BNA, INC.

Environmental Due Diligence Guide

REPORT

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Highlights

Disclosure

Shareholder Resolutions Asking for Action On Climate Seeing Record Support in 2010

Resolutions asking companies to address risks associated with climate change or other environmental concerns have garnered an unprecedented level of support in 2010, according to Ceres, a coalition of investors and public interest groups tracking the resolutions.

Of the 95 climate change- or sustainability-related shareholder resolutions filed with U.S. companies in 2010, 47 were withdrawn after successful negotiations with the companies, and 16 garnered more than 30 percent of voting shares at the annual meetings.

The resolutions do not commit the companies to act, and the percentages represent the portion of the shares voted, not the total number of shares. Many shareholders do not cast votes at all. According to Ceres, a resolution asking Massey Energy to adopt goals for reducing greenhouse gas emissions had support from shareholders representing 25.1 million shares, while 22.2 million voted against and 20.9 million abstained.

Two of the votes broke earlier records for support. The Massey Energy resolution garnered 53.1 percent of votes cast, and a resolution asking the mining and drilling company Layne Christensen to produce a sustainability report with emphases on greenhouse gases and water management garnered 60.3 percent of votes cast. In 2009, six resolutions received more than 30 percent of the vote. The percentages were released July 6, though the initial filings were announced earlier this year (19 EDDG 22, 3/18/10).

In 2009, a resolution with the energy company IDACORP Inc. received 51.2 percent of the vote, and a resolution with Massey received 45.6 percent (18 EDDG 71, 9/17/09). ''This year's record results send a powerful message that companies should boost their attention'' to risks associated with climate change and other environmental issues, Ceres President Mindy Lubber said in a news release.

Steve Crooke, a vice president and general counsel for Layne Christensen, told BNA the board had not met since the shareholder meeting, but it would ''take a look'' at the request for a report about sustainable water and energy use at its next meeting. Both Layne Christensen and Massey recommended shareholders vote against the environment-related resolutions.

''We believe that the Company has demonstrated a long history of dedication to good corporate citizenship, environmentally, socially, charitably and otherwise. Preparing the requested report would deplete limited human and financial resources without providing meaningful additional benefit to our stockholders, employees or the communities in which we operate,'' the Layne Christensen report said.

The Massey report said the company would comply with SEC regulations requiring companies to disclose climate-related risks, but setting greenhouse gas emission-reduction goals was premature.

The Ceres climate resolution tracker is available for download at http://www.ceres.org/Page.aspx?pid=1260.

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Cases

Lead-Based Paint

EPA Reopens Comment Period On Its Proposed Rule Changes

The Environmental Protection Agency July 6 said it is reopening the comment period on proposed revisions to the 2008 Lead Renovation, Repair, and Painting Program rule after several requests for more time to respond.

EPA will accept comments on the revisions at http://www.regulations.gov until Aug. 6. The revisions, which include additional requirements designed to ensure lead-based paint hazards generated by renovation work are eliminated after renovation work is finished, were proposed May 6 (75 FR 25038).

EPA also is reminding contractors that it has removed the opt-out provision of the rule. The Lead Renovation, Repair, and Painting rule requires certification of training providers and lead-safe work practice certification for individuals involved in the construction and remodeling industry. When the rule was finalized in April 2008, it included an opt-out provision available to contractors working in homes where no children under 6 years of age reside. That provision was eliminated in a final rule published May 6 that became effective July 6 (75 FR 24802).

To date, EPA has certified 254 training providers who have conducted more than 16,000 courses and trained an estimated 320,000 renovators in lead-safe work practices.

In June, EPA extended the deadline by which contractors must be certified until Sept. 30 and said it will not enforce that requirement until Oct. 1.

Lead-Based Paint

Builders Sue Over Removal Of Opt-Out Provision in Rule

A coalition of builders filed a lawsuit July 8 against the Environmental Protection Agency over its removal of an opt-out provision from its lead-based paint renovation rule (*National Association of Home Builders v. EPA*, D.C. Cir., No. 10-1183, 7/8/10).

In its petition, the National Association of Home Builders asked the court to review a final rule published May 6 amending the lead-based paint Renovation, Repair, and Painting Program's opt-out and recordkeeping provisions (75 FR 24802).

