

# 12

## Environmental Law

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## I. [12.1] SCOPE OF CHAPTER

This chapter provides an overview of commonly encountered environmental issues. The chapter is not intended to be, nor could it be in so few pages, an exhaustive treatise on the subject of environmental law. Rather, it is a starting point for grappling with environmental topics. The chapter is organized to address issues facing business start-ups, transactions in which a business might engage, ongoing operations, and enforcement-related issues. For a more comprehensive examination of environmental law, see IICLE's ENVIRONMENTAL LAW IN ILLINOIS (2001, Supp. 2004).

Environmental laws are detailed and complex. Statutory enactments and the consequent administrative regulations have occurred at all levels of American government — federal, state, and local. In Illinois, some state and local laws are unique, and some implement or are patterned after federal law. Those state laws that implement the federal laws are generally at least as stringent as the federal laws, but they may have significant differences.

An entity in Illinois simultaneously may be regulated by or in violation of a federal law and a state or local law, and the attorney may be dealing with several agencies at once. Hence, someone facing charges of environmental transgressions must anticipate and examine the possibilities of action from each of the governmental entities whose jurisdictions often may be concurrent and independent. The Occupational Safety and Health Administration (OSHA), the Illinois Department of Public Health, and the City of Chicago's Department of Environment have become active in pursuing environmental matters concurrently with the United States Environmental Protection Agency (USEPA), the Illinois Environmental Protection Agency (IEPA), and/or the Illinois Attorney General's Office. In addition, the protection against and consequent liability for environmental concerns has always been a part of the common law, including negligence, nuisance, and trespass. Accordingly, even without statutory authority, courts have traditional jurisdiction over such matters. Therefore, the liability of any defendant cannot be viewed solely within the statutory framework erected in past decades.

The enactment of various pieces of legislation and the resulting establishment of enforcement and administrative agencies has led to a bewildering vocabulary. The inevitable habit of practitioners, commentators, and the courts to adopt acronyms adds to the confusion. Hence, any description of broad-based environmental problems, rights, and remedies must include a glossary of terms; otherwise, the reader will be constantly flipping pages to identify statutes, regulations, administrative, judicatory, and regulatory actions, and the source of materials often enshrouded in an acronym. A glossary of abbreviations and acronyms appears in §12.98 below.

The Internet provides both general and specific information about the environmental laws. A list of Web sites of interest to the environmental practitioner appears in §12.99 below.

Finally, many environmental statutes and common law precedents continue to be in a state of evolution. Between writing and publication, some laws in this chapter may have changed or new laws may have developed. For instance, the IEPA filed proposed amendments to rules governing most leaking underground storage tanks (LUSTs) in January 2004. After various delays, the new

rules are still in flux. Attorneys should carefully research federal, state, and local laws before advising a client.

## II. ILLINOIS SYSTEM OF REGULATION

### A. [12.2] Agency Regulators

Illinois has a unique system of state regulation in which the Illinois legislature has divided authority over environmental matters among many state agencies. Those most frequently encountered are the IEPA, the Office of the State Fire Marshal (OSFM), the Illinois Emergency Management Agency (IEMA), the Illinois Attorney General, the state's attorneys, and the Illinois Pollution Control Board (IPCB). The City of Chicago's Department of Environment has also taken an active role. See Chicago Municipal Code §11-4-010, *et seq.* (Chicago Environmental Protection and Control Ordinance).

The IEPA's mandate is to conduct a program of surveillance of actual and potential contamination sources of air, water, noise, and solid waste pollution. Its authority includes inspection and investigation of violations, permitting, initiating administrative enforcement, and preventive or corrective actions for releases and substantial threats of releases. See 415 ILCS 5/4. It has the power to "issue administrative citations and take summary enforcement action." *Granite City Division of National Steel Co. v. PCB*, 155 Ill.2d 149, 613 N.E.2d 719, 725, 184 Ill.Dec. 402 (1993); 415 ILCS 5/31.1 (allowing issuance of administrative citations); *Miller v. PCB*, 267 Ill.App.3d 160, 642 N.E.2d 475, 204 Ill.Dec. 774 (4th Dist. 1994) (Illinois administrative citation procedure does not violate separation of powers or equal protection clauses). The IEPA is also the agency that the Illinois legislature has designated as the implementing agency for the majority of the federal environmental statutes. 415 ILCS 5/4(l). The IEPA has authority to transfer and terminate permits. See *Commonwealth Edison Co. v. PCB*, 127 Ill.App.3d 446, 468 N.E.2d 1339, 82 Ill.Dec. 559 (3d Dist. 1984). It must, however, issue or review a permit when so ordered by the IPCB. See *Grigoleit Co. v. PCB*, 245 Ill.App.3d 337, 613 N.E.2d 371, 375, 184 Ill.Dec. 344 (4th Dist. 1993).

The OSFM has authority to promulgate rules and regulations for storage of gasoline and volatile oils, and it has authority over underground storage tanks (USTs) that contain or are designed to contain petroleum, hazardous substances, or substances regulated under Subtitle I of the federal Hazardous and Solid Waste Amendments of 1984, Pub.L. No. 98-616, 98 Stat. 3221, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub.L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §6991). See 430 ILCS 15/2(1)(a) (granting authority to promulgate rules and regulations); 430 ILCS 15/2(3)(a) (granting authority over USTs). See also §12.31 below. The OSFM and the IEPA divide responsibility for the Illinois UST program.

Among its responsibilities, the IEMA (formerly named the Illinois Emergency Services and Disaster Agency) "coordinate[s] the overall emergency management program" of Illinois. 20 ILCS 3305/5(f)(1). The IEMA is the agency designated to receive notice of a release from a UST system that contains petroleum or a hazardous substance. See 35 Ill.Admin. Code §§731.160, 731.161. Also, it is the state entity designated to receive notice of a release from a facility of (1) a reportable quantity of a hazardous substance (see 29 Ill.Admin. Code §§430.30(a), 430.30(c)); (2) an extremely hazardous substance (see 29 Ill.Admin. Code §§430.30(a), 430.30(c)); or (3) a

reportable quantity of hazardous material that results in certain occurrences (29 Ill.Admin. Code §430.30(b)) such as hospitalization of a “member of the general public.”

In general, both the Attorney General and the state’s attorney for the county in which a violation has occurred have concurrent authority to bring actions for environmental damage. Both have authority to bring a civil action in circuit court or before the IPCB for an injunction, a cease-and-desist order to restrain a violation, and civil penalties and punitive damages for a violation of the Illinois Environmental Protection Act, 415 ILCS 5/1, *et seq.* See *People v. NL Industries*, 152 Ill.2d 82, 604 N.E.2d 349, 178 Ill.Dec. 93 (1992). See also 415 ILCS 5/42. The Attorney General and state’s attorney also may bring an action in circuit court seeking criminal penalties. See 415 ILCS 5/44(m) (allowing criminal penalties against operators of hazardous waste or incinerators who violate Environmental Protection Act). In most cases, the IEPA refers environmental matters to the Attorney General for enforcement.

The IPCB’s mission is described on its Web site ([www.ipcb.state.il.us](http://www.ipcb.state.il.us)) as follows:

**To restore, protect, and enhance the environment for all Illinois citizens, the Board promulgates environmental regulations and standards; and adjudicates contested environmental cases, serving as a public forum to resolve environmental issues and providing consistent interpretation of the Environmental Protection Act to enhance voluntary compliance.**

The IPCB consists of five members of various backgrounds appointed by the Governor. It conducts hearings on complaints charging violations of the Environmental Protection Act or regulations brought by the State or citizens. The IPCB also hears contested cases involving decisions of the IEPA and the OSFM and local government siting decisions on pollution control facilities (landfills, incinerators, and waste transfer stations).

The IPCB has authority to “determine, define and implement [Illinois] environmental control standards” and regulations, and it may adopt procedural rules for that purpose. 415 ILCS 5/5(b). The IPCB has jurisdiction to adjudicate (1) complaints of violation of the Environmental Protection Act or regulations; (2) petitions for variances; (3) review of the IEPA’s denial of a permit; and (4) petitions for removal of a seal on a facility because of emergency or alert. See 415 ILCS 5/5(d). Its powers include the right to issue subpoenas, compel attendance of witnesses, and compel production of evidence. See 415 ILCS 5/5(e). It also may (1) impose monetary civil penalties; (2) impose cease-and-desist orders; and (3) order performance of certain acts. See 415 ILCS 5/33(b), 5/33(c); 415 ILCS 5/42; *ESG Watts, Inc. v. PCB*, 282 Ill.App.3d 43, 668 N.E.2d 1015, 1020, 218 Ill.Dec. 183 (4th Dist. 1996) (noting IPCB may impose civil penalties, even in absence of pollution, for violations of Environmental Protection Act or regulations, but IPCB must have “adequate rationale” for such penalties and penalties must be related to seriousness of violation); *City of Waukegan v. PCB*, 57 Ill.2d 170, 311 N.E.2d 146 (1974); *Ralston Purina Co. v. PCB*, 27 Ill.App.3d 53, 325 N.E.2d 727 (4th Dist. 1975) (allowing civil penalties and requiring violator to file progress reports). *But see Metropolitan Sanitary District v. PCB*, 62 Ill.2d 38, 338 N.E.2d 392 (1975) (clarifying that while IPCB may impose civil penalties to further purpose of Environmental Protection Act, courts may construe such penalties as criminal if they do not further Act, but rather are for punishment).

On December 21, 2000, the IPCB replaced all of its procedural rules. 35 Ill.Admin. Code, Parts 101 – 130. The revised rules became effective January 1, 2001, and apply to all proceedings

pending as of that date. The rules are available on the IPCB Web site ([www.ipcb.state.il.us](http://www.ipcb.state.il.us)) or by calling 312/814-3620.

The City of Chicago Department of Environment enforces laws and provides information concerning air quality, illegal dumping, asbestos, USTs, and recycling. Its inspectors and investigators respond to citizens' reports of possible illegal environmental activity. On its Web site ([www.cityofchicago.org/environment](http://www.cityofchicago.org/environment)), it provides citizens with a checklist of information they need to know in order to file a complaint. Complainants can call the environmental complaint line at 312/744-7672.

## **B. [12.3] Relief from IPCB Regulation**

Often, an entity finds itself in a position of being unable, for technical, economic, or other reasons, to comply with an environmental regulation or standard. Various options exist to obtain relief from compliance, including site-specific rulemakings, adjusted standards, variances, and provisional variances.

### **1. [12.4] Site-Specific Rulemakings**

The Environmental Protection Act grants authority to the IPCB to adopt general regulations that "include regulations specific to individual persons or sites." 415 ILCS 5/27(a). Site-specific rulemakings generally follow the standard procedures for rulemaking before the IPCB. Any person may file a proposal for a rulemaking, and a hearing will be held in the part of the state affected. *Id.*; 35 Ill.Admin. Code §102.208. The procedures for filing a site-specific rulemaking are found at 35 Ill.Admin. Code §102.208, *et seq.* The IPCB must consider existing physical conditions, the character of the area involved, including the character of surrounding land uses, zoning classifications, the nature of the existing air quality or receiving body of water, as the case may be, and the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution. See 415 ILCS 5/27(a); *Granite City Division of National Steel Co. v. PCB*, 155 Ill.2d 149, 613 N.E.2d 719, 184 Ill.Dec. 402 (1993). Denial of such site-specific standards will not be overturned unless the denial is arbitrary and capricious. See *Central Illinois Public Service Co. v. PCB*, 116 Ill.2d 397, 507 N.E.2d 819, 823, 107 Ill.Dec. 666 (1987).

### **2. [12.5] Adjusted Standards**

After the IPCB has promulgated a regulation of general applicability, a person may petition the IPCB for an exception to the rule, known as an "adjusted standard." See 415 ILCS 5/28.1. An adjusted standard is a site-specific standard for a facility that is adopted in an adjudicatory proceeding. Unlike a variance, described below in §12.6, it does not expire and does not require eventual compliance. *Id.* The petitioner must justify the adjustment in accordance with either the level of justification specified in the general regulation or, if none is specified, as set forth in 415 ILCS 5/28.1(c). Section 28.1(c) requires adequate proof by the petitioner that

- (1) factors relating to that petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to that petitioner;**
- (2) the existence of those factors justifies an adjusted standard;**



**(3) the requested standard will not result in environmental or health effects substantially and significantly more adverse than the effects considered by the Board in adopting the rule of general applicability; and**

**(4) the adjusted standard is consistent with any applicable federal law.**

The justification also must be consistent with the factors that were weighed by the IPCB when it initially promulgated the general regulation under §27 rulemaking provisions. 415 ILCS 5/28.1(a).

The procedures for requesting an adjusted standard are set forth in the statute and at 35 Ill.Admin. Code §104.400, *et seq.* The procedures include public notice and comment (415 ILCS 5/28.1(d); 35 Ill.Admin. Code §104.408) and participation by the IEPA (415 ILCS 5/28.1(d); 35 Ill.Admin. Code §§104.402, 104.404, 104.416). The IPCB will hold a hearing on the petition at the request of any person or if it determines in its discretion that a hearing would be advisable. See 35 Ill.Admin. Code §§104.420, 104.422.

A petition for an individual adjusted standard filed within 20 days after the effective date of the regulation stays operation of the regulation regarding the petitioner pending disposition of the petition. See 415 ILCS 5/28.1(e). There is no stay, however, of a regulation adopted by the IPCB to implement the requirements of the “federal Clean Air Act, Safe Drinking Water Act or Comprehensive Environmental Response, Compensation and Liability Act, or the State RCRA, UIC, or NPDES programs.” *Id.*

A final IPCB determination regarding the petition for an adjusted standard may be appealed to the appellate court pursuant to §41 of the Environmental Protection Act. See 415 ILCS 5/28.1(g). The IPCB’s decision is quasi-judicial, and it will not be reversed unless it is arbitrary and capricious. See *Central Illinois Light Co. v. PCB*, 159 Ill.App.3d 389, 511 N.E.2d 269, 274 – 275, 110 Ill.Dec. 434 (3d Dist.), *appeal denied*, 117 Ill.2d 542 (1987).

### **3. [12.6] Variances**

Pursuant to §35 of the Environmental Protection Act, the IPCB may grant a variance when a petitioner shows “that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship.” 415 ILCS 5/35(a); *Ekco Glaco Corp. v. IEPA*, 186 Ill.App.3d 141, 542 N.E.2d 147, 151, 134 Ill.Dec. 147 (1st Dist. 1989). To show an arbitrary or unreasonable hardship, a petitioner must show that the “hardship resulting from a denial of the variance outweighs any injury to the public or the environment” if the variance is granted. *Marathon Oil Co. v. EPA*, 242 Ill.App.3d 200, 610 N.E.2d 789, 793, 182 Ill.Dec. 920 (5th Dist. 1993). “Virtual certainty of a future violation of the [IPCB’s] rule is a hardship,” and the hardship is arbitrary and unreasonable if granting the variance would not adversely impact the environment. 610 N.E.2d at 793 – 794.

Variances are not intended to provide a permanent exemption from the Environmental Protection Act. See *Monsanto Co. v. PCB*, 67 Ill.2d 276, 367 N.E.2d 684, 10 Ill.Dec. 231 (1977); *Mendota v. PCB*, 161 Ill.App.3d 203, 514 N.E.2d 218, 112 Ill.Dec. 752 (3d Dist. 1987). Rather, the purpose of the variance is to grant “temporary relief to a polluter while encouraging future compliance.” *Celotex Corp. v. PCB*, 65 Ill.App.3d 776, 382 N.E.2d 864, 866, 22 Ill.Dec. 474 (4th

Dist. 1978). Section 36(b) sets a general limit of five years' duration for a variance, which can be "extended from year to year by affirmative action of the [IPCB], but only if satisfactory progress has been shown." 415 ILCS 5/36(b).

Procedures for petitioning the IPCB for a variance are set forth in §37 of the Environmental Protection Act as well as in 35 Ill.Admin. Code, Parts 101 and 104. Section 37 states that any person seeking a variance shall file a petition with the IPCB and the IEPA, and the IEPA shall promptly investigate the petition and make a recommendation to the IPCB. See 415 ILCS 5/37. A hearing may be required if the IPCB concludes that it is advisable or if the IEPA or a third person files a written objection and requests a hearing. *Id.* 35 Ill.Admin. Code, Part 103, provides the general procedural rules, while Part 104 provides additional requirements regarding the content of the variance petition.

Examples of variance petitions include requests for temporary relief from standards that govern

- a. the discharge from wastewater treatment plants (*see Citizens Utilities Company of Illinois v. PCB*, 152 Ill.App.3d 122, 504 N.E.2d 224, 105 Ill.Dec. 355 (3d Dist. 1987) (ordering IPCB to grant variance); *City of Rock Island v. IEPA*, PCB 98-164, 2000 Ill. ENV LEXIS 463 (July 13, 2000) (granting variance); *Village of Princeville v. IEPA*, PCB 00-15, 199 Ill. ENV LEXIS 415 (Sept. 9, 1999) (granting variance from maximum contaminant level of gross particles); *Village of Dorchester v. IEPA*, PCB 99-161, 1999 Ill. ENV LEXIS 306 (July 8, 1999) (granting variance from total trihalomethanes regulations));
- b. the emission discharge arising from paper mills, a foundry, manufacturing adhesives, and burning coal at a power plant (*see Celotex, supra*, 382 N.E.2d 864 (reversing and remanding IPCB's denial of variance); *Caterpillar Tractor Co. v. PCB*, 48 Ill.App.3d 655, 363 N.E.2d 419, 6 Ill.Dec. 737 (3d Dist. 1977) (reversing and remanding IPCB's denial of variance with orders to IPCB to issue variance and appropriate conditions); *Minnesota Mining & Manufacturing Co. v. IEPA*, PCB 99-114, 1999 Ill. ENV LEXIS 438 (Sept. 23, 1999) (extending variance from emissions reductions requirements); *Central Illinois Light Co. v. IEPA*, PCB 99-80, 1999 Ill. ENV LEXIS 151 (Apr. 15, 1999) (granting variance from sulfur dioxide emissions regulations));
- c. the discharge of odor-producing organic materials (*Armour-Dial, Inc. v. PCB*, 60 Ill.App.3d 64, 376 N.E.2d 411, 17 Ill.Dec. 412 (2d Dist. 1978) (affirming IPCB's denial of petition for variance));
- d. the duration of sewer construction permits (*Unity Ventures v. PCB*, 132 Ill.App.3d 421, 476 N.E.2d 1368, 87 Ill.Dec. 376 (2d Dist. 1985) (affirming IPCB's denial of petition for variance));
- e. the open burning of explosive wastes (*Ensign-Bickford Co. v. IEPA*, PCB 00-24, 1999 Ill. ENV LEXIS 541 (Nov. 18, 1999) (granting conditional variance from regulations));
- f. dissolved oxygen levels in water (*City of Springfield v. IEPA*, PCB 00-179, 2000 Ill. ENV LEXIS 378 (June 8, 2000) (variance granted as prerequisite for building temporary dams)); and

- g. relief for water supply distribution systems (*Village of White City v. IEPA*, PCB 00-68, 2000 Ill. ENV LEXIS 150 (Mar. 2, 2000); *Three County Public Water District v. IEPA*, PCB 00-114, 2000 Ill. ENV LEXIS 152 (Mar. 2, 2000)).

The IPCB's decision to grant or deny the variance is "quasi-judicial, and, as such, must be supported by a written opinion with specific findings which are entitled to a presumption that they are *prima facie* true and correct." *Monsanto, supra*, 367 N.E.2d at 689. See 415 ILCS 5/35(a). The decision may be reversed on appeal if it is contrary to the manifest weight of the evidence. See 367 N.E.2d at 689. On the other hand, setting conditions on the variance is quasi-legislative to the extent it involves the IPCB's rulemaking power, and the conditions will not be reversed unless they are arbitrary, unreasonable, or capricious. 367 N.E.2d at 689 – 690.

#### **4. [12.7] Provisional Variances**

A provisional variance may be granted as short-term relief from a regulation. A request for a provisional variance must be made to the IEPA. The IEPA investigates the request and issues a recommendation to the IPCB. See 415 ILCS 5/37(b). The IPCB must grant a provisional variance within two days of receiving the IEPA's recommendation if it is found that compliance on a short-term basis with any rule, regulation, requirement, or order of the IPCB would impose an arbitrary or unreasonable hardship. See 415 ILCS 5/35(b). The duration of the provisional variance is not to exceed 45 days. See 415 ILCS 5/36(c). The IPCB may grant an extension of an additional 45 days, with a maximum of 90 days in any calendar year, upon the IEPA's recommendation. *Id.*

Procedures for requesting a provisional variance are set forth at 35 Ill.Admin. Code, Part 101, and §104.300, *et seq.*

### **III. BUSINESS START-UP**

#### **A. [12.8] Permits**

Excluding real estate issues discussed below in §§12.10 – 12.25, a significant environmental issue for a new business is whether the business needs environmental permits. If it does, the permit process should begin as early as possible because of the lag between application and issuance of the permit. The issuing agencies could include the USEPA, the IEPA, and local entities. Practitioners involved in business start-ups need to carefully research all environmental programs to determine which permits might be needed. The IEPA has published documents to help determine whether a business needs water, land, or air permits. The documents, titled "Do I Need [a Water] [a Land] [an Air] Pollution Control Permit?" can be found at the IEPA Web site's Office of Small Business page ([www.epa.state.il.us/small-business](http://www.epa.state.il.us/small-business)) under "Publications."

State environmental permits are issued by the IEPA pursuant to statutory authority. The IEPA has the duty to issue the permit once the applicant proves there will not be a violation of the Environmental Protection Act or regulations. See 415 ILCS 5/39(a). The IEPA has authority to impose such conditions in a permit as are necessary to accomplish the purposes of the Environmental Protection Act and are not inconsistent with IPCB regulations. *Id.* The IEPA's

authority to issue or refuse to issue permits, however, is subject to IPCB regulation and orders. See *Grigoleit Co. v. PCB*, 245 Ill.App.3d 337, 613 N.E.2d 371, 184 Ill.Dec. 344 (4th Dist. 1993).

Generally, the IEPA has 90 days to deny a permit after the permit application has been filed. See 415 ILCS 5/39(a). If applicable state or federal law or regulation requires opportunity for public hearing on the application or the application is for a landfill development permit, the time within which the IEPA may deny the permit is 180 days. *Id.* If there is no final IEPA action on the permit application within the statutory time, however, the applicant may deem the application issued. *Id.*

The total permitting process for certain facilities may be significantly longer than the 90 or 180 days the application is before the IEPA for approval. For example, pollution control facilities, as defined at 415 ILCS 5/3.330, must obtain local siting approval from the county board or municipality before the IEPA will grant a development or construction permit (415 ILCS 5/39(c)). This process includes public notice and a hearing before the county board or municipality prior to submitting the application to the IEPA. See 415 ILCS 5/39.2(d). The procedure for local siting approval set forth in §39.2, however, does not apply to the City of Chicago (a city or municipality with a population over one million). See 415 ILCS 5/39.2(h).

A permit may be required “for the construction, installation, or operation of [a] facility, equipment, vehicle, vessel, or aircraft.” 415 ILCS 5/39(a). If a permit is required for construction, the IEPA also may require a new permit application for a permit to operate before commencement of the operation of that source. Specifically, the activities for which a permit may be required include

1. “treatment, storage, or disposal of hazardous waste” (415 ILCS 5/39(d));
2. “underground injection of contaminants” (415 ILCS 5/39(e));
3. “surface mining of any resources other than fossil fuels” (415 ILCS 5/39(j));
4. “composting landscape waste” (415 ILCS 5/39(m));
5. air emission sources (415 ILCS 5/39.1, 5/39.5);
6. new regional pollution control facilities (415 ILCS 5/39.2), including those that dispose of hazardous waste (415 ILCS 5/39.3);
7. hazardous waste transportation operations (415 ILCS 5/21(g));
8. discharge of storm water by facilities engaging in “industrial activity” (as defined at 40 C.F.R. §122.26(b)(14)), including construction activity (such as clearing, grading, or excavating) that will result in a disturbance in excess of five acres or a disturbance that is part of a common plan of development or sale in excess of five acres (40 C.F.R. §122.26(b)(14)(x); 40 C.F.R. §§122.26(a), 122.26(c) (requiring permit); 40 C.F.R. §122.21(c) (stating that permittees under §122.26(b)(14)(x) must apply at least 90 days before construction begins)); and

9. a point source discharge of a contaminant into wells or into navigable waters within the jurisdiction of the state (navigable waters as defined in §1362(7) of the Federal Water Pollution Control Act, 33 U.S.C. §1251, *et seq.*, and including all waters within the United States) (415 ILCS 5/39(b)). *See also United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979).

In addition to permits issued by the IEPA, a new business may need federal or local permits in order to operate. For example, an installation and operating permit is required from the City of Chicago to install, erect, construct, reconstruct, alter, or add “to any fuel-burning, refuse-burning, compactor, any drain outlet or other facility for the discharge into any water or watercourse, combustion or process equipment or device” in Chicago. See Chicago Municipal Code §11-4-240.

Another type of local environmental permit required for many industrial users is for discharge of process or industrial wastewater into the local publicly owned treatment works (POTW). The Metropolitan Water Reclamation District of Greater Chicago (MWRDGC), for example, requires significant industrial users (SIUs) to have discharge authorizations in order to discharge process wastewater to the MWRDGC. See MWRDGC Sewage and Waste Control Ordinance, App. D, §1 as amended October 3, 2002. Many industrial facilities fall within the ambit of the definition of SIUs. A SIU is an entity that

1. is subject to categorical pretreatment standards under 40 C.F.R. §403.6, *et seq.* (40 C.F.R. §403.3(t)(1)(i));
2. on average, discharges at least 25,000 gallons per day of process wastewater to the sewage system (40 C.F.R. §403.3(t)(1)(ii));
3. discharges process wastewater to the sewage system that makes up at least five percent of the “average dry weather hydraulic or organic capacity of the POTW treatment plant,” (*Id.*); or
4. is designated by the MWRDGC as “having a reasonable potential for adversely affecting” the sewage system or “for violating any standard or requirement” of an MWRDGC ordinance (MWRDGC Sewage and Waste Control Ordinance, Art. II).

The requirements imposed on industrial users by a POTW may have been imposed by federal regulation on the POTW pursuant to the POTW’s permit to discharge pollutants under the National Pollutant Discharge Elimination System (NPDES). See 33 U.S.C. §§1342, 1311. Therefore, the POTW may have no latitude to grant variances or exemptions to businesses.

A new business also may need federal environmental permits. For example, the permit to dredge and fill wetlands is issued by the United States Army Corps of Engineers. See 33 U.S.C. §1344(a). In addition, Title III of the Clean Air Act requires a Risk Management Program to be developed if the facility utilizes a threshold amount of any of 139 regulated substances. See §12.32 below.

## **B. [12.9] USEPA Identification and Illinois Generator Numbers**

New businesses that generate hazardous waste must obtain a hazardous waste generator identification number. Any business that creates a “solid waste” has the responsibility to determine whether the waste is hazardous. 35 Ill.Admin. Code §722.111. See also 40 C.F.R. §262.11. With significant exceptions (*e.g.*, 35 Ill.Admin. Code §§721.104(a) (excluding multiple categories from definition of “solid waste”), 720.130 (providing factors for IPCB determination of whether particular recycled material is “solid waste”), and 720.131 (providing more factors for recycled materials)), a “solid waste” is any abandoned, recycled, inherently waste-like material, or a military munition. 35 Ill.Admin. Code §721.102. See also 40 C.F.R. §261.2. A solid waste is hazardous if it falls into one of the classifications of hazardous waste. 40 C.F.R. §261.10; 35 Ill.Admin. Code §721.101, *et seq.* See §12.35 below.

The generator of a hazardous waste must have an identification number from the USEPA in order to store, treat, dispose of, or transport that hazardous waste. 35 Ill.Admin. Code §722.112. See also 40 C.F.R. §262.12. In general, a “generator” is any person “whose act or process produces hazardous waste” or “first causes a hazardous waste to become subject to regulation.” 35 Ill.Admin. Code §720.110. See also 40 C.F.R. §260.10. In order to obtain the USEPA identification number, the generator must determine the amount of waste it will generate per month, whether its waste is listed in 40 C.F.R. §261.30, *et seq.*, and, if not listed, whether its waste is ignitable, corrosive, reactive, or toxic pursuant to 40 C.F.R. §261.21, *et seq.* The USEPA identification number is site specific. Therefore, if the USEPA has previously issued an identification number for a parcel of property, a new owner must file a subsequent notification with the USEPA and must use the old identification number.

## **IV. REAL ESTATE AND BUSINESS TRANSACTIONS**

### **A. [12.10] Environmental Due Diligence**

Due to the potential environmental liability that may be imposed on the buyer, lessee, or lender of a parcel of property, certain due diligence practices have become the norm in real estate transactions. Environmental liabilities include statutory liability for owning or operating a facility, operations in violation of environmental laws that result in substantial costs to attain compliance, the need for permits and new equipment, and payment of fines and penalties. Some form of environmental due diligence must be conducted to attempt to take advantage of statutory exemptions to liability, but the key purpose of environmental due diligence is to discover and allocate risks in the transaction.

Certain environmental laws impose strict joint and several liability on owners and operators of contaminated property. Not the least of these laws is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §9601, *et seq.* This law imposes strict liability for the release or threat of release of a hazardous substance from a facility or vessel. Under the auspices of CERCLA, owners and operators of contaminated property or of businesses that contaminated off-site facilities have had to pay for removal and remediation of contamination that preexisted their involvement with the property or business.

Illinois has a “mini-CERCLA” statute that, in 1995, was amended to establish proportionate share liability rather than the former strict joint and several liability. 415 ILCS 5/58.9. Thus, each party’s liability is limited to the extent of responsibility or fault of that party for contributing to

the release of the regulated substances. The IPCB issued regulations in 1998 to address how proportionate shares are to be determined. 35 Ill.Admin. Code, Part 741. Among other factors, the IPCB may consider the following: (1) volume; (2) degree of risk in context of foreseeable use; and (3) degree of involvement. A party to a real estate transaction will want to take all action possible to avoid liability for even a proportionate share of preexisting conditions, as well as avoid the strict joint liability of CERCLA. 35 Ill.Admin. Code §741.135.

One defense to liability under CERCLA and parallel Illinois provisions is that a defendant did not know and had no reason to know that any hazardous substance that is the subject of the release or the threatened release was disposed of on, in, or at the facility. To establish the “no reason to know” portion of the defense, the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. 42 U.S.C. §9601(35)(B); 415 ILCS 5/22.2(j)(6)(B). This defense sometimes is referred to as the “innocent landowner” defense. The innocent landowner defense, however, is difficult to meet because if the appropriate inquiry discovers an environmental issue on the property, the defense is lost. Further, if the inquiry finds no environmental issues, a court, in hindsight, is tempted to assert that the inquiry was not complete or thorough enough.

In Illinois, the Environmental Protection Act provides that a “defendant who has acquired real property shall have established a rebuttable presumption against all State claims and a conclusive presumption against all private party claims that the defendant has made all appropriate inquiry” if the defendant meets specified criteria. 415 ILCS 5/22.2(j)(6)(E)(i). The defendant must prove that immediately before or at the time of acquisition of the property, the defendant obtained either a “Phase I” or a “Phase II” “environmental audit” that “did not disclose the presence or likely presence of a release or a substantial threat of a release of a hazardous substance or pesticide at, on, to, or from the real property.” *Id.* The environmental audit must be performed by an “environmental professional,” defined as “an individual (other than a practicing attorney) who, through academic training, occupational experience, and reputation (such as engineers, industrial hygienists, geologists) can objectively conduct one or more aspects of an Environmental Audit and who either” has \$500,000 of professional liability insurance or is an Illinois licensed professional engineer or industrial hygienist. 415 ILCS 5/22.2(j)(6)(E)(iii).

There is currently no specific state or federal statutory definition of “all appropriate inquiry . . . consistent with good commercial or customary practice” with respect to liability under Illinois law or CERCLA other than to follow the guidelines for environmental assessments established by the American Society for Testing and Materials (ASTM). 415 ILCS 5/22.2(j)(6)(E)(v); 42 U.S.C. §9601(35)(B)(iv)(II). See the ASTM’s *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*, E1527-00; *Standard Practice for Environmental Site Assessments: Transaction Screen Process*, E1528-00. See [www.astm.org](http://www.astm.org). Illinois also requires a search of land title records. 415 ILCS 5/22.2(j)(6)(E)(v).

Under the direction of the Small Business Liability Relief and Brownfield Revitalization Act, Pub.L. No. 107-118, 115 Stat. 2356 (2002), the USEPA is developing regulations establishing standards and practices for how to conduct “all appropriate inquiry” to maintain the “innocent purchaser” defense. See 42 U.S.C. §§9601(35)(B), 9607(b)(3), 9601(40), 9607(q). Rules defining “all appropriate inquiry” were proposed on August 26, 2004. The brownfields legislation added new potential liability protections for property owners including “contiguous property owners”

and “bona fide prospective purchasers.” These parties also must demonstrate they conducted all appropriate inquiry in order to be protected. Illinois law specifically states that at such time as the federal standards are finalized, they will apply in Illinois. 415 ILCS 5/22.2(j)(6)(E)(v).

A presumption regarding liability under the Illinois law is, of course, not binding on a federal court evaluating liability under CERCLA. Moreover, some of the most onerous CERCLA costs have resulted from past disposal of hazardous substances off-site rather than contamination on a defendant’s own property. In addition, the Illinois law addresses due diligence for real property as opposed to business operations, and there are due diligence concerns that are beyond the scope of liability under CERCLA or the Illinois provisions in §22.2 of the Environmental Protection Act. Hence, at this time, there is not one “right” or “correct” goal, method, protocol, standard, or scope of environmental due diligence applicable to all types of transactions. Generally, the nature of the transaction and the parties involved drive the course of due diligence rather than an external standard applicable either to all transactions or specific types of transactions. For example, the environmental inquiry will proceed along a different path if a mortgage is involved, if the transaction includes the transfer of business operations as well as real property, if the transaction is a transfer of assets or shares, or if the real property is and always has been undeveloped but the buyer wants to develop it. Is the buyer willing to accept “minor” environmental liability below a threshold dollar amount? Will the seller or purchaser indemnify the other for environmental liability? Does the indemnitor have sufficiently deep pockets to support the indemnification?

Because of the extent of possible financial exposure that can result from environmental liability, however, the attorney for the purchaser should advise the client of potential liabilities and then consider with the client the scope of the environmental investigation. The attorney and the client should determine the goals of the investigation together. Even residential real estate may have environmental contamination although it has not been built on a landfill and the groundwater is not contaminated from adjacent industrial uses. Examples of common residential contamination include friable asbestos-containing material, radon, pesticides, lead leaching from lead pipes or solder, and peeling or chalking lead-bearing paint.

Illinois case law indicates that a seller should disclose environmental defects in the property materially affecting its value or desirability that are known or accessible only to the seller if the seller knows that the facts are not known to or within the reach of the diligent attention and observation of the purchaser. *See Posner v. Davis*, 76 Ill.App.3d 638, 395 N.E.2d 133, 32 Ill.Dec. 186 (1st Dist. 1979) (residential real estate). *But see Fleisher v. Lettvin*, 199 Ill.App.3d 504, 557 N.E.2d 383, 145 Ill.Dec. 613 (1st Dist.), *appeal denied*, 133 Ill.2d 555 (1990); *Lenzi v. Morkin*, 103 Ill.2d 290, 469 N.E.2d 178, 82 Ill.Dec. 644 (1984) (seller has no duty to disclose matters of public record). Also, the presence of hazardous waste materials in the soil may render a title unmerchantable. *See Jones v. Melrose Park National Bank*, 228 Ill.App.3d 249, 592 N.E.2d 562, 170 Ill.Dec. 126 (1st Dist. 1992); *Oechsle v. Pickus*, No. 94 C 5936, 1995 U.S. Dist. LEXIS 10095 (N.D.Ill. July 17, 1995) (denying motion to dismiss count for breach of warranty of merchantability of title in written contract because soil contaminated with petroleum hydrocarbons can have significant effect on merchantability of title under Illinois law).

Mold infestation has become an increasingly greater legal liability. The plaintiffs in mold infestation suits have been awarded high damages on various theories. In 2001, in a case involving mold infestation, a Texas jury awarded a plaintiff \$6.2 million in property damage, \$12 million in bad-faith punitive damages, \$5 million in damages for mental health anguish, and \$8.9



million in attorneys' fees. The plaintiffs filed suit against the insurance company after mold, resulting from a water leak, spread throughout their home, and the insurance company refused to remedy the damages. The plaintiffs did not succeed on their claim for personal injuries. See *Ballard v. Fire Insurance Exchange*, No. 99-05252 (Tex. Dist. Aug. 1, 2001). In 2000, a California jury awarded a plaintiff \$18 million in punitive damages on a theory of bad faith and \$485,000 in actual damages after the plaintiff's insurance company refused to pay mold damages after pipes burst. See *Anderson v. Allstate Insurance Co.*, No. CIV S-00-0907 PAN, 2000 U.S. Dist. LEXIS 22171 (E.D. Cal. Dec. 22, 2000), *rev'd*, 45 Fed. Appx. 754, 760 (9th Cir. 2002) (unpublished) (finding punitive damage award inappropriate because it was not supported by "malice, oppression or fraud"). Additionally, it may be difficult for the plaintiff to establish causation, that is, that the mold contamination caused the damage or injury. Finally, as *Ballard* and *Anderson* illustrate, issues concerning molds often create or, at least, are associated with issues involving insurance coverage.

Given the outcome of litigation involving mold infestations, assessments should evaluate the presence of molds. While there is no generally recognized test for determining when to undertake a mold assessment, if there is a water leak and water has not completely evaporated within three days (the general incubation period for molds), the moisture, in combination with the ubiquitous mold spores, generally results in mold. Although the environmental consultant will choose the appropriate method to assess molds, evaluation and remediation determinations may be based on three criteria: (1) mold genera; (2) total mold counts; and (3) the ratio of mold counts indoors to the counts outdoors. For the general practitioner, the EPA provides information for mold in the home at [www.epa.gov/iaq/mold](http://www.epa.gov/iaq/mold), including a publication entitled *A Brief Guide to Mold, Moisture, and Your Home*. Information is also available at [www.toxic-mold-news.com](http://www.toxic-mold-news.com), and [www.geocities.com/toxicmolds](http://www.geocities.com/toxicmolds).

Matters to investigate in environmental due diligence include present and past

1. air pollution;
2. water pollution including drinking water, surface water, and groundwater;
3. soil contamination from releases, spills, or other pollution sources;
4. disposal at off-site locations;
5. underground storage tanks;
6. material storage including storage of raw product and solid, hazardous, or toxic wastes;
7. polychlorinated biphenyls including transformers, electric ballasts, and capacitors;
8. pesticides;
9. wetlands;
10. endangered species;

11. radon,
12. lead-bearing substances;
13. asbestos-containing materials;
14. environmental licenses, permits, notifications, and approvals;
15. complaints;
16. odors;
17. noise;
18. underground structures including tanks, sewers, and pipelines;
19. septic systems;
20. radioactive materials;
21. indoor air quality; and
22. violations of environmental laws.

