

ENVIRONMENTAL NEWSLETTER

SUMMER 2009

NEW DIRECTOR JOINS MDNR

In January 2009, Governor Jay Nixon appointed Mark N. Templeton to lead the Missouri Department of Natural Resources (MDNR). Templeton is a St. Louis native with an undergraduate degree from Harvard and a law degree from Yale. Templeton's previous experiences have included assisting clients in developing "green" strategies and developing next-generation jobs in the environmental and energy sectors. Prior to joining MDNR, Templeton was serving as associate dean and chief operating officer of Yale Law School. Since joining MDNR, Templeton has focused on the creation of "green" jobs in Missouri and the development of alternative energy sources such as wind, solar and bio-fuel energy which have also been priorities for Governor Nixon. Under these new initiatives, opportunities may exist for various companies to offer services or products in the development of "green" jobs and alternative energy.



EPA FINDS GREENHOUSE GAS EMISSIONS ENDANGER PUBLIC HEALTH

On April 17, 2009, the Environmental Protection Agency (EPA) issued its proposed finding that emission of six greenhouse gases, including carbon dioxide, from motor vehicles endanger public health by contributing to climate change. Industry and the public have until June 23, 2009 to comment on EPA's finding.

This finding by new EPA Administrator Lisa Jackson was issued in conjunction with a commitment from President Obama that greenhouse gas emissions from industry and other sources should be regulated and reduced. Although a detailed plan for such regulation has not been finalized, greenhouse gas emissions may be regulated through a "cap and trade" system which would involve EPA or MDNR setting a "cap" on the level of emissions a facility can emit and business obtaining allowances through "trading" to comply with the "cap" on their emissions. Greensfelder can assist with compliance with the anticipated greenhouse gas regulations and input into the process of developing the regulatory scheme.

TOXIC RELEASE REPORTING IS TIGHTENED

The EPA Administrator has signed a final rule to reinstate stricter reporting requirements for industrial and federal facilities that release toxic substances. This action was taken in response to the 2009 Omnibus Appropriations Act, signed by the President in March 2009, which mandated that prior TRI reporting requirements be reestablished. As such, all TRI reports due July 1, 2009 must follow the new reporting protocols.

EPA DELAYS THE EFFECTIVE DATE FOR OIL SPILL PREVENTION, CONTROL, AND COUNTERMEASURE (SPCC) REQUIREMENTS

EPA announced it is delaying the effective date of the final rule that amends the Spill Prevention, Control, and Countermeasure (SPCC) regulations promulgated in the Federal Register on Dec. 5, 2008. The amendments will now become effective on January 14, 2010. However, EPA is requesting public comment on whether additional delay of the effective date is warranted.

NEW SUPREME COURT DECISION FURTHER DEFINES SUPERFUND LIABILITY

The Supreme Court recently issued an opinion in a case that further defines what actions will make a party liable for the costs of clean up under Superfund. In *Burlington Northern & Santa Fe Railway Co. v. the United States*, No. 07-1601, the Court addressed both arranger and apportionment liability.

In *Burlington*, Shell was the seller of pesticides to Brown & Bryant, an agricultural chemical distributor. Burlington Northern was a landowner on which Brown & Bryant operated a portion of their business.

Both Shell and Burlington were sued by the State of California and the United States to recover costs expended in remediating the Brown and Bryant facilities. Burlington was found liable due to its ownership of the contaminated property.

Shell was found liable by the District Court because Shell was aware that some of the product it sold was spilled during the transfer of the product from the Brown & Bryant's storage tanks. Shell also provided advice to its distributors to encourage the safe handling of the material. Thus, liability was imposed on the basis that a "disposal" occurred when the product was spilled

which was a "foreseeable byproduct of" the transaction, even though the disposal was not the purpose of the transaction.

Neither the District Court, nor the Court of Appeals imposed joint and several liability, but rather apportioned the liability of both at an amount significantly less than the total costs incurred by the governments.