The lead-based paint renovation rule requires certification of training providers and individuals involved in the construction and remodeling industry. The final rule, which became effective July 6, included an opt-out provision available to contractors working in homes where no children under 6 years of age reside (see related story, this page). The petitioners said EPA had no new scientific data to indicate the opt-out provision should be removed.

''Removing the opt-out provision more than doubles the number of homes subject to the regulation,'' NAHB Chairman Bob Jones said in a statement. He said removing the provision extends the rule to consumers who do not need protection from the hazards of lead-based paint. According to NAHB, additional costs of lead-safe work vary according to the type of job but average about $2,400, which might lead some consumers to seek uncertified contractors.

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On the Cutting Edge: An Insider's Perspective

Energy Efficiency Benchmarking, Due Diligence Moving into the Mainstream

A body of regulatory and legal drivers is bringing energy disclosure more into the mainstream, resulting in evolving environmental due diligence protocols, a Michigan climate change attorney told BNA July 8.

Such drivers no longer are in their infancy as more and more jurisdictions are incorporating mandatory energy efficiency and sustainability disclosure requirements into their regulations, according to Mark J. Bennett, senior counsel and climate change practice leader with Detroit, Mich.-based Miller Canfield, an international law firm.

Four Drivers for Disclosure

Essentially, there are four different vehicles through which parties are on the hook for disclosures related to energy efficiency, Bennett explained. First is a requirement under a transactional disclosure regulation. Such requirements exist in California and New York City, among many other jurisdictions, and now are in effect or will become effective on a rolling basis in the near future. These provisions require that before a party can sell, lease, or finance a property, they must disclose the energy consumption of the building. ''If you don't do this, you cannot go forward with the transaction,'' Bennett said. One of the most comprehensive resources tracking these developments at the state and local level is the Institute for Market Transformation.

''Policy makers see the real estate transaction as an ideal time to fulfill policy objectives as the regulatory obligation becomes a closing requirement,'' he added.

This transactional driver is similar to the impetus for conducting traditional environmental due diligence. However, the difference with energy efficiency disclosure is that it is not a uniform federal requirement but instead is highly jurisdiction-sensitive. It can vary by city and state, and potential conflicts can arise from overlapping requirements.

Another vehicle through which such disclosure may be required is building labeling, which requires a landlord to display publicly the building's energy consumption. ''Equipped with fully transparent and accurate energy consumption information, buyer and seller or landlord and tenant can negotiate the relative energy efficiency of a property into the transaction's economics,'' Bennett explained.

Mandatory auditing is another method by which such information may have to be disclosed. In this scenario, before transferring a property, an energy audit needs to be conducted.

The emergence of green building code upgrades is another strong driver for such disclosures, driven in part by states' receipt of federal stimulus. Funding also is a driving factor, Bennett explained.

As such, he continued, the opportunities presented by green building due diligence/energy efficiency disclosure is a departure from traditional due diligence that typically is focused on risk avoidance. Instead, under this paradigm, the opportunity exists to enhance a building's net operating income and thus its overall value through energy efficiency investments, often funded with financial incentives from different government or utility sources.

ASTM Standard Forthcoming

Given the acceleration of energy disclosure trends, ASTM International is in the final stages of balloting on a standard being developed to assist the commercial real estate industry with gathering information for such disclosures, Bennett said.

The standard, *Building Energy Performance Assessment for a Building Involved in a Real Estate Transaction* (ASTM Wk24707) (BEPA), is expected to be adopted this fall. Essentially, the BEPA standard addresses how to gather information on building energy performance so the user can make the best use of available benchmarking or green building standards, including Energy Star, the Capital Markets Partnership Green Value Score, and Leadership in Environmental and Energy Design, among others, to fulfill disclosure obligations (18 EDDG 35, 5/21/09).

''The BEPA standard brings everyone to a common starting point. It is not creating a new benchmarking standard but instead facilitating broader utilization of the various existing benchmarking standards. The environmental due diligence industry now is bundling the BEPA as an integrated scope of work into traditional Phase I environmental site assessment or property condition assessment reports,'' Bennett said. He stressed that the BEPA standard itself does not create any new legal obligations. However, it can assist with fulfilling a disclosure obligation if one is required in a particular transaction.