Because of the expense of bringing operations into compliance, the purchaser in a business transfer should be sure to include inquiry as to whether operations violate any environmental law. The practitioner also may advise the client of anticipated changes in federal, state, or local environmental law that will or may affect the property or business operations in the future. For example, as of February 2004, the Rules Committee of the Illinois House was considering the Toxic and Pathogenic Mold Protection Act, H.B. No. 4593. The bill requires the Illinois Department of Public Health to adopt exposure limits for molds if feasible (§15), to implement standards to reduce the occurrence of mold contamination in indoor environments (§30), and to approve scientific guidelines to identify the presence of molds (§45). Additionally, the bill requires a seller or transferor of property to disclose the existence of “molds in the indoor environment that either exceeds permissible exposure limits for molds developed by the Department . . . or poses any significant risk to health.” §80.

Various laws and guidance documents provide buyers and sellers with the ability to more accurately assess the risk of an environmental condition. For instance, as noted at the beginning of this section, Illinois’ proportionate share liability provision in the Environmental Protection Act allows parties to determine that portion of a risk to which they may be subject (*i.e.*, depending on the hazardous substance contributed). See 415 ILCS 5/58.9. In addition, most states, including Illinois, as well as the federal agencies (pursuant to brownfields legislation), will not pursue a party for groundwater contamination that migrates from an off-site source to which the party has no connection. See, *e.g.*, 60 Fed.Reg. 34,790 (July 3, 1995). As a result, the relative risk of purchasing property that has contamination emanating from off-site is reduced.

The Illinois legislature enacted a “prospective purchaser agreement” provision, pursuant to which a purchaser of real property may be relieved of liability for a release or threatened release

if it performs response actions to remove or remedy the release. See 415 ILCS 5/22.2b. In 1995, the USEPA also published its updated guidance document on agreements with prospective purchasers of contaminated property. See 60 Fed.Reg. 34,792 (July 3, 1995) (Guidance on Agreements with Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement). Such agreements are intended to be a way of reducing the uncertainty of CERCLA liability for prospective purchasers so that they might go forward with a transaction. In January 2000, the USEPA published documents designed to further assist prospective purchasers. 65 Fed.Reg. 1,381 (Jan. 10, 2000). The documents included a standard letter to send to parties requesting a prospective purchaser agreement, a proposed checklist of information needed by the agency to evaluate such requests, and a revised model prospective purchaser agreement. In January 2002, the brownfields legislation intended to make industrial and commercial real property purchases less risky, created a specific defense for “bona fide prospective purchasers.” As a result, the USEPA has effectively ceased using prospective purchaser agreements except under specific circumstances.

The lawyer should apply the law to the facts provided by the environmental consultant and determine whether there may be a present or future environmental liability. Both the lawyer and the consultant should work together to determine the extent of potential financial exposure to the client from a given environmental liability.

## **B. [12.11] Contracting with Environmental Consultants**

The factual investigation for environmental due diligence usually is performed by an environmental technical expert or consultant who is trained to gather the environmental information. The goals of the consultant’s investigation should be geared to the requirements of the particular transaction. The consultant selected should have the technical expertise required for the job. For example, a UST expert should not be hired if it is suspected that the issue may be emissions of volatile organic material into the ambient air. In addition, buyers should exercise caution when a seller has already retained the consultant and conducted due diligence. The buyer should understand that the seller’s consultant’s report may need strict scrutiny as the seller has no incentive to highlight environmental concerns.

Most environmental consultants have form contracts that, as would be expected, favor the consultant. The consultant’s form should be thoroughly reviewed and negotiated. Most such contracts severely limit the consultant’s liability (sometimes to the greater of the contract price or a relatively low dollar amount). Often, the consultant’s form excludes indemnification for the consultant’s own professional malpractice and requires the client to indemnify the consultant for liability to third parties. Consultants should and usually do agree to more reasonable terms from the client’s perspective.

The contract with a consultant should follow standard contractual requirements. Some provisions to consider that are unique to environmental consulting contracts include

1. a very detailed scope of work;
2. representations and warranties that the consultant will use the professional judgment, skills, and standards of at least customary environmental practices and standards of

- professional consultants when performing the work, unless the consultant agrees to a higher standard of, for example, “first class” environmental consultants;
3. a confidentiality clause that the consultant shall treat all information regarding the property, business, and assessment as confidential, including the fact of the consultant’s retention (a form of a separate confidentiality agreement is in §12.100 below),
  4. requirement of an oral report and then a draft before submittal of the final written report (an important provision if the draft can be protected by attorney-client or other privilege (see §§12.79 – 12.84 below)),
  5. a strong indemnity clause (note that the indemnity’s intrinsic value is limited to the consultant’s net worth, including the value of its insurance);
  6. a clause requiring appropriate levels of insurance, including professional malpractice coverage;
  7. specific items that should be documented in the report, such as the goals of the assessment; and
  8. a reliance letter attached to the final assessment that specifies which parties may use and rely on information contained in the final report (if the buyer will provide the report to a lender or other parties, the report will need to provide that such parties may rely on the findings of the report).

In addition, most environmental consultants include disclaimers and limitations of warranties in their reports. These disclaimers and limitations should be negotiated before the consultant is hired, and the agreed language should be included in the consulting contract. Such disclaimers and limitations of warranties may negate a presumption of “all appropriate inquiry” under 415 ILCS 5/22.2(j)(6)(B).

### **C. [12.12] Statutory Disclosures**

Several statutes in Illinois require parties to a transaction to make specific disclosures about the environmental condition of property involved in the transaction. The presence or absence of a disclosure document is not a defense to state CERCLA liability and does not establish that a defendant did not know and had no reason to know that any hazardous substance was disposed of on, in, or at the facility. See 415 ILCS 5/22.2(j)(6)(E)(viii).

#### **1. [12.13] Illinois Residential Real Property Disclosure Act**

The Illinois Residential Real Property Disclosure Act (Residential Disclosure Act), 765 ILCS 77/1, *et seq.*, effective October 1, 1994, applies to transfers of one to four residential dwelling units (including cooperatives and condominium units) by sale, installment sale, exchange, “assignment of beneficial interest, lease with an option to purchase, ground lease, or assignment of ground lease.” 765 ILCS 77/10. The Residential Disclosure Act requires the seller of the property to complete and deliver to the prospective buyer a disclosure report regarding material defects in the property. A “seller” is “an owner, beneficiary of a trust, contract purchaser or lessee of a ground lease, who has an interest . . . in residential real property.” 765 ILCS 77/5. See 765

ILCS 77/20. The term “seller” excludes persons who have neither occupied nor managed the residential real property. 765 ILCS 77/5. In addition, a “material defect is a condition that would have a substantial adverse effect on the value of the . . . property or that would significantly impair the health or safety of future occupants.” 765 ILCS 77/35.

The disclosures must be made on the form set forth in the Residential Disclosure Act and include environmental matters such as unsafe conditions in the drinking water, radon, asbestos, lead paint, lead water pipes, lead plumbing pipes, lead in the soil, and underground fuel storage tanks. *Id.* In addition, the form must include a copy of the Residential Disclosure Act. The form must also include a specific notice concerning the continuing obligations of the seller and the suggestion to consult an attorney.

The seller must deliver the disclosure report before the parties sign any written agreement to transfer the residential real property. See 765 ILCS 77/20. If the seller does not provide the disclosure document before conveyance of the residential real property, the buyer has the right to terminate the contract. See 765 ILCS 77/55.

The seller must disclose the defects of which the seller has actual knowledge and is not liable for any “error, inaccuracy, or omission of any information delivered” in the report that is based on information provided by a public agency, a contractor, or a licensed engineer, land surveyor, or structural pest control operator “if the seller had no knowledge of the error, inaccuracy, or omission.” 765 ILCS 77/25. Any seller who has “actual knowledge” before closing of “an error, inaccuracy, or omission in any prior disclosure document” must provide a written supplemental disclosure to the prospective buyer. 765 ILCS 77/30.

If a material defect is disclosed in the disclosure report after the prospective buyer accepts or executes the seller’s offer or counteroffer, then the buyer may terminate the contract within three business days after receipt of the report. See 765 ILCS 77/40. If material defects are revealed in a supplemental disclosure, however, the buyer does not have the right to terminate the purchase “unless the material defect results from an error, inaccuracy, or omission of which the seller had actual knowledge at the time the prior disclosure document was completed and signed by the seller.” *Id.* The seller must return all earnest money deposits or down payments. *Id.* The buyer has no right to terminate the contract or invalidate a transfer, however, after conveyance of the property. *Id.*

The buyer has one year after the earlier of possession, occupancy, or recording within which to sue for violation of the Residential Disclosure Act. See 765 ILCS 77/60. The seller’s liability to the purchaser for a knowing violation of or failure to perform a duty under the Residential Disclosure Act, or for knowingly providing false information on the disclosure report, is the amount of actual damages and court costs. See 765 ILCS 77/55. In addition, the court may award reasonable attorneys’ fees. *Id.* A transfer will not be invalidated, however, solely because the seller failed to comply with the Residential Disclosure Act. 765 ILCS 77/40. The Residential Disclosure Act does not limit or modify any disclosure obligation under any other statute or the common law, including disclosures to avoid fraud, misrepresentation, or deceit. See 765 ILCS 77/45.

## **2. [12.14] Residential Lead-Based Paint Hazard Reduction Act**

On March 6, 1996, the Department of Housing and Urban Development and the USEPA jointly published a final rule pursuant to §1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. §4852(d)) regarding disclosure of known lead-based paint and lead-based paint hazards by persons selling or leasing housing constructed before the phase-out of residential lead-based paint use in 1978 (target housing). See 24 C.F.R. §35.80, *et seq.*; 40 C.F.R. §745.100, *et seq.* The rule requires sellers and lessors of target housing to provide a USEPA-approved lead hazard information pamphlet, disclose the presence of lead-based paint or paint hazards, provide available records or reports pertaining to the presence of such conditions, and provide purchasers with a ten-day opportunity “to conduct a risk assessment or inspection for the presence of lead-based paint” (24 C.F.R. §35.90). See 24 C.F.R. §35.88; 40 C.F.R. §745.107. Of course, the parties to the sale or lease may negotiate the actual length of time for the ten-day assessment period. The above information and activities must be completed before the purchaser or lessee is obligated under any contract to purchase or lease target housing. 24 C.F.R. §§35.88, 35.90; 40 C.F.R. §745.107.

In addition, the federal regulation imposes an obligation on real estate brokers and other agents of the seller or lessor to ensure compliance with the above requirements. See 24 C.F.R. §35.94; 40 C.F.R. §745.115. Some commentators believe that the term “agents” includes attorneys, and therefore the seller’s and lessor’s lawyers must ensure compliance. See, *e.g.*, Michelle Mosby-Scott and Kathleen Weeks, *A Guide to the New Residential Lead Paint Disclosure Requirements*, 85 Ill.B.J. 108 (1997).

Significantly for the seller and lessor, however, neither has an affirmative duty to conduct any investigation for or evaluation of lead-based paint or lead paint hazard. See 24 C.F.R. §35.88(a); 40 C.F.R. §745.107(a). Nonetheless, the seller or lessor must disclose to its real estate agents or brokers the presence of any lead-based paint or paint hazard, the existence of any available records or reports, and any other information that the seller or lessor has about the condition. 24 C.F.R. §35.88; 40 C.F.R. §745.107.

The rule applies only to target housing that has at least one bedroom; for example, the rule does not apply to “efficiencies, studio apartments, dormitory housing, military barracks, and rentals of individual rooms in residential dwellings.” 24 C.F.R. §35.86; 40 C.F.R. §745.103. It also does not apply to housing for the elderly or persons with disabilities. See 24 C.F.R. §35.86; 40 C.F.R. §745.103. In addition, certain transactions are exempt from the rule, such as (a) sales at foreclosure of target housing, (b) leasing transactions involving housing that is free of lead-based paint (as determined by a certified inspector), and (c) nonrenewable, non-extendable leasing transactions for leases of 100 days or fewer. See 24 C.F.R. §35.82; 40 C.F.R. §745.101. Moreover, the rule does not require disclosure during renewals (including renegotiation or ratification) of existing leases if the lessor has previously disclosed the required information and has no new information about lead-based paint or paint hazards. 24 C.F.R. §35.82(d); 40 C.F.R. §745.101(d). Sales transactions of target housing that is free of lead-based paint, however, are not exempt unless an inspector certified under the federal certification program or a federally accredited state program deems the housing lead free. See 24 C.F.R. §35.82(b); 40 C.F.R. §745.101(b).

The seller must disclose in the lead warning statement the presence of known lead-based paint and lead-based paint hazards or indicate no knowledge of either; the seller also must disclose the basis for the determination that the conditions exist, the location of the paint or paint

hazard, and the condition of the painted surfaces. The seller must attach to the sales contract a list of any records or reports that the seller has provided to the purchaser pertaining to lead-based paint or paint hazards or indicate that no such documents are available. In addition, the real estate broker or agent must provide a statement that he or she is aware of the duty to ensure compliance with the regulations and has informed the seller of the seller's obligations under 42 U.S.C. §4852(d). Finally, the purchaser must provide a statement affirming receipt of the information and the lead hazard pamphlet and the opportunity to conduct the risk assessment or inspection (or the purchaser's waiver of the opportunity). The seller, purchaser, and agent must each certify the accuracy of their statements. See 24 C.F.R. §35.92; 40 C.F.R. §745.113.

The lessor must provide statements similar to those provided by the seller of target housing regarding the presence of lead-based paint and paint hazards, the list of records and reports, and other information known to the lessor concerning the paint and paint conditions. Likewise, the lessee must provide a statement affirming receipt of the information and the lead hazard information pamphlet. An agent involved in the lease transaction must provide a statement similar to the one provided by the seller's agent. Each party must sign and certify the accuracy of its statement. The seller, the lessor, and the agent each must retain a copy of the completed attachment for no less than three years. See 24 C.F.R. §35.92; 40 C.F.R. §745.113.

The pamphlet that the seller and lessor must provide to the purchaser or lessee was published by the USEPA and the Consumer Product Safety Commission on August 1, 1995, and is titled *Protect Your Family From Lead In Your Home*. See 64 Fed.Reg. 50,140 (Sept. 15, 1999). A free copy of this document can be obtained by calling 800-424-LEAD or through the HUD Web site at [www.hud.gov/offices/lead/outreach/communityoutreach.cfm](http://www.hud.gov/offices/lead/outreach/communityoutreach.cfm).

The lead-based paint disclosure requirements do not relieve a seller, lessor, or agent from responsibility for complying with other statutes or the common law. See 24 C.F.R. §35.98; 40 C.F.R. §745.119. The penalties for violation of the disclosure requirements include civil as well as criminal sanctions, and the party who commenced the civil action against a violator may recover attorneys' fees. Although the regulations do not provide that a transaction is void or voidable if there is a violation of the disclosure requirements, a person who knowingly fails to comply with the disclosure requirements may be jointly and severally liable to the purchaser or lessee for treble damages. See 24 C.F.R. §35.96; 40 C.F.R. §745.118.

The Lead Poisoning Prevention Act, 410 ILCS 45/1, *et seq.*, prohibits the use or application of lead-bearing substances in dwellings and other units. The Act requires physicians to screen children in high-risk areas and report findings of lead poisoning. Child care facilities must require lead blood level screening for admission. 410 ILCS 45/7.1. Before entering into a residential lease agreement, owners of residential buildings constructed prior to 1978 must give prospective lessees information on potential health hazards posed by lead through an informational brochure prepared by the Illinois Department of Public Health. 410 ILCS 45/9.1.

#### **D. [12.15] Transfer of Permits, Registrations, and Notices**

When selling or purchasing a business, practitioners should not neglect to ensure the transfer of permits, registrations, and notices. Unless these governmental approvals are transferred before closing or allowed extension dates, a purchaser may find itself unable to operate legally.

The IEPA is the entity that transfers permits issued pursuant to the Environmental Protection Act. *See Commonwealth Edison Co. v. PCB*, 127 Ill.App.3d 446, 468 N.E.2d 1339, 82 Ill.Dec. 559 (3d Dist. 1984). Some permits cannot be transferred, however, and must be issued anew to another owner. Examples of nontransferable permits are special waste-hauling permits issued by the IEPA (35 Ill.Admin. Code §809.207), prior conduct certificates for waste disposal sites also issued by the IEPA (35 Ill.Admin. Code §745.163(b)), and discharge authorizations issued by the Metropolitan Water Reclamation District of Greater Chicago (MWRDGC Sewage and Waste Control Ordinance, App. D, §7 as amended Oct. 3, 2002).

Some registrations require formal notice of a transfer on forms provided by the pertinent agency. For example, the new owner must submit to the IEPA a notification of hazardous waste activity in which the new owner indicates that the notification is a “subsequent notification” and includes information about the new ownership and operation. The OSFM must receive a notification form for USTs that includes information regarding the new owner.

On the other hand, some governmental approvals can be transferred merely by a letter to the appropriate agency. Transfer of the Illinois generator number may be accomplished by written notice to the IEPA permit section. The practitioner is advised to contact the issuing agency with permit in hand and request how the agency would prefer notification and/or transfer to be done.

## **E. [12.16] Brownfields/Property Redevelopment**

A “brownfield” is generally defined as a piece of abandoned or underused property with untapped economic development potential due to real or perceived environmental contamination. State and federal governments have established economic incentives to develop brownfields, including tax relief, grants, and low-interest loans. See, *e.g.*, 35 ILCS 5/201(I)(i). The tools and strategies used to address contamination on brownfield sites in Illinois — the Site Remediation Program (SRP) and the Tiered Approach to Corrective Action Objectives (TACO) — are commonly used to redevelop all types of contaminated property and should be considered in a broad context. On a federal level, the 2002 amendments to CERCLA (brownfields legislation) were specifically intended to allow for more development of brownfields properties by protecting parties from potential liabilities. See 42 U.S.C. §§9607(9)(1)(A), 9601(40).

### **1. [12.17] Illinois Site Remediation Program**

Illinois’ Site Remediation Program is a voluntary cleanup program for owners or operators of contaminated property. 415 ILCS 5/58, *et seq.*; 35 Ill.Admin. Code §370.100, *et seq.* It allows owners and operators the opportunity to receive technical assistance and culminates in receipt of a “no further remediation” (NFR) letter from the IEPA. Specifically, §4(y) of the Environmental Protection Act provides:

**The Agency shall have authority to release any person from further responsibility for preventive or corrective action under this Act following successful completion of preventive or corrective action undertaken by such person upon written request by the person.** 415 ILCS 5/4(y).

The intent of the SRP is to provide incentives to the private sector to develop brownfield property for productive commercial use and increase the willingness of the banking community to lend to companies operating on brownfields.



The SRP applies to “sites where there is a release, threatened release, or suspected release of hazardous substances, pesticides, or petroleum”; it specifically excludes sites that are (a) on the federal National Priorities List (NPL) (40 C.F.R. Part 300, App. B); (b) permitted as treatment, storage, or disposal facilities; (c) subject to closure requirements under federal or Illinois solid or hazardous waste laws; (d) subject to federal or Illinois UST laws; or (e) subject to a federal order that requires investigation or remediation. 415 ILCS 5/58.1. Facilities that were being remediated under the Pre-Notice Program (see former 415 ILCS 5/22.2(m)) and agricultural facilities (see 415 ILCS 5/58.2) may elect to undertake corrective action under the SRP. See 415 ILCS 5/58.1.

One goal of the legislation is to “establish expeditious alternatives for the review of the site investigation and remedial activities.” 415 ILCS 5/58(4). Thus, unless federal law requires a permit, no permit is required for the remediation activities. See 415 ILCS 5/58.4. In addition, although the IEPA administers the SRP (see 415 ILCS 5/58.3), the SRP establishes a review process that uses Illinois licensed professional engineers from the private sector. See 415 ILCS 5/58.7(c). Applicants select remediation objectives using TACO. See 415 ILCS 5/58.11; 35 Ill.Admin. Code, Part 742; §12.18 below.

An underlying assumption of the SRP is that no remediation is required to levels less than area background levels unless the land will be converted to residential use or the IEPA determines that the background level poses an “acute threat to human health or the environment.” 415 ILCS 5/58.5(b)(3). “Area background” means naturally occurring levels or levels that result from human activity in the vicinity of the site but not from releases from the site. 415 ILCS 5/58.2.

The procedural outline for the SRP includes a process of (a) site investigation; (b) development of remediation objectives; (c) creation of a remedial action plan (including selection of a remedy); and (d) completion of the plan and remedy. See 415 ILCS 5/58.6. These plans and results must be compiled into various reports such as the site investigation report, remediation objectives report, remedial action plan, and remedial action completion report; the minimum content of each report is set out in the statute. *Id.* Each report must include certification by an Illinois licensed professional engineer that (a) “all investigations and remedial activities were carried out under his or her direction”; (b) “to the best of his or her knowledge and belief, the work described in the plan has been completed in accordance with generally accepted engineering practices;” and (c) “the information presented is accurate and complete.” 415 ILCS 5/58.7(f).

Under the SRP, plans and reports may be submitted for review in any combination, including after completion of each activity or all activities. See 415 ILCS 5/58.6(f). In addition, the plans and reports may be reviewed by either the IEPA or a licensed professional engineer or a licensed professional geologist (RELPEG) selected by the applicant, although the applicant must pay for the services of either. See 415 ILCS 5/58.7. Even though a licensed professional engineer may conduct the review, “only the Agency [has] the authority to approve, disapprove, or approve with conditions [any] plan or report.” 415 ILCS 5/58.7(d)(3). The IEPA must base its determination on standards set forth in the statute at 415 ILCS 5/58.7 and any additional factors adopted by the IPCB. See 415 ILCS 5/58.7(e). Furthermore, the IEPA or a RELPEG must complete its review and respond to the submittal within 60 days, including an explanation and reasons for a disapproval or approval with conditions. 415 ILCS 5/58.7(d).

If the IEPA approves a remedial action completion report, it will issue an NFR letter. See 415 ILCS 5/58.7(d)(4), 5/58.10(b). The Environmental Protection Act explains:

**[T]he No Further Remediation Letter signifies a release from further responsibilities under this Act in performing the approved remedial action and shall be considered prima facie evidence that the site does not constitute a threat to human health and the environment and does not require further remediation under this Act, so long as the site is utilized in accordance with the terms of the No Further Remediation Letter. 415 ILCS 5/58.10(a).**

The NFR letter must contain any prohibition against use of the site inconsistent with a land restriction imposed by the remediation efforts and also must describe the preventive, engineering, and institutional controls required by the approved remedial action plan. See 415 ILCS 5/58.10(b).

Within 45 days of its receipt, the applicant must submit the NFR letter to the county recorder, who must record the letter in the chain of title. See 415 ILCS 5/58.8(a). The letter is not effective until it is officially recorded. See 415 ILCS 5/58.8(b).

The NFR letter applies in favor of a variety of entities, including

- a. the person to whom the letter is issued;
- b. the owner, co-owner, person sharing a legal relationship with the owner, and operator of the site;
- c. the owner's parent corporation or subsidiary;
- d. the owner's transferee (including a transferee as a result of bankruptcy, partition, dissolution of marriage, settlement or adjudication, charitable gift, or bequest);
- e. the owner's heir or devisee;
- f. a financial institution that acquired the ownership, operation, management, or control of the site through foreclosure or terms of a security agreement; and
- g. a fiduciary, estate, trust estate, or other interest in property held in a fiduciary capacity. See 415 ILCS 5/58.10(d).

The NFR letter is voidable if the site is not managed in compliance with the SRP, the terms of the approved remedial action plan, or the remediation objectives on which the letter was based. See 415 ILCS 5/58.10(e). For example, the letter may be voidable if the approved remedial action plan incorporates institutional controls or land use restrictions, such as maintaining an asphalt cap over the contamination or nonresidential use, and the owner or operator installs grass instead of asphalt or builds a house on the site. *Id.* The letter also is voidable if the recipient of the letter fails to pay the required no further remediation assessment fee (see 415 ILCS 5/58.10(g)) or the letter is not filed with the county recorder (see 415 ILCS 5/58.10(e)). Most significantly, the letter

is voidable if additional contamination is discovered at the site that was not addressed by the prior plans and reports. See 415 ILCS 5/58.10(e)(6).

In order to participate in the SRP, the owner, operator, or agent must make a request in writing to the IEPA for the review and approval services. See 415 ILCS 5/58.7. The IEPA, in turn, may impose certain requirements on the applicant, including (a) allowing the IEPA to evaluate or visit the site; (b) paying the IEPA's reasonable costs; and (c) advancing certain payments to the IEPA for its services (not to exceed the lesser of \$5,000 or half of the estimated costs). 415 ILCS 5/58.7(b)(1). The applicant may terminate the IEPA's services at any time, however.

## **2. [12.18] Illinois Tiered Approach to Corrective Action Objectives**

The SRP required the IPCB to adopt rules that establish a method for achieving site-specific remediation objectives. See 415 ILCS 5/58, *et seq.* In June 1997, the IPCB adopted final TACO rules, which assess a property based on its risk. See 35 Ill.Admin. Code, Part 742. Although initiated pursuant to the SRP, the TACO rules should be used in conjunction with the LUST program (see 35 Ill.Admin. Code, Parts 731 and 732) and the Part B permits and closure plans contained in the Resource Conservation and Recovery Act of 1976 (RCRA), Pub.L. No. 94-580, 90 Stat. 2795 (see 35 Ill.Admin. Code, Parts 724 and 725). 35 Ill.Admin. Code §742.105. They do not apply, however, if they would delay a response action to address imminent and substantial threats to human health and the environment. *Id.*

The key elements of the TACO approach are an analysis of the "exposure routes," "contaminants of concern," and "land use." The exposure routes addressed by TACO are inhalation, soil ingestion, groundwater ingestion, and dermal contact with soil. See 35 Ill.Admin. Code §742.115. The groundwater exposure route focuses on both the "migration from soil to groundwater" and "direct ingestion of groundwater." *Id.*

In order to determine the contaminants of concern, the applicant must conduct whatever site investigation is required under the applicable remediation program (LUST, RCRA, or SRP). See 35 Ill.Admin. Code §742.120. The "contaminants of concern" depend on the "materials and wastes managed at the site," "the extent of the no further remediation determination" being requested from the IEPA under the specific program, and "the requirements applicable to the specific program." 35 Ill.Admin. Code §742.115(b). The "land use" element of TACO analyzes the "present and post-remediation uses of the site where exposures may occur." 35 Ill.Admin. Code §742.115(c). The land use also must be classified as residential, conservation, agricultural, or industrial/commercial. 35 Ill.Admin. Code §742.115(c).

The TACO rules establish a three-tiered system for determining the appropriate remediation objective for a specific site. These tiers provide a method to evaluate a site in order to determine remediation objectives tied to the specific use of the property. An evaluation under Tier I or Tier II is not a prerequisite for an evaluation under Tier III. See 35 Ill.Admin. Code §742.110.

The Tier I evaluation consists of an analysis of "the extent and concentrations of the contaminants of concern, the groundwater class, the land use classification, human exposure routes at the site, and, if appropriate, soil pH." 35 Ill.Admin. Code §742.110(b). In simplistic terms, the site conditions and concentration of contaminants detected at a site (determined through laboratory analysis of soil and groundwater samples) must be compared to Tables A – E

in Appendix B of the rules. *Id.* The tables have different concentration limitations depending on whether the site is residential or industrial.

The Tier II evaluation uses risk-based equations listed in Appendix C, Tables A and C, to determine remediation objectives for the site. The Tier II analysis is used for residential and industrial/commercial property. See 35 Ill.Admin. Code §742.110(c).

The Tier III analysis is a formal risk assessment analysis. See 35 Ill.Admin. Code §742.915. Tier III allows the applicant to develop remediation objectives using alternative parameters that are not allowed under the Tier I or Tier II analyses. See 35 Ill.Admin. Code §742.110(d). The risk assessment analysis is based on site-specific information rather than on generic tables and is intended to be more flexible. See 35 Ill.Admin. Code §742.900. Tier III must be used for conservation and agricultural properties. See 35 Ill.Admin. Code §742.110(d).

Significantly, groundwater remediation objectives determined under the TACO regulations “may exceed the groundwater quality standards . . . under the Illinois Groundwater Protection Act” (415 ILCS 55/1, *et seq.*). 35 Ill.Admin. Code §742.105(f). Furthermore, the rules allow the applicant to develop remediation objectives based on area background concentrations. See 35 Ill.Admin. Code §742.110(e). The applicant may also address the presence of contamination by the exclusion of pathways. See 35 Ill.Admin. Code §742.300, *et seq.*

The TACO program permits risk-based site cleanups but also requires the use of “institutional controls,” in the form of “a legal mechanism for imposing a restriction” on present and future land use (35 Ill.Admin. Code §742.200) when remediation objectives are based on industrial or commercial property use, engineered barriers, or elimination of certain exposure routes, among others. 35 Ill.Admin. Code §742.1000.

The IEPA has adopted rules that amend TACO to create an instrument called the “Environmental Land Use Control” (ELUC) as an institutional control. 35 Ill.Admin. Code, Part 742. See 415 ILCS 5/58.17 (requiring IEPA to develop rules creating ELUC). The ELUC was created to alleviate concerns that institutional controls, such as deed restrictions, might not be effective in perpetuity. The regulations specifically define an “ELUC” as

**an instrument that . . . is placed in the chain of title to real property that limits or places requirements upon the use of the property for the purpose of protecting human health or the environment, is binding upon the property owner, heirs, successors, assigns, and lessees, and runs in perpetuity or until the agency approves, in writing, removal of the limitation or requirement from the chain of title.** 35 Ill.Admin. Code §742.200.

The ELUC operates as an institutional control to impose land usage limits or requirements, such as prohibiting groundwater use or certain property uses, or requiring the maintenance of engineered barriers or worker safety plans. They are available for use in the SRP, the LUST Program, and RCRA Part B permits and closures.

### **3. [12.19] Federal Brownfields Policy**

The Small Business Liability Relief and Brownfields Revitalization Act, Pub.L. No. 107-118, 115 Stat. 2356 (2002), includes provisions that reduce the risk associated with purchases of commercial and industrial property by including protections for owners and prospective purchasers. See 42 U.S.C. §§9601, 9607. The innocent landowner defense, pursuant to 42 U.S.C. §§9601(35) and 9607(b)(3), extends protection to the property owner who

**provides full cooperation, assistance, and facility access to the persons that are authorized to conduct response actions at the facility . . . is in compliance with any land use restrictions established or relied on in connection with the response action at a facility, and does not impede the effectiveness or integrity of any institutional control employed at the facility in connection with a response action.** 42 U.S.C. §9601(35)(A)(iii).

Additionally, the Small Business Liability Relief and Brownfields Revitalization Act created the bona fide prospective purchaser defense, pursuant to 42 U.S.C. §§9607(40)(B) and 9607(r). 42 U.S.C. §9607(40)(B). A prospective purchaser qualifying for status as a “bona fide prospective purchaser” must establish various elements, including showing that “all disposal of hazardous substances at the facility occurred before the person acquired the facility” and that the person is “taking reasonable steps to (i) stop any continuing release; (ii) prevent any threatened future release; and (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.” See 42 U.S.C. §9601(40). A bona fide prospective purchaser is not liable for contamination on the property if that purchaser does not obstruct remediation. 42 U.S.C. §9607(r).

An NFR letter under the Illinois SRP does not release an owner, operator, or other person from liability to the federal government or a private party under federal law, such as RCRA (42 U.S.C. §6901, *et seq.*) or CERCLA (42 U.S.C. §9601, *et seq.*). Illinois has moved to eliminate this threat by entering into agreements with the USEPA limiting the USEPA’s enforcement of those laws.

In 1995, the IEPA and USEPA entered into an agreement providing that for sites that have been remediated as part of the Illinois SRP and have received a no further action (NFA) letter, the USEPA will not subject the site to “further response actions.” Brownfields Amendment to the Superfund Memorandum of Agreement, Addendum No. 1 (available online at [www.epa.state.il.us/land/publications](http://www.epa.state.il.us/land/publications)). Similarly, in 1997 the USEPA and the IEPA entered into a memorandum of understanding (MOU) as to RCRA that approves the use of the Illinois SRP to remediate contaminated property and states that the USEPA does not anticipate taking any federal environmental cleanup action under RCRA or the Toxic Substances Control Act (TSCA), 15 U.S.C. §2610, *et seq.*, at a site where the IEPA has approved a remediation.

Counterbalancing the MOU, however, on November 14, 1996, the USEPA headquarters published a memorandum regarding interim approaches for regional relations with state voluntary cleanup programs that states that the USEPA does not intend memoranda of understanding with states regarding their voluntary cleanup programs to constitute no-action assurances for any specific site by the USEPA. Memorandum, Interim Approaches for Regional Relations with State Voluntary Cleanup Programs (Nov. 14, 1996) (available online at [www.epa.gov/swerosps/bf/html-doc/vcp.htm](http://www.epa.gov/swerosps/bf/html-doc/vcp.htm)).

The courts have stepped in to arguably limit the USEPA's authority to bring RCRA enforcement actions when a property owner is already working with the state to address contamination at the property. *Harmon Industries, Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999). See *United States v. City of Rock Island, Illinois*, 182 F.Supp.2d 690 (C.D.Ill. 2001). Nevertheless, the USEPA contests the apparent breadth of the *Harmon* ruling and still may attempt to assert its authority in certain cases.

The USEPA also has a "Policy on the Issuance of Comfort/Status Letters" with respect to brownfield property. The policy allows, but does not require, USEPA regional offices to issue a "comfort" or "status" letter to a party that wants to purchase, develop, or operate on brownfield property. The letter will not express any opinion as to the possible contamination at or proper usage of the property; the letter is for informational purposes regarding the USEPA's intent, based on its present information, to respond or initiate enforcement under CERCLA only. The USEPA is not limited from taking action in the future. "This policy is not a rule, and does not create any legal obligations" on the part of the USEPA or on the recipient of the comfort/status letter. 62 Fed.Reg. 4,624 (Jan. 30, 1997).

The policy provides examples of the letters that the regional offices may issue: (a) a "No Previous Federal Superfund Interest Letter" when there is no historical evidence of CERCLA program involvement with the property, (b) a "No Current Federal Superfund Interest Letter" when the property once was but is not currently in the CERCLA program, (c) a "Federal Interest Letter" when the USEPA plans to respond or is responding to a release or threatened release, and (d) a "State Action Letter" when the state has the lead for day-to-day activities and oversight of a response action at the property. *Id.*

In addition, prior to the enactment of the Small Business Liability Relief and Brownfields Revitalization Act, a prospective purchaser of contaminated property could obtain a covenant not to sue from the USEPA and CERCLA contribution protection (see 42 U.S.C. §9613(f)) under the prospective purchaser guidance if the purchaser entered into a binding contract with the USEPA pursuant to 60 Fed.Reg. 34,792 (July 3, 1995). However, the Act effectively voided the need for these agreements.

## **F. [12.20] Lease Transactions**

Both lessees and lessors may be liable under environmental laws for the condition of the property. See, e.g., *Bowers v. Wurzburg*, 528 S.E.2d 475, 479 – 480 (W.Va. 1999) (lessor liable under RESTATEMENT (SECOND) OF TORTS to neighbor for damages caused by lessee when lessor has actual or constructive knowledge); *State of New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985) (landlord liable under CERCLA even though it did not own site at time of tenant's disposal of hazardous substances); *United States v. A & N Cleaners & Launderers, Inc.*, 788 F.Supp. 1317 (S.D.N.Y. 1992) (lessee who exercised pervasive control over use and maintenance of property is liable as owner under CERCLA); *United States v. Northernair Plating Co.*, 670 F.Supp. 742 (W.D.Mich. 1987) (lessee liable under CERCLA for hazardous substances from own operation), *aff'd sub nom. United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 1527 (1990).

As a result, both parties to a lease need to perform environmental due diligence before the lease is executed. The lessor must determine the risk of liability from the lessee's operations, and

the lessee must determine the risk of liability if it leases the property. For example, leaking tanks and pipelines, continuing leaching and seepage from earlier spills, and leaking drums are “releases” and may subject present owners (lessors) and operators (lessees) to CERCLA liability even if they did not own or operate the property when the release commenced. *See Shore Realty, supra*. In addition, potential environmental liabilities raise the concern of the lessee’s ability to make the scheduled rent and other payments under the lease and the impairment of the value of the property. Both lessor and lessee alike should be advised to negotiate and include in the lease provisions specific to environmental matters. Such provisions from a lessor’s perspective might include the following concepts:

1. The lessee must comply with environmental laws (including new or amended laws during the term).
2. The lessee must clean up and remediate all releases and conditions affecting the environment occurring during the lease term.
3. The lessee must provide copies of certain environmental documents to the lessor (*e.g.*, permits, licenses, registrations, and environmental reports).
4. The lessee must notify the lessor of any environmental law violations, governmental notices, or formal or informal complaints about environmental matters.
5. The lessor prohibits the lessee from conducting certain operations on the property (*e.g.*, the lessee is restricted in use or quantity of hazardous substances at the property).
6. The lessee is liable for bringing property into compliance with future laws.
7. The lessee must remove waste during the lease term and upon lease termination.
8. The lessor has the right to inspect the property and the lessee’s compliance with environmental laws.
9. The lessee indemnifies the lessor for environmental liabilities occurring or arising during the lease term.

Environmental provisions from the lessee’s perspective might include these concepts:

1. The environmental condition of the property will not subject the lessee to liability.
2. There are no environmental actions (including litigation or complaints) regarding the environmental condition of the property.
3. No hazardous substances have been on or generated from the property in violation of environmental laws.
4. There are no USTs or pipelines at the property.

5. The lessor is responsible to remediate environmental substances (*e.g.*, asbestos-containing material, lead-bearing paint).

6. The lessor is liable to bring property into compliance with future laws.

7. The lessee has a right to terminate if the lessor, the property, or another tenant violates environmental laws.

8. The lessor must indemnify the lessee for all preexisting environmental conditions at the property.

### **G. [12.21] Loan Transactions and Lender Liability**

The financial impact to lenders due to environmental problems of their borrowers historically has been severe. Lenders have been held liable after foreclosing on contaminated collateral (*see United States v. Maryland Bank & Trust Co.*, 632 F.Supp. 573 (D.Md. 1986)) or if their post-foreclosure activities caused or worsened contamination (*see United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990)). The environmental liability can far exceed the value of the collateral. Although laws have been passed to protect lenders from such liability, lenders must still exercise some caution when involved in a transaction with environmental concerns. For instance, environmental contamination can reduce the value of the collateral, and the cost to a borrower of complying with environmental regulations can cause a borrower's insolvency.

