action to promote renewables. A case in point for programs that have produced results is New Jersey. Within the last few years, New Jersey’s governors have signed legislation that exempt renewable energy systems from real property taxes in the state, establish zoning preferences, and limit the ability of municipal zoning authorities from regulating solar energy. In addition, the state enacted a solar bill that steadily increases the quantity of solar energy that will need to be procured over at least the next decade to satisfy the state’s renewable portfolio standard. In addition, New Jersey’s 2008 law, called the Global Warming Response Act, authorized the state’s investor-owned electric utilities to invest directly in renewable energy projects and recover their investment costs in utility rates, which the state viewed as a strategy to jump start its efforts to achieve more than 20% renewable energy by the year 2020, a goal prominently featured in the New Jersey Energy Master Plan as well.

Separately, the public utility commissions in various states continue to issue orders and adopt policies that encourage enforcement of renewable portfolio standards and that provide separate funding support for renewable energy systems. New Jersey’s market-based approach that is now embedded in state statutes started, for example, with the Board of Public Utilities (“BPU”) issuing orders authorizing and directing the electric utilities to implement solar programs that support the growing market. One utility was authorized to start a solar loan program that covers 60% of the project cost and allows repayment of the loans in the form of assignment of solar renewable energy certificates, or SRECs,⁴ instead of in cash. The other electric utilities were authorized to launch auctions to procure long-term contracts supplying them with SRECs (over 10 to 15 years) to satisfy the utilities’ own renewable portfolio standard obligations. When the mandate for acquisition of SRECs by load-serving entities (such as utilities or competitive energy suppliers) is added to the BPU’s increase in the solar alternative compliance payment from $350 to now more than $600 per SREC this year, market forces have been steadily rising to encourage the solar industry to focus on New Jersey as one of the hottest markets for expansion.

The results speak for themselves. Through February 2011, New Jersey has more than 8,600 residential and commercial solar projects installed that are producing more than 175 MW of power supply, second only to California.

New Jersey is certainly not the only state to provide strong incentives that favor expanded production of renewable energy, market support for the value of SRECs or to encourage customers to install on-site generation of energy facilities. Connecticut, for example, has provided many millions in grant funds to hundreds of commercial and industrial customers at the rate of $450 per KW for combined heat and power or renewable energy, with multiple funding programs available. Furthermore, Connecticut’s legislature reported out of committee in March 2011 a measure that would create a solar “feed-in” tariff and its prospects for passage at the time of printing were considered quite high. Delaware, Pennsylvania, New York and Massachusetts are among the states that similarly have various programs and incentives that support expanded investments in renewable energy. Massachusetts enacted the Green Communities Act more than two years ago, which included a solar mechanism, and solar project development is accelerating there as a result as well. In Massachusetts, SRECs are currently trading in the $500 per MWh range as demand continues to outstrip supply, but that balance is expected to tip in the opposite direction once the aggregate capacity for one percent of nongovernmental net metered projects is reached probably later this year.

Business Customer Options: Companies that have installed distributed generation projects, renewable energy projects or invested in energy efficiency programs realize that by investing in renewable energy or even cogeneration on-site, they are increasing on-site reliability of electric supply to facilities, reducing carbon footprints, and expanding sustainability. Depending on the selected technology and energy savings, companies that install such distributed generation, renewable energy and energy efficiency also may enjoy significant stakeholder relationship benefits that could come in handy in the form of community support for the next zoning application or positive corporate benefits for marketing and disclosure to shareholders.

More significantly, on-site renewable energy, especially with all of the financial incentives supporting such project deployments, enables end-use customers to achieve a predictable long-term cost of power supply and credits for supplying clean power back to the grid. So how does a business that wants to install an on-site
renewable energy plant such as solar go about doing it?

There are generally two different business models and legal frameworks for these projects. One option is for the business to buy directly the on-site energy system and enter into a contract for the system to be installed, with the business responsible for ownership, operation and maintenance. These project owners will also be the “tax owner” for purposes of the incentives and, therefore, directly eligible to claim applicable tax credits and accelerated depreciation benefits.