Key Legal Issues

Bennett stressed the importance of emerging legal issues that might arise as a result of energy efficiency disclosure. One such issue is confidentiality, he said. ''Energy consumption information generally runs with the customer, not the physical building,'' he said. This is especially important in a landlord-tenant situation. ''Tenants don't often want their energy consumption publicly disclosed.'' Buyers and landlords routinely should request from sellers and tenants permission to obtain and disclose energy consumption information for any trailing three-year period as required under the ASTM standard.

In fulfilling disclosure obligations, Bennett also cautioned that parties must allow for various benchmarking systems referenced in applicable statutes and ensure they are using the system most suitable to a particular transaction. The legal appendix of the BEPA standard addresses this issue as well as confidentiality considerations in greater detail, Bennett said.

Superfund

Court Rules Against GE; No Denial of Due Process

A federal appeals court June 29 unanimously upheld the Environmental Protection Agency's authority to use unilateral administrative orders as an enforcement mechanism in superfund cases, affirming two district court rulings (*General Electric Co. v EPA,* D.C. Cir., No. 09-5092, 6/29/10).

The ruling of the U.S. Court of Appeals for the District of Columbia Circuit said Section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act, which authorizes EPA to issue unilateral administrative orders to potentially responsible parties to clean up hazardous waste sites, neither denies due process nor violates constitutional rights to property.

In a lawsuit filed in 2000, General Electric Co. claimed Section 106 as it is administered by EPA denied due process and was unconstitutional because it does not provide an opportunity for a hearing when an order is issued.

Recipients of unilateral compliance orders can respond either by cleaning up a property and seeking reimbursement from EPA or refusing to comply and forcing EPA to sue. In either case, GE's attorney said in oral argument, ''the process is an enormously coercive scheme'' (19 EDDG 45, 6/17/10).

The June 29 decision affirmed rulings from 2005 and 2009 by the U.S. District Court for the District of Columbia. In 2009, the court held that neither the law nor EPA's administration of it denied due process to parties issued unilateral administrative cleanup orders (18 EDDG 14, 2/19/09). The 2005 ruling said issuance of such orders was not an unconstitutional deprivation of property (14 EDDG 30, 4/21/05).

Senior Natural Resources Defense Council attorney Lawrence Levine, who filed a friend of the court brief in the case for NRDC, told BNA, ''The ruling very correctly validated EPA's authority to issue clean up orders to potentially responsible parties.''

GE spokesman Mark Behan told BNA the company is reviewing the decision and evaluating its options and that there still are some ''procedural options'' available short of appealing to the Supreme Court.

Hazardous Waste

Economic Loss Doctrine No Bar to Developer's Lawsuit

The economic loss doctrine does not bar a builder's negligence claim for property damage against a company that formerly operated on an adjacent site alleged to be the source of an underground plume of trichloroethylene, the Indiana Court of Appeals ruled June 18 (*KB Home Indiana Inc. v. Rockville TBD Corp.,* Ind. Ct. App., No. 02-0909-CV-881, 6/18/10).

Under the economic loss doctrine, a party suing for purely economic losses must have a contract with the defendant. The court concluded the doctrine does not bar the negligence action in this case because the plaintiff is not seeking damages involving matters governed by contract.

The court noted the builder purchased the properties from a third party and never entered into any contract with defendant Rockville TBD Corp. or its corporate predecessor L&E, which allegedly was the source of the plume.

While the developer has legitimate contract claims against the seller of the properties for failing to divulge the presence of contamination, it also has legitimate noncontract claims against the company alleged to be the source of the contamination, the court said.

Citing *Choung v. Iemma*, 708 N.E.2d 7 (Ind. Ct. App. 1999), the court said, ''if the plaintiff is not seeking damages involving the benefit of the bargain or other matters governed by contract and/or related principles, the economic loss doctrine does not bar a negligence action.''

''In this case, it is undisputed that KB did not contract with Rockville to purchase property or a product,'' the court said. ''KB did not assert any product liability or comparable claim, and there is no showing that KB is seeking to circumvent any contractual, statutory, or other limits on the nature or scope of its permissible recovery against Rockville.''

The court said, ''[The seller's] breach of warranty that the land was free of hazardous materials does not absolve Rockville of responsibility for its negligent conduct that may have caused the contamination.''