#### **1. [12.22] Liability Under CERCLA**

Under CERCLA, liability may be imposed on any of four classes of responsible parties, including, in relevant part, the current owner or operator of contaminated property and the owner or operator at the time hazardous substances were disposed of. 42 U.S.C. §9607(a). Since its enactment in 1980, CERCLA has expressly exempted from the definition of "owner" or "operator" any party "who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." 42 U.S.C. §9601(20)(A) ("secured creditor exemption"). Thus, if a lender does not "participate in the management" of contaminated property, the lender will receive the benefit of the secured creditor exemption and, accordingly, will not be subject to CERCLA liability.

Historically, inconsistent court decisions have created uncertainty regarding what types of activities on the part of a lender constitute "participation in management" and thus would subject a lender to CERCLA liability by depriving the lender of the benefit of the secured creditor exemption. *See, e.g., United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990) (narrow interpretation of secured creditor exemption); *In re Bergsoe Metal Corp.*, 910 F.2d 668 (9th Cir. 1990) (relatively broad interpretation of secured creditor exemption). Although the USEPA issued a rule (the "lender liability rule") in April 1992 (*see* 57 Fed.Reg. 18,344 (Apr. 29, 1992)) that attempted to define the scope of "participating in management," the rule subsequently was declared invalid and vacated by the D.C. Circuit Court of Appeals in *Kelley v. USEPA*, 15 F.3d 1100 (D.C. Cir. 1994).

In response, Congress enacted the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 (Asset Conservation Act), Pub.L. No. 104-208, 110 Stat.



30009-462, which was signed into law on September 30, 1996. The Asset Conservation Act reinstates most of the provisions of the lender liability rule and, in particular, sets forth the types of activities that constitute “participating in management” and thus would subject a lender to CERCLA liability by depriving the lender of the benefit of the secured creditor exemption. In so doing, the Asset Conservation Act makes a distinction between lender activities that take place prior to any foreclosure and, in the event that foreclosure occurs, lender activities that take place after foreclosure.

**Pre-foreclosure activities.** Under the Asset Conservation Act, a lender will be deemed to have “participated in management” only if it engages in either of two types of pre-foreclosure activities. First, a lender will be deemed to have “participated in management” if prior to foreclosure it exercises “decision-making control” over environmental compliance related to a facility such that the lender has “undertaken responsibility for the hazardous substance handling or disposal practices related to the vessel or facility.” 42 U.S.C. §9601(20)(F)(ii)(I). Second, a lender will be deemed to have “participated in management” if prior to foreclosure it exercises control at “a level comparable to that of a manager” of the facility, such that the lender has “assumed or manifested” responsibility for either (a) the overall management of the facility encompassing day-to-day decision making with respect to environmental compliance or (b) all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the facility other than the function of environmental compliance. 42 U.S.C. §9601(20)(F)(ii)(II).

Accordingly, unless a lender, prior to any foreclosure that takes place, either exercises control over environmental compliance at contaminated property or assumes overall control of such property as described above, the lender will not be subject to CERCLA liability, as the lender will not be deemed to have “participated in the management” of the property.

In addition, the Asset Conservation Act lists a number of pre-foreclosure activities that expressly do not constitute “participation in management” and thus do not deprive a lender of the benefit of the secured creditor exemption. However, these activities are safely out of the realm of management of the facility only if “the actions do not rise to the level of participating in management.” These include

- a. holding a security interest or abandoning or releasing a security interest;
- b. including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition that relates to environmental compliance;
- c. monitoring or enforcing the terms and conditions of the extension of credit or security interest;
- d. monitoring or undertaking one or more inspections of the vessel or facility;
- e. requiring a response action or other lawful means of addressing the release or threatened release of a hazardous substance in connection with the vessel or facility prior to, during, or on the expiration of the term of the extension of credit;

- f. providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the vessel or facility;
- g. restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;
- h. exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or
- i. conducting a response action under 42 U.S.C. §9607(d) or under the direction of an on-scene coordinator appointed under the National Contingency Plan. 42 U.S.C. §9601(20)(F)(iv).

**Post-foreclosure activities.** The Asset Conservation Act also sets out the types of post-foreclosure activities that a lender may engage in without losing the benefit of the secured creditor exemption and subjecting itself to CERCLA liability. Specifically, a lender may sell, release, or liquidate contaminated property; maintain business activities at contaminated property; wind up operations; or engage in certain types of CERCLA cleanup actions, provided that (a) prior to foreclosure, the lender did not engage in any pre-foreclosure activities that would constitute “participation in management,” as discussed above; and (b) after foreclosure, the lender “seeks to sell, re-release . . . or otherwise divest [itself of the contaminated property] at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.” 42 U.S.C. §9601(20)(E)(ii).

On July 7, 1997, the USEPA issued a policy statement in which it said that it will treat the 1992 CERCLA lender liability rule and its preamble as guidance in interpreting the lender liability exemption if the rule provides additional clarification of the same or similar terms used in the secured creditor exemption. See 62 Fed.Reg. 36,424 (July 7, 1997). For example, the USEPA may consult the lender liability rule to determine whether a lender has divested itself of a foreclosed-on facility “at the earliest practicable, commercially reasonable time, on commercially reasonable terms.” *Id.* Therefore, lawyers who are advising lenders should consult the USEPA’s CERCLA lender liability rule and its preamble (see 57 Fed.Reg. 18,344 (Apr. 29, 1992)) before providing advice to lenders and others that may be affected by application of the CERCLA secured creditor exemption.

## 2. [12.23] Liability Under RCRA

Under RCRA, liability may be imposed on the owner or operator of a UST from which contamination has been released. 42 U.S.C. §6991b(h). In addition to defining the scope of lender liability under CERCLA (as discussed above in §12.22), the Asset Conservation Act sets out the scope of lender liability under the liability provisions of RCRA. Specifically, the Asset Conservation Act amends RCRA to add an exemption from liability nearly identical to the CERCLA secured creditor exemption discussed above — *i.e.*, it exempts from the definition of “owner” or “operator” any person “that, without participating in the management of an underground storage tank and otherwise not engaged in petroleum production, refining, or marketing, holds indicia of ownership primarily to protect the person’s security interest.” 42 U.S.C. §6991b(h)(9)(A). See also 40 C.F.R. §§280.210 – 280.230.

Thus, as in the case with CERCLA liability, if a lender is not “participating in the management” of a UST (and is not in the petroleum industry), then the lender will not be subject to liability under the RCRA liability provision. 42 U.S.C. §6991b(h)(9)(A). Moreover, the Asset Conservation Act provides for the same test for “participation in management” under the RCRA liability provision as under CERCLA. 42 U.S.C. §6991b(h)(9)(B). Therefore, a lender will not be subject to liability if it does not engage in any of the pre-foreclosure or post-foreclosure activities discussed above in §12.22.

### **3. [12.24] Liability Under the Illinois Environmental Protection Act**

The Illinois Environmental Protection Act contains various protections for lenders. Like CERCLA, liability may be imposed on any of four classes of responsible parties, including, in relevant part, the current owner or operator of contaminated property and the owner or operator at the time hazardous substances were disposed of. 415 ILCS 5/22.2(f). The Environmental Protection Act provides, however, that no liability may be imposed on any person for environmental contamination unless the contamination was “proximately caused by such person’s act or omission.” 415 ILCS 5/58.9(a)(1). Therefore, unless a lender were to proximately cause environmental contamination at property in which it held a security interest, the lender would not be subject to liability under the Environmental Protection Act.

Further, the Environmental Protection Act provides that a lender that acquires ownership, management, operation, or control of a facility under the terms of a security agreement, such as through a foreclosure, a deed in lieu of foreclosure, receivership, or an assignment of rents, may not be required to take remedial action unless the lender (a) takes physical possession of the site and (b) “directly causes a release of a regulated substance that results in removal or remedial activity.” 415 ILCS 5/58.9(2)(E).

Section 58.9(2)(A) may also apply to lenders; that section provides that a person cannot be required to perform a remedial action unless the person caused or contributed to a release of regulated substances in a “material” respect.

In addition, a financial institution in Illinois is liable only if it “takes possession of the vessel or facility and . . . exercises actual, direct, and continual or recurrent managerial control in the operation of the vessel or facility.” 415 ILCS 5/22.2(h)(2)(E).

Illinois also has enacted a UST provision to protect lenders that hold indicia of ownership in property containing USTs merely to protect their security interests. 415 ILCS 5/57.12A. “Indicia of ownership” includes legal or equitable title to real or personal property acquired incident to foreclosure or its equivalents. See 415 ILCS 5/57.12A(b)(3). “Primarily to protect a security interest” includes securing payment or performance of an obligation and does not mean holding property primarily for investment purposes. 415 ILCS 5/57.12A(b)(6).

The exemption does not apply if the secured lender participates in management either before or after it forecloses. Participation in management includes control of decision making related to the UST but does not include the mere capacity to influence or the unexercised right to control such decisions. The statute includes examples of actions that are not participation in management during the pre-loan period, loan policing, workout, and foreclosure. See 415 ILCS 5/57.12A(c).

Although the secured lender may escape liability to the Illinois and U.S. governments for corrective action for leaking petroleum USTs under the Asset Conservation Act and Illinois Environmental Protection Act, these statutes do not protect a lender from liability to other parties. Thus, for example, despite the statutory and regulatory amendments, a secured lender may be liable to third parties (such as neighbors) under tort theories for property damage and personal injury caused by a leak from a UST or a release or threat of a release of a hazardous substance on the foreclosed property. Also, as noted in §12.21 above, a lender needs to ensure that the borrower will not be so encumbered with environmental costs that it cannot repay its loan.

Lenders should be advised to include in the loan agreement provisions specific to environmental matters. Such provisions might include

- a. a representation and warranty regarding (1) compliance of the borrower and collateral with environmental law and (2) absence of the borrower's liability under any CERCLA-type environmental laws;
- b. a requirement that the borrower must (1) comply (or come into compliance) with environmental law (including new or amended laws during the loan term), (2) clean up and remediate all releases and conditions affecting the collateral during the loan term, (3) provide copies of all notices, complaints, and other documentation of potential or actual environmental liability or obligation, (4) provide notice of any inquiry or complaint related to environmental liability or obligation, and (5) provide periodic written environmental assessments of the collateral performed by a neutral environmental professional;
- c. a restriction on the borrower's operations (*e.g.*, the borrower is prohibited from using certain materials or equipment);
- d. authority and access for the lender to monitor or inspect the collateral and the borrower's business and financial condition during the loan term; and
- e. an indemnification of the lender by the borrower for environmental liabilities.

A lender also might seek an indemnity or a guarantee from a third party.

## **H. [12.25] Purchase and Sale Transactions**

Individuals involved in the purchase or sale of property must consider the significant risks environmental laws have created. The seller's prior operations may have involved wastes or hazardous substances that resulted in contamination or, at least, required appropriate permits. The purchaser must be able to identify these risks and determine whether the risks are worth taking and whether the deal can be structured to properly allocate them. Counsel's job is to assist in the identification and allocation of risks (usually through due diligence and the use of a consultant; see §§12.10 – 12.11 above) and to ensure that the relevant documents contain provisions that fully address the environmental issues.

Shifting environmental risks involves the contractual allocation of liabilities through indemnifications, releases, cost-sharing and/or escrow provisions, representations and warranties,

appropriate definitions, covenants, and financial assurance provisions. Some of these tools are discussed below.

Representations and warranties serve the purposes of disclosure (generally through scheduling the exceptions) and a basis for liability (if they are proven false). Representations and warranties typically include compliance with environmental laws (a defined term); no use, storage, or release of defined hazardous materials; no receipts of notices for on-site or off-site disposal; a stipulation that permits have been obtained and will be transferred; and a disclosure of the current and past conditions of the property.

An essential aspect of the representations and warranties is the schedule of exceptions. If the schedule is overly broad, the representations and warranties have very little meaning. This is especially the case if the representations and warranties form the basis of the indemnification. Care should be taken to include the scheduled items in the indemnification.

There are two definitions that are essential in contracts: “environmental laws” and “hazardous materials/substances.” Many form definitions of “environmental laws” include every possible federal, state, and local rule, regulation, or interpretation one could imagine. In order to avoid the suggestion that the use of such a broadly defined term in the representations and warranties makes each of such laws applicable, the definition should be limited to “applicable” laws. Care also should be taken when the definition includes all laws enacted in the future. Although a party arguably cannot make a representation of current compliance with future laws, the definition should nonetheless include future laws for the purposes of the indemnity (which likely uses the same defined term). A specific exclusion can be written into the representation to address any concerns about representations of future compliance.

“Hazardous materials/substances” is often defined too broadly because every statute defining or listing any “hazardous” term is included. In many cases, the statutes overlap. For instance, the definition of “hazardous substances” in CERCLA includes “hazardous waste” as defined in RCRA, “toxic substances” as defined in the TSCA, and “hazardous substances” as defined in the Clean Water Act (CWA), 33 U.S.C. §1251, *et seq.* It is common to include petroleum in the definition, as it is excluded by CERCLA. OSHA’s definition of “hazardous chemicals” should generally be avoided in a definition of hazardous substances or materials. “Hazardous chemicals” includes almost every conceivable substance and would prevent parties from having an idea of the substances that actually fall within the scope of the transaction.

## **V. ONGOING BUSINESS OPERATIONS**

### **A. [12.26] Reporting Obligations for Spills and Unpermitted Releases**

Businesses frequently experience situations that result in release reporting obligations. These obligations are intended to assist authorities in responding to emergencies and incidents.

#### **1. [12.27] Federal Requirements**

Spills of hazardous substances are regulated on the federal level under a variety of statutes, including the Clean Water Act (with regulation at 40 C.F.R. Part 130); CERCLA (40 C.F.R. Parts

305 and 307); the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA; also known as SARA Title III), 42 U.S.C. §11001, *et seq.* (40 C.F.R. Parts 350 and 355); the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. §1801, *et seq.*, (49 C.F.R. Parts 171 – 180); the Occupational Safety and Health Act (OSHA), 29 U.S.C. §651, *et seq.* (29 C.F.R. §§1910.120(a), 1910.120(q)); RCRA (40 C.F.R. Parts 260 – 282); and the Toxic Substances Control Act (40 C.F.R. Part 720). In addition, if a release exceeds that allowable under a permit, the permit may specify an entity that must receive notice. Additional authorities who must be notified depend on the media exposed. Applicable statutes and regulations should be directly and carefully consulted. In addition, spills of polychlorinated biphenyls (PCBs) are regulated under 40 C.F.R. §761.120, *et seq.*; releases of hazardous substances into the ambient air are subject to the Clean Air Act (CAA), 42 U.S.C. §7401, *et seq.* See 42 U.S.C. §7401, *et seq.*; 40 C.F.R. Part 60.

The National Response Center must receive oral notice of a reportable quantity of (a) a CERCLA “hazardous substance;” (b) a SARA Title III “extremely hazardous substance;” or (c) a RCRA “hazardous waste” release. The reporting obligation applies to a sudden discharge or gradual leak into the environment. A particular release becomes subject to regulation depending on the reportable quantity for the substance involved, which can be as little as one pound. 40 C.F.R. §302.4 contains a list of substances designated “hazardous” under CERCLA and the CWA and “hazardous wastes” under RCRA and their respective reportable quantities. 40 C.F.R. Part 355, Appendix A and Appendix B list extremely hazardous substances. In general, the reportable quantity is the quantity spilled during a 24-hour period. The phone number for the National Response Center is 800/424-8802.

A release under the TSCA must be reported to the Office of Prevention, Pesticides, and Toxic Substances of the appropriate USEPA regional office within 24 hours of discovery. “Any person who manufactures, processes, or distributes in commerce a chemical substance or mixture” must immediately report information “that such substance or mixture presents a substantial risk of injury to health or the environment.” 15 U.S.C. §2607(e). A reportable release of PCBs is over 10 pounds or more of materials that contain PCBs over 50 ppm (PCB material) or any release of PCB material that directly contaminates surface or drinking waters, sewers, grazing land, or vegetable gardens. See 40 C.F.R. §761.125.

The HMTA requires the carrier to give immediate notification to the National Response Center of a release of hazardous materials, listed at 49 C.F.R. §172.101, if any of a number of occurrences result, including if

- a. a person is killed;
- b. a person requires hospitalization because of injuries sustained;
- c. the general public is evacuated for an hour or more;
- d. a major transportation artery or facility is closed or shut down for one hour or more;
- e. the operational flight pattern or routine of an aircraft is altered; or

- f. there is fire, breakage, or suspected contamination involving an infectious substance or radioactive material or a marine pollutant. See 49 C.F.R. §171.15(b) (effective Jan. 1, 2005).

OSHA requires a report to the Occupational Safety and Health Administration area director within 24 hours of a release that causes employee exposure to any of the carcinogens listed in 29 C.F.R. §1910.1003.

The USEPA regional administrator or state program director must receive a report of a permit violation or release of a toxic pollutant not covered by a permit under the CWA.

Releases from underground tanks must be reported within 24 hours to the USEPA's applicable regional office. (For Illinois, Region V — 312/353-2000). If the tank holds petroleum, the release must exceed 25 gallons or cause a sheen on surface waters. If less than 25 gallons, it must be reported if it cannot be cleaned up within 24 hours. If the tank holds hazardous substances, the owner or operator must refer to the reportable quantities under CERCLA for that substance.

Generally, these statutes require written, as well as oral, notice. The party responsible for providing the notice may include operators as well as owners. See generally Susan M. Cooke, ed., *THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY, AND LITIGATION*, pp. 8-15 through 8-20 (Matthew Bender and Co., 2004) (discussing various statutes); Jeffrey J. Kimmel, ed., *SPILL REPORTING PROCEDURES GUIDE* (BNA, 2004).

## **2. [12.28] Illinois Requirements**

Illinois' state spill reporting obligations mirror the federal EPCRA requirements. 430 ILCS 100/1, *et seq.*; 29 Ill.Admin. Code §620.10, *et seq.* In addition, Illinois requires release reporting consistent with regulations promulgated by the U.S. Department of Transportation concerning transportation-related incidents. 29 Ill.Admin. Code §430.10, *et seq.* Notice must be given by the "responsible party" — the person or entity in control of the material or substance at the time of the accident or incident. Both the IEMA and the community emergency coordinator for the local emergency planning committee of the likely affected area must be notified. The IEMA can be reached at 217/782-7860.

Releases from USTs should be reported within 24 hours to the IEMA. If the tank holds petroleum, the spill must be reported if it exceeds 25 gallons or causes a sheen on surface waters; if the tank holds less than 25 gallons, the spill must be reported if it cannot be cleaned up within 24 hours. Also, spills should be reported to the local fire marshal. For hazardous substances, a report should be made if the spill meets the "reportable quantity" for that substance under CERCLA. See 41 Ill.Admin. Code §§170.560, 170.590.

Parties must immediately report air emissions that exceed permit limits to the nearest regional office of the IEPA, unless the permit provides other conditions. See 35 Ill.Admin. Code §§201.263, 201.405.

## **B. [12.29] Underground Storage Tanks**

Specific requirements exist under federal and state laws for USTs. Such requirements include the design and operation of tanks and the development of systems to prevent spills. Illinois law includes a comprehensive scheme for recovering costs to clean up contamination from spills. See §12.31 below.

### **1. [12.30] Federal UST Requirements**

USTs that contain product as opposed to waste are regulated by the federal RCRA and by implementing regulations at 40 C.F.R. §280.10, *et seq.* These laws apply to USTs that contain “regulated substances,” *e.g.*, hazardous substances (as defined by CERCLA, 42 U.S.C. §9601(14)), petroleum (defined at 40 C.F.R. §280.12), or mixtures of these products. See also 40 C.F.R. §280.12 (definitions of “hazardous substance UST system” and “petroleum UST system”).

An “underground storage tank” is defined as “any one or combination of tanks (including underground pipes connected thereto) which is used to contain an accumulation of regulated substances, and the volume of which is 10 percentum or more beneath the surface of the ground.” 42 U.S.C. §6991.

Not all USTs that contain hazardous substances or petroleum are regulated by the federal law, however. Exceptions listed at 40 C.F.R. §280.12 in the definition of “UST” include, but are not limited to, (a) farm or residential tanks of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes; (b) tanks used for storing heating oil for consumptive use on the premises where stored; (c) flow-through process tanks; and (d) storage tanks situated in an underground area (such as a basement, cellar, etc.) that are situated on or above the surface of the floor. Other excluded USTs include (a) any UST system (defined at 40 C.F.R. §280.12) whose capacity is 110 gallons or less; (b) any UST system that contains a de minimis concentration of regulated substances; and (c) any emergency spill or overflow containment UST system that is expeditiously emptied after use. See 40 C.F.R. §280.10(b) (listing more excluded tanks).

Each “owner” (defined at 42 U.S.C. §6991(3)) of a UST must notify the designated state agency of the existence of the UST unless the UST was taken out of operation before January 1, 1974. 42 U.S.C. §6991a. The Office of State Fire Marshall is the agency designated to receive notice in Illinois. See 430 ILCS 15/4(b).

The regulations contain performance standards for all “new” USTs, *i.e.*, those installed after December 22, 1988. See 40 C.F.R. §§280.12 (definition of “new tank system”), 280.20. Both the owner and the “operator” of the UST have the obligation to comply with these regulations. “Operator” means any person who has the control of, or responsibility for, the daily operation of a UST. 42 U.S.C. §6991(4). New UST systems must be designed and manufactured according to standards of a nationally recognized organization. In addition, the “new” tanks have spill prevention and overflow equipment and corrosion prevention and leak detection devices. 40 C.F.R. §280.20.

By December 22, 1998, older USTs were required to either comply with the new tank performance standards upgrading requirements (40 C.F.R. §§280.21(b), 280.21(d)) or complete clean closure (40 C.F.R. §280.71). In addition, these old or existing USTs were required to meet requirements for corrosion protection, spill and overflow prevention, and leak detection. The leak detection requirements, for old and new tanks, must be accomplished by December 22 of the year



designated in a phase-in schedule, which varies with the age of the system. 40 C.F.R. §280.40. Release detection may be in the form of manual gauging, tank tightness testing, or automatic methods such as vapor monitoring systems. See 40 C.F.R. §§280.40 – 280.44. Owners and operators must maintain records demonstrating compliance with the regulations. See 40 C.F.R. §280.45.

The USEPA requires owners and operators of UST systems to notify their state or local agencies of the existence of their systems. 40 C.F.R. §280.22. As noted above, owners and operators must report releases and suspected releases from USTs. Owners and operators also must investigate suspected releases (see 40 C.F.R. §280.52) and take corrective action for confirmed releases. 40 C.F.R. §§280.60 – 280.66.

In addition, there are requirements for USTs closed temporarily (40 C.F.R. §280.70) or undergoing a change in service or permanent closure. 40 C.F.R. §§280.71, 280.72. An owner and operator of a UST closed before December 22, 1988, “must assess the excavation zone and close the UST system in accordance with [the regulations] if releases from the UST may, in the judgment of the implementing agency, pose a current or potential threat to human health and the environment.” 40 C.F.R. §280.73.

Owners or operators of petroleum USTs also must comply with financial responsibility requirements for taking corrective action and compensating third parties for bodily injury and property damage caused by accidental releases from the USTs. See 40 C.F.R. §§280.90 – 280.115. The amount of such financial assurance differs depending on the operations conducted by the owner or operator and the number of USTs owned or operated. See 40 C.F.R. §280.93. The range is from pre-occurrence amounts of \$1 million for large “petroleum marketing facilities” (defined at 40 C.F.R. §280.92) to \$500,000 for all other USTs, and aggregate amounts of \$1 million for owners or operators of 1 to 100 petroleum USTs to \$2 million for 101 or more USTs. Allowable financial mechanisms include self-insurance, guarantees, insurance, surety bonds, letters of credit, trust funds, and state requirements, such as state funds or state insurance. See 40 C.F.R. §§280.94 – 280.108.

## **2. [12.31] Illinois UST Requirements**

The LUST Program (Title XVI of the Environmental Protection Act) establishes (a) procedures for remediation and state oversight of remediation of UST sites contaminated by releases of petroleum and other regulated substances; (b) a state fund from which qualifying UST owners and operators may satisfy the state financial responsibility requirements and seek payment for costs of investigation of LUSTs; and (c) requirements for state review or audit and approval of corrective action. See 415 ILCS 5/57. Significantly, the program has risk-based cleanup requirements that provide some relief for LUST owners whose sites do not pose a threat to human health or safety. The IPCB has issued regulations at 35 Ill.Admin. Code, Parts 731, 732, and 742. Part 731 regulations must be followed for releases from a UST containing hazardous substances or petroleum. Owners and operators that report a petroleum release after September 23, 1994, must comply with Title XVI (the LUST Program) and the Part 732 regulations (petroleum underground storage tanks).

The program imposes duties on the “owner” or “operator” of a LUST, as those terms are defined in the statute. 415 ILCS 5/57.1, 5/57.2. Generally, if a UST has been out of use since

before November 8, 1984, the owner is the last person to have used the UST. See 415 ILCS 5/57.2 (referring to Subtitle 1 of RCRA). If a client purchases a property with USTs that have been out of use since before the November 8, 1984, cut-off, the client generally is not responsible for remediation unless the client is an operator. An “operator” is any person in control of or responsible for the daily operation of the UST. A property owner who removes USTs may inadvertently become the operator and thus be liable for the remediation.

The program exempts USTs taken out of operation before January 2, 1974, and USTs used “exclusively to store heating oil for consumptive use on the premises where stored and which serves other than a farm or residential unit” unless the Fire Marshall determines that there is a threat to human health or the environment. 415 ILCS 5/57.5(g). By regulation, the term “UST” does not include, among other tanks, “[f]arm or residential tank[s] of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes” (35 Ill.Admin. Code §731.112) and “heating oil tank[s] of any capacity used exclusively for storing heating oil for consumptive use on a farm or residence” (41 Ill.Admin. Code §170.400; 35 Ill.Admin. Code §731.110).

Removal, abandonment, upgrading, release, detection, and repair of USTs is pursuant to OSFM regulation. See 430 ILCS 15/2(3)(b)(ii). The OSFM must be present for UST removal. If a UST is removed and there has not been a release of petroleum from it, the OSFM issues a certificate of removal (see 415 ILCS 5/57.5), which has the same legal effect as an NFR letter, discussed above in §12.17. When a UST is removed and/or a UST release is confirmed, an owner/operator may take “early action” to remove the tank and remove visibly contaminated soils (within a perimeter of four feet) and groundwater that exhibits a sheen. 415 ILCS 5/57.6, 5/57.7. In addition to properly reporting a release to the IEMA and filing the required 20-day and 45-day follow-up reports with the IEPA, the owner/operator then will submit to the IEPA a proposal to classify the site based on specific risk factors. 415 ILCS 5/57.7. Each site will fall into one of three categories: “no further action,” “high priority,” or “low priority.” The basis of the site classification system is Illinois Geological Survey Circular 532 by Richard C. Berg et al., *Potential for Contamination of Shallow Aquifers in Illinois* (1984), which contains a map of all soil types in the state. A licensed professional engineer hired by the owner/operator will determine which soil type exists on site. 415 ILCS 5/57.7(b).

Certain areas on the Illinois Geological Survey map, notably the Chicago area, are classified “no further action,” meaning that no further remediation is required beyond removal of the LUST, visibly contaminated fill material, and any groundwater in the excavation that exhibits a sheen. 415 ILCS 5/57.6, 5/57.7(c)(3)(A). The IEPA may require groundwater monitoring even though the site is classified as “no further action.” 415 ILCS 5/57.7(b)(2)(B). The legislative amendments direct the IPCB to adopt rules for criteria and minimum field inspections for such sites. *Id.* These criteria are set forth at 35 Ill.Admin. Code §732.302. Other areas are “high priority” or “low priority” and may require corrective action or groundwater monitoring, respectively. Site classification also may be conducted by the exposure pathway exclusion, pursuant to TACO. See 35 Ill.Admin. Code §732.312.

Once the site has been classified as high priority or low priority, the owner/operator must submit a corrective action plan (CAP) to the IEPA. 415 ILCS 5/57.7(c). The CAP may use a tiered, risked-based approach to corrective action (TACO). See §12.18 above.

After the owner/operator has performed the necessary remediation pursuant to the CAP, the owner/operator must submit a completion report to the IEPA. If the IEPA determines that the site is adequately remediated, it will issue an NFR letter. The NFR letter will contain a statement by the IEPA, based on the certification of the licensed professional engineer retained by the owner/operator, that

- a. all statutory and regulatory corrective action requirements applicable to the occurrence have been complied with;
- b. all corrective action concerning the remediation of the occurrence has been completed; and
- c. no further corrective action concerning the occurrence is necessary for the protection of human health, safety, and the environment. 415 ILCS 5/57.10(c).

The IEPA's LUST section has a project manager on call daily to answer questions about the program and about LUST sites (217/782-6762 or 888/299-9533). The LUST section's incident database is available on the IEPA's Web site for information about the status of LUST sites. See [www.epa.state.il.us/land/lust](http://www.epa.state.il.us/land/lust).

Owners/operators of petroleum USTs are required to demonstrate financial ability to remediate tank releases and pay for damages to third parties. Federal regulations allow such a demonstration to be in the form of publicly financed UST funds. Illinois has set up such a fund. 415 ILCS 5/57.11. Eligible tank owners and operators may seek reimbursement from the LUST Fund for remediation costs incurred. The LUST Fund specifies which owners/operators are eligible under what circumstances. 415 ILCS 5/57.9. The cost may be reimbursed, subject to a deductible, if the costs are consistent with the technical plan submitted, are associated with corrective action additions, and are reasonable. 415 ILCS 5/57.8. Any "owner or operator who has received approval for any budget plan submitted pursuant to [Part 732] and who is eligible for payment from the [LUST] fund may elect to defer site classification, low priority groundwater monitoring, or remediation activities until [LUST] funds are available in [the] amount [of the] approved budget plan" if the owner/operator submits a report to the IEPA that demonstrates that (a) "[t]he early action requirements" of the regulations have been met (35 Ill.Admin. Code, Part 732, Subpart B) and (b) after an "investigation of migration pathways" (35 Ill.Admin. Code §732.307(g)), the release does not pose a threat to human health or the environment through the migratory pathways. 35 Ill.Admin. Code §732.306.

NOTE: The Illinois statutory provisions for site investigation and corrective action/groundwater investigation, site classification, and corrective action at 415 ILCS 5/57.7 were amended in 2002 on four separate occasions (by P.A. 92-554 (eff. June 24, 2002), P.A. 92-574 (eff. June 26, 2002), P.A. 92-651 (eff. July 11, 2002), and P.A. 92-735 (eff. July 25, 2002)), resulting in four versions of §57.7 in the statute. Pursuant to 5 ILCS 70/6, when two or more Acts are enacted by the same General Assembly, full effect is to be given to each Act except in the case of irreconcilable difference. In such a case, the Act last acted upon is controlling. *Id.* P.A. 96-651 was the last enacted and therefore is controlling in the event of conflict. In addition, on January 13, 2004, the IEPA filed proposed amendments to the LUST rules. (*In re Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks*, R04-22, 2004 Ill.ENV LEXIS 66 (Jan. 22, 2004) (cons.)). The amendments included changes to corrective action measures, procedures for obtaining payment from the LUST Fund, and new procedures for releases reported after June 24, 2002. The proposal has been through public hearing and was in a public comment period as of

October 2004. See [www.ipcb.state.il.us/cool/external/caseview2.asp?referer=coolsearch&case=6286](http://www.ipcb.state.il.us/cool/external/caseview2.asp?referer=coolsearch&case=6286).

### **C. [12.32] Air Pollution**

The Clean Air Act provides the mechanism for the attainment and maintenance of air quality standards. The CAA includes a complex regulatory structure dealing with the construction and operation of sources of on-site air emissions, including liability for failure to comply.

The USEPA has issued standards that reflect the minimum allowable air quality in all parts of the country for certain pollutants. These standards are called “national ambient air quality standards” (NAAQS) and they have been promulgated for six “criteria” pollutants (ozone, carbon monoxide, particulate matter, sulfur dioxide, nitrogen dioxide, and lead). 42 U.S.C. §§7408, 7409; 40 C.F.R. Part 50. Individual states have been delegated the responsibility for developing “state implementation plans” (SIPs) to bring every area in the state into compliance with the NAAQS. 42 U.S.C. §7410(a)(1).

Geographical areas that exceed the NAAQS are designated “non-attainment” for that standard. Non-attainment designations are found at 40 C.F.R. Part 81. In non-attainment areas, the new source review (NSR) program applies and the goal is to attain the NAAQS by imposing federal technology-based control requirements on emissions from new or modified stationary sources of pollution. Under the NSR program, developers of “major stationary sources” located in non-attainment areas or in an ozone transport region are required to obtain a permit prior to commencing construction. 42 U.S.C. §§7511c(a), 7511c(b)(2). A “major stationary source” is generally defined as a source that has the potential to emit 100 tons per year (tpy) of a pollutant or a physical change at a non-major source that itself constitutes a major source. 42 U.S.C. §7602(j); 40 C.F.R. §§52.24(f)(4)(i)(a), 52.24(f)(4)(i)(b). The threshold for becoming a major source is lower if a region has been designated a “serious,” “severe,” or “extreme” non-attainment area for ozone, nitrogen oxides, or carbon monoxide. 42 U.S.C. §§7511a(c) – 7511a(e). The NSR permitting requirements also apply when modifying a major source, including any change that results in increased emissions of pollutants or emission of a new pollutant. 42 U.S.C. §§7411(a)(4), 7501(4). A source undergoing construction or modification under the NSR requirements generally is required to offset emission increases with contemporaneous decreases at the source or elsewhere.

Areas that do not exceed the NAAQS are “attainment areas,” and the program is the prevention of significant deterioration (PSD). Under the PSD program, a facility must obtain a permit before construction in an attainment area of any “major emitting facility.” A “major emitting facility” is defined as any source belonging to a list of 28 source categories that has the potential to emit 100 tons or more of a pollutant per year, or any other source having the potential to emit more than 250 tons per year. See 42 U.S.C. §7479 (source categories); 40 C.F.R. §52.21(b)(4) (definition of “potential to emit”); 42 U.S.C. §§7479(1), 7475(a) (major emitting facility). PSD permits also are required for any “major modification” of a facility, which is defined as a change that results in a significant net emissions increase. 40 C.F.R. §52.21(b)(2)(i). The PSD provisions require new sources to adopt “best available control technology” (BACT) to minimize emission of pollutants. 42 U.S.C. §7475(a)(4). Illinois’ NSR rules can be found at 35 Ill.Admin. Code, Part 203. Illinois uses the federal PSD rules at 40 C.F.R. §52.21.

The CAA imposes reductions on air toxins and includes chemical accident prevention and response mechanisms. Specifically, the CAA covers “hazardous air pollutants” (HAPs), which,

initially, are those chemicals listed in the statute. 42 U.S.C. §7412(b)(1). Title III includes provisions for the reduction of air emissions of HAPs from “major sources” and “area sources.” A “major source” means “any stationary source located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any [HAP] or 25 tons per year or more of any combination of [HAP]s.” 42 U.S.C. §7412(a)(1). An “area source” is any stationary source that is not a major source (*e.g.*, a dry cleaner may be a stationary but not major source). 42 U.S.C. §7412(a)(2). Title III requires that maximum achievable control technology (MACT) be applied to industries designated by the USEPA that emit HAPs, and Title III contains provisions for lowering the risk to human health from HAPs after MACT has been applied. The USEPA must designate emission standards for categories of industries under a schedule established by 42 U.S.C. §7412(e)(1).

CAA provisions regarding the prevention of accidental releases of certain toxic and flammable substances are found at 42 U.S.C. §7412(r). This section establishes threshold quantities (TQs) for a list of regulated substances. The list can be found at 40 C.F.R. §68.130 (adopted at 59 Fed.Reg. 4, 494 (Jan. 31, 1994, and amended at 62 Fed.Reg. 45,130 (Aug. 25, 1997), 63 Fed.Reg. 640 (Jan. 6 1998), and 65 Fed.Reg. 13,243 (Mar. 13, 2000) (conforming §68.130 to fuels provision of the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act, Pub.L No. 106-40, 113 Stat. 207 (1999)). Owners/operators of a stationary air emission source having a regulated substance in a quantity exceeding the TQ must prepare a risk management plan (RMP) to detect and prevent or minimize the accidental release of such substances. The USEPA has developed Web-based instructions for preparing and submitting RMPs at [yosemite.epa.gov/oswer/ceppoweb.nsf/content/rmpsubmission.htm](http://yosemite.epa.gov/oswer/ceppoweb.nsf/content/rmpsubmission.htm).

The CAA also requires each state to develop an operating permit program for certain sources. 42 U.S.C. §§7661a(a), 7661b(a). The permit programs generally are called “Title V programs,” as they were required pursuant to Title V of the Clean Air Act Amendments of 1990, Pub.L. No. 101-549, 104 Stat. 2399.

Title V programs apply to the following sources: “major sources” of air pollutants, defined as sources with the potential to emit pollutants in excess of threshold amounts (40 C.F.R. §70.2); specific emission standards (new source performance standards) (40 C.F.R. Part 60); specific sources the USEPA has designated as subject to standards for HAPs (40 C.F.R. Parts 61, 63); and affected sources of acid rain (primarily utilities) (40 C.F.R. §70.3(a)).

Title V programs have been developed in many states, including Illinois. Because of the large volume of Title V applications received, Illinois is still reviewing applications and issuing permits. Illinois’ Clean Air Act Permit Program is found at 415 ILCS 5/39.5, and many of the regulations that flow from §39.5 are found in 35 Ill.Admin. Code, Part 251, *et seq.* In the Chicago Metropolitan Area, a “major source” includes those listed in 42 U.S.C. §7661(2) and those that emit or have the potential to emit at least 25 tons per year of volatile organic compounds. The Chicago ozone non-attainment area includes Cook County, DuPage County, Aux Sable and Goose Lake Townships in Grundy County, Kane County, Oswego Township in Kendall County, Lake County, McHenry County, and Will County. See 66 Fed.Reg. 21,096 (Apr. 27, 2001); [www.epa.gov/oar/oaqps/greenbk/gncs.html](http://www.epa.gov/oar/oaqps/greenbk/gncs.html). In areas of Illinois that are not designated non-attainment for ozone, a “major source” is one that has the potential to emit 100 tons per year of any regulated pollutant. The Illinois Clean Air Act general permit regulations are at 35 Ill.Admin. Code, Part 201. Regulations specific to major sources are at 35 Ill.Admin. Code, Part 203. Permit procedures for the Illinois Clean Air Act Permit Program are at 35 Ill.Admin. Code, Part 270. Procedures for public participation in the permit program are at 35 Ill.Admin. Code, Part 252.

Under the CAA, one five-year permit will cover all processes. The Title V permit application must include detailed information on the following:

1. all emission units;
2. operation of equipment;
3. operating parameters;
4. raw materials;
5. operating schedules;
6. compliance status of each unit;
7. compliance schedule;
8. certification by a responsible official; and
9. applicability of regulations to each emission source. 40 C.F.R. §70.5(c); 42 U.S.C. §7661b.