The Supreme Court reversed the liability assessed against Shell finding that arranger liability requires a finding of "intent." Because "arrange for disposal" is not defined by CERCLA, the words must be given their ordinary meaning. Thus, for liability, Shell and Brown & Bryant must have intended that disposal occur during the transfer. Mere knowledge of ongoing leaks or spills is insufficient to impose arranger liability.

The Court did affirm Burlington's limited share of the remediation costs. The District Court assessed Burlington 9% of the costs based upon the percentage of total area of the facility that was owned by Burlington, the duration of Brown & Bryant's business divided by the term of Burlington's lease and the fact that only two of the chemicals spilled on Burlington's parcel required remediation. The Court affirmed the District Court's analysis of the facts that the major portion of the contamination requiring remediation was located on a portion of the facility which was the most distant from Burlington's property and that the spill on Burlington's parcel made up only a small part of the cost for the remediation of the site. The Court has adopted a more flexible approach to apportionment of liability which may permit PRPs to avoid liability for orphan shares.

DID YOU KNOW . . .

According to the EPA, if every American home replaced just one conventional light bulb with a compact fluorescent light bulb, we would save enough energy to light more than 3 million homes a year.

Many Best Buy stores will take your old TVs, computers and other electronic “toys” for recycling. There is a \$10 charge, but you will receive a \$10 Best Buy gift card in return.

Some coffee shops give you a credit (at Starbucks it’s 10 cents) when you use a reusable drink container or travel mug.

YOU JUST MIGHT NEED AN ENVIRONMENTAL LAWYER FOR YOUR REAL ESTATE OR BUSINESS TRANSACTION, IF . . .

Environmental issues are at the forefront of many transactions because of the potential liability which may arise as a result of the current or prior use of the property. However, the early involvement of an attorney experienced in environmental law can limit that liability.

Parties to a transaction have asked under what circumstances is an environmental attorney needed. The question can be best answered by asking a series of questions regarding the property and what is known about it. So, you just might need an environmental attorney for your transaction if you answer yes, to any of the following questions.

Are there any environmental studies for the site, including audits, Phase I or Phase II investigations or sampling of any media? Do the reports identify any stressed vegetation or stains on the soil or floors of the property, any underground, or above-ground storage

tanks, unexplained pipes, such as vent or fill pipes, or pipelines on the property? Are there any groundwater wells on the property?

Are there any: lakes; lagoons; impoundments; pits; septic tanks or systems; trenches, ditches or other open conduits; floor drains; dry wells; or, catch basins? Are there any areas designated as a: wetland; flood plain; coastal area; habitat for an endangered species; or, historical/archeological site?

Is there an operating business on-site which has or had any emissions to the environment, or has a permit to operate? Does the business have any material safety

data sheets; emergency response plans; spill-control plans; Emergency Planning and Community Right to Know Act (EPCRA) filings; spill reports; waste manifests; SEC filings on environmental matters; environmental litigation files; or environmental policies and procedures? Is the business a treatment, storage or disposal facility or a transfer

facility for waste materials? Does it use any hazardous wastes, drums, or electrical equipment on the property or did it use any in the past?

Are there any wastewater discharges to a Publicly Operated Treatment Works (POTW) or other water discharges from the property? Does any equipment washing or metal cleaning occur on the property? Are any paint booths located on the property? Is the zoning or land use classification currently limited to



commercial or industrial uses? If the property has a tenant, is the tenant's use of the property a commercial or industrial use?

Are there any buildings constructed prior to 1978 on the property and is there any fireproofing; thermal insulation; boilers; building ventilation systems; ceiling tiles; vinyl floor tiles; dry wall, dry wall tape and plaster; textured paints; roofing shingles, felt, tar, flashing; decorative building materials; or, sheathing on electric or power cables? Is there any mold present in any building on the property?

Will the future use of the property include manufacturing, the use of any hazardous substance or any emissions from the property? Will the land be disturbed by any redevelopment?

While every property is unique, an affirmative answer to any of the foregoing questions may indicate that there is a potential for a hidden environmental problem that may lead to liability for the owner of the property or business. However, early action in a transaction to allow an environmental attorney to address issues may limit the potential for unforeseen costs down the road.

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