The opinion is available at http://www.in.gov/judiciary/opinions/pdf/06181001jgb.pdf.

Hazardous Waste

Future Redevelopment May Create RCRA Claim

A federal court June 14 refused to grant ExxonMobil Corp. summary judgment in a case where the current owners of a property it formerly owned and used as a gas station invoked the Resource Conservation and Recovery Act to force ExxonMobil to help remediate the site (*Sullins v. ExxonMobil Corp.,* N.D. Cal., No. 4:08-cv-04927, 6/14/10).

Although the plaintiff's environmental consultants determined that if the property were developed for commercial or residential use, no remediation would be necessary provided institutional controls were used to restrict use of the groundwater, the court found there may be imminent and substantial danger under RCRA Section 7002(a)(1)(B) because the site was located in an area of a city targeted for redevelopment.

After plaintiffs Carlton and Rita Sullins bought the property, the city of Livermore fire department required them to remove five leaking underground storage tanks from the site. Later, the city and the county of Alameda Department of Environmental Health Services, Environmental Protection Division, determined soil and groundwater on the property contained chemicals of concern and ordered the Sullins and ExxonMobil to clean it up.

The plaintiffs then brought various claims against ExxonMobil, including a claim under RCRA Section 7002(a)(1)(B), which permits a claim by any person against a past owner that has contributed to hazardous waste on a site that ''may present an imminent and substantial endangerment to health or the environment.'' They claimed ExxonMobil had made no effort to investigate or remediate the property and had not contributed to the Sullins' efforts to comply with the cleanup orders.

ExxonMobil sought summary judgment, arguing there was no imminent and substantial endangerment, pointing to the fact the Sullins' consultants consistently found that contamination on the property did not constitute a present harm. The court held because the property was in a redevelopment zone, there was a triable issue of fact regarding the substantial and imminent danger and denied the motion.

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GAO Says Funds Inadequate to Clean Up Existing Sites

The Environmental Protection Agency's cost estimate for cleanup of 1,269 existing superfund sites exceeds current funding levels, and funding likely will be inadequate over the next five years, the Government Accountability Office said in a report released at a Senate hearing June 22.

The report said EPA estimated its costs for construction at nonfederal sites on the National Priorities List will be between $335 million and $681 million each year for fiscal years 2010 to 2014, which exceed the $220 million to $267 million EPA allocated annually for remedial actions from fiscal years 2000 to 2009.

Moreover, EPA expects to add about 20 to 25 sites each year to the NPL, according to the report, which was released at a hearing of the Senate Environment and Public Works Subcommittee on Superfund, Toxics and Environmental Health.

GAO said the cost estimates are probably understated because they do not include costs for sites that are early in the cleanup process or sites where a responsible party currently is funding remedial action but may be unable to do so in the future. Also, according to EPA officials, the agency's actual costs often are higher than its estimates because contamination often is greater than expected, the report said.

EPA has asked Congress to reinstate a series of taxes that had financed the Superfund Trust Fund, which was used to clean up sites for which no responsible party can be identified or the party cannot pay. The taxes expired in 1995.

Mathy Stanislaus, assistant EPA administrator for solid waste and emergency response, said at the hearing that the superfund program is doing well at ''leveraging federal enforcement dollars to secure private-party cleanups,'' noting that in fiscal 2009, EPA obtained commitments worth $2.4 billion from private parties for site remediation.

This has allowed EPA to focus its appropriated funds on sites where the potentially responsible parties cannot be identified, Stanislaus said. However, the agency obviously could do much more to advance cleanups at those sites if the Superfund Trust Fund were replenished. He said size and complexity of the NPL projects and pressures to equitably and responsibly allocate funds to superfund sites has become a greater challenge.

The GAO report is available at http://www.gao.gov/new.items/d10857t.pdf.

EPA Told to Consider Vapor Intrusion in Listing Superfund Sites

In a June 22 report on the funding shortfall for the superfund program, the Government Accountability Office urged the Environmental Protection Agency to consider adding vapor intrusion to the criteria it uses to determine if a contaminated site qualifies for the National Priorities List.

The report urged ''EPA administrators [to] determine the extent to which EPA will consider vapor intrusion in listing National Priorities List sites and its effect on the number of sites in the future.''