Copies of the permit application and compliance plan must be available to the public; the USEPA will review applications before permits will be granted, and the USEPA can object to issuance of a permit. Permit holders must file an annual statement indicating comparative emission levels from year to year. Major pollution sources in the Chicago Metropolitan and Metro East areas are required to estimate certain emissions and report actual emissions in great detail annually.

Illinois has developed a market-based approach to minimize the cost of volatile organic materials (VOM) reduction called the “emissions reduction market system” (ERMS). The ERMS applies in the Chicago non-attainment area, and sources in the area must participate in the ERMS if they are required to obtain a CAA permit and have baseline seasonal VOM emissions of at least ten tons or actual seasonal emissions of at least ten tons. The ERMS is a “cap and trade” market system in which participating sources must hold “allotment trading units” (ATUs) for their actual VOM emissions. Each year, starting with the 2001 ozone season, sources are issued trading units based on an allotment set in the sources’ CAA permits. At the end of each ozone season (May 1 – September 30), sources must hold sufficient trading units to cover their actual VOM emissions during the season. The rules for the ERMS are found at 35 Ill.Admin. Code, Part 205.

Illinois is one of a number of states under federal mandate to reduce overall nitrogen oxide (NOx) emissions, the so-called NOx SIP Call. As such, Illinois has adopted a NOx emissions trading program. The purpose of the program is to reduce NOx emissions using a market-based cap and trade program. The program applies to emissions of NOx from electrical generating units (EGUs) and large industrial boilers and turbines whose primary purpose is to generate process steam rather than electricity (non-EGUs) during the ozone season beginning in 2004. More information can be found at [www.epa.state.il.us/air/nnox](http://www.epa.state.il.us/air/nnox).

In addition to permitting requirements, the CAA contains a number of targeted programs. Such programs include provisions applicable to mobile sources (motor vehicles), 42 U.S.C. §7521, *et seq.*; sources of noise pollution, 42 U.S.C. §7641, *et seq.*; sources of acid rain (primarily utilities), 42 U.S.C. §7651, *et seq.*; and ozone protection, 42 U.S.C. §7671, *et seq.*

Owners and operators of sources emitting pollutants to the air are potentially subject to both civil and criminal liability under the CAA. The USEPA may file an administrative action for penalties against any entity that has violated an applicable SIP, specified chapters of the CAA, regulations or permit conditions, or the USEPA's prohibition on new source construction or modification due to a state's noncompliance with the CAA. 42 U.S.C. §7413(d)(1). Administrative penalties cannot exceed \$32,500 per day of violation up to a maximum of \$270,000 (including penalties for nonpayment) for violations that allegedly first occurred within the preceding 12 months. 42 U.S.C. §7413(d)(1); 61 Fed.Reg. 69,360 (Dec. 31, 1996); 40 C.F.R. §19.4.

The USEPA also may file a complaint in federal district court for penalties. 42 U.S.C. §7413(b). Although penalties may be sought in the amount of \$32,500 per day, in reality the penalties issued are much lower. See 42 U.S.C. §7413(b); 40 C.F.R. §19.4. Private parties may file a "citizen's suit" complaint in federal district court for violations of emission standards or limits, an order by the USEPA or the state concerning an emission standard or limit, the construction of any new or modified major facility without a permit, or the USEPA's failure to act under the CAA. 42 U.S.C. §7604(a).

In the case of certain "knowing" violations of the CAA, criminal sanctions are available. Such violations range from knowingly releasing a substance that places another individual in imminent danger of death or serious harm (up to 15 years in prison and fine) to knowingly failing to pay a required fee (1 year prison and/or fine). 42 U.S.C. §§7413(a)(5), 7413(c)(1) – 7413(c)(3). See §§12.89 – 12.93 below.

On February 24, 1997, the USEPA published the "credible evidence rule," regarding the types of evidence that it will rely on in demonstrating noncompliance with emission limits under the CAA. 62 Fed.Reg. 8,314 (Feb. 24, 1997), codified at 40 C.F.R. Parts 51, 52, 60, and 61. The final rule became effective December 30, 1997. 63 Fed.Reg. 414 (Jan. 6, 1998).

The credible evidence rule is the USEPA's response to controversy over whether there was a regulatory bar to the admission of non-reference test data to prove a violation of an air emission standard, regardless of the credibility and probative nature of the non-reference data. "Reference tests" are the methods required under individual regulations for measuring whether a source is in compliance with or exceeds emissions limits.

The credible evidence rule allows the IEPA and citizen groups to rely on any credible evidence, not just data from reference tests or other federally promulgated or approved compliance methods, to prove violations of the CAA. Other evidence could include continuous monitoring, expert testimony, and engineering analysis.

#### **D. [12.33] Water Pollution**

As was the case with air pollution, regulation of water pollution was previously handled through a state water discharge permitting system. The USEPA now dictates the permitting procedure through the Clean Water Act, which is in turn implemented by the state in Illinois.

The purpose of the CWA is to restore and maintain “the chemical, physical and biological integrity of [the] Nation’s waters.” 33 U.S.C. §1251(a). Discharge of any pollutant is therefore unlawful except as allowed under the CWA. 33 U.S.C. §1311(a). To reduce discharges of water pollutants, the CWA requires the USEPA to issue federal “effluent limitations.” 33 U.S.C. §1362(11). The goal of these limitations is to control levels of contaminant concentrations in discharges sent directly to navigable waters or indirectly through a sewage treatment system.

Discharges that go directly from a specific “point source” (defined at 33 U.S.C. §1362(14)) to waters of the United States are regulated through the issuance of NPDES permits. 33 U.S.C. §1342. NPDES permits establish maximum contaminant levels for a discharger and require a discharger to report any failures to meet those levels. *Id.* In Illinois, direct dischargers obtain NPDES permits from the IEPA by virtue of the USEPA’s delegation of authority to the IEPA. See 35 Ill.Admin. Code, Parts 301 – 312.

Indirect discharges are regulated through pretreatment standards and requirements that may include standards applicable to specific industries. 33 U.S.C. §1317(b)(1); 40 C.F.R. §403.1, *et seq.* See also 35 Ill.Admin. Code, Part 310, Subpart A. The purpose of these regulations is to ensure that no discharges will interfere with the publically owned treatment works. POTWs control industrial user discharges through permits and orders. 40 C.F.R. §§403.8(a), 403.9(a).

Water pollution is controlled and regulated in Illinois both by the state permit system and by a unique classification and regulation of waters in the state. The IPCB regulations set general and site-specific state water quality standards, including

1. general water quality standards for general use, public and food-processing water supplies, secondary contact waters, and indigenous aquatic life and Lake Michigan water (35 Ill.Admin. Code, Part 302);
2. water use designations and site-specific waters (35 Ill.Admin. Code, Part 303);
3. effluent standards (35 Ill.Admin. Code, Part 304);
4. monitoring and reporting requirements for contaminate discharges (35 Ill.Admin. Code, Part 305); and
5. performance criteria, including site-specific requirements and prohibitions (35 Ill.Admin. Code, Part 306).

The water pollution regulations also address

1. sewer-discharge criteria for sewer systems in the state (35 Ill.Admin. Code, Part 307);
2. disposal of wastes from watercraft (35 Ill.Admin. Code, Part 308);
3. NPDES permits (35 Ill.Admin. Code, Part 309);



4. pretreatment requirements for public sewer system users (35 Ill.Admin. Code, Part 310); and
5. treatment plant operator certification (35 Ill.Admin. Code, Part 312).

Public water supplies, including primary drinking water standards, regulation of regulated recharge areas, and groundwater, are addressed in 35 Ill.Admin. Code, Parts 601 – 620.

The groundwater classification and quality standards promulgated pursuant to the Illinois Groundwater Protection Act, 415 ILCS 55/1, *et seq.*, are unique to Illinois. 35 Ill.Admin. Code, Part 620, prescribes the method of classification of groundwater, non-degradation provisions, standards for quality of groundwaters, and various procedures and protocols for the management and protection of groundwater. Illinois divides its groundwater into four classes: (1) Class I — “potable resource groundwater” (§620.210); (2) Class II — “general resource groundwater” (§620.220); (3) Class III — “special resource groundwater” (§620.230); and (4) Class IV — all other groundwater (§620.240). The classifications turn on a number of variables, including the depth, proximity to drinking water wells, and necessity for ecological systems, to name a few. Groundwater in Illinois must meet the quality standards appropriate for its class. See 35 Ill.Admin. Code §620.401, *et seq.* The regulations contain a general prohibition against the release of any contaminant to groundwater that has a beneficial use or is capable of beneficial use on the one hand, and a provision for groundwater management zones to mitigate impairment from releases from a site and reclassification of groundwater by adjusted standards when remediation is unfeasible on the other. See 35 Ill.Admin. Code §§620.250, 620.260, 620.301. Illinois’ 2004 Water Quality Report, created pursuant to §305(b) of the CWA, reports on water quality conditions of Illinois’ streams, lakes, and groundwater. It is available at [www.epa.state.il.us/water/water-quality](http://www.epa.state.il.us/water/water-quality).

#### **E. [12.34] Waste Classification**

The Environmental Protection Act defines and delineates the classes of waste in Illinois. PCB regulations set forth the specific requirements for different wastes, including how the waste must be generated, transported, treated, stored, and disposed of. It is the responsibility of the generator of the waste to classify its waste correctly and then ensure it is correctly treated, transported, stored, and disposed of. Under both the Environmental Protection Act and CERCLA, generators are strictly liable for releases or threatened releases of their waste.

The types of waste in Illinois include, but are not limited to, hazardous waste (415 ILCS 5/3.220), industrial process waste (§3.235), pollution control waste (§3.335), special waste (§3.475), landfill waste (§3.265), municipal waste (§3.290), landscape waste (§3.270), potentially infectious medical waste (§3.360), waste tires (§53, *et seq.*), general construction or demolition debris (§3.160), and universal wastes (40 C.F.R. §§273.1 – 273.5; 35 Ill.Admin. Code, Part 733). Certain of these wastes are discussed in §§12.35 – 12.40 below.

##### **1. [12.35] Hazardous Waste**

Hazardous waste is subject to regulation under RCRA. The purpose of RCRA is to reduce the generation of hazardous waste and ensure its proper handling. 42 U.S.C. §6902(b). Illinois

received authorization to implement RCRA by submitting an acceptable hazardous waste management program to the USEPA. 40 C.F.R. Part 272. See also 415 ILCS 5/20, *et seq.* The IPCB is required by the Environmental Protection Act to adopt federal RCRA rules as they are enacted. 415 ILCS 5/22.4.

To determine whether RCRA applies, a generator must initially determine whether a material is solid waste (defined at 42 U.S.C. §6903(27); 415 ILCS 5/3.535; 35 Ill.Admin. Code §807.104). Generally, materials that are discarded or abandoned are considered solid wastes. Next, the generator determines whether the solid waste falls into one of the classifications of hazardous waste. A solid waste generally is classified as hazardous if

- a. it is listed as such;
- b. it exhibits one of four defined characteristics of hazardous waste (ignitability, corrosivity, reactivity, or toxicity);
- c. it is a mixture of a listed and a solid waste; or
- d. it is derived from the treatment, storage, or disposal of a hazardous waste. See 40 C.F.R. Part 261; 35 Ill.Admin. Code, Part 721.

Standards apply to all those who handle hazardous waste, including the generator, transporter, and owner/operators of disposal facilities used to treat, store, or dispose of the hazardous waste. 42 U.S.C. §6924; 40 C.F.R. Parts 264 – 268.

## **2. [12.36] Special Waste**

Illinois classifies certain waste as “special waste” for the purposes of handling and disposal. The Environmental Protection Act defines “special waste” as any potentially infectious medical waste, hazardous waste, industrial process waste (*e.g.*, cutting oils, paint sludges, equipment cleanings, metallic dust sweepings, used solvents from parts cleaners), or pollution control waste (*e.g.*, baghouse dust, landfill waste, scrubber sludge, and chemical spill cleaning material). 415 ILCS 5/3.475; [www.epa.state.il.us/small-business/special-waste](http://www.epa.state.il.us/small-business/special-waste).

Special waste must have a manifest when transported for disposal and must be treated, stored, or disposed of at a facility authorized to manage the waste. 35 Ill.Admin. Code §§808.121, 809.302. Persons hauling special waste must obtain permits to do so. 35 Ill.Admin. Code §809.201.

“Special waste” excludes industrial process and pollution control waste that is not hazardous waste, a liquid (as determined by the paint filter test), regulated asbestos-containing waste materials, PCBs, waste subject to the land disposal restrictions, or waste generated by shredding recyclable metals. In order to take advantage of the exclusion, the generator of such industrial process or pollution control waste must certify that the waste is not within the above categories of special waste and must attach to the certification the information used to determine that the waste is not a special waste. See 415 ILCS 5/22.48. Although the generator does not have to file a copy of the certification with the IEPA, the generator must maintain the certification for at least three years after the generator changes the raw materials or process used to generate the waste. 415

ILCS 5/22.48(d). The certificate must be provided to the IEPA, as well as the hauler or treatment, storage, or disposal facility upon their request. *Id.*

### **3. [12.37] Construction Debris**

Any operation that receives, transfers, recycles, or otherwise manages construction or demolition debris must maintain load tickets and manifests that reflect the receipt of the debris from the hauler and generator. The record must identify the “hauler, generator, place of origin of the [debris], the weight or volume of the [debris],” and the disposition of the debris. 415 ILCS 5/21(w). In addition, “the generator, transporter, or recycler” of construction or demolition debris must maintain a copy of the documentation for three years. *Id.*

“General construction or demolition debris” refers to “non-hazardous, uncontaminated materials resulting from the construction, remodeling, repair, and demolition of utilities, structures, and roads.” 415 ILCS 5/3.160(a). “Clean” (or general) construction debris (including broken concrete without protruding metal bars, bricks, rock, stone, reclaimed asphalt pavement, or uncontaminated dirt or sand generated from construction or demolition activities) does not have to be landfilled. 415 ILCS 5/3.160(b), 5/21(w) (establishing permissible uses for clean construction or demolition debris).

### **4. [12.38] Universal Waste**

In 1995, the USEPA published final regulations that govern the collection and management of certain hazardous waste that it classified as “universal waste.” See 40 C.F.R. §273.1, *et seq.* These regulations streamline the collection and disposal requirements for such waste. “Universal waste” includes certain spent or waste lead-acid batteries (40 C.F.R. §273.2), certain recalled pesticides and unused pesticides that are “collected and managed as part of a waste pesticide collection program” (40 C.F.R. §273.3), waste mercury thermostats (40 C.F.R. §273.4), and lamps (40 C.F.R. §273.5). 40 C.F.R. §273.9. In addition, the USEPA has adopted a procedure for classifying other hazardous waste as universal waste. See 40 C.F.R. §§260.23, 273.80, *et seq.*

The IPCB adopted the federal universal waste rules as of August 1, 1996. See 35 Ill.Admin. Code, Part 733. The regulations provide an alternative set of management standards in lieu of regulation under 35 Ill.Admin. Code, Parts 702 – 705, 720 – 726, and 728. See 35 Ill.Admin. Code §733.101.

Illinois is not, however, authorized by the USEPA to classify any other waste as universal waste at this time. See [www.epa.gov/epaoswer/hazwaste/id/univwast/uwsum.htm](http://www.epa.gov/epaoswer/hazwaste/id/univwast/uwsum.htm).

The universal waste rules establish standards for universal waste management, labeling, storage, employee training, release response, off-site shipment, shipment tracking, and foreign exporting. The rules set forth requirements for the universal waste handler, transporter, and destination facility.

The term “universal waste handler” includes generators of universal waste and owners or operators of facilities that receive universal waste from other universal waste handlers. 40 C.F.R. §273.9; 35 Ill.Admin. Code §733.109 (defining terms). The term does not include conditionally

exempt small-quantity generators or generators of household waste. See 40 C.F.R. §261.5; 35 Ill.Admin. Code §721.105.

The standards for small-quantity handlers of universal waste (handlers that accumulate fewer than 5,000 kilograms of universal waste at one time) are different from the standards applicable to large-quantity handlers of universal waste (those who accumulate 5,000 kilograms or more of universal waste at one time during any calendar year). See 40 C.F.R. §273.9; 35 Ill.Admin. Code §733.132. The small-quantity handler is not required to notify the USEPA of universal waste handling activities, but the large-quantity generator must notify the USEPA of the activities and obtain a USEPA identification number before commencing universal waste handling activities that meet or exceed the 5,000 kilogram limit. See 40 C.F.R. §§273.12, 273.32; 35 Ill.Admin. Code §§733.112, 733.132. The “small quantity handler . . . is not required to keep records of shipments of universal waste” (see 40 C.F.R. §273.19; 35 Ill.Admin. Code §733.119), but the large-quantity handler must keep for at least three years a record of each shipment of universal waste to and from the facility in the form of shipping documents such as logs, invoices, manifests, or bills of lading (40 C.F.R. §273.39; 35 Ill.Admin. Code §733.139). In addition, the small-quantity handler “must inform all employees who handle or have the responsibility for managing universal waste [about] proper handling and emergency procedures” (40 C.F.R. §273.16; 35 Ill.Admin. Code §733.116), whereas the large-quantity handler “must ensure that all employees are thoroughly familiar with proper waste handling and emergency procedures” (40 C.F.R. §273.36; 35 Ill.Admin. Code §733.136).

Both small-quantity and large-quantity handlers, however, are “[p]rohibited from disposing of universal waste” and “from diluting or treating universal waste” except in response to a release. 40 C.F.R. §§273.11, 273.31; 35 Ill.Admin. Code §§733.111, 733.131. Both are subject to the same labeling and marking regulations, which require specific language on containers, tanks, vehicles, and vessels. See 40 C.F.R. §§273.14, 273.34; 35 Ill.Admin. Code §§733.114, 733.134. Neither may accumulate universal waste for longer than one year unless the accumulation is to obtain a quantity “necessary to facilitate proper recovery, treatment, or disposal.” 40 C.F.R. §§273.15, 273.35; 35 Ill.Admin. Code §§733.115, 733.135. In addition, both must “immediately contain all releases” and are considered the “generator of the material resulting from the release.” 40 C.F.R. §§273.17, 273.37; 35 Ill.Admin. Code §§733.117, 733.137.

Universal waste transporters must comply with United States Department of Transportation requirements for the transportation of hazardous material at 49 C.F.R. §171.1, *et seq.* (except for manifesting requirements), if the universal waste meets the definition of “hazardous material” in 49 C.F.R. §171.8. See 40 C.F.R. §273.52; 35 Ill.Admin. Code §733.152. If the transporter stores the universal waste for more than ten days, the transporter becomes a universal waste handler and must comply with requirements applicable to universal waste handlers. See 40 C.F.R. §273.53; 35 Ill.Admin. Code §733.153. The transporter also is subject to rules regarding the release of universal waste (see 40 C.F.R. §273.54; 35 Ill.Admin. Code §733.154) and is “prohibited from transporting the universal waste to a place other than a universal waste handler, a destination facility, or a foreign destination.” 40 C.F.R. §273.55; 35 Ill.Admin. Code §733.155.

A “universal waste destination facility” is a “facility that treats, disposes of, or recycles a particular category of universal waste.” 40 C.F.R. §273.9; 35 Ill.Admin. Code §733.109. A destination facility is generally subject to all of the requirements applicable to facilities that treat, store, and dispose of hazardous waste. See 40 C.F.R. §273.60; 35 Ill.Admin. Code §733.160. In

addition, the “destination facility is prohibited from sending or taking universal waste to a place other than a universal waste handler, another destination facility, or a foreign destination.” 40 C.F.R. §273.61; 35 Ill.Admin. Code §733.161(a).

The destination facility also must keep for at least three years a record of each shipment of universal waste received. The record may be a shipping record that includes the name and address of the facility from which the universal waste was sent, the “quantity of each type of universal waste received,” and the date of receipt. 40 C.F.R. §273.62; 35 Ill.Admin. Code §733.162.

## **5. [12.39] Used and Waste Tires**

Used and waste tires are a solid waste problem because they do not readily decompose or degrade and they provide a habitat for disease-spreading mosquitoes and other organisms, are a fire hazard when accumulated, and can pollute the air, ground, and water when burned in an uncontrolled manner. See 415 ILCS 5/53. On the other hand, used tires have a beneficial use if recycled or burned for energy. As a result, Illinois has extensive regulation of used and waste tires as set forth in §53 – 55.15 of the Environmental Protection Act and 35 Ill.Admin. Code §848.101, *et seq.*

The Environmental Protection Act prohibits open dumping and open burning of used and waste tires and requires tires to be disposed of in permitted landfills. See 415 ILCS 5/55(a). No one is permitted to mix a whole tire with municipal waste after January 1, 1995. See 415 ILCS 5/55(b-1). Further, as of January 1, 1990, any person who operated a non-permitted site containing more than 50 used or waste tires for disposal, storage, or processing must have provided notice to the IEPA; a person who first begins those activities after January 1, 1990, must notify the IEPA within 30 days of their commencement. See 415 ILCS 5/55(c).

As of January 1, 1992, a person who has a “tire storage site” that contains more than 50 used tires must provide notice of the activity to the IEPA and comply with other requirements, including management standards and record-keeping and reporting, financial assurance, and tire transportation requirements, set forth at 35 Ill.Admin. Code, Part 848, Subparts B, C, D, and F. 415 ILCS 5/55(d)(1). A “tire storage site” is a site at which tires are stored or processed other than a site at which tires are separated from the vehicle wheel rim, accepted in trade for new tires, or sold in retail both new and used in the ordinary course of business, and which does not have more than 250 used tires. 415 ILCS 5/54.12. A “tire storage site” also includes a facility at which tires are sold at retail, provided that the facility maintains fewer than 1,300 recyclable tires, 1,300 tire carcasses, and 1,300 used tires on-site inside a building or so that they do not accumulate waste. *Id.*

Retailers, including small businesses such as gasoline stations that sell tires, are heavily regulated under the used and waste tire provisions. Many companies store more than 50 used tires on-site at one time and have had to comply with §55(d)(1). Moreover, as of July 1, 1992, any person retailing tires must collect a \$2 tire tax per tire sold, and beginning on July 1, 2003, collect from retail customers an additional 50 cents per new or used tire sold and delivered in this state, accept used tires from customers in exchange for new ones purchased, post a written notice about recycling in the language specified in the statute (see 415 ILCS 5/55.8), maintain reports, and file tax returns regarding the tire tax (see 415 ILCS 5/55.10). In addition, retailers cannot store used tires intended for recycling on-site for more than 90 days. See 415 ILCS 5/55.8(b).

With respect to tire disposal, as of January 1, 1992, the owner or operator of a “tire disposal site” (a site, other than a permitted landfill, at which tires are disposed) must receive approval from the IEPA after filing a “tire removal agreement” or entering into a written agreement with the IEPA to participate in a “consensual removal action.” 415 ILCS 5/55(d)(2). Both types of agreements are described in the Environmental Protection Act at §§55.3 and 55.4, respectively, and the tire removal agreement is further described in the rules at 35 Ill.Admin. Code, Part 848, Subpart E. Tire storage and disposal sites also must comply with extensive management standards. See 35 Ill.Admin. Code §848.201, *et seq.*

In addition, the Environmental Protection Act and regulations control transportation of used and waste tires. The Act prohibits arrangement for off-site transportation of used tires “with a person known to openly dump such tires.” 415 ILCS 5/55(f).

There are certain limited exceptions and exemptions from the used and waste tire requirements for agricultural uses (see §12.48 below), recreational facilities (415 ILCS 5/55.1(a)(3)), not-for-profit corporations (see 415 ILCS 5/55.1(b)), units of local government (415 ILCS 5/55.1(c)), tire retreading facilities (see 35 Ill.Admin. Code §848.206), and tire-stamping and die-cutting facilities (see 35 Ill.Admin. Code §848.207).

#### **6. [12.40] Potentially Infectious Medical Waste**

Illinois regulates the transportation, treatment, storage, and disposal of potentially infectious medical waste (PIMW). Small offices, such as physician and dentist offices, as well as larger institutions, such as nursing homes and hospitals, must comply with these requirements. PIMW is special waste (see 415 ILCS 5/3.475) generated in connection with diagnosis, treatment, or immunization of humans or animals, medical or biological research, or biological testing; PIMW includes cultures and stocks, human pathological wastes (except teeth and contiguous bone and gum), human blood and blood products, used “sharps” (such as needles, pipettes, scalpels, and glass slides and cover slips), animal waste, isolation waste (including from humans with communicable diseases), and unused sharps. 415 ILCS 5/3.360. PIMW does not include waste generated as general household waste, sharps from which the infectious potential has been eliminated and that are rendered unrecognizable by treatment, and other wastes that are noninfectious after treatment. *Id.*

Sections 56 – 56.6 of the Environmental Protection Act and 35 Ill.Admin. Code, Parts 1420 – 1422, govern PIMW treatment, storage, disposal, and transfer facilities and transportation, packaging, and labeling of PIMW. The Act generally prohibits any person from causing or allowing disposal of PIMW. See 415 ILCS 5/56.1(a). Any PIMW that is allowed to be disposed of is strictly regulated.

Generators must segregate PIMW into sharps, oversized PIMW (larger than 33 gallons), and all other PIMW. See 35 Ill.Admin. Code §1421.111. If PIMW is mixed with other waste, it is all regulated as PIMW and must comply with other applicable regulations as well. *Id.* Each class of PIMW must be packaged, labeled, and marked in accordance with Subpart C of the regulations. See 35 Ill.Admin. Code §§1421.120, 1421.121 (packaging); §§1421.130, 1421.131 (labeling and marking). Sharps may be disposed of in a permitted municipal waste landfill only if the infectious potential has been eliminated by treatment and they are packaged pursuant to 35 Ill.Admin. Code, Part 1421. See 35 Ill.Admin. Code §1420.104(a). Transporters of PIMW must have a PIMW

hauling permit from the IEPA. See 35 Ill.Admin. Code §1420.105(b). The onus is on the generator and others who deliver PIMW to a transporter to confirm that the transporter has a permit. See 415 ILCS 5/56.1(d). Neither a generator that transports PIMW created by its own activities, a noncommercial transporter that transports less than 50 pounds of PIMW at one time, nor the U.S. Postal Service, however, must have an IEPA PIMW transporter permit. 415 ILCS 5/56.1(f).

Generally, storage, treatment, and transfer facilities must have an IEPA permit. See 415 ILCS 5/56.1(c). Neither facilities that store, treat, or transfer PIMW nor hospitals, however, need a PIMW permit to conduct such activities for PIMW generated by their own or (in the case of hospitals) medical staff's activities. See 415 ILCS 5/56.1(g).

Transporters must prepare and distribute waste manifests for PIMW to the generator and disposal facility; a copy must be maintained for three years by the generator, transporter, and disposal facility. See 415 ILCS 5/56.1(h), 5/56.4(b). Unlike special and hazardous waste manifests, however, a copy of the PIMW manifest does not have to be filed with the IEPA. See 415 ILCS 5/56.4(b). The U.S. Department of Transportation strictly regulates the packaging and transportation of medical waste. See 35 Ill.Admin. Code §§1421.140, 1421.141.

The Environmental Protection Act also requires yearly reports to the IEPA from PIMW transporters; storage, treatment, and transfer facilities that are required to have a permit; and facilities and hospitals that are not required to have a permit but that transfer, treat, or store more than 50 pounds of PIMW per month. See 415 ILCS 5/56.3.

## **F. [12.41] Noise Pollution**

The purpose of §§23 – 25 of the Environmental Protection Act and Subpart H of Title 35 of the Illinois Administrative Code is “to prevent noise which creates a public nuisance.” 415 ILCS 5/23. It is unlawful for any person to “emit beyond the boundaries of [his or her real or personal] property any noise that unreasonably interferes with the enjoyment of life or with any lawful business or activity” generally or that violates a particular IPCB regulation. 415 ILCS 5/24. *See also Ferndale Heights Utilities Co. v. PCB*, 44 Ill.App.3d 962, 358 N.E.2d 1224, 3 Ill.Dec. 539 (1st Dist. 1976); *Discovery South Group, Ltd. v. PCB*, 275 Ill.App.3d 547, 656 N.E.2d 51, 211 Ill.Dec. 859 (1st Dist. 1995).

The regulations governing noise from property line or stationary sources classify the recipient and emitter property according to the Standard Land Use Coding Manual (SLUCM), which designates land activities by means of numerical codes. See 35 Ill.Admin. Code §901.101, Part 901, App. B. What sound level is allowable depends on the SLUCM class of the recipients (see §§901.102, 901.103); certain exceptions, however, are based on the SLUCM classification of the emitter as well as of the recipient (see, e.g., §901.105), with exceptions listed at §§901.106(b) and 901.107.

The sound level for property line or stationary sources is measured not less than 25 feet from the property line source. The Illinois Supreme Court upheld the IPCB's regulation of stationary sources in *Illinois Coal Operators Ass'n v. PCB*, 59 Ill.2d 305, 319 N.E.2d 782, 786 – 787 (1974), and further held that the regulations adequately protected an existing land user against changes in the use of adjacent lands.

The regulations also govern noise emissions from mobile sources. See 35 Ill.Admin. Code, Parts 902 (motor vehicles), 905 (snowmobiles). 35 Ill.Admin. Code, Parts 951 and 952, set forth procedures for determining conformity and compliance with the regulations, including instrumentation requirements, measurement techniques, and surveillance.

#### **G. [12.42] Worker Hazard Communication**

OSHA imposes a duty on each employer to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. §654(a). Regulations promulgated by the Secretary of Labor under OSHA provide that workers have the right to know of the existence and danger of chemicals in the workplace and require employers to give specific written and oral information and training to employees about the hazardous materials. See, *e.g.*, 29 C.F.R. §1910.1200(h) (OSHA hazard communication standard).

Employee training must include at least the following:

**(i) Methods and observations that may be used to detect the presence or release of a hazardous chemical in the work area;**

**(ii) The physical and health hazards of the chemicals in the work area;**

**(iii) The measures employees can take to protect themselves from these hazards; and**

**(iv) The details of the hazard communication program developed by the employer, including an explanation of the labeling system and the material safety data sheet, and how employees can obtain and use the appropriate hazard information.** 29 C.F.R. §1910.1200(h)(3).

The written hazard communication program must describe how the employer will meet the requirements for (1) labeling and other forms of warning on containers of hazardous chemicals, (2) material safety data sheets (MSDSs), and (3) employee information and training about hazardous chemicals. See 29 C.F.R. §1910.1200(e). The written program also must contain a list of hazardous chemicals in the workplace and the methods the employer will use to inform employees of potential contact with hazardous chemicals during non-routine tasks. *Id.* In addition, employers must ensure that their hazard communication program provides methods to inform the employees of other employers (*e.g.*, contractors) about the information. *Id.*

Unless the Secretary of Labor has approved the state’s plan for development and enforcement of the state’s standards, OSHA preempts the state regulation of any occupational safety or health issue with respect to which a federal standard has been established. See *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88, 120 L.Ed.2d 73, 112 S.Ct. 2374 (1992). See also *Stanislawski v. Industrial Commission*, 99 Ill.2d 36, 457 N.E.2d 399, 75 Ill.Dec. 405 (1983). OSHA completely preempts the field of worker health and safety, including non-conflicting and supplementary state laws and state agency enforcement. See *National Solid Wastes Management, supra*. Although Illinois submitted a plan for development and enforcement of state occupational and safety standards, it subsequently withdrew the plan. Therefore, the federal OSHA standards



are currently applicable and enforced in Illinois for private employers, and there are no enforceable parallel Illinois occupational and safety standards. See [www.osha.gov/fso/osp](http://www.osha.gov/fso/osp). Nonetheless, Illinois laws and standards do regulate public employers.

#### **H. [12.43] Community Right-To-Know**

The Emergency Planning and Community Right-To-Know Act focuses on planning for chemical emergencies at the state and local levels to avoid accidents. It requires businesses to participate in the emergency planning process and to make information about chemicals at their facilities available to agencies and the public. First, EPCRA requires the owner or operator of any facility that is required under OSHA to prepare or have available an MSDS for a hazardous chemical to submit either the MSDS or a list of chemicals grouped in categories of health and physical hazards, as set forth in OSHA, to the (1) local emergency planning committee, (2) state emergency response commission (IEMA is the designated entity; see 430 ILCS 100/4, 100/16), and (3) local fire department. See 42 U.S.C. §11021. Second, ECPRA mandates that the owner and operator submit an emergency and hazardous chemical inventory form that contains an estimate (in ranges) of the maximum amount of hazardous chemicals in each category present at the facility during the preceding year and the general location of the chemical at the facility. This is known as a “Tier I report.” 42 U.S.C. §11022(d)(1). If requested, the owner or operator must complete a Tier II report, which contains additional information about the amount and location of hazardous chemicals at the facility. 42 U.S.C. §11022(d)(2). In Illinois, a facility may file a Tier II report in lieu of a Tier I report although, unlike certain other states, Illinois initially requires only a Tier I report.

Third, owner/operators must file a toxic chemical release form each year for toxic chemicals that were manufactured, processed, or otherwise used in quantities exceeding the threshold quantity during the preceding calendar year. This form is referred to as the “TRI” or “Form R.” See 42 U.S.C. §11023. The list of toxic chemicals is at 40 C.F.R. §372.65. The requirement applies to facilities that employ ten or more full-time employees and that are in Standard Industrial Classification Codes 20 – 39. See 42 U.S.C. §11023(b)(1). The inventory forms, lists of hazardous chemicals, MSDSs, toxic chemical release forms, follow-up emergency release notifications, and other forms are available for public inspection. See 42 U.S.C. §11044.

As of January 1, 1998, industries that manufacture, process, or otherwise use certain chemicals must follow EPCRA reporting requirements. 62 Fed.Reg. 23,834 (May 1, 1997). “These industry groups are metal mining, coal mining, electric utilities, commercial hazardous waste treatment, chemicals and allied products-wholesale, petroleum bulk terminals and plants-wholesale, and solvent recovery services.” *Id.* This list is not exhaustive, but rather a guide to understanding the types of industries likely to be regulated by the action. “To determine whether your facility is regulated by this action, you should carefully examine this final rule [62 Fed.Reg. 23,834] and the applicability criteria in part 372 subpart B of Title 40 of the Code of Federal Regulations.” *Id.*

#### **I. [12.44] Illinois Chemical Safety Act**

The purpose of the Illinois Chemical Safety Act, 430 ILCS 45/1, *et seq.*, is to “establish an orderly system to assure that responsible parties are adequately prepared to respond to the release of chemical substances into the environment and to improve the ability of State and local

authorities to respond to such releases.” 430 ILCS 45/2(b). A “chemical substance” is defined in the Illinois Chemical Safety Act as any extremely hazardous substance that is present in an amount in excess of its threshold planning quantity, as defined by EPCRA, any “hazardous substance” as defined by the Environmental Protection Act, and any petroleum including crude oil or any fraction thereof. 430 ILCS 45/3.

The Illinois Chemical Safety Act requires that all businesses have a written chemical safety contingency plan unless the IEMA issues an exemption. “Businesses” are defined as any

**individual, partnership, corporation, or association in the State engaged in a business operation that has 5 or more full-time employees, or 20 or more part-time employees, and that is properly assigned or included within one of the [40 designated] Standard Industrial Classifications (SIC), as designated in the Standard Industrial Classification Manual prepared by the Federal Office of Management and Budget.** 430 ILCS 45/3.

Some of the typical business classifications include those that manufacture plastic, pesticide, paint, asphalt, pharmaceuticals, and petroleum and other industries that use potentially dangerous chemical substances. Businesses that are not within the designated classification codes but that the IEPA finds “use, store, or manufacture a chemical substance in a quantity that poses a threat” to human health or the environment are also subject to the Illinois Chemical Safety Act. *Id.*

Each business’ contingency plan must include (1) “a listing of the chemical substances that may be released at the facility”; (2) information on the probable nature, routes, and causes of possible releases; (3) “response procedures to be followed at the facility and for notifying local emergency response agencies”; and (4) a listing of appropriate persons qualified to act as emergency coordinators at the facility. 430 ILCS 45/4(b). After the contingency plan is developed, the business must submit a copy to the appropriate local fire, police, or other emergency response agency as determined by the local response plan or by agreement. The public shall have full access to review this plan. See 430 ILCS 45/4(c).

Businesses required to develop and maintain a contingency plan also must implement an employee education plan. The education plan must be developed in such a way as to ensure that all personnel responsible for the implementation of the contingency plan are familiar with the delineated procedures set out in case there is a release of a chemical substance. The educational program must include annual instruction and document that the program has been completed. See 430 ILCS 45/6.

## **VI. [12.45] AGRICULTURAL OPERATIONS**

In general, agricultural operations, including farms, silvicultural facilities, and livestock establishments, must comply with environmental laws applicable to other industries and are likewise subject to common law liability. In order to protect the economic production of our sources of food and at the same time recognize pollution issues unique to agricultural types of operations, however, both Congress and the Illinois legislature have afforded some agricultural operations separate legislative classification and treatment.

## **A. [12.46] Wastes**

Although the panoply of waste regulations generally applies to agricultural operations, there are some exceptions. Certain waste regulations applicable to agricultural operations are less stringent than the norm. Solid waste generated from growing and harvesting crops or raising animals (including manure) is not considered a hazardous waste if it is returned to the soil as fertilizer. See 35 Ill.Admin. Code §721.104(b)(2). Moreover, persons engaged in agricultural activities are not required to notify the IEPA regarding the disposal, treatment, or storage on their agricultural property of solid, nonhazardous waste acquired for on-site use and disposed of on-site in accordance with IEPA regulations. See 415 ILCS 5/21(d).

Certain farming operations are exempt from waste permit and registration requirements. A farmer is not required to have a permit to dispose of hazardous waste pesticides from the farmer's own use on his or her property, provided that the emptied containers are triple rinsed and the residue is disposed of per the instruction label. See 35 Ill.Admin. Code §§703.123, 722.170.

No permit is required for landscape waste composting operations on a farm if the operation is on the agricultural property on which the composting material is used and the composting operation constitutes no more than two percent of the property's total acreage. 415 ILCS 5/21(q)(3). The property must be devoted principally to the production of agricultural crops, and neither the property nor the operator can be connected to any waste hauler or generator of nonagricultural compost materials. The regulations are explicit regarding the siting, storage, use, and rate of application of the compost. The site also must be registered yearly with the IEPA. *Id.*

Although farmers generally are subject to both CERCLA and the parallel Illinois law, farmers and others who use pesticides have a limited exemption. There is no CERCLA liability for response costs or damages that result from the storage, handling, and use of a pesticide consistent with the directions, warnings, and cautions on its label and the uses for which it was registered under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §136, *et seq.*, and the Illinois Pesticide Act, 415 ILCS 60/1, *et seq.* See also 42 U.S.C. §9607(i); 415 ILCS 5/22.2(j)(4).