The second option, which the industry calls a power purchase agreement (or “PPA”) model, is one in which the business customer enters into a contract for a third-party energy provider to design, install, own, operate and maintain the energy system on the business customer’s premises pursuant to an agreement that can look like both a lease and a long-term power sales contract. The PPA model features a lease in the sense that the energy provider’s system is located on the business customer’s property as a “host,” and features a power sales contract as the business customer pledges to buy the power output from the system. The PPA model is especially beneficial for business customers that prefer to “stick to their knitting” in running their business without sinking lots of capital in a new energy plant. It also ensures a predictable long-term on-site supply of electricity to the business. The PPA model is also especially desirable for allowing a third-party or bank to access federal investment tax credits or production tax credits unavailable to commercial customers that are non-profits (i.e., schools or hospitals).

Speaking of federal tax credits, it is critical that parties entering into agreements for on-site electric generation, renewable energy or energy efficiency projects understand all of the various streams of cash and monetary benefits available to the project owner or energy services provider. This is critical to negotiating price and allocating risk and other business terms between the contract counter-parties.

For example, the contracts need to specify which party is entitled to claim ownership of and trade the SRECs that are generated by the project because the renewable portfolio standard prevalent in the Northeast requires the electric load-serving entities to either buy a certain portion of their energy supply from renewable energy sources or buy SRECs that are registered and traded through the power grid system. So these SRECs have real value that need to be understood as part of the transaction.

In addition to the energy contractual issues referenced above, lawyers supporting renewable energy project developments also face a number of land use, siting and environmental issues as project developers seek permits to build these projects. Especially with projects to be built either in sensitive environmental areas (such as offshore wind) or where neighbors allege adverse environmental affects of projects, lawyers advising project developers may face a number of issues during the permitting and approval process. Key persistent issues raised are as follows:

- **Land use and zoning**: Renewable projects often are not compatible with traditional definitions and requirements in local zoning codes, including limitations on impervious surfaces and obligations for setback requirements. New Jersey has exempted solar from impervious surface rules and defined solar as a “beneficial use,” which shifts the burden of proof in zoning cases, requiring project opponents, rather than developers, to carry the burden against projects.
- **Environmental impacts**: Wind projects in particular are being challenged in populated areas by opponents claiming offensive noise, shadow flicker, ice and blade throw, wildlife impacts, air and water quality impacts, viewshed impacts and site development impacts. Three small projects proposed in Connecticut have garnered major opposition from environmental groups alleging these impacts.
- **Offshore wind projects** face complex siting challenges from overlapping federal and state jurisdictions depending on locations. The U.S. Department of Interior (“DOI”) recently announced, in light of lessons learned on the Cape Wind Project’s 10-plus year delay in obtaining approvals, it would simplify and speed the leasing process for wind energy development off the Atlantic coast. In addition, DOI promises to work aggressively to process applications to build transmission lines to move the electricity produced by offshore wind farms to consumers. DOI’s newly-constituted Bureau of Ocean Energy Management, Regulation and Enforcement could issue Atlantic offshore leases by the end of 2011. But states, especially under the authority of the Coastal Zone Management Act, have authority to issue coastal zone water quality consistency determinations for offshore wind projects, which complicates approvals further unless both state and federal governments support the project. Of course, environmental reviews under the National Environmental Policy Act will be a prerequisite before federal agency action as well.

In summary, now is a great time for businesses to consider taking control of their own electricity costs and to secure their energy future by exploring on-site electric
generation, investing in renewable energy and installing energy efficiency equipment. Such resources are currently supported substantially by federal and state policies and grant programs promoting their use, but some of these lucrative benefits are not likely to last indefinitely. There are various options for installing such systems and various energy service providers offer contract terms and options to capture these benefits. Perhaps more than ever, environmental counsel is needed to help project developers balance the public policy goals favoring renewables against claims of adverse environmental impacts. Naturally, educated and well-advised businesses are best able to understand what programs and options are most suited for their needs.

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2. For projects placed in service in 2012, this bonus depreciation drops to 50%, with a Modified Accelerated Cost Recovery System schedule thereafter.

3. To ensure compliance with Treasury Regulations (31 CFR Part 10, §10.35), we inform you that any tax comments contained in this article are not offered as legal advice and cannot be used by you or anyone else, for the purpose of avoiding penalties imposed by the Internal Revenue Code. As is always the case, eligibility for actual tax credits and other incentives depend on various facts and circumstances and should be reviewed with your attorney.

4. One SREC represents 1,000 kilowatt hours of generation produced from a qualifying solar project. To qualify, the project must be connected to the electric distribution system serving New Jersey.