The report was released at an oversight hearing on superfund program funding of the Senate Environment and Public Works Subcommittee on Superfund, Toxics and Environmental Health (see related story, this page).

Testifying at the hearing, Mathy Stanislaus, EPA assistant administrator for solid waste and emergency response, conceded vapor intrusion may not be ''sufficiently accounted for'' in EPA's Hazard Ranking System.

Stanislaus did not respond directly to the GAO recommendation on vapor intrusion at the hearing. However, in an earlier letter responding to the report, he said he agreed with the recommendation and, in fact, EPA is evaluating whether vapor intrusion needs to be addressed more specifically in its Hazard Ranking System.

At the hearing, Stanislaus said when vapor intrusion is discovered at a site, it is addressed ''in both the remedial and the removal cleanup'' phases even though its presence is not a determining factor in listing the site on the National Priorities List (NPL).

EPA has not finalized draft guidance on assessing vapor intrusion since the draft was issued in 2002. An EPA scientist said in April the agency is ''taking significant steps'' toward finalizing the guidance by the end of 2012 and expects to publish interim guidance this year (19 EDDG 40, 5/20/10).

In December 2009, a report from EPA's Office of Inspector General was highly critical of what it called ''outdated'' toxicity values for four chlorinated chemicals most likely to pose vapor intrusion health risks, including dichloroethylene, perchloroethylene, trichloroethylene, and vinyl chloride. That report urged the agency to update and finalize its vapor intrusion guidance.

The June 22 GAO report said EPA's current funding levels fall short of its cost estimates to remediate the 1,269 sites currently on the NPL. The shortage of funds would be exacerbated by EPA's expectation to add from 101 to 125 sites to the NPL over the next five years, it said. Funds would be spread even thinner if the list of candidate sites grew as a result of vapor intrusion being adding to the site listing criteria, the report said.

In a related development, ASTM International June 14 published its *E 2600-10 Standard Guide for Vapor Encroachment Screening on Property Involved in Real Estate Transactions*. The standard replaced a 2008 document that was considered too prescriptive to be a ''standard guide.'' The newly revised standard focuses solely on screening for the likelihood of migrating vapors ''to encroach upon the subsurface of a property involved in a real estate transaction and create a vapor encroachment condition,'' Anthony Buonicore, chairman of the ASTM work group on vapor intrusion, told BNA as the guide was being developed. Buonicore is managing director of the Buonicore Group in New York City.

The GAO report is available at http://www.gao.gov/new.items/d10857t.pdf.

Wetlands

Dredge-and-Fill Permit Violated Water Statute, NEPA

A federal court has ruled the U.S. Army Corps of Engineers violated the National Environmental Policy Act and the Clean Water Act when it issued a permit to fill wetlands at a housing, office, and retail project in Florida without producing an environmental impact statement or considering alternatives (*Sierra Club v. Van Antwerp,* D.D.C., No. 07-1756, 6/30/10).

The U.S. District Court for the District of Columbia June 30 remanded the permit to the Corps of Engineers with instructions to ''file supplemental submissions addressing the exact parameters of appropriate relief.''

The court gave the federal defendants and intervening defendants—the project developers—until July 20 to submit a proposed remediation plan and any comments. The court gave plaintiffs until Aug. 19 to file a response to the proposed plans and comments.

Three environmental activist groups sued in 2007 over the Clean Water Act Section 404 dredge-and-fill permit issued for the Cypress Creek Town Center now under construction in a Tampa suburb by the Richard E. Jacobs Group of Cleveland and Sierra Properties of Tampa.

In a memorandum opinion, the court concluded the case was part of a ''disturbing pattern'' on the part of the Corps in failing to adhere to the requirements of the Clean Water Act and NEPA. The court said, ''Unfortunately, this is a familiar course of action for the Corps when processing permit applications. As another member of this Court has stated, the Corps 'resorted to arbitrary and capricious meaning—manipulating models and changing definitions where necessary—to make this project seem compliant with [CWA] and [NEPA] when it is not.' ''

The Cypress Creek Town Center project involved the filling of wetlands near the intersection of two highways. The Corps issued a dredge-and-fill permit for the project in May 2007 after conducting an environmental assessment and concluding a lengthier environmental impact statement would not be needed because the project would not have significant environmental impacts.