## **B. [12.47] Underground Storage Tanks**

Farm USTs of less than 1,100 gallons capacity used for motor fuel for noncommercial purposes and farm heating oil USTs are excluded from regulation under both the federal and Illinois UST laws. See 42 U.S.C. §6991(1)(A); 41 Ill.Admin. Code §170.400; 35 Ill.Admin. Code §§731.110(e), 731.112. A "farm UST" is a UST on land devoted to the production of crops or raising of animals, including fish. 41 Ill.Admin. Code §170.400. Such farm tanks, therefore, do not have to comply with registration, release detection, and upgrading requirements applicable to USTs in Illinois.

## **C. [12.48] Used and Waste Tires**

An agricultural operation that stores no more than 20 used tires is exempt from certain provisions of the Illinois used tire law. 415 ILCS 5/53, 5/55.1(a)(1). The used tires must have been generated and must be located at the site as a result of growing and harvesting crops or raising animals. Such an agricultural operation is exempt from the requirement that stored tires be prevented from accumulating water. 415 ILCS 5/55.1(a)(1).

#### **D. [12.49] Pesticides**

The USEPA has designated certain pesticides as “restricted use” pesticides. See 7 U.S.C §136a(d)(1). Only a “private applicator” licensed by the Illinois Department of Agriculture may purchase, use, or supervise the use of restricted use pesticides on property owned, rented, or otherwise controlled by the private applicator or the private applicator’s employer. See 415 ILCS 60/11. In order to obtain the license, the private applicator must demonstrate competence and knowledge of pesticide use. 415 ILCS 60/9. The private applicator may obtain such competency and knowledge by attending a three-hour training class and passing a written examination administered pursuant to Department of Agriculture regulations. See 8 Ill.Admin. Code §250.80. The general competency standards include labeling comprehension, safety factors, environmental consequences of use, peer factors, pesticide application techniques, and applicable laws. 8 Ill.Admin. Code §250.110. The private applicator license is valid for three years. 415 ILCS 60/9.

#### **E. [12.50] Air Pollution**

State air construction and operating permits are not required for portable grain-handling equipment and one-turn storage space or for grain-handling operations (exclusive of grain-drying operations) with an annual grain throughput not exceeding 300,000 bushels. 35 Ill.Admin. Code §§201.146(s), 201.146(u). Because of fugitive particulate matter, existing grain-handling operations with an annual grain throughput of 300,000 bushels or more, however, must apply for an operating permit from the IEPA. 35 Ill.Admin. Code §212.462. Those operations must comply with requirements for cleaning and separating, dump pits, internal transfer areas, and load-out areas. 35 Ill.Admin. Code §212.462(a).

State air construction and operating permits are not required for operations that have a total grain-drying capacity less than or equal to 750 bushels per hour for five percent moisture extraction at the manufacturer’s rate capacity. 35 Ill.Admin. Code §201.146(t). Grain-drying operations with a total grain drying capacity in excess of 750 bushels per hour for five percent moisture extraction, however, must apply for an operating permit and comply with requirements for dryers. 35 Ill.Admin. Code §212.463.

Although grain-handling and grain-drying facilities, including portable facilities and one-turn storage space, are exempt from regulations relating to fugitive particulate matter (35 Ill.Admin. Code §212.461(a)), they must comply with explicit housekeeping measures (35 Ill.Admin. Code §212.461(b)). In addition, all new and modified grain-handling operations with annual throughput of more than 300,000 bushels and new and modified grain-drying operations must apply to the IEPA for construction and operating permits. 35 Ill.Admin. Code §§212.462(e), 212.463(d). There are emissions limitations for process emissions units used for grain drying, storing, or mixing in Lake Calumet, a non-attainment area for PM-10; the limitations do not apply to fugitive emissions or emissions from non-column grain drying in Lake Calumet, however. See 35 Ill.Admin. Code §212.324.

With respect to organic material emission (OME) standards of the Environmental Protection Act, agricultural operations that spray pesticides are generally exempt from OME standards, even in severe ozone areas. 35 Ill.Admin. Code §§215.541, 218.541, 219.541.

Moreover, the general prohibition in the Environmental Protection Act against open burning (415 ILCS 5/9(c)) does not apply to certain burning of “agricultural waste” when no other economically reasonable alternative is available. 35 Ill.Admin. Code §237.120(a). “Agricultural waste” is “refuse, except garbage and dead animals, generated on a farm or ranch by crop and livestock production practices.” 35 Ill.Admin. Code §237.101. To satisfy the exemption, the waste must be burned (1) on the premises where it is generated, (2) outside of the borders of a municipality, (3) more than 305 meters from residential or populated areas, (4) in a location that will not create a visibility hazard to various vehicles, and (5) at a time when atmospheric conditions will readily dissipate contaminants. 35 Ill.Admin. Code §237.120(a).

#### **F. [12.51] Water and Odor Issues in Livestock Operations**

Livestock operations present unique odor and water pollution issues. In order to control such environmental issues, regulations limit where new livestock management and waste handling operations can be sited. New livestock management or waste handling facilities cannot contain within their boundaries any stream or other permanent surface waters, and they cannot be sited within one-half mile of a populated area or within one-quarter mile of a non-farm residence. 35 Ill.Admin. Code §501.402. The regulations grandfather idle facilities with intact livestock shelters at which livestock operations have occurred for four consecutive months within the ten years preceding the effective date of July 15, 1991. 35 Ill.Admin. Code §501.402(b)(2). Also, the prohibitions do not apply to facilities in an “agricultural area” (see 505 ILCS 5/11, *et seq.*), to expansion of an existing livestock facility that has operated more than one year, or to a use allowed by local ordinance. 35 Ill.Admin. Code §501.402(d). When new livestock facilities are located within one-half or one-quarter mile as allowed by §501.402(d), the facility must be as far away from the residence or populated area as feasible. 35 Ill.Admin. Code §§501.402(e), 501.402(f).

With respect to water pollution specifically, a new or existing livestock facility must be “constructed in such a way that pollution will be prevented, or supplementary measures shall be adopted which will prevent pollution.” 35 Ill.Admin. Code §501.402(g). Water pollution protections may include diversion dikes and walls or curbs to prevent the flow-through of surface waters and to direct runoff to appropriate disposal or storage areas. 35 Ill.Admin. Code §501.403. Livestock manure waste must be contained in a storage structure if stored in excess of six months. Moreover, temporary manure waste stacks must be constructed and maintained to prevent runoff and leachate to surface and underground water and cannot be constructed within 100 feet of a water well. 35 Ill.Admin. Code §501.404(b).

Field application of livestock waste is also regulated to minimize odor and water pollution. Certain site-specific considerations regulate the quantity of waste applied to soils in order to minimize the potential for pollution. In addition, facility operators must practice odor control during both manure removal and field application. 35 Ill.Admin. Code §501.405.

The Livestock Management Facilities Act (LMFA), 510 ILCS 77/1, *et seq.*, was signed into law in 1996. The LMFA was enacted in response to the perceived larger concentration of animals at livestock facilities in Illinois and the resulting potential for greater impact on the surrounding area. “Livestock facilities” include animal feeding operations, livestock shelters, and on-farm milking and milk-handling facilities. Certain livestock facilities, such as at educational institutions, temporary livestock pasture operations, and market holding facilities, however, are exempt from the LMFA. 510 ILCS 77/10.30.

The Department of Agriculture is responsible for proposing to the IPCB rules to implement the LMFA. 510 ILCS 77/55(b). However, the LMFA provides: “Nothing in this Act shall be construed as a limitation or preemption of any statutory or regulatory authority under the Illinois Environmental Protection Act.” 510 ILCS 77/100. Therefore, as explained in more detail in §12.52 below, the owner and operator of a livestock facility is subject to both the IEPA and the Illinois Department of Agriculture on environmental issues. The IPCB issued final rules on November 15, 2001. See 35 Ill.Admin. Code, Part 506. The final rules supersede emergency rules that had been adopted in October 1996 and that no longer apply. See 35 Ill.Admin. Code §506.101 (IPCB Note).

### **1. [12.52] Livestock Waste and Waste Lagoons**

The LMFA requires newly constructed or modified livestock waste lagoons to meet lagoon design and construction standards and imposes financial responsibility requirements and closure procedures. See 35 Ill.Admin. Code, Part 506, Subpart B.

Any earthen livestock waste lagoon subject to registration must be constructed or modified in accordance with “Design of Anaerobic Lagoons for Animal Waste Management” published by the American Society of Agricultural Engineers or the national guidelines as published by the United States Department of Agriculture Natural Resource Conservation Service in Illinois and titled “Waste Treatment Lagoon.” 510 ILCS 77/15(a). The rules contain standards for lagoon and liner design. See 35 Ill.Admin. Code §§506.204 – 506.205. In addition, if groundwater monitoring is required, the rules direct how the owner or operator shall implement groundwater monitoring. See 35 Ill.Admin. Code §506.206.

The owner or operator of a new or modified livestock waste lagoon must conduct a site investigation under the direction of a licensed professional engineer in accordance with the rules to determine whether “aquifer material” is present within 50 feet of the planned bottom of the lagoon. If aquifer material is found within the 50-foot range, the owner or operator then must implement appropriate design features and monitoring procedures to ensure that groundwater is not contaminated. See 35 Ill.Admin. Code §506.202. The owner of new or modified lagoons must establish and maintain evidence of financial responsibility to provide for closure and proper disposal of the contents of the lagoons. 510 ILCS 77/17. The mechanisms for financial responsibility are set forth in the LMFA and may include any combination of commercial or private insurance, guarantees, surety bonds, letters of credit, certificates of deposit, designated savings accounts, or by participation in a livestock waste lagoon closure fund managed by the Illinois Finance Authority. 510 ILCS 77/17.

In addition, the owner or operator is required to completely empty lagoons removed from service. The closure must be completed in accordance with the rules within two years of the date of cessation of operation unless the lagoon is maintained or serviced. 510 ILCS 77/15(e).

The owner or operator of earthen livestock waste lagoons must certify that the lagoons have been constructed or modified in accordance with the standards set by the LMFA and implementing regulations. 510 ILCS 77/15(b). See also 35 Ill.Admin. Code §506.207(c). In addition, an owner must notify the Department of Agriculture of a change of ownership within 30 working days of closing the transaction. 510 ILCS 77/15(e). The Department is responsible for

inspecting earthen livestock waste lagoons during at least one of the phases of pre-construction, construction, and post-construction and has jurisdiction to require modifications to bring construction in compliance with standards. 510 ILCS 77/15(b).

Although the LMFA places the general responsibility for regulation of livestock facilities, including environmental issues, in the hands of the Illinois Department of Agriculture, the IEPA also maintains jurisdiction over any violations of the Environmental Protection Act. Therefore, the owner or operator of a livestock management facility may have to answer to two agencies simultaneously and may receive different, if not conflicting, directions.

The Department of Agriculture has authority to issue cease and desist orders for violation of the LMFA, but the IEPA is the agency designated to receive complaints about an earthen livestock waste lagoon. If the IEPA determines that modification to the lagoon is necessary because structural problems with the earthen lagoon have caused a negative impact on the groundwater, the IEPA notifies the Department of Agriculture and then the Department and the IEPA “shall cooperate with the owner or operator of the affected livestock waste lagoon to provide a reasonable solution to protect the groundwater.” 510 ILCS 77/15(c). The complaint procedures apply to all earthen lagoons, whether existing before or constructed after the effective date of the LMFA and its rules. *Id.* Furthermore, the owner or operator must comply with the IEPA’s requirements for handling, storing, and disposing of livestock wastes, but waste management plans are under the jurisdiction of the Department of Agriculture.

The LMFA requires the owner or operator of livestock management facilities of between 1,000 and 5,000 animal units (defined at 510 ILCS 77/10.10) to prepare and maintain on file at the facility a general waste management plan that must be made available to the Department of Agriculture. 510 ILCS 77/20(c). In addition, owners or operators at facilities that have more than 5,000 animal units must prepare and submit a waste management plan to the Department of Agriculture for approval prior to operation of a new facility. 510 ILCS 77/20(d). Existing facilities of more than 5,000 animal units must submit the plan for approval within 60 days of the effective date of regulations, and owners of facilities that through growth meet or exceed 5,000 animal units must submit the waste management plan within 60 days after reaching that number. *Id.*

The requirements for waste management plans are contained in 35 Ill.Admin. Code §506.301, *et seq.* The Department criteria for approving waste management plans include whether the waste application rate is appropriate and whether the land area is adequate. 35 Ill.Admin. Code §506.311.

## **2. [12.53] Odors**

The LMFA requires owners or operators of livestock waste handling facilities to practice odor control methods during the course of manure removal and field application. 510 ILCS 77/25(a).

## **3. [12.54] Certification of Livestock Managers**

The LMFA requires the Department of Agriculture to prepare a certified livestock manager program to enhance management skills in critical areas such as environmental awareness, safety

concerns, odor control, neighbor awareness, current best management practices, and the developing and implementing of manure management plans. 510 ILCS 77/30. The LMFA further allows only certified livestock managers to supervise a livestock waste handling facility serving 300 or more animal units, although there is a grace period of six months for the supervisor to become certified. 510 ILCS 77/30(a).

The certification is valid for three years and may be renewed for a three-year period. 510 ILCS 77/30(c). The Department, however, may require re-certification for just cause, such as repeated complaints about the facility. *Id.*

#### 4. [12.55] Setbacks

New facilities that serve more than 50 animal units must comply with setback requirements set forth in the LMFA. 510 ILCS 77/35(c). A “new facility” is defined as

**a livestock management facility or a livestock waste handling facility the construction or expansion of which is commenced on or after [May 21, 1996]. Expanding a facility where the fixed capital cost of the new components constructed within a 2-year period does not exceed 50% of the fixed capital cost of a comparable entirely new facility shall not be deemed a new facility as used in [the Livestock Management Facilities Act], 510 ILCS 77/10.45; 35 Ill.Admin. Code §506.103.**

The rules require new livestock management and livestock waste handling facilities to provide notification to the Department of Agriculture of the intent to build. 510 ILCS 77/11(a).

Livestock facilities or waste handling facilities handling more than 50 but fewer than 1,000 animal units must be set back from the nearest occupied non-farm unit by one-quarter mile and from the nearest populated area by one-half mile. 510 ILCS 77/35(c)(3). Facilities serving 1,000 to 7,000 units must be set back by an additional 440 feet for each additional 1,000 animal units over 1,000; for any occupied residence, the one-quarter mile setback must be increased by 220 feet for each additional 1,000 animal units over 1,000 animal units. 510 ILCS 77/35(c)(4). Facilities handling over 7,000 animal units must be set back by one mile from a populated area and one-half mile from any occupied residence. 510 ILCS 77/35(c)(5).

The minimum setback requirements may be reduced with the approval of the Department or if waived by the owners of occupied residences within the minimum zone. 510 ILCS 77/35(g). The IEPA requirements regarding location of new livestock management facilities and waste handling facilities and conditions for exemption of compliance with the maximum feasible location still apply. 510 ILCS 77/35(d).

#### G. [12.56] NPDES Permits

Certain agricultural operations are required by the federal CWA to have a NPDES permit. Although NPDES permits are required by federal law, the State of Illinois administers the NPDES program in Illinois.

An animal-feeding operation must have an NPDES permit if pollution is discharged directly or indirectly from the operation to navigable waters and the operation is classified either as a



“very large operation” or a “large operation.” 35 Ill.Admin. Code §§502.101 – 502.104. The USEPA may require other animal-feeding operations to obtain a permit. 35 Ill.Admin. Code §502.106.

NPDES permits are required for the construction, operation, or modification of facilities that produce at least 20,000 pounds of aquatic animals per year and that grow or hold the animals in ponds, raceways, or other similar structures from which there may be a discharge for any 30 or more days a year. 35 Ill.Admin. Code §503.101(a). In addition, an NPDES permit is “required for any fish or aquatic animal facility which contains, grows, or holds any species of fish or other aquatic animal life non-native to the United States, from which there is a discharge to a navigable water at any time.” 35 Ill.Admin. Code §503.101(b). NPDES permits are also required (1) for point source discharges of irrigation return flow from land areas of more than 3,000 contiguous acres or 3,000 noncontiguous acres that use the same drainage system (35 Ill.Admin. Code §503.102) or (2) for discharges from silvicultural activities (35 Ill.Admin. Code §503.103).

Generally, agricultural operations are not required to have storm water discharge permits. See 40 C.F.R. §122.2. Agricultural operations that must have NPDES permits pursuant to federal regulations, however, must have storm water discharge permits. See 40 C.F.R. §122.26(b)(14). These operations include feedlots (40 C.F.R. §122.23), concentrated aquatic animal production facilities (40 C.F.R. §122.24), and aquaculture projects (40 C.F.R. §122.25).

The federal court of appeals held in *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 1793 (1995), that discharge into a stream from “liquid manure spreading operations [at a farm was] a point source within the meaning of [33 U.S.C. §]1362(14) because the farm [was part] of a concentrated animal feeding operation.” 34 F.3d at 115. The discharge was not within the agricultural storm water exemption of §1362(14). *Id.*

There are also certain agricultural support entities, such as “farm product warehousing and storage” (Standard Industrial Classification Code 4221), that must have storm water permits. See 40 C.F.R. §122.26(b)(14)(xi). “Farm product warehousing and storage” includes bean elevators, grain elevators (storage only), and potato cellars. See the Office of Management and Budget’s NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM — UNITED STATES, 2002 (Claitor’s Publishing, 2002). Facilities with existing NPDES permits for storm water discharge must apply for individual permits 180 days before their current permit expires. 40 C.F.R. §§122.26(e), 122.26(f).

## **H. [12.57] Wetlands**

Sections 301 and 404 of the federal CWA prohibit the discharge of “dredged or fill material” into navigable waters of the United States without a permit. 33 U.S.C. §§1311, 1344. The term “waters of the United States” includes all interstate waters, including interstate wetlands adjacent to such waters. See 40 C.F.R. §122.2. The term even includes intrastate, nonadjacent, and isolated wetlands that impact interstate commerce; use of these isolated wetlands by migratory birds may be sufficient evidence of an impact on interstate commerce. See *Hoffman Homes, Inc. v. Administrator, USEPA*, 999 F.2d 256, 261 (7th Cir. 1993) (nearly all wetlands fall within jurisdiction of CWA since one test for whether wetland affects interstate commerce is whether migratory birds use wetland). There is an ongoing dispute over the extent of the CWA’s scope

(see *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 148 L.Ed.2d, 121 S.Ct. 675 (2001)), and counsel is advised to review case law in the applicable circuit. See, e.g., *United States v. Rueth Development Co.*, 335 F.3d 598, 601 (7th Cir. 2003) (holding that “[d]ecisions such as *Hoffman Homes*, give full effect to Congress’s intent to make the Clean Water Act as far-reaching as the Commerce Clause permits” and that “the wetland at issue falls under the broad definition of ‘waters of the United States’ in *Hoffman Homes*”).

The CWA exempts certain activities from the requirement of a permit to fill wetlands. Those activities include the discharge of dredged or fill material —

**(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;**

**(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;**

**(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;**

**(D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;**

**(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized. 33 U.S.C. §1344(f)(1).**

See *United States v. Akers*, 785 F.2d 814 (9th Cir.), *cert. denied*, 107 S.Ct. 107 (1986). Despite the foregoing, however, a permit is required to discharge dredge or fill material in order to bring the wetland into a new use to which it was not previously subject. *Conant v. United States*, 786 F.2d 1008, 1010 (11th Cir. 1986) (“To fall within the exemption . . . the activity ‘must be part of an established (*i.e.*, on-going) farming, silviculture, or ranching operation.’” Quoting 33 C.F.R. §323.4(a)(1)(ii).).

The CWA provides that the applicant for a permit to dredge and fill a wetland must provide a certification from the state in which the activity will occur. See 33 U.S.C. §1341(a)(1). In Illinois, an application for certification for dredge-and-fill activities must be made on the joint application form titled “Protecting Illinois Waters” that is available from the IEPA, the U.S. Army Corps of Engineers, and the Illinois Department of Transportation. 35 Ill.Admin. Code §395.201. The IEPA certifies or waives certification if the intended activities will not violate applicable Illinois

regulations (including water quality standards), violate applicable provisions of the federal CWA, or interfere with existing water uses (including for public recreation and for public and food-processing uses).

## VII. LITIGATION AND ENFORCEMENT

### A. [12.58] Illinois State Agency Enforcement

The IEPA and the IPCB share primary responsibility for enforcement of the Environmental Protection Act. The IEPA is responsible for investigating violations of the Act and its regulations, and the IPCB conducts hearings and fines offenders. See 415 ILCS 5/4 (establishment, duties, and powers of IEPA); 415 ILCS 5/5 (establishment, duties, and powers of IPCB); *ESG Watts, Inc. v. PCB*, 282 Ill.App.3d 43, 668 N.E.2d 1015, 218 Ill.Dec. 183 (4th Dist. 1996). Specifically, under Title VIII of the Environmental Protection Act, “Enforcement” (415 ILCS 5/30 – 5/34), the IEPA “shall cause investigations to be made upon the request of the [IPCB] or upon receipt of information concerning an alleged violation [of the Act or its regulations].” 415 ILCS 5/30. The IEPA has the authority, within constitutional limitations, to “enter at all reasonable times upon any private or public property” in order to inspect and investigate possible violations. 415 ILCS 5/4(d).

Violations of environmental laws may be enforced either through administrative routes (the IPCB) or through the courts, where the IEPA is represented by either the Attorney General or the state’s attorney. 415 ILCS 5/43(a). An administrative hearing will be held after proper notice to all parties and after a complaint is issued and served. 415 ILCS 5/31. See §12.59 below. The burden of proof in such a hearing before the IPCB is on the IEPA or other complainant to show that the respondent either has caused or has threatened to cause a violation. “If such proof has been made, the burden [shifts to] the respondent to show that compliance . . . would impose an arbitrary or unreasonable hardship.” *Processing & Books, Inc. v. PCB*, 64 Ill.2d 68, 351 N.E.2d 865, 869 (1976); 415 ILCS 5/31(e). The burden then is on the respondent to show the reasonableness of the respondent’s conduct. See *Slager v. PCB*, 96 Ill.App.3d 332, 421 N.E.2d 929, 52 Ill.Dec. 66 (1st Dist. 1981). The regulations governing the conduct of IPCB hearings are codified at 35 Ill.Admin. Code, Part 101, *et seq.*

Enforcement proceedings brought in the courts are governed by the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.*, and the Illinois Supreme Court Rules.

Title XII of the Environmental Protection Act, “Penalties” (415 ILCS 5/42 – 5/45), sets forth the various forms of relief available under the Act:

**[A]ny person that violates any provision of this Act or any regulation adopted by the [IPCB], or any permit or term or condition thereof, or that violates any order of the [IPCB] pursuant to this Act, shall be liable to a civil penalty of not to exceed \$50,000 for the violation and an additional civil penalty of not to exceed \$10,000 for each day during which the violation continues.** 415 ILCS 5/42(a).

The factors to be considered by the IPCB in determining the appropriate civil penalty include

- (1) the duration and gravity of the violation;**
- (2) the presence or absence of due diligence on the part of the respondent in attempting to comply with . . . this Act;**
- (3) any economic benefits accrued by the respondent because of delay in compliance . . .**
- (4) the amount of monetary penalty which will serve to deter further violations by the respondent and [enhance] voluntary compliance . . . by the respondent and other persons similarly [situated];**
- (5) the number, proximity in time, and gravity of previously adjudicated violations of this Act by the respondent;**
- (6) whether the respondent voluntarily self-disclosed . . .**
- (7) whether the respondent has agreed to undertake a “supplemental environmental project,” which means an environmentally beneficial project that a respondent agrees to undertake . . . but . . . is not otherwise legally required to perform. 415 ILCS 5/42(h).**

In *Park Crematory, Inc. v. PCB*, 264 Ill.App.3d 498, 637 N.E.2d 520, 201 Ill.Dec. 931 (1st Dist. 1994), the court vacated a \$9,000 penalty assessed by the IPCB for violation of the Environmental Protection Act because the penalty was excessive. The court said that the imposition of a civil fine would not aid in enforcement of the Act because Park Crematory’s owner acted in good faith, the violations were not willful, knowing, or repeated, and Park Crematory cooperated with the IEPA. In addition, Park Crematory did not receive any economic gain from the violations and had acted promptly to correct the violations. The court also said that the complaint should never have been filed against Park Crematory because it had corrected the violations before the complaint was filed. *Id. See also Szkoda v. Illinois Human Rights Commission*, 302 Ill.App.3d 532, 706 N.E.2d 962, 236 Ill.Dec. 88 (1st Dist. 1998).

Civil penalties typically are made payable to the Environmental Protection Trust Fund and are used in accordance with the provisions of the fund. 415 ILCS 5/42(a). When the state’s attorney or Attorney General prevails against a person who has committed a “wilful, knowing or repeated” violation of the Environmental Protection Act, the IPCB or a court can award costs and reasonable attorneys’ fees, including the reasonable costs of expert witnesses and consultants. 415 ILCS 5/42(f).

Injunctive relief also is available under the Environmental Protection Act. Specifically:

**In circumstances of substantial danger to the environment or to the public health of persons or to the welfare of persons where such danger is to the livelihood of such persons, the State’s Attorney or Attorney General . . . may institute a civil action for an immediate injunction to halt any discharge or other activity causing or contributing to the danger or to require such other action as may be necessary. 415 ILCS 5/43(a).**

Also, any person adversely affected in fact by a violation of the Environmental Protection Act or its regulations may sue for injunctive relief, but not before 30 days after the plaintiff has been denied relief by the IPCB in a proceeding brought under §31(d)(1) of the Act. 415 ILCS 5/45(b).

The scope of an injunction in the environmental setting is narrow. *See People v. Joliet Railway Equipment Co.*, 108 Ill.App.3d 197, 438 N.E.2d 1205, 1211, 63 Ill.Dec. 842 (3d Dist. 1982) (“scope of the injunction must be narrowly drawn to the location where the offensive conduct is established by the evidence [and] cannot be expanded by speculation”). An action for injunctive relief under the Environmental Protection Act, moreover, is not governed by general equitable principles. Rather, a complainant need only allege and show the respondent’s violation of the Act; there is no need to show irreparable damage or absence of any adequate remedy at law. *People v. Van Tran Electric Corp.*, 152 Ill.App.3d 175, 503 N.E.2d 1179, 105 Ill.Dec. 173 (5th Dist. 1987). *See also People v. Conrail Corp.*, 245 Ill.App.3d 167, 613 N.E.2d 784, 184 Ill.Dec. 467 (5th Dist. 1993). Moreover, a court has no discretion to refuse to grant an injunction once the proper showing has been made. *See People v. Mika Timber Co.*, 221 Ill.App.3d 192, 581 N.E.2d 895, 163 Ill.Dec. 741 (5th Dist. 1991); *ESG Watts, supra*. *But see People v. Staunton Landfill, Inc.*, 245 Ill.App.3d 757, 614 N.E.2d 1286, 185 Ill.Dec. 601 (4th Dist. 1993) (stating court has equitable discretion and upholding denial of preliminary injunction); *People ex rel. Ryan v. Agro, Inc.*, 345 Ill.App.3d 1011, 803 N.E.2d 1007, 281 Ill.Dec. 386 (2d Dist. 2004) (rejecting State’s argument that once State proves violation of Environmental Protection Act, trial court has no discretion to refuse to issue injunction).

### **1. [12.59] Procedural Rights**

Section 31 of the Environmental Protection Act provides procedural rights to alleged violators of the Act. See 415 ILCS 5/31(a)(1). This section is very specific as to the form, contents, and time frame of the statutory due process rights. In particular, within 180 days after the IEPA “becomes aware of” an alleged violation of the Act, an implementing regulation, or a permit and before it files any formal enforcement action, it must provide written notice, by certified mail, to the alleged violator. *Id.* The recipient then has the option to submit a written response, by certified mail, within 45 days and meet with the IEPA in order to resolve the matter before the IEPA files a formal complaint. 415 ILCS 5/31(a)(2).

The IEPA’s written notice must provide information regarding the alleged violator’s right to respond in writing and meet with the IEPA. The notice also must contain an explanation of the violations alleged and an explanation of actions that the IEPA believes may resolve the violation, including an estimate of a reasonable time frame for completion of the suggested resolution. Finally, the IEPA must explain any alleged violations that it believes cannot be resolved without the involvement of the state’s attorney or Attorney General. 415 ILCS 5/31. This notice is not required for administrative citations under §31.1. See 415 ILCS 5/31(f).

The alleged violator’s written response should state any rebuttal, explanation, or justification and contain a proposed “Compliance Commitment Agreement” that includes specified time frames for compliance and may include a request for a meeting with the IEPA (415 ILCS 5/31(a)(2)), which must be held within 60 days (415 ILCS 5/31(a)(4)). The Attorney General and state’s attorney may not attend the meeting. *Id.* Within 21 days after the meeting, the alleged violator must submit to the IEPA a written response to the alleged violations, by certified mail,

including any additional information in rebuttal, explanation, or justification, a proposed compliance commitment agreement that includes specified times for achieving each commitment (or states that compliance has been achieved), and a statement indicating that the alleged violator chooses to rely on the original written response. 415 ILCS 5/31(a)(5).

The IEPA must reply to the written response within 30 days, by certified mail, and include in the reply a rejection, acceptance, or modification of the proposed compliance commitment agreement. 415 ILCS 5/31(a)(7). The IEPA's failure to respond to either the initial or post-meeting response of the violator within 30 days constitutes acceptance of the proposed compliance commitment agreement. 415 ILCS 5/31(a)(9). If the IEPA does not agree with the compliance commitment agreement, it must serve further notice, by certified mail, on the alleged violator of its intention to pursue legal action. This notice is a precondition to the state's attorney's or Attorney General's representation of the IEPA in the matter. In addition, the alleged violator has another opportunity to meet with the IEPA within 30 days of receipt of this notice of intent to commence legal action, and the IEPA must notify the recipient of the right to have the meeting. 415 ILCS 5/31(b).

## **2. [12.60] Illinois Pollution Control Board — Procedural Rules**

On December 21, 2000, the Illinois Pollution Control Board adopted new procedural rules. 35 Ill.Admin. Code, Parts 101 – 130. The rules became effective on January 1, 2001, and apply to all proceedings pending as of that date and proceedings initiated after that date. The rules are available on the IPCB's Web site ([www.ipcb.state.il.us](http://www.ipcb.state.il.us)) or by calling 312/814-3620. The rules significantly change certain procedures before the IPCB as well as impact certain submittals to the IEPA and the Department of Natural Resources. The rules are too many to include in full in this chapter, but any lawyer who practices before the IPCB should carefully review the rules to determine the applicable procedures.

Among the more significant rules, 35 Ill.Admin. Code §101.400(a) clarifies that corporations, associations, and local governments that are parties in adjudicatory proceedings may appear only by and through lawyers in cases before the IPCB. Such proceedings include petitions for variances and UST reimbursement requests.

Further, in the enforcement section, 35 Ill.Admin. Code §103.204(d), the rules provide that any party that fails to file an answer to a complaint within 60 days is deemed to have admitted the material allegations. Additionally, a party's failure to respond to requests to admit in a sworn statement within 28 days results in the facts requested being admitted as true under 35 Ill.Admin. Code §101.618(c).

The rules also contain procedures in 35 Ill.Admin. Code, Part 107, for appeal of pollution control facility siting decisions by siting applicants and other persons who were physically present at and participated in the public hearings and were adversely affected by the decisions (35 Ill.Admin. Code §107.200). Formerly, the IPCB could reverse the siting decision only if the local government's decision was against the manifest weight of the evidence, the proceeding lacked fundamental fairness, or the local siting authority did not have jurisdiction. The rules also contain changes to the administrative citation procedures to include a provision that persons who lose their citation appeals will be subject to costs that could exceed the amount of the statutory fine (\$500). See 35 Ill.Admin. Code §108, Subpart E.

## **B. [12.61] Liability for Release or Threatened Release of Hazardous Substances**

Section 107 of CERCLA and §22.2 of the Environmental Protection Act impose liability for the cost of removal or remedial action incurred as a result of the release or threat of release of a hazardous substance. 42 U.S.C. §9607; 415 ILCS 5/22.2. Since §22.2 of the Act is patterned after §107 of CERCLA, CERCLA's liability provisions are discussed below in §12.62.

### **1. [12.62] Liability Under CERCLA**

The plaintiff in a private party action under §107(a) of CERCLA must prove that (a) the defendant is a "covered person" within the meaning of CERCLA; (b) there was a "release" or "threatened release" of a hazardous substance at the facility or vessel; (c) the plaintiff incurred costs because of the release or threatened release; and (d) the plaintiff's response actions were consistent with the National Contingency Plan (40 C.F.R. §300.1, *et seq.*). *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998); *United States v. Petersen Sand & Gravel, Inc.*, 806 F.Supp. 1346 (N.D.Ill. 1992). Liability under CERCLA includes the costs of (a) removal or remedial action; (b) injury, destruction, or loss of natural resources; (c) health assessments; and (d) other necessary response costs. 42 U.S.C. §9607(a).

The parties who are "covered persons" and may be potentially liable under CERCLA include (a) the owner or operator of the facility or vessel; (b) the owner or operator of the facility at the time any hazardous substance was disposed of; (c) generators and other persons who arranged for disposal or treatment of the hazardous substances; and (d) any person who accepted the hazardous substances for transport to disposal or treatment facilities and selected the destination to which the wastes were taken. 42 U.S.C. §9607(a). Courts have long held that CERCLA should be given a broad and liberal construction and should not be narrowly interpreted to limit the liability of responsible parties. *See Petersen Sand & Gravel, supra*. A "de micromis" exception to CERCLA liability applies to persons disposing of and treating less than 110 gallons of liquid or less than 200 gallons of solid waste when at least part of the disposal or treatment occurred before April 1, 2001. 42 U.S.C. §9607(o). CERCLA also exempts residential and small business producers of municipal solid waste. 42 U.S.C. §9607(p).

The statute is silent on the scope of the potentially responsible parties' liability. Courts have concluded that such liability is joint and several and also may be apportioned among the responsible parties when appropriate on a case-by-case basis. *See United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3d Cir. 1992) (liability can be apportioned); *Allied Corp. v. ACME Solvents Reclaiming, Inc.*, 691 F.Supp. 1100 (N.D.Ill. 1988). A finding of liability under CERCLA is strict and without regard to the party's fault or state of mind. *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988). *See also In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 974 F.2d 775 (7th Cir. 1992); *Harley-Davidson, Inc. v. Minstar, Inc.*, 41 F.3d 341 (7th Cir. 1994) (CERCLA liability is strict and does not require proof of negligence or intent).

A variety of parties may potentially be liable under CERCLA, including parent corporations, corporate officers and directors, shareholders, lenders, and successor corporations. The issue of a parent's liability for a subsidiary's actions under CERCLA was addressed by the Supreme Court in 1998 in *United States v. Bestfoods*, 524 U.S. 51, 141 L.Ed.2d 43, 118 S.Ct. 1876 (1998). In *Bestfoods*, the Court held that a parent corporation can be charged with derivative CERCLA liability for its subsidiary's actions when, but only when, the corporate veil may be pierced. *See*

also *BP Amoco Chemical Co. v. Sun Oil Co.*, 200 F.Supp.2d 429 (D.Del. 2002) (in order to state claim for operator liability under CERCLA, plaintiff must allege that parent managed, directed, or controlled operations specifically related to pollution). This finding, however, does not prevent a parent from being held directly liable for its own actions in operating a facility owned by its subsidiary. *United States v. Bestfoods*, *supra*, 118 S.Ct. at 1886.

There is significant disagreement among courts over whether, in enforcing CERCLA's indirect liability, courts should borrow state law or instead apply a federal common law of veil piercing; the Court in *United States v. Bestfoods* acknowledged the conflict but did not address it. Generally, however, this means that the parent will not be liable for the subsidiary's conduct as an operator if it does not misuse the corporate form and control to accomplish wrongful purposes, most notably fraud, on the parent's behalf. 118 S.Ct. at 1885. *See also Bestfoods v. Aerojet-General Corp.*, 173 F.Supp.2d 729 (W.D.Mich. 2001) (acknowledging that Supreme Court did not resolve this issue).

Furthermore, a parent corporation will not be directly liable for the environmental condition of a facility as long as it does not "operate" the facility. Under CERCLA, an operator "must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *United States v. Bestfoods*, *supra*, 118 S.Ct. at 1887. *See also Coeur D'Alene Tribe v. Asarco Inc.*, 280 F.Supp.2d 1094 (D. Idaho 2003). In *Bestfoods v. Aerojet*, *supra*, the Western District of Michigan court considered the issue of direct liability on remand from the Supreme Court. In examining the relationship between the parent and the actual operations of the facility, without relying on the closeness of the relationship between the parent and the subsidiary, the court rejected allegations that the actions of the parent were eccentric under accepted terms of parental oversight. 173 F.Supp.2d at 751. Given the fact that there was no parental control over the facility's production or disposal of waste, the court held that mere interlocking boards with dual officers making policy decisions and supervising the facility was not enough to prove parental CERCLA operator liability. *Id.*

The *United States v. Bestfoods*, *supra*, decision provided clarification that CERCLA did not displace the traditional precepts of limited liability of corporate shareholders. The same holds true for corporate officers and directors. Although direct liability may still be imposed when a person's activities rise to the level of operation, the *United States v. Bestfoods* decision does make it more difficult to establish that a shareholder, officer, or director is directly liable. Proof of common officers and directors, shareholder development of corporate policies and practices, and shareholder approval of financial decisions may no longer suffice to justify the imposition of liability. *See People ex rel. Burris v. C.J.R. Processing, Inc.*, 269 Ill.App.3d 1013, 647 N.E.2d 1035, 207 Ill.Dec. 542 (3d Dist. 1995) (corporate officers may be held liable for their personal involvement or active participation in violation of Environmental Protection Act). *See also People ex rel. Madigan v. Tang*, 346 Ill.App.3d 277, 805 N.E.2d 243, 281 Ill.Dec. 875 (1st Dist. 2004).

A successor corporation may be liable if its predecessor is liable or potentially liable under CERCLA. *Compare Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988) (successor liability imposed on corporations that either merged or consolidated with responsible party corporation), *cert. denied*, 109 S.Ct. 837 (1989), *with Sylvester Brothers Development Co. v. Burlington Northern R.R.*, 772 F.Supp. 443 (D.Minn. 1990), *and Petersen*



*Sand & Gravel, supra* (corporate successor not liable when it did not assume predecessor's liabilities or have fraudulent purpose for incorporating). In *Allied Corp. v. ACME Solvents Reclaiming, Inc.*, 812 F.Supp. 124 (N.D.Ill. 1993), the court granted summary judgment for the defendant Valspar because, although successor corporations may be liable under CERCLA, the asset purchase was neither a de facto merger nor a continuation of the business; most of the officers, directors, shareholders, and personnel were different after the closing, and the successor did not manufacture the same products. In *Maytag Corp. v. Navistar International Transportation Corp.*, 219 F.3d 587 (7th Cir. 2000), the Seventh Circuit ruled that because the Rock Island Railroad was reorganized and not liquidated during bankruptcy, a potential viable entity survived and the corporate successor could be sued under CERCLA. See also *P.R. Mallory & Co. v. American States Insurance Co.*, No. 54C01-0005-CP-00156, 2004 WL 1737489 (Ind.Cir. July 29, 2004) (finding company to be corporate successor when there was sufficient corporate succession to support transfer of liability and rights to successor corporation by operation of law).

The federal government or a private party may bring a CERCLA action. See, e.g., *Allied Corp., supra* (no governmental approval required for private recovery action). In addition, a party has a right to contribution under 42 U.S.C. §9613(f)(1). The United States has statutory authority to settle a person's liability and provide covenants not to sue and de minimis settlements with parties that contributed minimal substances in terms of amount and toxicity. 42 U.S.C. §9622(g). The settlement may be in the form of an administrative order or a judicial consent decree. 42 U.S.C. §9622(g)(4). Moreover, a party that has resolved its CERCLA liability to the United States or a state in an administrative or judicially approved settlement has a defense to liability to non-settling parties for matters addressed in the settlement. See 42 U.S.C. §9613(f)(2). However, in *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 769 (7th Cir. 1994), the court of appeals held that a potentially responsible party (PRP) may seek contribution from a PRP that has settled its CERCLA liability to the USEPA in a consent decree for "matter not addressed" in the consent decree; the settlor is not immune from all contribution claims. See also *NutraSweet Co. v. X-L Engineering Co.*, 227 F.3d 776 (7th Cir. 2000); *Rumpke of Indiana, Inc. v. Cummins Engine Co.*, 107 F.3d 1235 (7th Cir. 1997). In addition, CERCLA precludes a responsible party from divesting itself of liability to a third party, but it does not prevent or outlaw indemnification agreements. *Akzo Coatings, supra*. See also *Harley-Davidson, supra*.

Lender liability under CERCLA was clarified by the Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996 (Asset Conservation Act), Pub.L. No. 104-208, 110 Stat. 3009-462 (codified at 42 U.S.C. §§9601(20), 9607(n), 6991b(h)(9)), which protects secured creditors from incurring CERCLA liability by unintentionally forfeiting their secured creditor exemption and thereby becoming "owners or operators." The Asset Conservation Act was passed in response to the narrow interpretation of the secured creditor exemption taken by the federal courts. See *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990). The Asset Conservation Act adopts the broader approach taken by the USEPA in its lender liability rule, which the D.C. Circuit Court struck down in 1994. National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability Under CERCLA, 57 Fed.Reg. 18,344 (Apr. 29, 1992). See *Kelley ex rel. Michigan Natural Resources Commission v. Tiscornia*, 104 F.3d 361, 1996 U.S.App. LEXIS 33616 at \*\*6 – 7 (6th Cir. Dec. 19, 1996) (citation restricted under Rule 24) ("A comparison of the amendments to CERCLA . . . and the EPA 'lender liability rule' . . . makes it clear that these amendments effectively codify the EPA rule."). A lender that holds indicia of ownership primarily to protect a security interest "without participating in the management" of the facility will be entitled to CERCLA's secured creditor exemption and,

therefore, will not be subject to CERCLA liability. 42 U.S.C. §9601(20)(E)(i). The statute interprets the standard “participate in management” to mean “actually participating in the management or operational affairs of a vessel or facility.” 42 U.S.C. §9601(20)(F)(i)(I). A lender will be deemed to have participated in management, and therefore incur CERCLA liability, if either of two standards is met. First, a lender that exercises decision-making control over the facility’s environmental compliance, such that the lender takes responsibility for the handling or disposal of hazardous substances, shall be considered to participate in management. 42 U.S.C. §9601(20)(F)(ii)(I). Second, a lender shall be considered to participate in management if the person “exercises control at a level comparable to that of a manager.” 42 U.S.C. §9601(20)(F)(ii)(II). This “control” must involve either responsibility for day-to-day decision making for the overall management of the facility, including the function of environmental compliance, or responsibility over all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the facility. *Id.* See also §§12.21 – 12.24 above for a discussion of lender liability.

There are only a limited number of defenses to liability under CERCLA set forth in 42 U.S.C. §9607(b). These provide that liability will not be imposed if a party shows by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by

**(1) an act of God;**

**(2) an act of war;**

**(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned . . . and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or**

**(4) any combination of the foregoing paragraphs. *Id.***

See §12.10 above for a description of the innocent landowner defense. The 2001 brownfields legislation amended CERCLA to provide additional bases to be protected from liability, including a de minimis exception, bona fide purchaser, and contiguous landowner provisions. See §12.19 above.

The United States Supreme Court held in *Key Tronic Corp. v. United States*, 511 U.S. 809, 128 L.Ed.2d 797, 114 S.Ct. 1960 (1994), that litigation-related attorneys’ fees are not recoverable under CERCLA, although a plaintiff may sue for certain other attorneys’ fees. The Court said that attorneys’ fees for legal services incurred in identifying PRPs are recoverable because they are fees for lawyers’ work “closely tied to the actual cleanup” and may constitute a necessary cost of response. 114 S.Ct. at 1967. On the other hand, a plaintiff may not maintain an action for fees for legal services performed in connection with negotiations related to a consent decree or for bringing a cost recovery action under §107 of CERCLA. 114 S.Ct. at 1968.

Whether a plaintiff may bring its claim under the cost recovery provisions of CERCLA §107 or only for contribution under CERCLA §113 can have a significant impact on the burden of proof of allocation, allocation of orphan shares (“orphan shares” include those of insolvent or dissolved responsible parties), equitable defenses, and contribution protection. The Seventh Circuit has held that PRPs are limited to contribution actions under CERCLA §113(f) because they are potentially liable; such PRPs may not maintain §107(a) cost recovery actions. *See Akzo Coatings, supra*. The Seventh Circuit, relying on dicta in *Akzo Coatings*, also allowed “innocent” landowners, who were PRPs by virtue of owning the CERCLA facility, to sue other PRPs under CERCLA §107 in *Rumpke of Indiana, supra*, and *AM International, Inc. v. Datacard Corporation, DBS, Inc.*, 106 F.3d 1342 (7th Cir. 1997). In *Browning-Ferris Industries of Illinois, Inc. v. Ter Maat*, No. 92 C 20259, 1996 U.S. Dist. LEXIS 13891 (N.D.Ill. Sept. 19, 1996), *rev’d on other grounds*, 195 F.3d 953 (7th Cir. 1999), the court held that the third-party plaintiffs were not limited to a §113(f) contribution action because although they were potentially liable parties, they had not admitted liability and had not been found liable. *See also Alcan-Toyo America, Inc. v. Northern Illinois Gas Co.*, 881 F.Supp. 342 (N.D.Ill. 1995); J. Rogers et al., *CERCLA Claims Under Section 107 Versus 113: Uncertain Consequences for Litigants and Settlers*, 31 Chemical Waste Litig.Rep. 1021 (1996).

## **2. [12.63] Liability Under Illinois Law**

Section 22.2(f) of the Environmental Protection Act is patterned after CERCLA. *See People v. NL Industries*, 152 Ill.2d 82, 604 N.E.2d 349, 178 Ill.Dec. 93 (1992). Section 22.2(f) provides that the following persons shall be liable for all costs of removal or remedial action incurred by the State of Illinois or any unit of local government:

**(1) the owner and operator of a facility or vessel from which there is a release or substantial threat of release of a hazardous substance or pesticide;**

**(2) [the owner or operator of the] facility or vessel used for such disposal, transport, treatment or storage from which there was a release or substantial threat of a release of any such hazardous substance or pesticide;**

**(3) any person who by contract, agreement, or otherwise has arranged . . . for transport, storage, disposal or treatment of hazardous substances or pesticides . . . and**

**(4) any person who accepts or accepted any hazardous substances or pesticides for transport to disposal, storage or treatment facilities or sites from which there is a release or a substantial threat of a release of a hazardous substance or pesticide.**  
415 ILCS 5/22.2(f).

“Owner or operator” is defined differently under CERCLA and the Environmental Protection Act. Compare 42 U.S.C. §9601(20) with 415 ILCS 5/22.2(h)(2). Illinois specifically excludes from liability land trustees and other fiduciaries that do not manage the facility. 415 ILCS 5/22(h). See §§12.21 – 12.24 above for a discussion of lender liability under the Environmental Protection Act. Also, the term “owner or operator” under the Illinois statute excludes natural persons who own single-family residential property of one to four dwelling units unless the person owns more than ten dwelling units in Illinois or the owner, agent, representative, contractor, or employee has caused, contributed to, or allowed the release or threatened release of

the hazardous substance or pesticide. 415 ILCS 5/22.2(h)(2)(F). In addition, the “owner or operator” of an abandoned facility is the person who currently owns or operates it or “who owned, operated, or otherwise controlled activities at the abandoned facility immediately prior to such abandonment.” 415 ILCS 5/22.2(h)(2)(B).

Section 22.2(j)(1) of the Environmental Protection Act provides defenses parallel to those of §107(b) of CERCLA. Under §22.2(j)(1), there shall be no liability when a party shows by a preponderance of the evidence that the release or substantial threat of release of a hazardous substance and the resulting damages were caused solely by an act of God, an act of war, or an act or omission of a third party other than an employee or agent of the defendant or one whose act or omission occurs in connection with a contractual relationship existing directly or indirectly with the defendant. See §12.10 above for a discussion of the innocent landowner defense. In addition, as discussed in §12.64 below, in 1996 Illinois replaced strict joint and several liability under the Environmental Protection Act with proportionate liability.

Both the Attorney General and the state’s attorney may file a state cost recovery action on behalf of the state either in the circuit court or before the IPCB, which have concurrent jurisdiction. See *NL Industries, supra*. Illinois also has provisions for de minimis settlements and covenants not to sue. 415 ILCS 5/22.2a(a), 5/22.2a(b).

Unlike CERCLA, there is no private cause of action to recover costs under the Environmental Protection Act; there is the general right of citizens, however, to file a complaint with the IPCB against a person who violates the Act. See 415 ILCS 5/31(b). In fact, the IPCB has held that past costs of remediation may be recovered in such an action. *Lake County Forest Preserve District v. Ostro*, PCB 92-80 (Mar. 31, 1994); *Malina v. Day*, PCB 98-54, 1998 Ill. ENV LEXIS 28 (Jan. 22, 1998). This is significant because it helps fill the void left by RCRA private cost recovery cases denying recovery of past costs and only allowing injunctive relief. See *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 134 L.Ed.2d 121, 116 S.Ct. 1251 (1996).

A defendant may bring a third-party action in contribution or indemnification, including under §45 of the Environmental Protection Act (415 ILCS 5/45(d)) or under the Joint Tortfeasor Contribution Act (Contribution Act), 740 ILCS 100/0.01, *et seq.* See *People v. Brockman*, 143 Ill.2d 351, 574 N.E.2d 626, 158 Ill.Dec. 513 (1991). However, in *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610 (7th Cir. 1998), the Seventh Circuit denied PMC the ability to obtain contribution under the Contribution Act for past costs incurred that it also, but unsuccessfully, sought under CERCLA. These costs were not incurred consistent with the National Contingency Plan. According to the court, “When the [National Contingency Plan] requirement is flouted, contribution is denied; that is the sanction for the violation.” 151 F.3d at 618.

a. [12.64] *Proportionate Liability*

In 1996, the Illinois legislature replaced strict joint and several liability under the Environmental Protection Act with proportionate liability. See 415 ILCS 5/58.9. See also *People v. State Oil Co.*, PCB 97-103, 2003 Ill. ENV LEXIS 148 (Mar. 20, 2003). Accordingly, a person is not liable for remedial action or costs of remediation more than “may be attributed to being proximately caused by such person’s act or omission or beyond such person’s proportionate degree of responsibility.” 415 ILCS 5/58.9(a)(1). For remedial actions, moreover, a person is

liable only if he or she was a “material” cause of or contributed “in any material respect” to the release. 415 ILCS 5/58.9(a)(2)(A).

In addition to limiting the liability of persons who neither caused nor contributed to a release in any material respect, the section limits the liability of landlords, the state, units of local government, financial institutions, and corporate fiduciaries for releases caused by others. Landlords are not liable if they do not know, and could not have reasonably known, of the acts or omissions of a tenant that did, or was likely to, cause or contribute to a release. 415 ILCS 5/58.9(a)(2)(B) – 5/58.9(a)(2)(E). Corporate fiduciaries that acquire ownership, operation, management, or control through acceptance of a fiduciary appointment are liable if they “directly” cause a release of a regulated substance, but not otherwise. 415 ILCS 5/58.9(a)(2)(F). The state or a unit of local government may be liable if it takes possession of the site and exercises “actual, direct, and continual or recurrent managerial control in the operation of the site that causes a release or substantial threat of a release,” but is not liable merely by virtue of involuntarily or voluntarily acquiring property that causes a release or threat of a release. 415 ILCS 5/58.9(a)(2)(C), 5/58.9(a)(2)(D).

The IPCB adopted rules and procedures for determining proportionate liability based on the degree to which a person directly caused or contributed to a release of regulated substances. See 35 Ill.Admin. Code, Part 741. With respect to other actions brought under Illinois law, §2-1118 of the Code of Civil Procedure, 735 ILCS 5/2-1118, provides joint and several liability for injuries or damages caused by the discharge of any pollutant into the atmosphere. Thus, a common law action for nuisance or negligence subjects defendants to joint and several liability.

*b. [12.65] Agrichemical Facilities*

There is a release from state liability under §22.2(f) of the Environmental Protection Act for response costs or damages that result from a release of a pesticide from an agrichemical facility site if the IEPA has received notice from the Department of Agriculture and the owner or operator of the agrichemical facility is proceeding with a corrective action plan under the Agrichemical Facility Response Action Program (Agrichemical Response Program) at 415 ILCS 60/19.3, *et seq.* See 415 ILCS 5/22.2(j)(4.6).

The Department of Agriculture and the IEPA have potentially overlapping jurisdiction over agrichemical facilities in Illinois. The Department of Agriculture has the duty to enforce the Illinois Pesticide Act, 415 ILCS 60/1, *et seq.*, including “the registration, purchase, use, storage and disposal of pesticides.” 415 ILCS 60/3(1). The IEPA also has jurisdiction over those aspects of the Pesticide Act and the Environmental Protection Act “intended to protect and preserve the quality of air, water, and guard against unreasonable contamination of land resources.” 415 ILCS 60/3(3). The overlapping jurisdiction extends to implementation of the Agrichemical Response Program.

The Agrichemical Response Program was established to “reduce potential agrichemical pollution and minimize environmental degradation risk” at sites where agricultural pesticides are stored or handled (or both) in preparation for end use (agrichemical facilities). 415 ILCS 60/19.3(a). The Agrichemical Response Program provides guidance for assessing the threat of soil pesticide contaminants to groundwater at agrichemical facilities, recommending which sites need to establish a voluntary corrective action program, and establishing site-specific soil cleanup

objectives, but the program does not apply to basic manufacturing or central distribution sites used only for wholesale purposes. *Id.*

An Agrichemical Facility Response Action Program Board (Agrichemical Board) consists mainly of persons related to the agrichemical industry and end users (farmers) and assists in managing the Agrichemical Response Program. 415 ILCS 60/19.3(b). The Agrichemical Board is granted the authority to review and give final approval to each agrichemical facility corrective action plan. 415 ILCS60/19.3(c). In addition, the Agrichemical Board may recommend to the Department of Agriculture that the corrective action has been completed and that the Department should issue a notice of closure; if remedial action is not required, the Agrichemical Board may recommend to the Department that it issue a notice of closure that states that no further remedial action is required to remedy the past pesticide contamination. *Id.*

The scope of the corrective action under the Agrichemical Response Program, however, is limited to the soil pesticide contamination present at the site, unless the implementation of the plan is coordinated with the IEPA. 415 ILCS 60/19.3(f). If groundwater is included in the corrective action plan, the Department of Agriculture must notify the IEPA, the IEPA must review the plan jointly with the Department, and the IEPA must provide a written endorsement of the plan. *Id.* The IEPA may approve a groundwater management zone for impairment mitigation results for up to five years. *Id.* Both the Department and the IEPA provide remedial project oversight, monitor remedial work progress, and report to the Agrichemical Board on the status of the remedial project. Upon completion of the corrective action plan and recommendation of the Agrichemical Board, however, it is the Department of Agriculture that issues the no further action notice. *Id.*

An Agrichemical Incident Response Trust Fund was established to pay, inter alia, for the costs of response action incurred by owners or operators of agrichemical facilities pursuant to 415 ILCS 60/22.3 and for the Department of Agriculture to take emergency action in response to a release of agricultural pesticides from an agrichemical facility that has created an imminent threat to public health or the environment. 415 ILCS 60/22.2.

*c. [12.66] Dry-Cleaning Facilities*

The Drycleaner Environmental Response Trust Fund Act (Drycleaner Act), 415 ILCS 135/1, *et seq.*, was created to support remediation of dry-cleaning solvent releases at dry-cleaning facilities. See also Office of the Comptroller, State of Illinois, ILLINOIS DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES 2003, p. 432, available online at [www.ioc.state.il.us](http://www.ioc.state.il.us) (showing that over \$5.9 million was appropriated to the fund for the 2003 fiscal year). The Drycleaner Act applies to facilities in Illinois that are or have been engaged in dry-cleaning operations for the public other than U.S. military facilities, laundries, linen supply facilities, prisons and penal institutions, not-for-profit hospitals or health care facilities, and facilities located or formerly located on federal or state property. 415 ILCS 135/5(f).

The Drycleaner Act establishes a reimbursement program for remediation of existing releases and an insurance program for reimbursement for remediation of future releases. 415 ILCS 135/10. The Drycleaner Act also sets a quantity-based dry-cleaning solvent fee that is imposed on persons who sell and transfer dry-cleaning solvents to persons operating dry-cleaning facilities. 415 ILCS 135/65.

The Drycleaner Act creates the Drycleaner Environmental Response Trust Fund Council (Drycleaner Council) to administer the Drycleaner Act. 415 ILCS 135/15. The Drycleaner Council is empowered to establish rules and regulations for implementation of the Drycleaner Act program, including reimbursement from the Drycleaner Environmental Response Trust Fund, activation of the program of insurance to support the trust fund, record-retention requirements for owners and operators, appeal procedures for affected parties, and licensing of dry-cleaning facilities. The Drycleaner Council may promulgate emergency rules for up to one year and thereafter shall conduct general rulemaking under the Illinois Administrative Procedures Act. 415 ILCS 135/20.

The Drycleaner Council also has the power to seek recovery from a potentially responsible party for costs incurred by the Drycleaner Trust Fund in connection with a release that is subject to the Drycleaner Act, including reasonable attorneys' fees and costs. 415 ILCS 135/50. Although the Drycleaner Council's right to seek recovery does not affect a cause of action under §22.2 of the Environmental Protection Act, an award or reimbursement by the Council is a claimant's exclusive method for the recovery of costs of remediation of the dry-cleaning facility. 415 ILCS 135/55(a).

Appeal from a final decision of the Drycleaner Council, such as denial of reimbursement from the Drycleaner Trust Fund, is to the Council's administrative hearing officer, and the decision of the Council's hearing officer, in turn, is appealable pursuant to the Illinois Administrative Review Law. 415 ILCS 135/20(g).

Only certain persons are eligible for reimbursement from the Drycleaner Trust Fund. Owners and operators of active dry-cleaning facilities licensed by the Drycleaner Council at the time of application to the Drycleaner Trust Fund are eligible for reimbursement only of remedial action costs incurred in connection with a release from a licensed dry-cleaning facility. 415 ILCS 135/40(b)(1). Owners of inactive dry-cleaning facilities who also owned them when they were active facilities are eligible for reimbursement only of remedial action costs incurred in connection with a release from a dry-cleaning facility that was active when it was owned by the claimant. 415 ILCS 135/40(b)(2). Thus, neither a person who purchases a dry-cleaning facility after it is closed nor a person who owns an unlicensed dry-cleaning facility is eligible for reimbursement from the Drycleaner Trust Fund.

A claimant who demonstrates eligibility for reimbursement (415 ILCS 135/40(c)) may be reimbursed from the Drycleaner Trust Fund for dry-cleaning solvent investigation, remedial action planning, and remediation of dry-cleaning solvent contamination at the dry-cleaning facility (415 ILCS 135/40(a)). The claim is subject to a deductible (unless modified by the Drycleaner Council). 415 ILCS 135/40(e). The remedial action must be conducted in accordance with the SRP under the Environmental Protection Act, 35 Ill.Admin. Code, Part 740, and the TACO regulations at 35 Ill.Admin. Code, Part 742. 415 ILCS 135/40(i).

With respect to protection for future releases, the Drycleaner Act establishes an insurance program under which the owner or operator of a dry-cleaning facility may purchase up to \$500,000 of coverage for remedial action costs associated with soil and groundwater contamination resulting from a release of dry-cleaning solvent at an insured dry-cleaning facility, including insurance for third-party liability for soil and groundwater contamination. 415 ILCS

135/45(c). The owner or operator may purchase the insurance, however, only if he or she completes a site investigation by June 30, 2006, and participates in and meets all requirements of a dry-cleaning compliance program approved by the Drycleaner Council. 415 ILCS 135/45(d).

*d. [12.67] Illinois Municipal Laws*

Corporate authorities of a municipality may remediate hazardous substances on, in, or under any abandoned and unsafe property within the municipality's territory. 65 ILCS 5/11-31-1(f). The municipality also may inspect and test the property (including the soil and groundwater) if the preliminary evidence indicates the presence or likely presence of a hazardous substance or a release or substantial threat of a release of a hazardous substance on, in, or under the abandoned property. *Id.* Any county that has a health department may exercise the same powers within the county or any city, village, or incorporated town with a population of fewer than 50,000. *Id.*

Property is "abandoned" if it has been tax delinquent for two or more years and is unoccupied by persons with legal possession. In addition, the property is "unsafe" if it presents an "actual or imminent threat to public health and safety caused by the release of hazardous substances." *Id.*

Before entering the property for the purpose of inspection, testing, or remediation, the municipality or county must obtain an order that allows such activity from the circuit court of the county in which the property is located. *Id.* Not only will the court expedite the hearing on an application for remediation, but the hearing takes precedence over all other suits if the testing of the property indicates that it fails to meet the applicable remediation objectives for the property's most recent usage. The remediation is complete when the property satisfies the Tier I, Tier II, or Tier III remediation objectives under the TACO regulations for the property's most recent usage. *Id.* See §12.18 above.

The municipality or county has a lien on the property for the costs of inspection, testing, and remediation, including court costs and attorneys' fees, if hazardous substances that present an imminent threat to human public health and safety are present on the property. The lien is assignable.

If the municipality or county files a notice of lien within 180 days after completion of the inspection, testing, or remediation, the lien is superior to all other liens, except liens for taxes, for the demolition, repair, or enclosure of unsafe and dangerous buildings, and for the removal of unsafe substances from buildings under §§11-31-1(a) and 11-31-1(e). The lien may be enforced in a mortgage foreclosure action, a mechanics lien foreclosure action, or a foreclosure action under §11-31-1(c). See 65 ILCS 5/11-31-1(f). The foreclosure action may be commenced at any time after the municipality or county files the notice of lien. The municipality or county may not proceed against other assets of the owner of the real estate for costs that remain unsatisfied after the foreclosure procedure, however, unless the additional recovery is authorized by separate environmental laws. *Id.*

**C. [12.68] Citizen Enforcement Actions**

Citizen suit provisions authorize private citizens and entities to act as private attorneys general to compel compliance with environmental laws. Because of public access to various environmental reports that reveal violations, these suits are increasingly commonplace. Citizen



suits can be maintained under the CWA (33 U.S.C. §1365(a)(1)), RCRA (42 U.S.C. §6972(a)(1)(A)), the CAA (42 U.S.C. §7604(a)(1)), the TSCA, and CERCLA.

The CWA, RCRA, the CAA, and CERCLA authorize citizens to sue other persons, the United States, and any other governmental unit for violations to the extent permitted by the Eleventh Amendment to the Constitution. Any party bringing an action must have standing. In order to have standing, (1) the plaintiff must have suffered an injury in fact; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely (as opposed to speculative) that the injury will be redressed by a favorable decision. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 140 L.Ed.2d 210, 118 S.Ct. 1003 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 119 L.Ed.2d 351, 112 S.Ct. 2130 (1992). The Supreme Court in *Sierra Club v. Morton*, 405 U.S. 727, 31 L.Ed.2d 636, 92 S.Ct. 1361 (1972), said that harm to aesthetic or environmental interests may be sufficient to confer standing if the party seeking review is among the injured. The statutes also provide that giving notice to certain parties is a prerequisite to filing citizen suits.

### **1. [12.69] Clean Water Act**

Pursuant to §505 of the CWA, any citizen may commence an action on his or her own behalf against any person who is alleged to be in violation of an effluent standard or limitation or an order issued by the USEPA Administrator or a state with respect to such a standard or limitation. 33 U.S.C. §1365(a)(1). *See York Center Park District v. Krilich*, 40 F.3d 205 (7th Cir. 1994). A citizen also may sue the Administrator of the USEPA for failure to perform a non-discretionary act or duty. 33 U.S.C. §1365(a)(2). To compel future compliance with the CWA, a district court may prescribe injunctive relief in a citizen suit; additionally or alternatively, the court may impose civil penalties payable to the U.S. Treasury. 33 U.S.C. §1365(a); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 145 L.Ed.2d 610, 120 S.Ct. 693 (2000).

Section 505(b)(1) of the CWA prohibits the commencement of a citizen suit against an alleged violator of a CWA standard or order (a) if the action is commenced prior to 60 days after the plaintiff has given notice of the alleged violation or (b) if the Administrator or state has commenced and is diligently prosecuting a civil or criminal action in a court to require compliance. 33 U.S.C. §1365(b)(1). The court may award the costs of litigation, including attorneys' and experts' fees, to a "prevailing or substantially prevailing party." 33 U.S.C. §1365(d).

### **2. [12.70] Resource Conservation and Recovery Act**

Section 7002 of RCRA provides for three types of citizen actions. First, §7002(a)(1)(A) provides that any person may commence an action against any other person "who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective [under the Act]." 42 U.S.C. §6972(a)(1)(A). Second, any person may commence an action against another person "who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. §6972(a)(1)(B). Third, any person may commence an action "against

the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary.” 42 U.S.C. §6972(a)(2).

District courts have jurisdiction over these actions without regard to the amount in controversy or the citizenship of the parties. Citizens may sue for injunctive relief or for an order compelling the USEPA to exercise its authority, and the court may award any appropriate civil penalties. 42 U.S.C. §6972(a). The court also may award litigation costs (including reasonable attorneys’ and expert witness’ fees) to a substantially prevailing party. 42 U.S.C. §6972(e). RCRA differs from CERCLA in that it does not authorize a private cause of action to recover the past costs of cleaning up hazardous wastes. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 134 L.Ed.2d 121, 116 S.Ct. 1251 (1996).

Citizens who sue under §7002(a)(1)(A) must allege that the person is in violation of RCRA, though §7002(a)(1)(A) bars an action for wholly past violations of RCRA. *Harris Bank Hinsdale, N.A. v. Suburban Lawn, Inc.*, No. 92 C 6814, 1992 U.S. Dist. LEXIS (N.D.Ill. Dec. 22, 1992). Injunctive relief for violation of §7002 (a)(1)(B), however, can be based on either past or present violations. *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988); *Harris Bank, supra*; *Meghrig, supra*.

Pursuant to §7002(b), notice must be given before commencing a citizen action under §7002(a)(1)(A) (60 days) or §7002(a)(1)(B) (90 days) of RCRA. 42 U.S.C. §§6972(b)(1)(A), 6972(b)(2)(A). The notice requirement is jurisdictional, and it is a prerequisite to filing a citizen suit. *Hallstrom v. Tillamook County*, 493 U.S. 20, 107 L.Ed.2d 237, 110 S.Ct. 304 (1989).

### 3. [12.71] Clean Air Act

Section 304 of the CAA provides for three types of citizen suits. First, any person may commence a civil action against another person

**who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.** 42 U.S.C. §7604(a)(1).

Second, any person may commence a civil action

**against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.** 42 U.S.C. §7604(a)(2).

Third, any person may commence a civil action against another person

**who proposes to construct or constructs any new or modified major emitting facility without a permit [as specified in the statute].** 42 U.S.C. §7604(a)(3).

District courts have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce an emission standard or limitation, or such an order, or to order the USEPA Administrator to perform such act or duty. 42 U.S.C. §7604(a).

Pursuant to §304(b), notice must be given 60 days prior to commencing an action. Under the CAA, citizen suits may seek both civil penalties and injunctive relief. 42 U.S.C. §7604(g). The court may award to any party costs of litigation, including reasonable attorneys' and expert witness' fees. 42 U.S.C. §7604(d).

#### **4. [12.72] CERCLA**

Section 310(a) of CERCLA authorizes any person to commence a civil action on his or her own behalf against (a) any person (including the United States) who is alleged to be in violation of any standard, regulation, condition, requirement, or order under CERCLA; or (b) the President or other officer of the United States (including the USEPA Administrator) for an alleged failure to perform any non-discretionary act or duty under CERCLA. 42 U.S.C. §9659(a). The plaintiff must provide 60 days' notice prior to commencing the action and must provide copies of the complaint to the Attorney General of the United States and the Administrator of the USEPA. 40 C.F.R. §§374.4 – 374.5.

A district court held on a motion for judgment on the pleadings that the term "violation" in the citizen suit provision of CERCLA (42 U.S.C. §9659(a)(1)) does not include the USEPA's failure to perform its duties as administrator of CERCLA. *Battaglia v. Browner*, 963 F.Supp. 689 (N.D.Ill. 1997). The alleged violation was that the USEPA had refused to remove the plaintiffs' property from the CERCLA information list (see 40 C.F.R. §300.5); the plaintiffs alleged that there was no basis for including the property on the list.

#### **5. [12.73] EPCRA**

Pursuant to §326(a)(1) of EPCRA any person may commence a civil action on his or her own behalf under several circumstances. 42 U.S.C. §11046(a)(1). A suit may be commenced against an owner or operator of a facility for failure to (a) submit a follow-up emergency notice, (b) submit a material safety data sheet, (c) complete and submit an inventory form, or (d) complete and submit a toxic chemical release form. 42 U.S.C. §11046(a)(1)(A).

A citizen may commence a civil action against the USEPA Administrator for failure to

- a. publish inventory forms;
- b. respond to a petition to add or delete a chemical within 180 days after receipt of the petition;
- c. publish a toxic chemical release form;
- d. establish a computer database;
- e. promulgate trade secret regulations; or
- f. render a decision in response to a petition within nine months after receipt of the petition. 42 U.S.C. §11046(a)(1)(B).

Additionally, a suit may be commenced against the Administrator, a state governor, or a state emergency response team for failure to provide a mechanism for public availability of information. 42 U.S.C. §11046(a)(1)(C). Any person may commence a civil action against a state governor or state emergency response commission for failure to respond to a request for Tier II information within 120 days of receipt of such request. 42 U.S.C. §11046(a)(1)(D).

No civil action under EPCRA may be commenced prior to 60 days after the plaintiff has given notice to the alleged violator. 42 U.S.C. §11046(d)(1). Furthermore, no action may be commenced against an owner or operator of a facility if the Administrator has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned or impose a civil penalty under EPCRA. 42 U.S.C. §11046(e). District courts have jurisdiction to hear EPCRA civil claims to enforce the requirement concerned and impose any civil penalty and to order the Administrator to perform the act concerned. 42 U.S.C. §§11046(b), 11046(c). The court may award costs of litigation, including reasonable attorneys' and expert witness' fees. 42 U.S.C. §11046(f).

In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 140 L.Ed.2d 210, 118 S.Ct. 1003 (1998), the Court held that an environmental group did not have standing to sue for past violations under the citizen suit provision of EPCRA, 42 U.S.C. §11001, *et seq.* By the time the environmental organization filed its complaint, the violator had received the 60-day notice of the organization's intent to sue and had filed its inventory and toxic chemical release forms, although after the statutory deadline. *Id.* The Court, finding the Article III jurisdictional barrier too large, declined to address the issue of whether EPCRA authorizes citizen suits for wholly past violations on the merits. *Id.*

#### **D. [12.74] Common Law Liability**

The Environmental Protection Act does not preempt otherwise available common law causes of action. *City of Monmouth v. PCB*, 57 Ill.2d 482, 313 N.E.2d 161 (1974); 415 ILCS 5/45(a). Rather, the Act provides remedies that are "in addition to those remedies recognized by the common law." 313 N.E.2d at 163. Accordingly, common law actions such as (1) nuisance, (2) trespass, (3) strict liability, and (4) negligence provide a basis for environmental liability. However, in *NBD Bank v. Krueger Ringier, Inc.*, 292 Ill.App.3d 691, 686 N.E.2d 704, 226 Ill.Dec. 921 (1st Dist. 1997), *appeal denied*, 176 Ill.2d 576 (1998), the First District Appellate Court found that the economic loss doctrine barred a purchaser's tort claims for costs incurred in investigating and remediating contaminated property brought against the seller. The court stated that the suit was an attempt to recover "diminished commercial expectations" and that contract law and the Uniform Commercial Code, not tort law, provided the appropriate remedy for such economic losses. 686 N.E.2d at 708.

##### **1. [12.75] Nuisance and Continuing Nuisance**

A cause of action for nuisance may impose environmental liability for damages to land, air, or water that were caused by a person or his or her acts. An action for nuisance may be maintained on a theory that the nuisance is private or public. A private nuisance is a negligent, intentional, or unreasonable invasion of another's interest in the private use and enjoyment of his or her land. *Carroll v. Hurst*, 103 Ill.App.3d 984, 431 N.E.2d 1344, 59 Ill.Dec. 587 (4th Dist.

1982). The issue regarding whether use of one's property is unreasonable is determined by weighing the following factors:

- a. the extent of the harm involved;
- b. the character of the harm involved;
- c. the social value that the law attaches to the type of use or enjoyment invaded;
- d. the suitability of the particular use or enjoyment invaded to the character of the locality;  
and
- e. the burden on the person harmed of avoiding the harm. *Great Atlantic & Pacific Tea Co. v. LaSalle National Bank*, 77 Ill.App.3d 478, 395 N.E.2d 1193, 1198 – 199, 32 Ill.Dec. 812 (1st Dist. 1979) (citing RESTATEMENT (SECOND) OF TORTS §827 (1979)).

When considering nuisance actions, state courts need not defer to the IEPA or the USEPA. *See Village of Wilsonville v. SCA Services, Inc.*, 86 Ill.2d 1, 426 N.E.2d 824, 55 Ill.Dec. 499 (1981); *Donaldson v. Central Illinois Public Service Co.*, 313 Ill.App.3d 1061, 730 N.E.2d 68, 246 Ill.Dec. 388 (5th Dist. 2000) (Illinois nuisance law is not preempted by state or federal environmental regulatory laws). In *NutraSweet Co. v. X-L Engineering Corp.*, 933 F.Supp. 1409 (N.D.Ill. 1996) (applying Illinois law), *aff'd*, 277 F.3d 776 (7th Cir. 2000), the defendant's dumping of volatile organic compounds (VOCs) into the soil, which eventually got into the groundwater under the plaintiff's property, was an invasion for purposes of a private nuisance action.

“A public nuisance is an unreasonable interference with a right common to the general public,” such as a business' alleged interference with the right to clean air. *City of Chicago v. Commonwealth Edison Co.*, 24 Ill.App.3d 624, 321 N.E.2d 412, 418 (1st Dist. 1974). The facts of each case determine whether a public nuisance exists because of smoke, odors, dust, or gaseous fumes. To determine whether a right has been invaded, courts consider (a) the extent of injury or harm incurred to the public health, safety, peace, or comfort; (b) the extent that the operation's methods or effects comply with standards outlined by applicable federal, state, or local regulations; (c) the suitability of the industry's location; and (d) the gravity of harm done to the public compared with the utility of the business to the community. 321 N.E.2d at 418.

Each invasion on the land of another creates a fresh nuisance. Hence, an action for nuisance may be maintained for the creation of the nuisance, and a separate action may be maintained for the continuance of the nuisance. A cause of action can be maintained for a continuing nuisance regardless of a subsequent buyer's actual or constructive notice of the nuisance. *See Admiral Builders Corp. v. Robert Hall Village*, 101 Ill.App.3d 132, 427 N.E.2d 1032, 56 Ill.Dec. 627 (1st Dist. 1981). Accordingly, a person who creates a nuisance and/or a person who continues or maintains a nuisance created by another may be liable for the damage caused.

A “nuisance is remediable by injunction or a suit for damages.” *Wilsonville, supra*, 426 N.E.2d at 834 (affirming permanent injunction against operator of chemical waste disposal site). The type and measure of damages depends on whether the nuisance is permanent or temporary. *See Tamalunis v. City of Georgetown*, 185 Ill.App.3d 173, 542 N.E.2d 402, 134 Ill.Dec. 223 (4th Dist. 1989). The measure of damages for a permanent nuisance is the depreciation in the market

value of the property injured. In contrast, the measure of damages for a temporary nuisance includes the “personal inconvenience, annoyance, and discomfort suffered on account of the nuisance.” 542 N.E.2d at 410.

## 2. [12.76] Trespass and Continuing Trespass

An action for trespass may be maintained when a thing or a third person enters the land of another through a negligent or intentional act. *Dial v. City of O’Fallon*, 81 Ill.2d 548, 411 N.E.2d 217, 44 Ill.Dec. 248 (1980). An intentional intrusion requires a high degree of certainty that an intrusion of another’s property will result from the act. Liability for intentional trespass may be imposed irrespective of any harm. If an invasion on the land of another was negligent or reckless, liability may be imposed if harm is caused to a legally protected interest. *See also Meyers v. Kissner*, 149 Ill.2d 1, 594 N.E.2d 336, 171 Ill.Dec. 484 (1992) (Illinois recognizes cause of action for continuing trespass).

In *NutraSweet Co. v. X-L Engineering Corp.*, 933 F.Supp. 1409 (N.D.Ill. 1996), the court held that a trespass occurred when VOCs seeped into the groundwater and made their way to the plaintiff’s property. Significantly, the court said that the entry of the contaminants in the groundwater onto the plaintiff’s property was a violation of CERCLA and, therefore, was unlawful. Accordingly, the court granted summary judgment in favor of the plaintiff on the trespass count.

## 3. [12.77] Strict Liability

A cause of action for strict liability may be pled when damages result from unreasonably dangerous defective products or ultra-hazardous activities. Illinois has long recognized strict liability for damages caused by engaging in an ultra-hazardous activity. The term “ultra-hazardous” means dangerous in its normal or non-defective state. *Fallon v. Indian Trail School*, 148 Ill.App.3d 931, 500 N.E.2d 101, 102 Ill.Dec. 479 (2d Dist. 1986). In *City of Joliet v. Harwood*, 86 Ill. 110 (1877), the Illinois Supreme Court held that blasting was intrinsically dangerous and gave rise to strict liability for the blaster. A similar result was reached in *Opal v. Material Service Corp.*, 9 Ill.App.2d 433, 133 N.E.2d 733 (1st Dist. 1956), and *Fitzsimons & Connell Co. v. Braun & Fitts*, 199 Ill. 390, 65 N.E. 249 (1902), *overruled on other grounds sub nom. Peck v. Chicago Rys.*, 270 Ill. 34 (1915). Likewise, the Northern District of Illinois held that shipping acrylonitrile was an ultra-hazardous activity that subjected the shipper to strict liability under Illinois law. *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 517 F.Supp. 314 (N.D.Ill. 1981).