The plaintiff groups, including Clean Water Action, Gulf Restoration Network, and the Sierra Club, argued the project would degrade Cypress Creek and its wetlands and that the wetland destruction was unnecessary and unlawful. The 502-acre project site includes 155 acres of wetlands.

''In the instant case, it is clear from the record that the Corps failed to comply with NEPA's procedural requirements,'' the court said, granting summary judgment on the NEPA claim. ''While the Corps seems to argue that it was only required to take a 'hard look' at potential environmental concerns, the Corps is also required to make a convincing case that there would not be significant environmental impacts. Even though the Corps took the necessary hard look at some potential environmental impacts, its determination that there would not be significant environmental impacts is so contrary to the record that the Court can find it to be nothing short of arbitrary and capricious.''

The record cited by the ruling included the Corps' determination that the project would fill wetlands and result in increases in runoff with high levels of eroded sediment.

In saying the Corps was required to make a convincing case for its decision, the court cited *Grand Canyon Trust v. Federal Aviation Administration* (290 F.3d 399, 340 (D.C. Cir. 2002)), in which the appellate court said an environmental assessment must ''provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact.''

The district court also granted the plaintiffs summary judgment on another point—that the Corps violated Section 404 of the Clean Water Act by failing to require an adequate consideration of alternatives to the proposed project.

According to the Cypress Creek project developer, a reduction in the size of the project would reduce the project's rate of return below 8 percent, and consequently ''it would no longer be attractive to investors and would be financially unworkable.'' However, the court decided the developer failed to provide adequate economic analyses to support its contention that an 8 percent rate of return was necessary. The judge also said the developer never proved the cost calculations were accurate.

On one point, the court ruled against the plaintiffs. While the environmental groups had argued the Corps should have conducted a formal consultation with the Fish and Wildlife Service under the Endangered Species Act, the judge found the Corps' informal consultation with the Fish and Wildlife Service was adequate.

The opinion is available at http://www.box.net/shared/arlyheq6on. The order is available at http://www.box.net/shared/oi1i75xkk8.

Conference Calendar

July 29-31: ''Modern Real Estate Transactions: Practical Strategies for Real Estate Acquisition, Disposition, and Ownership,'' Chicago, Ill.; ALI-ABA; 4025 Chestnut St., Philadelphia, Pa. 19104-3099; $1,449; (215) 243-1630; Fax: (215) 243-1664; Web: http://www.ali-aba.org.

Aug. 25-28: ''Land Use Institute: Planning, Regulation, Litigation, Eminent Domain, and Compensation,'' Santa Fe, N.M.; ALI-ABA; 4025 Chestnut St., Philadelphia, Pa. 19104-3099; $1,449; (215) 243-1630; Fax: (215) 243-1664; Web: http://www.ali-aba.org.

Sept. 2-3: ''Sustainable Risk Rationalisation Conference 2010,'' Melbourne, Australia; RTM Communications Inc.; 510 King St., Suite 410, Alexandria, Va. 22314; See website for pricing; (703) 549-0977; Fax: (703) 548-5945; Web: http://www.rtmcomm.com.

Sept. 29 - Oct. 2: ''The ABA Environment, Energy, and Resources Law Summit: 18th Section Fall Meeting,'' New Orleans, La.; American Bar Association, Section on Environment, Energy & Resources (SEER); 321 N. Clark St., Chicago, Ill. 60654; Prices vary, see website for details; (312) 988-5724; Fax: (312) 988-5572; Web: http://www.abanet.org/environ/fallmeet/2010/home.shtml.

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In Brief

Recovery Act Funding Disputes

The Environmental Protection Agency will use an abbreviated process to resolve disputes with states that have not met performance requirements for spending American Recovery and Reinvestment Act (ARRA) funds awarded to clean up leaking underground storage tanks (LUST). EPA published a notice of availability of a policy that would deviate from its normal dispute procedures in the *Federal Register* June 23 (75 FR 35799). In April 2009, EPA announced it would give more than $190 million in Recovery Act funds for leaking underground storage tank cleanups to states and territories except for North Dakota and American Samoa, which declined money from the act. The funds were provided in the form of cooperative agreements to address ''shovel-ready'' projects. In most situations, disputes and disagreements with states and local governments over the use of the funds are resolved in accordance with specific procedures. However, EPA said, ''these procedures are not practicable to use for LUST disputes'' because such projects can involve up to four levels of review and take several months to complete. ''This time frame is too long to permit the agency to meet ARRA requirements for timely enforcement action and reallocation of potentially de-obligated ARRA funds,'' EPA said in the notice. States that received LUST funds under the Recovery Act had to obligate funds for contracts, subgrants, or similar transactions for at least 35 percent of funds and expend at least 15 percent of funds within nine months of the award. For more information on the changes in disputes resolution, contact Steven McNeely at (703) 603-7164.