In *Ganton Technologies, Inc. v. Quadion Corp.*, 834 F.Supp. 1018 (N.D.Ill. 1993), the court held that the cleanup of PCBs from an industrial site is not an abnormally dangerous activity that warrants the application of strict liability under Illinois law. In addition, the Seventh Circuit Court of Appeals held in *G.J. Leasing Co. v. Union Electric Co.*, 54 F.3d 379 (7th Cir. 1995), that the seller of a building that contained asbestos was not strictly liable for the release of asbestos fibers into the air after it sold the building. The court also said that the ownership or operation of a building that contains asbestos insulation is not an abnormally hazardous activity. 54 F.3d at 386 – 387. *See also Hammond v. North American Asbestos Corp.*, 97 Ill.2d 195, 454 N.E.2d 210, 73 Ill.Dec. 350 (1983) (there may be cause of action for strict liability for personal injury caused by hazardous materials). *But see Traube v. Freund*, 333 Ill.App.3d 198, 775 N.E.2d 212, 266 Ill.Dec.

650 (5th Dist. 2002) (“ultrahazardous” and “abnormally dangerous” do not include danger that arises from mere casual or collateral negligence of others with respect to it under particular circumstances).

#### **4. [12.78] Negligence**

A cause of action for negligence may exist when there is personal injury or property damage. For example, in *Board of Education of City of Chicago v. A, C & S, Inc.*, 131 Ill.2d 428, 546 N.E.2d 580, 137 Ill.Dec. 635 (1989), negligence was pled for buildings contaminated with asbestos, allegedly rendering the buildings unsafe.

“To state a cause [of action] for negligence, a complaint must allege facts sufficient to show the existence of a duty, a breach of that duty, and injury to the plaintiff which is proximately caused by that breach.” *Gouge v. Central Illinois Public Service Co.*, 144 Ill.2d 535, 582 N.E.2d 108, 111, 163 Ill.Dec. 842 (1991). Whether a duty exists is a question of law and depends on the relationship of the parties. In determining whether a duty exists, a court weighs the “foreseeability of the injury, the likelihood of the injury, the magnitude of the burden of guarding against it and the consequences of placing that burden on the defendant.” 582 N.E.2d at 112. A plaintiff may also establish a duty if a defendant violated a statute or rule, such as an environmental one, designed to protect human life or property, if the plaintiff shows that (a) the violation proximately caused the injury, (b) the plaintiff belonged to the class of persons whom the rule was intended to protect from injury, and (c) the kind of injury suffered by the plaintiff was the kind of injury that the rule sought to prevent. *Id.*

In *NutraSweet Co. v. X-L Engineering Corp.*, 933 F.Supp. 1409 (N.D.Ill. 1996), the court held that the defendant had a duty not to contaminate the environment. The defendant’s violation of CERCLA established both that it had breached the duty of care owed to the plaintiff (a neighboring corporation whose land was polluted by toxic chemicals that migrated from the defendant’s property) and the proximate causation element of negligence. 933 F.Supp. at 1423. In addition, the plaintiff was injured because it had to incur investigation and remediation costs to remove the VOCs from its land. Thus, the court granted summary judgment in favor of the plaintiff on the negligence count. The court dismissed the sole shareholder and corporate officer, however, because he had not participated in the negligent acts of the employee who dumped the VOCs. 933 F.Supp. at 1424.

#### **E. [12.79] Protecting Environmental Reports from Discovery**

The attorney-client privilege and work product doctrine can be used to protect environmental data or audits from discovery. The concepts are fundamentally distinct in their application: “The work product exemption is for the attorney’s benefit, while the attorney-client privilege is for the benefit of the client.” Joe A. Sutherland and William E. Deitrick, *The Attorney-Client Privilege and Work Product Doctrine in Federal and Illinois Courts*, 73 Ill.B.J. 448 (1985) (Sutherland and Dietrick), citing *Panter v. Marshall Field & Co.*, 80 F.R.D. 718 (N.D.Ill. 1978). In addition, the self-analysis privilege should be analyzed in any effort to protect environmental audits from disclosure. Due to the uncertainties in applying these concepts in the environmental arena, many states have developed audit privilege laws, which specifically address environmental reports. Finally, the USEPA has issued an audit policy stating its position on disclosure of environmental information.

## 1. [12.80] Attorney-Client Privilege

The elements necessary to establish the existence of an attorney-client privilege are (a) a communication (b) made between privileged persons (c) in confidence and (d) for the purpose of seeking, obtaining, or providing legal assistance for the client. Edna S. Epstein and Michael M. Martin, eds., *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE*, p. 14 (2d ed. 1988) (Epstein and Martin), citing *RESTATEMENT (SECOND) OF THE LAW GOVERNING LAWYERS* §118 (Tentative Draft No. 1, 1988). See *Fischel & Kahn, Ltd. v. Van Straaten Gallery, Inc.*, 189 Ill.2d 579, 727 N.E.2d 240, 244 Ill.Dec. 941 (2000). Notably, facts communicated are not immune from discovery if they can be gathered from some source other than the privileged communication. This is a significant concern in environmental matters, particularly when reporting obligations exist. Additionally, community right-to-know statutes make a great amount of information available to the public. The communication itself, however, is protectable even though the information may be available through other sources. Epstein and Martin, pp. 14 – 15. See also *United States v. O'Malley*, 786 F.2d 786 (7th Cir. 1986).

One issue that frequently arises is the identity of the “client” when the party represented is a corporation, which is almost always the case when environmental matters are involved. Specifically, the issue concerns “which officers and employees are entitled to the protection of the privilege with respect to their confidential communications with a corporation’s attorneys.” Sutherland and Dietrick, p. 448. The courts have developed two tests to determine whether an officer or employee is entitled to protection of the attorney-client privilege: the “control group” test and the “subject matter” test. The “control group” test addresses “whether the employee making the communication is a member of the group within the corporation with the authority to decide what action the corporation may take upon the advice of the attorney.” *Id.* The Illinois Supreme Court has adopted the control group test. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill.2d 103, 432 N.E.2d 250, 59 Ill.Dec. 666 (1982). In *Consolidation Coal*, the Illinois Supreme Court stated:

**[T]he privilege ought to be limited for the corporate client to the extent reasonably necessary to achieve its purpose.**

\* \* \* \*

**The control-group test appears to us to strike a reasonable balance by protecting consultations with counsel by those who are the decisionmakers or who substantially influence corporate decisions and by minimizing the amount of relevant factual material which is immune from discovery.** 432 N.E.2d at 257.

In comparison, the subject matter test, applicable under federal law, deems confidential communications of an employee who is not a member of the control group privileged “if made at the direction of his or her superiors to the corporation’s attorney, where the subject matter upon which the attorney’s advice is sought concerns and the communications relate to performance of the employee’s duties.” Sutherland and Deitrick, p. 449, citing *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491 (7th Cir. 1970).



Of particular interest in the environmental field, investigations conducted by an attorney as part of the ordinary and normal business of the client do not always benefit from the attorney-client privilege. As a general rule, communications to attorneys conducting special investigations are not privileged unless the investigation forms a basis for the attorney's legal advice to the corporation. In *United States v. Chevron U.S.A., Inc.*, 757 F.Supp. 512 (E.D.Pa. 1990), the court held that the attorney-client privilege did not apply to a corporate compliance review status report that provided the company's responsive acts to a prior environmental audit. The compliance review was based on first-hand observation and interviews by an in-house audit team, one of whom was an attorney. *Id.* The court said that the company had failed to demonstrate that the attorney was there in the capacity of an attorney as opposed to in a business capacity; it was not clear that the communications were primarily to obtain legal advice. *Id.* In *Olen Properties Corp. v. Sheldahl, Inc.*, No. CV 91-6446-WDK, 1994 U.S. Dist. LEXIS 7125 (C.D.Cal. Apr. 12, 1994), the court applied the privilege to protect an audit report being sought for disclosure in a private CERCLA cost-recovery case. The *Olen Properties* court reasoned that the audit was prepared to obtain legal advice on whether the company was in compliance with environmental regulations.

In order to increase the likelihood that an investigation will benefit from the attorney-client privilege, the retention letter from the client to the attorney "should explicitly request legal advice based upon the results of the investigation. Without such a specific request, there is a greater probability that the facts learned by the attorney may not be protected by the attorney-client privilege." Epstein and Martin, p. 58. In addition, the attorney should retain the consultant as necessary for the attorney to render the legal advice. The attorney should manage and interact with the consultant.

It is possible for a client to waive the attorney-client privilege. Again, the privilege extends to the communication between the attorney and the client and not the facts communicated. Therefore, disclosure of the facts communicated does not constitute a waiver; rather, only disclosure of the client's communication waives the privilege. Epstein and Martin, p. 63. Voluntary disclosure to one federal agency has been held to preclude reassertion of the privilege with respect to the request of another federal agency for the document. Epstein and Martin, p. 76, citing *Permian Corp. v. United States*, 665 F.2d 1214 (D.C.Cir. 1981).

## 2. [12.81] Work Product Doctrine

The work product doctrine relates to documents prepared by an attorney in anticipation of litigation. This doctrine is related to, but distinct from, the attorney-client privilege.

**The work product doctrine provides a broader protection than the attorney-client privilege and is designed to protect the right of an attorney to thoroughly prepare his case and to preclude a less diligent adversary attorney from taking undue advantage of the former's efforts.** *Fischel & Kahn, Ltd. v. Van Straaten Gallery, Inc.*, 189 Ill.2d 579, 727 N.E.2d 240, 246, 244 Ill.Dec. 941 (2000), citing *Hickman v. Taylor*, 329 U.S. 495, 91 L.Ed.2d 451, 67 S.Ct. 385 (1947).

On the federal level, the work product doctrine has been codified in Federal Rule of Civil Procedure 26(b)(3), which provides:

**[A] party may obtain discovery of [material] otherwise discoverable under . . . this rule and prepared in anticipation of litigation . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney . . . concerning the litigation.**

In comparison, the work product doctrine is codified on the state level in Illinois S.Ct. Rule 201(b)(2):

**Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney.**

As a practical matter, the only difference between the federal and state rules is that ordinary work product is generally discoverable in Illinois, while under the federal rules ordinary work product is exempted unless a party can show "good cause." *See Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill.2d 178, 579 N.E.2d 322, 161 Ill.Dec. 774 (1991); *Monier v. Chamberlain*, 35 Ill.2d 351, 221 N.E.2d 410 (1966). Opinion work product is exempted from discovery in both Illinois and federal courts. Sutherland and Deitrick, p. 449.

The work product doctrine applies to materials prepared in anticipation of litigation or for trial. However, to be in "anticipation of litigation," the litigation need only be a remote prospect or mere possibility. Further, the proceeding for which the materials or documents are prepared need not be in a court of law but need only be adversarial in nature. Epstein and Martin, pp. 116 – 118.

The work product doctrine has been applied in environmental cases. *See In re Grand Jury Subpoena*, 350 F.3d 1010 (9th Cir. 2003) (documents prepared by environmental consultant under direction of attorney to advise and defend client in anticipated litigation are covered by work product doctrine, which includes dual purpose documents because their litigation purpose permeates any non-litigation purpose), *amended by* 357 F.3d 900 (9th Cir. 2004); *Brookfield-North Riverside Water Commission v. Martin Oil Marketing, Ltd.*, No. 90 C 5884, 1992 U.S. Dist. LEXIS 8160 (N.D.Ill. June 8, 1992) (protecting reports under work product doctrine); *State ex rel. Corbin v. Ybarra*, 161 Ariz. 188, 777 P.2d 686 (1989) (consultants and experts were part of attorney's investigative staff and their subsequent reports constituted attorney work product).

### **3. [12.82] Illinois Environmental Audit Privilege**

In addition to statutory and common law privileges from disclosure, Illinois enacted a statutory environmental audit privilege in 1995 that shields environmental audit reports from discovery. See 415 ILCS 5/52.2, *et seq.* There are no reported decisions as yet interpreting the environmental audit privilege, although the statute provides grist for a narrow application of the privilege.

In order for the privilege to apply, the report must be of an “environmental audit,” as defined at 415 ILCS 5/52.2(i). The audit must be voluntary and designed to “identify and prevent noncompliance and to improve compliance” with federal, state, regional, or local environmental laws. *Id.* Furthermore, the report must be labeled: “Environmental Audit Report: Privileged Document.” *Id.*

The report may consist of several documents (each of which should bear the label). The privilege extends to

**field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs, and surveys . . . collected or developed for the primary purpose and in the course of an environmental audit.** 415 ILCS 5/52.2(i).

The privilege does not extend to (a) information required to be made available to a regulatory agency under federal, state, or local law; (b) information obtained by a regulatory agency; and (c) information obtained from a source independent of the audit. 415 ILCS 5/52.2(h).

In order to maintain the privilege, the owner or operator must take corrective action or remedy any identified violations of federal, state, or local environmental law within a “reasonable time” (a phrase that is not defined in the statute). 415 ILCS 5/52.2(d)(2)(C). In addition, there is no protection of the audit material if the privilege is asserted for a fraudulent purpose or over material that is not subject to the privilege. 415 ILCS 5/52.2(d)(2)(A), 5/52.2(d)(2)(B). If the report is considered privileged, however, it is not admissible as evidence in any legal action in any Illinois civil, criminal, or administrative proceeding. 415 ILCS 5/52.2(b). Furthermore, if the privilege applies, the officer, employee, and consultant involved with the audit may not be examined as to the audit or audit report. 415 ILCS 5/52.2(c).

As in the case of most privileges, the environmental audit privilege may be expressly waived. In addition, the burden of proving that the privilege applies is on the party asserting the privilege. The state’s attorney or Attorney General, however, bears the burden of proof if either seeks disclosure of the report. 415 ILCS 5/52.2(d)(3).

Procedurally, when the audit report or information is requested, the party who claims the privilege must provide certain information to the requesting party:

- a. the date of the report;
- b. the identity of the entity that conducted the audit;
- c. the name and location of the audited facility; and
- d. the identification of the portions of the environmental audit report for which the privilege is being asserted. 415 ILCS 5/52.2(d)(4).

Within 30 days of the written request by the Attorney General or state’s attorney, moreover, the party asserting the privilege must file with the appropriate court or the IPCB a petition that requests an in camera hearing on whether the environmental audit report, or portions of it, are

privileged. 415 ILCS 5/52.2(e). The IPCB must schedule the in camera review within 45 days of the petition. An order of disclosure may require disclosure of only portions of the report. 415 ILCS 5/52.2(e)(3).

#### **4. [12.83] Federal Environmental Audit Policies**

While encouraging environmental auditing, the USEPA has shown resistance to a privilege that would prevent disclosure of audit reports. In December 1995, the USEPA issued a final policy in which it stated that it will not routinely request environmental audit reports. 60 Fed.Reg. 66,706 (Dec. 22, 1995). In April 2000, the USEPA issued revisions to the 1995 audit policy and reaffirmed its policy to refrain from routine requests for audit reports. 65 Fed.Reg. 19,618 (Apr. 11, 2000). If the USEPA has independent evidence of a violation, however, it may seek the information needed to establish the extent and nature of the violation and the degree of culpability. Such information includes environmental audit reports. The USEPA also remains firmly opposed to statutory audit privileges and immunity. *Id.*

Under the 2000 audit policy, the USEPA will not seek gravity-based penalties and will not recommend criminal prosecution against regulated entities that discover violations during systematic discovery (*i.e.*, environmental audits) if the violations are voluntarily and fully disclosed in writing to the USEPA within 21 days of discovery and the USEPA is notified in writing within 60 days that the violation has been remedied. Gravity-based penalties will be reduced by 75 percent if the disclosing entity does not detect the violation through systematic discovery but otherwise meets all of the other policy conditions. A “voluntary” discovery is one that does not occur pursuant to legally mandated monitoring or sampling, such as by statute, regulation, permit, or order of an administrative or judicial body. *Id.*

The leniency does not apply if the same violation (or a closely-related violation) occurred at the same facility within the past three years. The violation cannot be one that resulted in serious actual harm or presented an imminent and substantial endangerment to human health or the environment. The violation also cannot violate any judicial or administrative order. *Id.* In addition, although the USEPA will not seek gravity-based penalties, it retains the right to recover any economic benefit gained as a result of the violation. *Id.* The regulated entity must cooperate as required by the USEPA and provide the information it needs to determine the audit policy applicability. *Id.*

#### **5. [12.84] Federal Self-Critical Analysis Privilege**

A few courts have prevented forced disclosure of environmental reports by applying the common law “self-critical analysis” privilege to the environmental audit arena. The self-critical analysis privilege originated to protect from disclosure hospital appraisals of patients’ care and treatment. *See Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff’d*, 479 F.2d 920 (1973). In the seminal case *Reichhold Chemicals, Inc. v. Textron, Inc.*, 157 F.R.D. 522, 526 (N.D.Fla. 1994), the district court applied the self-critical analysis privilege to a “retrospective self-assessment of . . . compliance with environmental regulations.” The court applied a four-pronged inquiry to determine whether the documents at issue should be privileged: (a) Was the information developed after the fact for the purpose of candid self-evaluation and analysis of past pollution and the role of various parties in the pollution? (b) Was the report prepared with the expectation that it would be, and was it in fact, kept confidential? (c) Does the public have a

strong interest in preserving the free flow of the type of information sought? (d) Is the information of the type whose flow would be curtailed if discovery were allowed? The court concluded:

**In summary, I find that plaintiff Reichhold is entitled to a qualified privilege for retrospective analyses of past conduct, practices, and occurrences, and the resulting environmental consequences. This privilege in this case applies only to reports which were prepared after the fact for the purpose of candid self-evaluation and analysis of the cause and effect of past pollution, and of Reichhold's possible role, as well as other's, in contributing to the pollution at the site.** 157 F.R.D. at 527.

Application of the privilege is a matter of the court's discretion. Furthermore, as in the case of the work product privilege, the court would require disclosure of the documents on a showing of "exceptional necessity" or "extraordinary circumstances." 157 F.R.D. at 528.

There are no reported Illinois federal or state decisions adopting, rejecting, or commenting on the applicability of the self-critical analysis privilege to environmental documents. Moreover, the Seventh Circuit has not directly addressed whether a self-critical analysis privilege exists at all under federal common law. *Tice v. American Airlines, Inc.*, 192 F.R.D. 270 (N.D.Ill. 2000); *In re Mercury Finance Company of Illinois*, No. 97 C 3035, 1999 U.S. Dist. LEXIS (N.D.Ill. July 12, 1999). A number of federal courts have recognized, however, that self-critical analyses are generally privileged. *Tice, supra*, citing *Morgan v. Union Pacific R.R.*, 182 F.R.D. 261, 264 (N.D.Ill. 1998); *In re Crazy Eddie Securities Litigation*, 792 F.Supp. 197, 205 – 206 (E.D.N.Y. 1992); *Coates v. Johnson & Johnson*, 756 F.2d 524, 551 (7th Cir. 1985) (recognizing prevailing view that self-critical portions of plan are privileged).

## VIII. [12.85] INSURANCE ISSUES

When a client has liability for environmental pollution, there may be several types of insurance that will cover the loss. In particular, the client may be entitled to insurance coverage for environmental pollution under its past and present comprehensive general liability (CGL) policies. CGL policies typically provide coverage to an insured for property damage, bodily injury, and personal injury or some combination thereof.

Insurance coverage for environmental pollution under CGL policies has been one of the most heavily litigated areas of the law and, as a result, it is one of the most dynamic. The issues involved in environmental insurance coverage are too complex to cover fully in this chapter. See generally Mitchell L. Lathrop, ENVIRONMENTAL INSURANCE COVERAGE (Juris Publishing, 2004). There are certain environmental insurance issues that have been resolved in Illinois, however, of which the general practitioner should be aware when advising a client. As a preliminary matter, a significant threshold coverage concern is that, unlike the law in some other states, late notice may provide an insurer a defense to coverage, even when the insurer has not been prejudiced by the lack of earlier notice. See *Mitchell Buick & Oldsmobile Sales, Inc. v. National Dealer Services, Inc.*, 138 Ill.App.3d 574, 485 N.E.2d 1281, 93 Ill.Dec. 71 (2d Dist. 1985). Therefore, the lawyer should advise immediate notice to insurers.

In *Cincinnati Cos. v. West American Insurance Co.*, 183 Ill.2d 317, 701 N.E.2d 499, 505, 233 Ill.Dec. 649 (1998), the court stated that the insurer has received actual notice when it knows that “a cause of action has been filed and that the complaint [potentially] falls within the scope of the coverage of one of its policies,” and that “actual notice” means “notice sufficient to permit the insurer to locate and defend the lawsuit.” 701 N.E.2d at 505, quoting *Federated Mutual Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, 282 Ill.App.3d 716, 668 N.E.2d 627, 633, 218 Ill.Dec. 143 (2d Dist. 1996) (insurer’s actual notice of lawsuit was sufficient notice). See also *Rios v. Valenciano*, 273 Ill.App.3d 35, 652 N.E.2d 416, 209 Ill.Dec. 876 (2d Dist. 1995) (effective notice to insurer may be given by someone other than insured).

Another issue is the insurer’s duty to defend or indemnify. “If the facts alleged in the underlying complaint fall within, or potentially within, the policy’s coverage, the insurer’s duty to defend arises.” *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill.2d 90, 607 N.E.2d 1204, 1212, 180 Ill.Dec. 691 (1992). The insurer can refuse the defense only if it is clear from the face of the complaint that the allegations are not covered. *Id.* Moreover, even if only one of several theories of recovery asserted by the plaintiff is covered by a policy, the insurer must provide a defense. Any ambiguities in the policy are construed against the insurer and in favor of coverage. *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill.2d 64, 578 N.E.2d 926, 161 Ill.Dec. 280 (1991).

#### A. [12.86] Pollution Exclusion

In the environmental context, an insured’s biggest obstacle in obtaining coverage under the typical CGL policy is the industry-standard “pollution exclusion,” which was generally introduced into standard form CGL policies about 1970. The typical pollution exclusion, in effect in policies issued until approximately 1985, provides:

**This insurance does not apply . . . to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.**

In approximately 1985, most standard form policies introduced an “absolute” pollution exclusion, which deleted the “sudden and accidental” exception to the exclusion and otherwise broadened the scope of the policies. The absolute pollution exclusion has been interpreted by the courts to bar coverage for environmental claims. See, e.g., *Western World Insurance Co. v. Stack Oil, Inc.*, 922 F.2d 118 (2d Cir. 1990). Specifically, the Illinois Supreme Court held that the absolute pollution exclusion applies to those injuries caused by traditional environmental pollution, *i.e.*, hazardous materials discharged into the land, atmosphere, or any watercourse or body of water. *American States Insurance Co. v. Koloms*, 177 Ill.2d 473, 687 N.E.2d 72, 227 Ill.Dec. 149 (1997) (release of carbon monoxide inside commercial building did not constitute traditional environmental pollution); *Kim v. State Farm Fire & Casualty Co.*, 312 Ill.App.3d 770, 728 N.E.2d 530, 245 Ill.Dec. 448 (1st Dist. 2000) (discharge of perc into soil underneath dry-cleaning store met definition of traditional environmental pollution; thus, resulting injuries were excluded from coverage under absolute pollution exclusion).

With respect to the pollution exclusion used in most occurrence-based CGL policies between approximately 1970 and 1985, the Illinois Supreme Court has found that the term “sudden” is ambiguous. “Sudden” is construed in favor of insureds to mean unexpected or unintended. Accordingly, these CGL policies construed under Illinois law may provide coverage for environmental damage. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill.2d 90, 607 N.E.2d 1204, 180 Ill.Dec. 691 (1992).

There is no coverage under the CGL policies that have the standard 1970 – 1985 pollution exclusion clauses, however, if the insured had a “known loss” at the time that it purchased the policy. A “known loss” occurs if the insured knows or has reason to know when it purchases a CGL policy that there is a “substantial probability that it will suffer or has already suffered a loss.” *Outboard Marine, supra*, 607 N.E.2d at 1210. The issue boils down to whether the insured “knew or had reason to know” at the time it purchased the CGL policy that a probable loss or liability would occur due to the contamination alleged in the underlying complaints. *Id.* The extent of the insured’s knowledge is an issue of fact about which there has been much litigation between insureds and insurers in Illinois.

Some insureds have avoided the scope of the pollution exclusion altogether by asserting that coverage exists under a CGL policy because of a personal injury liability provision that does not contain a pollution exclusion. The plaintiffs in *Pipefitters Welfare Educational Fund v. Westchester Fire Insurance Co.*, 976 F.2d 1037 (7th Cir. 1992), successfully demonstrated that environmental damage caused by PCBs was covered under the personal injury portions of a CGL policy.

In *Pipefitters*, 976 F.2d at 1040, the policy defined “personal injury” as an injury arising out of one or more of the following offenses committed during the policy period:

- (1) false arrest, detention, imprisonment, or malicious prosecution;**
- (2) wrongful entry or eviction or other invasion of the right to private occupancy;**
- (3) a publication or utterance [constituting a libel, slander, or invasion of privacy].**

The insureds argued that the plaintiff’s claim of negligent failure to warn of the existence of PCBs was an offense sounding in “wrongful entry or eviction or other invasion of the right to private occupancy.” *Id.* The Seventh Circuit narrowly construed the catch-all portion “other invasion of the right to private occupancy” as “encompassing only conduct of the same general type as eviction and wrongful entry.” 976 F.2d at 1041. Because wrongful entry “is neither a well defined nor a widely employed” term, the Seventh Circuit analogized it to the tort of trespass. *Id.* After the court concluded that intent was not a necessary requirement of trespass, the court found coverage for the environmental liability-based claim under the personal injury provision. 976 F.2d at 1042. *Accord Millers Mutual Insurance Association of Illinois v. Graham Oil Co.*, 282 Ill.App.3d 129, 668 N.E.2d 223, 218 Ill.Dec. 60 (2d Dist. 1996) (finding gasoline contamination onto neighboring properties fell within policy’s “wrongful entry” provision).

## **B. [12.87] What Is a “Suit”?**

There is a general split of authority on the issue of coverage for environmental compliance demands short of litigation. *Compare Aetna Casualty & Surety Co. v. Pintlar Corp.*, 948 F.2d 1507 (9th Cir. 1991) (potentially responsible party letters are “suits”), *with Harleysville Mutual Insurance Co. v. Sussex County, Delaware*, 831 F.Supp. 1111, 1130 – 1132 (D.Del. 1993) (PRP letters are not “suits”). In Illinois, the issue was decided in *Lapham-Hickey Steel Corp. v. Protection Mutual Insurance Co.*, 166 Ill.2d 520, 655 N.E.2d 842, 211 Ill.Dec. 459 (1995). In *Lapham-Hickey*, the Illinois Supreme Court held that the insured’s receipt of a proposed consent order that named the insured as a “responsible person” was not a “suit” within the meaning of the defense obligation in the all-risks insurance policy. The court said that “suit” is unambiguous and also said:

**[T]he duty to defend extends only to suits and not to allegations, accusations or claims which have not been embodied within the context of a complaint. In the instant case, a complaint alleging liability for property damage has never been filed against Lapham-Hickey. Without a complaint, there is no “suit.” And without a “suit,” Protection’s duty to defend Lapham-Hickey is not triggered.** 655 N.E.2d at 847.

*See also Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill.2d 127, 708 N.E.2d 1122, 237 Ill.Dec. 82 (1999); *Forest Preserve District of DuPage County, Illinois v. Pacific Indemnity Co.*, 279 Ill.App.3d 728, 665 N.E.2d 305, 216 Ill.Dec. 245 (1st Dist.), *appeal denied*, 168 Ill.2d 588 (1996).

### C. [12.88] Trigger of Coverage

A commonly encountered insurance issue is determining which CGL policy will apply to the environmental damage. Environmental damage may occur over time and may not be discovered for years. For example, wastes from buried, leaking drums may continuously migrate through the soil and groundwater for decades before discovery. Most policies are renewed yearly, and the insured may switch insurers between commencement and discovery of the environmental damage. Thus, there may be numerous policies that potentially cover segments of the years of damages.

Policyholders generally argue that each insurer whose policy was in effect during the period from first release through discovery of a pollutant is obligated to provide coverage, and some courts have accepted this position, which is called the “continuous trigger of coverage.” *See Central Illinois Public Service Co. v. Allianz Underwriters Insurance Co.*, 240 Ill.App.3d 598, 608 N.E.2d 155, 181 Ill.Dec. 82 (1992). In *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill.2d 64, 578 N.E.2d 926, 161 Ill.Dec. 280 (1991), the Illinois Supreme Court, in dicta, seemed to endorse a “continuous trigger” applied to asbestos property-damage claims. *See also United States Gypsum Co. v. Admiral Insurance Co.*, 268 Ill.App.3d 598, 643 N.E.2d 1226, 205 Ill.Dec. 619 (1st Dist. 1994) (continuous trigger theory applies to liability coverage for property damage that results from releases of asbestos that constitute continuing process over multiple policy periods), *appeal denied*, 161 Ill.2d 542 (1995); *Board of Education of Township High School District No. 211, Cook County, Illinois v. International Insurance Co.*, 308 Ill.App.3d 597, 720 N.E.2d 622, 242 Ill.Dec. 1 (1st Dist. 1999) (finding *Gypsum* “continuous trigger” analysis compelling and applicable), *appeal denied*, 188 Ill.2d 562 (2000); *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 283 Ill.App.3d 630, 670 N.E.2d 740, 219 Ill.Dec.



62 (2d Dist. 1996) (Rule 23) (PCB contamination of Waukegan Harbor from 1950s to approximately 1976 constituted single continuing occurrence). Thus, in a situation in which there is a continuous release of pollutants, all policies in effect during that period may be triggered for coverage. However, a lessee's policy's "wrongful entry" provision may not be triggered by a trespass claim when the policy expired before the expiration of the lease because, as the court in *National Fire & Indemnity Exchange v. Ali & Sons*, 346 Ill.App.3d 107, 803 N.E.2d 636, 639 – 640, 281 Ill.Dec. 232 (1st Dist. 2004), explained, "trespass" is the invasion of exclusive possession of land and the lease makes the possession non-exclusive.

The insurers may be jointly and severally liable for the long-term discharges of pollution. See *Zurich Insurance Co. v. Raymark Industries, Inc.*, 118 Ill.2d 23, 514 N.E.2d 150, 112 Ill.Dec. 684 (1987) (affirming appellate court's refusal to allocate costs between insurers on pro rata basis). But see *Outboard Marine, supra* (court applied pro rata time on risk allocation and allocated to insured those years during which it had no insurance).

The First District Illinois Appellate Court, however, held in *Benoy Motor Sales, Inc. v. Universal Underwriters Insurance Co.*, 287 Ill.App.3d 942, 679 N.E.2d 414, 223 Ill.Dec. 229 (1st Dist. 1997), that the insurer was obligated to indemnify its insureds for the defense costs and settlement amounts that resulted from the continuing pollution and could not allocate to the insured shipments of wastes during gaps in coverage. The court said:

**Environmental pollution does not stop and start in discrete time periods. When pollutants are released or discharged the damage is immediate. There is a continuing process. If we were to pour black ink into white milk we could not find a time when the coloring process did not occur.** 679 N.E.2d at 418.

The *Benoy Motor Sales* court further said that the "analogy to *Zurich* . . . is apt" and that (quoting *Zurich*, 514 N.E.2d at 161) "an insurer that was on the risk during the time the claimant was exposed . . . must provide coverage." 679 N.E.2d at 418.

## IX. [12.89] CRIMINAL LIABILITY

The number of criminal prosecutions for environmental violations has increased significantly since the 1980s. Moreover, the government prosecutors have gradually shifted their focus to prosecuting individuals, rather than large corporations. The trend has blurred the line between civil and criminal violations, and the practitioner must be aware of possible criminal charges facing his or her clients.

### A. [12.90] Federal Criminal Provisions

Federal environmental laws include criminal liability for those individuals and/or companies that violate them. The criminal provisions in most environmental statutes are similar. They criminalize "knowing" violations of relevant statutory provisions. For example, RCRA makes it a crime to knowingly (1) treat, store, or dispose of hazardous waste without a permit, (2) transport hazardous waste to a facility that has no permit, and (3) dispose of hazardous waste in violation of a permit or regulation. 42 U.S.C. §6928(d). The criminal penalties for a first conviction under RCRA include a fine not to exceed \$50,000 for each day of violation and/or imprisonment of up to five years for a knowing violation of its provisions. 42 U.S.C. §6928(d). The criminal penalties

are increased to a fine not to exceed \$250,000 and/or imprisonment of up to 15 years for knowing endangerment. A corporation convicted for knowing endangerment will face a fine not to exceed \$1 million. 42 U.S.C. §6928(e). “Knowing endangerment” is knowingly placing another person “in imminent danger of death or serious bodily injury.” See 33 U.S.C. §1319(c)(3) (CWA); 42 U.S.C. §6928(e) (RCRA); 42 U.S.C. §7413(c)(5)(A) (CAA). Similarly, the penalty for a first conviction for knowingly violating the CWA includes a fine not to exceed \$50,000 for each day of the violation and/or imprisonment for a maximum of three years. 33 U.S.C. §1319(c)(2). See also 33 U.S.C. §§1319(c)(1) (concerning negligent violations); 1319(c)(3) (concerning knowing endangerment); 1319(c)(4) (concerning false statements). The penalty for a first conviction for knowingly violating the CAA includes a fine pursuant to Title 18 and/or a maximum imprisonment of five years. 42 U.S.C. §7413(c)(1). See also 42 U.S.C. §§7413(c)(4) (concerning negligent release with imminent danger); 7413(c)(5)(A) (concerning knowing release with imminent danger). See §12.32 above.

Other federal environmental statutes impose criminal penalties and imprisonment, including

1. CERCLA (fine pursuant to Title 18 and/or up to three years for a first conviction and five years for subsequent convictions for violation of requirements for a failure to report releases of reportable quantities of hazardous substances to the National Response Center; 42 U.S.C. §9603(b));
2. EPCRA (up to \$25,000 and/or imprisonment of two years for a first conviction of a knowing violation and \$50,000 and/or imprisonment of five years for second or subsequent convictions; 42 U.S.C. §11045(b)(4));
3. the TSCA (up to \$25,000 for each day of violation and/or a maximum imprisonment of one year for a knowing violation; 15 U.S.C. §2615(b));
4. the Federal Insecticide, Fungicide, and Rodenticide Act (up to \$50,000 and/or imprisonment for one year for a knowing violation by a registrant or producer; 7 U.S.C. §136l(b)(1)(A));
5. the Safe Drinking Water Act of 1974, 42 U.S.C. §300f, *et seq.* (up to \$25,000 fine pursuant to Title 18, and/or imprisonment of three years for willful violation; 42 U.S.C. §300h-2(b)(2));
6. the Endangered Species Act (up to \$50,000 and/or imprisonment of one year for a knowing violation; 16 U.S.C. §1540(b)(1)); and
7. the Marine Mammal Protection Act (up to \$20,000 and/or imprisonment of one year for a knowing violation; 16 U.S.C. §1375(b)).

Many of these laws also criminalize negligent violations as well as knowing endangerment.

Criminal liability under environmental laws may be imposed on corporations, owners, operators, and employees. In *United States v. Protex Industries, Inc.*, 874 F.2d 740 (10th Cir. 1989), a corporation was convicted of violating the knowing endangerment provision of RCRA because three of its employees were subjected to solvent poisoning. See *United States v. Hayes International Corp.*, 786 F.2d 1499 (11th Cir. 1986) (corporate liability based on actions of its

employee who agreed to dispose of hazardous waste illegally). In *United States v. Wagner*, 29 F.3d 264 (7th Cir. 1994), criminal liability was imposed on both the corporation and its owner-operator for violation of RCRA regulations. In *United States v. Tyco Printed Circuit Group*, No. 3:04-CR-139-AVC (D.Conn. Aug. 17, 2004), a judge ordered a circuits manufacturer to pay a \$6 million criminal fine and spend \$4 million in environmental projects for 12 felony convictions of the CWA based on the company's bypass of its wastewater treatment systems at three of its facilities.

Low-level employees have been found criminally responsible for violations of environmental laws. For example, a low-level employee was found criminally responsible for violating CERCLA in *United States v. Carr*, 880 F.2d 1550 (2d Cir. 1989). In *Carr*, a civilian maintenance supervisor for the U.S. Army violated §103(a) of CERCLA when he directed work crews to dispose of waste cans of paint in a pond and failed to report the release of the hazardous substances — the paint — to the federal agency. 880 F.2d at 1551. “The district court imposed a suspended sentence of one year’s imprisonment, and sentenced [the maintenance supervisor] to one year of probation.” *Id.* The U.S. Court of Appeals for the Second Circuit affirmed the district court and found that the reporting requirements of CERCLA reach a person “at relatively low rank” if that person is “in a position to detect, prevent, and abate a release of hazardous substances.” 880 F.2d at 1554. *See also United States v. Dee*, 912 F.2d 741 (4th Cir. 1990) (low-level governmental employees found guilty of violating RCRA).

In addition, the scope of criminal responsibility of corporate officers is a subject of increasing concern. In *United States v. Iverson*, 162 F.3d 1015 (9th Cir. 1998), the court affirmed the conviction of a retired company president under the CWA for illegal discharges of wastewater. The court found that a corporate officer is subject to personal liability if he or she has the authority to exercise control over the company’s activity that results in illegal discharges, regardless of whether that authority is in fact exercised and regardless of whether the company expressly vested a duty in the officer to oversee such activity. In *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 860 (2000), a project supervisor was held personally liable based on his negligent supervision of an independent backhoe operator who accidentally struck an oil pipeline while working.

In June 1999, the Department of Justice issued a memorandum entitled “Bringing Criminal Charges Against Corporations” (June 16, 1999) ([www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html](http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html)) that sets out eight specific factors to be considered when deciding whether to indict a corporation if a prosecutor believes it has committed criminal offenses, including environmental violations. The factors include the nature and seriousness of the offense, the pervasiveness of the wrongful conduct, the corporation’s past history, voluntary, timely disclosure, corporate compliance programs, the availability of remedial actions, and the willingness to make restitution.

In addition to environmental laws, various common law claims are often raised in a criminal environmental case, including conspiracy (18 U.S.C. §371), principals/aiding and abetting (18 U.S.C. §2), and willful violations of OSHA (willful violations resulting in death of employee, 29 U.S.C. §666(e); giving advanced notice of inspections, 29 U.S.C. §666(f); giving false statements, 29 U.S.C. §666(g)). Generally, the mental state required is the same as for the underlying offense.

## 1. [12.91] Mens Rea

The judicial interpretation of these environmental laws has diluted the traditional requirement of mens rea. For example, a “knowing” violation has been construed to mean that a defendant has knowledge of the actions taken and not of the statute forbidding them. *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 29 L.Ed.2d 178, 91 S.Ct. 1697 (1971); *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984). Courts do not require knowledge of the law or an intent to break it. *E.g., United States v. Dee*, 912 F.2d 741 (4th Cir. 1990) (ignorance of law is no defense). It is presumed that a defendant who operates within the regulated community knows that articles and substances capable of threatening public health and safety are subject to regulation. *International Minerals, supra*, 91 S.Ct. at 1701 – 1702. In *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993), the Ninth Circuit held that the government is not required to prove that the defendants knew their acts violated the CWA, only that they knew they were discharging pollutants.

Similarly, in *United States v. Wagner*, 29 F.3d 264 (7th Cir. 1994), the court affirmed the conviction of a corporation and its owner-operator for storage of hazardous waste without a permit and unlawful disposal of hazardous waste in violation of RCRA. The court held that the government did not have to prove that the defendants had knowledge of the RCRA permit requirements. 29 F.3d at 266. In addition, the Seventh Circuit referred to *International Minerals, supra*, in which the court found that when “obnoxious waste materials” are involved, “the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.” *Wagner, supra*, 29 F.3d at 266 n.1, quoting 91 S.Ct. at 1701 – 1702.

The courts have moved ever closer to abolishing the mens rea requirement in environmental crimes. *See United States v. Sinskey*, 119 F.3d 712 (8th Cir. 1997) (only mens rea required was proof defendant knew underlying facts); *United States v. Tomlinson*, No. 99-30020, 1999 U.S.App. LEXIS 16758 (9th Cir. July 16, 1999) (unpublished) (defendant need only have knowledge that asbestos emissions could be regulated, not that actual pollutants discharged were regulated). *But see United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996) (“knowing” was required to apply to all elements of CWA offense); *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997) (government must prove that defendant did not have permit as element of charged offense).

Environmental laws that criminalize negligent violation of environmental laws also dilute the traditional notions that criminal liability requires mens rea. In *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 860 (2000), the Ninth Circuit found that a person who acts with simple negligence, rather than “criminal” negligence, is liable under the CWA. Thus, the mere failure to use reasonable care was sufficient for a criminal conviction.

## 2. [12.92] Sentencing Guidelines

In 1984, the U.S. Sentencing Commission was established by Congress as an independent agency to institute sentencing policies and practices for federal crimes. 28 U.S.C. §991. There are separate sentencing guidelines for individuals and organizations. The Sentencing Guidelines for organizations (Chapter 8 of the Federal Sentencing Guidelines) exempt environmental crimes from their base fine calculations, and instead incorporate by reference the general guidelines

under Title 18 of the U.S. Code. Although the Commission has had a draft guideline since 1993 for sanctions for organizations convicted specifically of environmental offenses, the draft was never finalized. Nevertheless, in the introductory commentary to Chapter 8, the Commission affirms the following principles concerning criminal penalties for organizations convicted of federal environmental crimes:

**First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. . . .**

**Second, if the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets.**

**Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization. . . .**

**Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct.** United States Sentencing Commission, GUIDELINES MANUAL, *Chapter 8 — Sentencing of Organizations*, Introductory Commentary (Nov. 2004).

With respect to sentencing individuals, the 2004 Federal Sentencing Guidelines place environmental offenses into six categories:

- a. “Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants” (Guideline §2Q1.1);
- b. “Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce” (Guideline §2Q1.2);
- c. “Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification” (Guideline §2Q1.3);
- d. “Tampering or Attempted Tampering with a Public Water System; Threatening to Tamper with a Public Water System” (Guideline §2Q1.4);
- e. “Hazardous or Injurious Devices on Federal Lands” (Guideline §2Q1.6); and
- f. “Offenses Involving Fish, Wildlife, and Plants” (Guideline §2Q2.1).

The Guidelines include various mitigating and aggravating circumstances that decrease or increase the calculated fine, including considerations relating to the victim, the defendant’s role in the crime, and whether the defendant obstructed or intended to obstruct justice. An upward adjustment has been found appropriate when a defendant organized or coordinated participants (*see United States v. Rivero*, 993 F.2d 620 (7th Cir. 1993)) or exercised management responsibility over the activities (*see United States v. Skinner*, 986 F.2d 1091 (7th Cir. 1993)). *See also United States v. Shurelds*, No. 97-6265, 1999 U.S.App. LEXIS 3521 (6th Cir. Mar. 2, 1999)

(citation restricted under Rule 24) (increase in offense level upheld because defendant was in charge of asbestos removal project and exercised control over site workers).

## **B. [12.93] Illinois Criminal Provisions**

Illinois' criminal provisions are set forth at 415 ILCS 5/44. Unless specified in the Environmental Protection Act, it is a Class A misdemeanor to violate the Act or its regulations, or any permit condition, or to knowingly submit false information under the Act. 415 ILCS 5/44(a). The Environmental Protection Act then lists specific criminal violations that will result in felony convictions, including calculated criminal disposal of hazardous waste (415 ILCS 5/44(b)), criminal disposal of hazardous waste (415 ILCS 5/44(c)), unauthorized use of hazardous waste (415 ILCS 5/44(d)), unlawful delivery of hazardous waste (415 ILCS 5/44(e)), reckless disposal of hazardous waste (415 ILCS 5/44(f)), concealment of criminal disposal of hazardous waste (415 ILCS 5/44(g)), and violations of various other provisions of environmental laws (415 ILCS 5/44(j)).

Negligence is also penalized under the Environmental Protection Act. There is a fine for negligent violation of §12(f) relating to discharges of contaminants into the waters of the state, §12(g) relating to underground injection of contaminants, §13(b) relating to water pollution and water quality standards, §39(b) relating to NPDES permits, and §39.5 relating to the state's CAA program, regulation, standards, and filing requirements. 415 ILCS 5/44(j)(3). Also, false statements and record-keeping violations may be found to constitute criminal activities. 415 ILCS 5/44(h), 5/44(i), 5/44(j)(4)(A), 5/44(j)(4)(C).

The consequences of being convicted for a criminal offense related to hazardous waste disposal vary. A Class 2 felony is punishable by up to seven years' imprisonment (730 ILCS 5/5-8-1(a)(5)) and a fine not to exceed \$500,000 for each day of the offense (415 ILCS 5/44(b)). The potential incarceration for a Class 2 misdemeanor, including for calculated criminal disposal (415 ILCS 5/44(b)), is not fewer than three years nor more than seven years. See 730 ILCS 5/5-8-1(a)(5). Criminal disposal of hazardous waste is a Class 3 felony (415 ILCS 5/44(c)(2)), the penalty for which is a fine not to exceed \$250,000 for each day of the offense (*id.*) and incarceration of not fewer than two years nor more than five years (730 ILCS 5/5-8-1(a)(6)). Unauthorized use of hazardous waste by a person who knowingly treats, transports, or stores hazardous waste without required permits or licenses is a Class 4 felony, subject to not fewer than one nor more than three years in prison (730 ILCS 5/5-8-1(a)(7)) and up to a \$100,000 fine for each day of violation. See 415 ILCS 5/44(d). A person who knowingly transports hazardous waste without having on his or her person the required permits or licenses is guilty of a Class A misdemeanor and may be fined up to \$1,000. See 415 ILCS 5/44(d)(1)(D), 5/44(d)(2).

The Environmental Protection Act also criminalizes the disposal of nonhazardous waste. 415 ILCS 5/44(p). Such disposal occurs if a person knowingly (1) conducts a waste storage, disposal, or treatment operation without a permit under §21(d) of the Environmental Protection Act in a quantity that exceeds 250 cubic feet of waste, or (2) conducts open dumping in violation of §21(a) of the Act. A person convicted of violating §21(d) with respect to nonhazardous waste is guilty of a Class 4 felony for the first offense and subject to a fine of up to \$25,000 for each day of violation; for second or subsequent offenses, the violator is guilty of a Class 3 felony and subject to a fine not to exceed \$50,000 for each day of violation. 415 ILCS 5/44(p)(2)(A). A person convicted of violating §21(a) with respect to open dumping of nonhazardous waste is

guilty of a Class A misdemeanor, and for second and subsequent offenses in a quantity that exceeds 250 cubic feet is guilty of a Class 4 felony and is subject to a fine not to exceed \$5,000 for each day of violation. 415 ILCS 5/44(p)(2)(B).

The Environmental Protection Act contains a forfeiture section. Subject to several exceptions, the Act provides that, in addition to all other civil and criminal penalties provided by law, any person convicted of a criminal violation of the Act shall forfeit to the state

1. an amount equal to the value of all profits earned, savings realized, and benefits incurred as a direct or indirect result of the violation; and
2. any vehicle or conveyance used in the perpetration of the violation, except common carrier conveyances, unless the carrier consented to or was privy to the violation and the owner knew or consented to the violation. 415 ILCS 5/44.1.

It should be noted that the remedies provided by the Act do not preempt existing civil or criminal remedies for wrongful action. 415 ILCS 5/45(a). *See also Tamalunis v. City of Georgetown*, 185 Ill.App.3d 173, 542 N.E.2d 402, 134 Ill.Dec. 223 (4th Dist. 1989); *People ex rel. Scott v. Janson*, 57 Ill.2d 451, 312 N.E.2d 620 (1974).

In addition to the statutory criminal liability discussed above, criminal liability may arise under non-environmental state laws. There is precedent under Illinois law that corporate officers may be charged with criminal offenses arising from worker exposure to hazardous substances. Specifically, in *People v. Film Recovery Systems*, No. 84 C 5064 (Cook Cty.Cir. June 14, 1985) (cons.), the State successfully prosecuted three individuals and two corporations for the death of one employee and injuries to fourteen others who were, unknown to them, exposed to large quantities of cyanide in the workplace. The individuals convicted were the president of the corporation, the plant manager, and the plant foreman. They were convicted under state law for murder (with sentences of 25 years' imprisonment and \$10,000 in fines) and reckless conduct (14 concurrent 364-day imprisonment terms and \$14,000 in fines). The two corporations involved were convicted of involuntary manslaughter (\$10,000 in fines) and reckless conduct (\$14,000 in fines). *But see People v. O'Neil*, 194 Ill.App.3d 79, 550 N.E.2d 1090, 141 Ill.Dec. 44 (1st Dist. 1990), in which the appellate court reversed and remanded the convictions on grounds not related to the issues addressed above. Specifically, the appellate court found that the judgments were legally inconsistent because murder and reckless conduct require mutually exclusive mental states, and the defendants' convictions for both, based on the same conduct, were impermissible.

Although there are no other reported Illinois cases involving convictions under non-environmental criminal laws for employee exposures to hazardous substances, the *Film Recovery Systems* decision suggests that the State may pursue charges that the corporation or its employees violated state laws concerning battery (720 ILCS 5/12-3), aggravated battery (720 ILCS 5/12-4), or reckless conduct (720 ILCS 5/12-5). The mental state for a battery charge is specific intent or knowledge (720 ILCS 5/12-3, 5/12-4).

## **X. ETHICAL ISSUES**

### **A. [12.94] Introduction**

Although the ethical problems the lawyer faces in the environmental arena are not unique, some of them occur more often and are of greater complexity and importance in the environmental field than in other areas of legal practice. The main reason for this is the public law aspect of much of environmental practice, *i.e.*, the fact that most environmental issues are of great public interest and concern because they have the potential to cause a substantial impact on the community at large. See Irma S. Russell, ISSUES OF LEGAL ETHICS IN THE PRACTICE OF ENVIRONMENTAL LAW (ABA Publishing, 2003); James R. Arnold and Gerald J. Buchwald, *Superfund = Superliability: Are Lawyers the Next Deep Pocket?*, 79 A.B.A.J. 117 (Sept. 1993) ([www.abanet.org/legalservices/lpl/journalarticles.html](http://www.abanet.org/legalservices/lpl/journalarticles.html)); David Sive, *Ethical Problems in Environmental Litigation*, 2 Prac. Real Est. Law 27, 28 (July 1986).

## **B. [12.95] Competent Representation**

Rule 1.1(a) of the Illinois Rules of Professional Conduct (RPC) provides that a lawyer “shall provide competent representation to a client.” RPC 1.1(b) goes on to require that a lawyer not represent a client in a matter in which the lawyer is not competent “without the association of another lawyer who is competent to provide such representation.” The question therefore arises regarding when a non-environmental attorney has an ethical duty to involve an attorney specializing in environmental law.

The practice of environmental law differs from that of many other legal areas. One important difference is that most environmental statutes strongly favor the government. Thus, contesting liability may not be advisable. See *United States v. Cannons Engineering Corp.*, 899 F.2d 79 (1st Cir. 1990) (CERCLA case in which court approved of government’s practice of penalizing those parties who settle last because goal of CERCLA is prompt cleanup); *United States v. National Railroad Passenger Corp.*, No. CIV.A. 86-1094, 1999 U.S. Dist. LEXIS 4781 (E.D.Pa. Apr. 6, 1999). Another difference is that, because of the relative ease with which courts can establish liability in environmental cases and the importance of self-reporting in the environmental area, the role of the environmental lawyer as a counselor has added significance. As a result, an environmental lawyer must have the knowledge of environmental laws and either the scientific knowledge or the access to technical expert assistance in order to assess adequately the impact of any environmental solution on other areas of the environment. The attorney also must have sufficient knowledge of related laws to assess their impact on any given course of action.

## **C. [12.96] Conflicts of Interest**

Rules of Professional Conduct 1.7 and 1.9 address conflicts of interest in representing an adverse client or in representing a new client whose interests are adverse to those of a former client. One situation that can arise in the environmental context is that of an attorney or firm asked to represent two or more defendants in a large multiparty CERCLA action. Although at first blush this may seem entirely proper, a conflict can arise when determining allocation of shares of liability. Thus, serious ethical review is required before undertaking such joint representation. It is essential to work out agreements between the clients involved and to try to resolve any doubts before accepting employment.

Another possible conflict arises when a lawyer is asked to represent several clients with potentially opposing interests. For example, an attorney may be asked to represent several clients,



each of whom is interested in the same limited natural resource. An attorney in this situation should explain to each client early on that he or she represents several clients with interests in the same resource and obtain each client's agreement that there are no expectations for the attorney to share the confidences of one client with any other client. Otherwise, the lawyer may be held guilty of unethical conduct and malpractice for failing to disclose one client's confidence to another client when that other client's best interests require such disclosure.

There are many other possible conflict situations that can arise in the environmental area, such as the problem of representing potentially opposing interests in separate cases (*see Leckrone v. City of Salem*, 152 Ill.App.3d 126, 503 N.E.2d 1093, 105 Ill.Dec. 87 (5th Dist. 1987), for a discussion of this issue) or representation of a named party who is not the one actually paying the bill. See RPC 5.4(c), providing that a lawyer "shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

#### **D. [12.97] Disclosure of Client Secrets**

Rule of Professional Conduct 1.6 governs the circumstances under which an attorney can or must reveal client confidences. The Rule allows disclosure of confidences designed to prevent a future crime involving serious harm or death but forbids disclosure regarding a past crime. The environmental attorney faces disclosure issues of greater magnitude than those faced by other attorneys because of the consequences a client's harmful conduct can have on the environment, public safety, and health. An environmental lawyer must therefore often make the difficult choice between following the strict requirements of client confidentiality imposed by the rules and not disclosing or following the best interests of the public (and possibly his or her client) and disclosing. The Rules of Professional Conduct govern when an attorney can or must withdraw from representation. RPC 1.16(b)(1)(B) allows withdrawal when a client insists on pursuing an illegal course of action.

In the wake of the Sarbanes-Oxley Act of 2002, Pub.L. No. 107-204, 116 Stat. 745, corporations, their accountants, and their attorneys face greater scrutiny concerning corporations' reports to the Securities and Exchange Commission (SEC). Sarbanes-Oxley impacts the environmental realm because of SEC-required financial reporting, which may include cost estimates related to environmental liabilities. Because corporate officers can be held liable under Sarbanes-Oxley for false or inaccurate financial statements, these officers will scrutinize information being received from environmental managers. Accountants are impacted because, as external auditors, they must attest to and report on the corporation's evaluation of its financial reporting. Finally, attorneys are affected because Sarbanes-Oxley requires attorneys appearing and practicing before the SEC to report evidence of a material violation of federal or state laws, a material breach of fiduciary duty arising under federal or state law, or a similar material violation of any federal or state law.

## **XI. APPENDIX**

### **A. [12.98] Glossary of Acronyms and Abbreviations**

**ACM:** asbestos-containing materials

**Act:** Illinois Environmental Protection Act, 415 ILCS 5/1, *et seq.*  
**ASTM:** American Society for Testing and Materials  
**ATU:** allotment trading unit  
**BACT:** best available control technology  
**Brownfields** abandoned or underused industrial or commercial properties where expansion or redevelopment is complicated by real or perceived contamination  
  
**CAA:** Clean Air Act, 42 U.S.C. §7401, *et seq.*  
**CAP:** corrective action plan  
**CEM:** continuous emission monitor  
**CERCLA:** Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601, *et seq.*  
  
**CFR:** Code of Federal Regulations  
**CGL:** comprehensive general liability insurance policy  
**CWA:** Clean Water Act, 33 U.S.C. §1251, *et seq.*  
**EGU:** electrical generating unit

<b>ELUC:</b>	environmental land use control
<b>EPCRA:</b>	Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. §11001, <i>et seq.</i> (same as SARA Title III)
<b>ERMS:</b>	emissions reduction market system
<b>FIFRA:</b>	Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §135, <i>et seq.</i>
<b>FOIA:</b>	Freedom of Information Act, 5 U.S.C. §552
<b>Generator:</b>	In general, any person whose act or process produces hazardous waste or first causes a hazardous waste to become subject to regulation, 35 Ill.Admin. Code §720.110; 40 C.F.R. §260.10. See also the definition in 415 ILCS 5/39(h) of the “generator” of treated, incinerated, partially recycled, or response action hazardous waste.
<b>HAP:</b>	hazardous air pollutant as defined by the CAA Amendments
<b>HMTA:</b>	Hazardous Materials Transportation Act, 49 U.S.C. §1801, <i>et seq.</i>
<b>IDOT:</b>	Illinois Department of Transportation
<b>IEPA:</b>	Illinois Environmental Protection Agency
<b>IEMA:</b>	Illinois Emergency Management Agency
<b>IPCB:</b>	Illinois Pollution Control Board
<b>LMFA:</b>	Livestock Management Facilities Act, 510 ILCS 77/1, <i>et seq.</i>
<b>LUST:</b>	leaking underground storage tank
<b>MACT:</b>	maximum achievable control technology
<b>MOU:</b>	memorandum of understanding
<b>MSDS:</b>	material safety data sheet
<b>MWRDGC:</b>	Metropolitan Water Reclamation District of Greater Chicago
<b>NAAQS:</b>	National Ambient Air Quality Standards
<b>NCP:</b>	National Contingency Plan (40 C.F.R. Part 300)
<b>NESHAP:</b>	National Emission Standards for Hazardous Air Pollutants
<b>NFA Letter:</b>	no further action letter
<b>NFR Letter:</b>	no further remediation letter
<b>NOx:</b>	nitrogen oxide
<b>NPDES:</b>	National Pollutant Discharge Elimination System
<b>NPL:</b>	National Priorities List (USEPA’s list of Superfund sites requiring priority cleanup)
<b>NSPS:</b>	New Source Performance Standards
<b>NSR:</b>	New Source Review
<b>OME:</b>	organic material emission
<b>OSFM:</b>	Office of the State Fire Marshal
<b>OSHA:</b>	Occupational Safety and Health Act of 1970, 29 U.S.C. §651, <i>et seq.</i>
<b>PCB material:</b>	material that contains over 50 ppm polychlorinated biphenyl
<b>PCBs:</b>	polychlorinated biphenyl
<b>PIMW:</b>	potential infectious medical waste
<b>POTW:</b>	publicly owned treatment works
<b>ppb:</b>	parts per billion
<b>ppm:</b>	parts per million
<b>PRP:</b>	A party who is potentially responsible under CERCLA or the parallel Illinois law for the release or threatened release of a hazardous substance; sometimes referred to as a potentially responsible party

<b>PSD:</b>	prevention of significant deterioration
<b>RCRA:</b>	Resource Conservation and Recovery Act, 42 U.S.C. §6901, <i>et seq.</i>
<b>RMP:</b>	risk management plan
<b>RQ:</b>	reportable quantity
<b>SARA Title III:</b>	Emergency Planning and Community Right-To-Know Act, 42 U.S.C. §11011, <i>et seq.</i> (also referred to as EPCRA)
<b>SIC:</b>	standard industrial classification
<b>SIP:</b>	state implementation plan
<b>SIU:</b>	“significant industrial user” as defined by federal, state, or local water use and discharge laws
<b>SPCC:</b>	spill prevention control and countermeasures
<b>SRP:</b>	Site Remediation Program
<b>TACO:</b>	Tiered Approach to Corrective Action Objectives
<b>TSCA:</b>	Toxic Substances Control Act, 15 U.S.C. §2601, <i>et seq.</i>
<b>TQ:</b>	threshold quantities
<b>UIC:</b>	underground injection control
<b>USEPA:</b>	United States Environmental Protection Agency
<b>UST:</b>	underground storage tank
<b>VOC:</b>	volatile organic compound
<b>VOM:</b>	volatile organic material

#### B. [12.99] List of Environmental Internet Sites

<b>Organization/Agency/ Web Site Name</b>	<b>URL</b>	<b>Description</b>
Amazing Environmental Organization Web Directory	<a href="http://www.webdirectory.com">www.webdirectory.com</a>	An environmental search engine that can lead to incredible amounts of environmental information.
American Society for Testing and Materials	<a href="http://www.astm.org">www.astm.org</a>	Provides, for a fee, the Phase I and Phase II assessment guidance (ASTM E1527-00 and E1903-97 (2002), respectively) among other items.
BNA Daily Environment Report	<a href="http://www.bna.com">www.bna.com</a>	Updated daily with environmental news highlights, each of which can be clicked on for the more in-depth story. The sidebar includes an environmental events hyperlink that lists today’s date and preceding dates in reverse chronological order. By clicking on the date of interest, site visitors are provided with a link to the national environmental events (seminars, conferences, conventions) that took place (or are taking place) on that date. <i>Subscription required.</i>

<b>Organization/Agency/ Web Site Name</b>	<b>URL</b>	<b>Description</b>
BNA Environmental & Safety Library on the Web	<a href="http://esweb.bna.com">http://esweb.bna.com</a>	Includes all federal environmental and safety statutes, codified regulations, and guidance documents, as well as Federal Register documents. <i>Subscription required.</i>
The Center for International Environmental Law	<a href="http://www.ciel.org">www.ciel.org</a>	Focuses on current international environmental law issues, including biodiversity and wildlife, climate change, and human rights and the environment.
CERCLA (Superfund)	<a href="http://www4.law.cornell.edu/uscode/42/ch103.html">www4.law.cornell.edu/uscode/42/ch103.html</a>	Text of the Act from 42 U.S.C. §9601, <i>et seq.</i> NOTE: The text of the U.S.C. on this site is not kept current.
Clean Air Act	<a href="http://www4.law.cornell.edu/uscode/42/ch85.html">www4.law.cornell.edu/uscode/42/ch85.html</a>	Text of the Act from 42 U.S.C. §7401, <i>et seq.</i> NOTE: The text of the U.S.C. on this site is not kept current.
Drycleaner Environmental Response Trust Fund of Illinois	<a href="http://www.cleanupfund.org">www.cleanupfund.org</a>	Assists dry cleaners in the cleanup process.
Dry Cleaning	<a href="http://www.epa.gov/compliance/resources/publications/assistance/sectors/dryclean.pdf">www.epa.gov/compliance/resources/publications/assistance/sectors/dryclean.pdf</a>	Provides USEPA regulations for dry cleaners.
Envirofacts (USEPA Toxic Release Reports)	<a href="http://www.epa.gov/enviro">www.epa.gov/enviro</a>	Provides direct access to the wealth of information contained in the USEPA's databases on air releases, chemicals, facility information, grants/funding, hazardous waste, risk management plans, Superfund, toxic releases, water discharge permits, drinking water contaminant occurrence, and drinking water microbial and disinfection byproduct information.
EnviroLink	<a href="http://www.envirolink.org">www.envirolink.org</a>	A great source for up-to-date international environmental news.

<b>Organization/Agency/ Web Site Name</b>	<b>URL</b>	<b>Description</b>
Environmental and Energy Study Institute	<a href="http://www.eesi.org">www.eesi.org</a>	Founded by a bipartisan group of members of Congress in 1984, the Environmental and Energy Study Institute helps meet the critical need for timely information, the exchange of ideas, and rigorous policy debate on major environmental and energy issues.
Environmental Law & Policy Center	<a href="http://www.elpc.org">www.elpc.org</a>	A Midwest regional environmental advocacy organization working on energy, transportation, environmental management, and forest, land, and water issues in the Great Lakes states.
Environmental Law Institute	<a href="http://www.eli.org">www.eli.org</a>	ELI sponsors a wide-range of environmental education courses and seminars for environmental professionals throughout the country, and the Web site offers a complete calendar of ELI's upcoming activities, as well as chronicling past events.
Environmental News Network	<a href="http://www.enn.com">www.enn.com</a>	ENN is a resource for quality environmental news, features, and multimedia content. From content and commerce to governance and technology, ENN connects consumers and corporations in the new economy.
Environmental Professional's Homepage	<a href="http://www.clay.net">www.clay.net</a>	Provides hyperlinks to practically every environmental Web site on the Internet, including federal and state government agencies; federal regulations and legislation; health-and-safety-related agencies, regulations, and databases; and various professional organizations. Also includes listings of upcoming conferences, calls for papers, and job openings.

<b>Organization/Agency/ Web Site Name</b>	<b>URL</b>	<b>Description</b>
Environmental Technology Verification Program	<a href="http://www.epa.gov/etv">www.epa.gov/etv</a>	The USEPA's ETV Program, operated by the Office of Research and Development, verifies the performance of innovative technical solutions to problems that threaten human health or the environment.
Environmental Treaties and Resource Indicators	<a href="http://sedac.ciesin.org/entri">http://sedac.ciesin.org/entri</a>	ENTRI is a fast, convenient, comprehensive online search service for finding information about environmental treaties and national resource indicators.
Environmental Working Group	<a href="http://www.ewg.org">www.ewg.org</a>	EWG is a leading content provider for public interest groups and concerned citizens who are campaigning to protect the environment.
The EXtension TOXicology NETwork	<a href="http://ace.ace.orst.edu/info/extoxnet">http://ace.ace.orst.edu/info/extoxnet</a>	The EXTOWNET InfoBase provides a variety of information about pesticides. For example, the pesticide information profiles provide specific information on pesticides and the toxicology information briefs contain a discussion of certain concepts in toxicology and environmental chemistry. Other topic areas include toxicology issues of concern, factsheets, news about toxicology issues, newsletters, resources for toxicology information, and technical information.
FindLaw	<a href="http://www.findlaw.com/01topics/13environmental">www.findlaw.com/01topics/13environmental</a>	FindLaw, the leading Web portal focused on law and government, provides access to a comprehensive and fast-growing online library of legal resources for use by legal professionals, consumers, and small businesses.

<b>Organization/Agency/ Web Site Name</b>	<b>URL</b>	<b>Description</b>
Great Lakes Information Network	<a href="http://www.great-lakes.net">www.great-lakes.net</a>	GLIN is a partnership that provides one place online for people to find information relating to the binational Great Lakes-St. Lawrence region of North America. GLIN offers a wealth of data and information about the region's environment, economy, tourism, education, and more.
Illinois Brownfields Initiative	<a href="http://www.epa.state.il.us/land/brownfields">www.epa.state.il.us/land/brownfields</a>	Provides information and contacts for assistance with Illinois' program to redevelop brownfields.
Illinois Environmental Protection Agency	<a href="http://www.epa.state.il.us">www.epa.state.il.us</a>	The mission of the IEPA is to safeguard environmental quality, consistent with the social and economic needs of the state, so as to protect health, welfare, property, and the quality of life.
Illinois Legislative Information System	<a href="http://www.ilga.gov">www.ilga.gov</a>	Contains all Illinois statutes and acts as well as proposed legislation. The official site of the Illinois General Assembly.
Illinois Pollution Control Board	<a href="http://www.ipcb.state.il.us">www.ipcb.state.il.us</a>	Provides information on the IPCB as well as recent cases, rules, and regulations. Also contains the text of the Illinois Environmental Protection Act and pending legislation.
Illinois Small Business Environmental Assistance	<a href="http://www.illinoisbiz.biz/bus/sba.html">www.illinoisbiz.biz/bus/sba.html</a>	Provides help to small businesses in dealing with environmental issues. Maintained by the Illinois Department of Commerce and Economic Opportunity.
Indiana Department of Environmental Management Permit Guide	<a href="http://www.state.in.us/idem/guides">www.state.in.us/idem/guides</a>	Lists all major categories of permitting authority (land, air, water, waste), and then systematically addresses the extent to which a facility may require specific state or federal permits and indicates the persons within each agency to contact for further information.



<b>Organization/Agency/ Web Site Name</b>	<b>URL</b>	<b>Description</b>
The Information Network for Superfund Settlements	<a href="http://envinfo.com/insslead.html">http://envinfo.com/insslead.html</a>	The Information Network has become one of the foremost organizations addressing Superfund issues, focusing on them primarily from the viewpoint of industrial PRPs. The Network maintains one of the country's most complete collections of USEPA guidance documents, administrative orders, and other relevant materials.
Inter-American Development Bank	<a href="http://www.iadb.org">www.iadb.org</a>	The Inter-American Development Bank was established in December 1959 to help accelerate economic and social development in Latin America and the Caribbean.
ISO 14000 Information Center	<a href="http://www.iso14000.com">www.iso14000.com</a>	ISO 14000 training and information.
Legal Ethics	<a href="http://www.legalethics.com/intra.law?law=environmental">www.legalethics.com/intra.law?law=environmental</a>	Provides links to various environmental resources.
Mine Safety and Health Administration	<a href="http://www.msha.gov">www.msha.gov</a>	
National Archives and Records Administration, Office of the Federal Register	<a href="http://www.gpoaccess.gov/nara/index.html">www.gpoaccess.gov/nara/index.html</a>	Provides access to a searchable database for the Federal Register and Code of Federal Regulations.
National Association of State Information Resource Executives State Search	<a href="http://www.nascio.org">www.nascio.org</a>	The NASIRE State Search page seeks to "serve as a topical clearinghouse of state government information on the Internet."
National Institute for Occupational Safety and Health	<a href="http://www.cdc.gov/niosh">www.cdc.gov/niosh</a>	NIOSH is a diverse organization made up of employees representing a wide range of disciplines, including industrial hygiene, nursing, epidemiology, engineering, medicine, and statistics. NIOSH is responsible for conducting research on the full scope of occupational disease and injury, ranging from lung disease in miners to carpal tunnel syndrome in computer users.

<b>Organization/Agency/ Web Site Name</b>	<b>URL</b>	<b>Description</b>
National Response Center	<a href="http://www.nrc.uscg.mil">www.nrc.uscg.mil</a>	Provides background information on the NRC, information on reporting an oil or chemical spill, legislative requirements, and contacts.
North American Commission for Environmental Cooperation	<a href="http://www.cec.org">www.cec.org</a>	Publications and information resources on laws, treaties, and agreements.
OSHA Chemical Sampling Information	<a href="http://www.osha-slc.gov/dts/chemicalsampling/toc/toc_chemsamp.html">www.osha-slc.gov/dts/chemicalsampling/toc/toc_chemsamp.html</a>	The Chemical Sampling Information file presents, in concise form, data on a large number of chemical substances that may be encountered in industrial hygiene investigations. It is intended as a basic reference for industrial hygienists engaged in OSHA field activity.
Pace University School of Law Virtual Environmental Law Library	<a href="http://law.pace.edu/environment">http://law.pace.edu/environment</a>	Includes sections related to international laws, comparative laws, and U.S. environmental laws.
Paints and Coatings Resource Center	<a href="http://www.paintcenter.org">www.paintcenter.org</a>	Provides regulatory compliance information to individual organic coating facilities, vendors, and suppliers.
Planet Ark	<a href="http://www.planetark.org/index.cfm">www.planetark.org/index.cfm</a>	A “daily guide to helping the planet.” Home of Reuters Daily World Environment News.
Pollution Online	<a href="http://www.pollutiononline.com">www.pollutiononline.com</a>	A virtual community for pollution-control industry professionals.
Public Utilities Reports, Inc.	<a href="http://www.pur.com">www.pur.com</a>	PUR provides information, analysis, and seminars for the electric utility, natural gas, telecommunications, and water industries.
The Right-To-Know Network	<a href="http://www.rtk.net">www.rtk.net</a>	The Right-To-Know Network provides free access to numerous databases, text files, and conferences on the environment, housing, and sustainable development.

<b>Organization/Agency/ Web Site Name</b>	<b>URL</b>	<b>Description</b>
Sierra Club	<a href="http://www.sierraclub.org">http://www.sierraclub.org</a>	Membership organization existing to protect “the wild places of the earth” and to promote responsible use of the earth’s resources.
Social Science Information Gateway	<a href="http://sosig.ac.uk">http://sosig.ac.uk</a>	Has pages on Environmental Sciences, the Environment and Women, Development and the Environment. The SOSIG Internet Catalogue is an online database of high-quality Internet resources offering users the chance to read descriptions of resources available over the Internet and to access those resources directly.
Technology Transfer Network	<a href="http://www.epa.gov/ttn">www.epa.gov/ttn</a>	The TTN is a collection of technical Web sites containing information about many areas of air pollution science, technology, regulation, measurement, and prevention. In addition, the TTN serves as a public forum for the exchange of technical information and ideas among participants and USEPA staff.
USEPA	<a href="http://www.epa.gov">www.epa.gov</a>	The USEPA’s Web site serves as the cornerstone for environmental legal research in the United States.
USEPA Region V	<a href="http://www.epa.gov/region5">www.epa.gov/region5</a>	Provides information on Illinois and surrounding states.
USEPA Region V Contacts	<a href="http://www.epa.gov/cgi-bin/r5experts.cgi">www.epa.gov/cgi-bin/r5experts.cgi</a>	Contains phone numbers for various experts at USEPA, Region V.
USEPA Small Business Assistance Program	<a href="http://www.epa.gov/ttn/sbap">www.epa.gov/ttn/sbap</a>	Provides links to state/local Web sites and other USEPA sites.

Organization/Agency/ Web Site Name	URL	Description
USEPA's Applicability Determination Index	<a href="http://cfpub.epa.gov/adi">http://cfpub.epa.gov/adi</a>	ADI is a database containing USEPA memoranda on applicability and compliance issues associated with the New Source Performance Standards (NSPS) and National Emissions Standards for Hazardous Air Pollutants (NESHAP), and chlorofluorocarbons (CFCs). There is also a separate category for asbestos. The database allows users to search for determinations by a combination of subparts, regulatory citations (references), issue dates, USEPA regions/offices, and keywords. Users can then view information from the determinations found and tag one or more determination to download to their computers.
USEPA's Oil Spill Program	<a href="http://www.epa.gov/oilspill/index.htm">www.epa.gov/oilspill/index.htm</a>	Provides information on oil spill prevention, control, and countermeasure (SPCC) plans and preventing, responding to, and reporting spills.
USEPA's RCRA, Superfund, and EPCRA Hotline	<a href="http://www.epa.gov/epaoswer/hotline">www.epa.gov/epaoswer/hotline</a>	Provides information and links on RCRA, EPCRA, Superfund, and the Risk Management Program.
U.S. Fish and Wildlife Service	<a href="http://www.fws.gov/who">www.fws.gov/who</a>	The U.S. Fish and Wildlife Service is the only agency of the U.S. government whose primary responsibility is fish, wildlife, and plant conservation.
Yahoo's Environmental Menu	<a href="http://dir.yahoo.com/society_and_culture/environment_and_nature">http://dir.yahoo.com/society_and_culture/environment_and_nature</a>	Yahoo's directory of environmental and nature-related Web sites.

### C. [12.100] Environmental Consulting Services Confidentiality Agreement

Dear \_\_\_\_\_:

**In connection with the proposed acquisition of [certain real property (Property)] [a certain business (Business)] by one of our clients (Client), our Client may retain your environmental consulting firm (Consultant) to perform certain environmental investigations and may provide Consultant with certain confidential material and information, including, without**

**limitation, financial, environmental, business, and other information about the [Property] [Business] (such information, including, without limitation, all derivations and analyses thereof concerning said [Property] [Business], the fact that the [Property] [Business] is for sale, and the fact that our Client may be interested in purchasing it, is hereinafter called “Confidential Information”). The Confidential Information will be provided to Consultant solely for purposes of (1) enabling Client to determine whether Consultant may be of assistance to Client and (2) enabling Consultant to determine whether and how it may be able to assist Client and prepare a proposal to so assist Client.**

**In consideration of its opportunity to review the Confidential Information to prepare a proposal to assist Client, Consultant shall maintain the Confidential Information in strict confidentiality and hereby agrees for itself and on behalf of its employees, agents, directors, partners, and shareholders (Representatives), as follows:**

- 1. Not to use for any purpose any portion of the Confidential Information except to evaluate its possible interest in assisting Client with respect to the possible acquisition of the [Property] [Business];**
- 2. Not to disclose to any person any portion of the Confidential Information except to those Representatives who need to know such information for the purposes set forth herein, and who, prior to being provided with any Confidential Information, are advised of the restrictions of this agreement and who agree to be bound by the terms of this agreement;**
- 3. Not to disclose to any person that this agreement exists or that the Confidential Information has been made available to it; and**
- 4. To reimburse, indemnify, and hold Client harmless from and against any damage, claim, loss, or expense incurred as a result of its breach of this agreement.**

**Consultant shall be responsible for any breach of this agreement by its Representatives and shall take reasonable steps to ensure that those Representatives that are given access to the Confidential Information will be bound by and conduct their review in accordance with the terms of this agreement.**

**If Consultant or any of its Representatives are requested or required by law or legal process to disclose any Confidential Information, Consultant will notify Client and this law firm a reasonable time prior to disclosure so that an appropriate protective order and/or any other action may be taken to protect the confidentiality of the information. In the event that such a protective order is not obtained or other protective action is not successful, or Client waives compliance with the provisions hereof, Consultant or its Representatives may disclose to any tribunal or other person only that portion of the Confidential Information that Consultant or its Representatives is or are legally required to disclose and shall exercise its or their best effort(s) to obtain assurance that confidential treatment will be accorded such Confidential Information.**

**Very truly yours,**

\_\_\_\_\_

**AGREED TO AND ACCEPTED** this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_

[CONSULTANT]

**By:** \_\_\_\_\_

**Its:** \_\_\_\_\_