Refinery Liable for Lost Value

The Ontario Superior Court of Justice July 6 found a nickel refinery liable for C$36 million ($34 million) in damages to residents of Port Colborne, Ontario, for lost property values due to soil contamination caused by the refinery's emissions (*Smith v. Inco Ltd.*, Ont. Sup. Ct., No. 12023/01, 7/6/10). The court issued the award after finding a direct link between negative publicity about nickel contamination in the soil near the Inco Ltd. refinery and depressed property values. ''I find on the balance of probabilities that the plaintiff has proved a general causal connection between the negative publicity and public disclosures that started in the year 2000 and a negative effect on the values of the class members' properties,'' the court said in the ruling. The class-action lawsuit was filed by about 7,000 property owners in Port Colborne, home to the refinery. The 101-day trial ended Jan. 21. The plaintiffs alleged that as a result of wrongful conduct by the Inco refinery, the provincial Ministry of Environment began investigating soil in the city in September 2000. The soil investigations, in turn, resulted in public disclosures of nickel contamination, negatively affecting property values, the plaintiffs said. In examining the claim for damages, the court looked not at actual decreases in property values but at the loss of expected increases in value compared with properties in similar communities. Any residential property located near a major industrial facility would include a ''baked-in discount'' that would tend to limit damages caused by negative publicity, the court said. However, the court said there was sufficient evidence at trial to confirm potential buyers of the affected properties would seek a discount as compensation for soil contamination.

Wind Project Complies With Law

The Massachusetts Supreme Judicial Court July 6 upheld a lower court finding that state environmental officials had acted properly in ruling a proposed wind farm project complied with the state's Wetlands Protection Act (*Ten Local Citizen Group v. New England Wind*, Mass., No. SJC-10585, 7/6/10). Iberdrola Renewables, the developer of the proposed 30-megawatt Hoosac Wind Project to be constructed on Bakke Mountain in Berkshire County, said the ruling will allow the company to move forward with the plan to construct 20 wind turbines on the site. The company initially proposed the project in 2003. The plan called for the construction of two gravel access roads that would originate in the town of Florida and allow for the construction and maintenance of the wind turbines. The access roads to the mountain would cross 12 streams, and the company planned to construct a series of culverts under bridges to protect them. Because the project involved work in a wetlands area, it fell under the purview of the Wetlands Protection Act as well as wetlands regulations promulgated by the Massachusetts Department of Environmental Protection. The court noted the act does not prohibit development in wetlands areas but creates a procedure that requires DEP to impose conditions on activities in certain areas to protect them.

Environmental Justice Report

The Environmental Protection Agency has established an intra-agency workgroup to review recommendations from environmental justice advocates to better incorporate considerations of low-income and minority populations into its rulemaking process, according to a report released June 29. The work group is evaluating recommendations for including such communities earlier in the rulemaking process, developing measurements to quantify environmental justice gains, and crafting multipollutant, multimedia rules that address several health hazards at once, according to the report. Environmental justice advocates made the recommendations to EPA during a March symposium to address disproportionate impacts on poor or minority communities during the rulemaking process. EPA had promised to report back on the recommendations within 100 days. EPA's intra-agency work group has not yet determined how EPA should apply the recommendations. The 100-day report groups the recommendations by topics to be addressed in the future, such as policy, science, capacity building, and promoting healthy and sustainable communities. The work group will discuss how EPA will proceed with the recommendations during a July 29 teleconference with environmental justice stakeholders. The report is available at http://www.epa.gov/environmentaljustice/multimedia/albums/epa/hundred-day-challenge.pdf.

Special Report

Supreme Court Rejects 'Judicial Taking' in Beach Erosion Case

The U.S. Supreme Court June 17 held that the Florida Supreme Court did not engage in an illegal taking of property when it upheld an erosion control project that denied six residents direct access to their beach front (*Stop the Beach Renourishment Inc. v. Florida Dept. of Environmental Protection,* U.S., No. 08-1151, 6/17/10).

While the court was unanimous on that question, the justices sharply divided over the larger issue of whether a court could ever be found to have engaged in a property taking without paying the owners just compensation.

The court split 4-4 on that question. Retiring Justice John Paul Stevens took no part in the case.

At issue was a government erosion-control effort to restore a beach in Destin, Fla., with the new beach becoming the property of the state. The property owners, known as Stop the Beach Renourishment Inc., asked for a ruling that would allow a court action to be deemed ''a judicial taking'' for the first time.

No Taking of Real Property

Eight justices agreed there was no taking of real property without just compensation in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution.

Justice Antonin Scalia wrote the opinion for the court. Addressing the narrow question of the Florida case, Scalia wrote that because the Florida Supreme Court's decision ''did not contravene the established property rights of petitioner's members, Florida has not violated the Fifth and Fourteenth Amendments. The judgment of the Florida Supreme Court is therefore affirmed.''

Scalia wrote that although the facts of this case did not demonstrate a judicial taking had occurred, he held out the possibility that a court could be found to have engaged in a taking. Agreeing with Scalia were Chief Justice John G. Roberts and Justices Samuel A. Alito and Clarence Thomas.

Justices Ruth Bader Ginsburg, Stephen G. Breyer, Anthony M. Kennedy, and Sonia Sotomayor held the court need not address that issue.

In the plurality portion of the opinion, Scalia argued for the existence of a judicial takings doctrine.

''In sum,'' Scalia wrote, ''the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking.''

''If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation,'' he wrote.

But Bader Ginsburg, Breyer, Kennedy, and Sotomayor disagreed.

Kennedy wrote, with Sotomayor concurring, ''To announce that courts too can effect a taking when they decide cases involving property rights, would raise certain difficult questions. Since this case does not require those questions to be addressed, in my respectful view, the Court should not reach beyond the necessities of the case to announce a sweeping rule that court decisions can be takings, as that phrase is used in the Takings Clause.''

Property at Issue

The seven-mile stretch of beach at the heart of the case is located in and around Destin. Since 1995, the property has been damaged by numerous hurricanes and tropical storms.

In 2003, the city of Destin and Walton County applied for the permits needed to restore 6.9 miles of beach that had been eroded by the storms. The work, under the state's Beach and Shore Preservation Act, would add about 75 feet of dry sand seaward of the mean high-water line.

Stop the Beach Renourishment Inc. challenged the Florida Department of Environmental Protection's approval of the project.

The state District Court of Appeal set aside the DEP final order approving the permits and remanded for a showing to be made that there was no unconstitutional taking.

The District Court of Appeal also certified to the Florida Supreme Court the following question: ''On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?''

The Florida Supreme Court answered the certified question in the negative and quashed the remand, and the case went to the U.S. Supreme Court (18 EDDG 82, 11/19/09).

Climate Change Threats

The ruling was of interest to many coastal states seeking to protect their coastlines from erosion, rising seas, and storms, all of which could be enhanced by the effects of climate change. The Coastal States Organization, which represents the governors of the nation's 35 coastal states, commonwealths, and territories, submitted an amicus brief in the case.

''Climate change, specifically the interrelated impacts of sea level rise, erosion, and increased storm intensity and frequency, is placing the nation's coasts and national prosperity in grave danger. Increasingly, the coasts are being ravaged by hurricanes, swept away by erosion, and disappearing as water creeps upon the beaches, dunes, roadways, and buildings,'' the group said in its brief.

''As climate continues to change, allowing states to best decide the tools that serve their needs for managing their coastal lands and waters will become more and more essential for the continued prosperity of the states and the nation,'' the group said.

''Acting within its right as a sovereign, Florida correctly ensured the protection of its interest, and the interests of the nation as a whole, through its Beach and Shore Preservation Act.''

Text of the U.S. Supreme Court's decision is available at http://www.supremecourt.gov/opinions/09pdf/08-1151.pdf.

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