ENVIRONMENTAL COST RECOVERY & LENDER LIABILITY UPDATE

As a service to Jenner & Block's clients and the greater legal community, the Firm's Environmental, Energy and Natural Resources Law practice maintains this online resource center that offers the latest case law and other developments in Environmental Cost Recovery & Lender Liability.

Please also visit the Firm's Corporate Environmental Lawyer Blog for current developments in this area.

Jenner & Block will update this web page with new developments and items of interest as they become available. For further information, please contact Partner Gabrielle Sigel.

Federal Law Developments

Trustees' Assessment Costs for Natural Resource Damages Are Recoverable Upon Expenditure

In a case of first impression, on September 4, 2007, the federal court for the Eastern District of Washington refused to dismiss a claim by Native American land trustees against the federal government under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a)(4)(C), for costs incurred to assess damages to natural resources. Confederated Tribes & Bands of the Yakama Nation v. United States, 2007 U.S. Dist. LEXIS 65011 (E.D. Wash. Sept. 4, 2007). The Yakama Nation had filed CERCLA claims against the U.S. Departments of Energy and Defense concerning contamination, including natural resource damages, arising from releases at Hanford Nuclear Reservation. One of plaintiffs' claims is for the costs of assessing the extent of natural resources damages, which the DOE had, thus far, been refusing to fund. The U.S. agencies sought to dismiss the claim for assessment costs as not yet "ripe" for review by the court because, the agencies argued, such costs could not be claimed until EPA had selected a remedial action for the site, which was still far from occurring at Hanford.

The court analyzed the complex CERCLA language and implementing regulations concerning when natural resource-related claims could be brought. Judge Suko found that CERCLA distinguished between natural resource damages and natural resource assessment costs. While damages could not be the subject of a lawsuit before a remedial action was selected, assessment costs were not subject to that timing restriction. Thus, the Yakama Nation could immediately proceed with its claim for assessment costs.

If followed in other jurisdictions, this case will allow natural resource trustees, including Native American tribes and the U.S. Departments of Interior and Commerce, to begin recovering natural assessment costs early in the Superfund process. As a result, Judge Suko’s decision may
speed up or otherwise encourage trustees to invest in and prosecute natural resource damages claims.

The United States Is a CERCLA PRP for Owned Native American Lands

On August 21, 2007, the federal district court for the Eastern District of Washington held that the United States is a CERCLA owner with respect to Native American lands for which the United States holds fee title and exercises authority and control. *United States v. Newmont U.S.A.*, 2007 U.S. Dist. LEXIS 61308 (E.D. Wash. Aug. 21, 2007) (“Newmont I”). The case arises from CERCLA claims, originally brought by the United States Environmental Protection Agency (EPA) against the operators of a former open-pit uranium mine on the Spokane Indian Reservation. See *United States v. Newmont U.S.A.*, 2007 U.S. Dist. LEXIS 63726 (E.D. Wash. Aug 28, 2007) (ruling on EPA’s motion for partial summary judgment as to CERCLA liability issues) (“Newmont II”). In response to that lawsuit, the mine operators filed a counterclaim against the United States, asserting that the federal government was a CERCLA “owner” of the mine. After an extensive analysis of the history of the United States’ acquisition, by conquer, of the Spokane Tribe’s land, the court found that the United States had full fee title to the property, with the Tribe maintaining only a possessory right as against third-parties other than the federal government. The court found that it did not have to reach the issue of whether “bare legal title” was sufficient to confer CERCLA owner PRP liability. Rather, the court found that, in the case of the Spokane Reservation, the United States had both title and had exercised authority and control over the leased mining lands. The United States was found to be a CERCLA owner, in part because it had the authority to prevent the “very contamination” at issue. *Newmont I* at *69.

The holding in the *Newmont I* opinion is largely tied to how the United States acquired and controlled certain Native American lands; however, private parties involved in CERCLA cases on Native American lands, as well as other property for which the United States is the owner as trustee, may rely on *Newmont I* to assert that the United States, as owner, is a PRP and must share in the costs of CERCLA liability.

No Punitive Damages in MTBE Market Share Liability Case

On August 16, 2007, the U.S. District Court for the Southern District of New York held that New York plaintiffs suing manufacturers of MTBE could not recover punitive damages because their underlying damage claim was based on market share liability. *In re: MBTE Prods. Liab. Litig.*, 2007 U.S. Dist. LEXIS 60234 (S.D.N.Y. Aug. 16, 2007). Market share liability is an evidentiary approach that permits a plaintiff to forego having to prove that a particular defendant caused particular harm. Instead, in cases involving manufacturers’ products that are deemed fungible, each defendant’s causal liability depends on its share of the market for the fungible products. The judge for the New York MTBE case ruled on defendants’ motion to strike plaintiffs’ demand for punitive damage. *Id.* at *3. Although this case is part of multi-district litigation, it must be decided
under applicable New York state law.

The court relied on two reasons for finding that allowing punitive damages when plaintiffs rely on market share liability is inconsistent with New York law. First, New York courts have sought to minimize other inequities imposed on defendant in cases where market share liability is used. Second, New York law has emphasized practical considerations when evaluating evidentiary issues in market share cases. Following the state court’s emphasis on “practical considerations,” the federal court found that prohibiting punitive damages had the practical consequence of limiting plaintiffs’ reliance on the market share evidentiary shortcut. Thus, the court ruled that, if plaintiffs cannot show that individual defendants are “bad actors,” plaintiffs cannot recover punitive damages from them.

The court excluded from the trial, scheduled for March 2008, all evidence and arguments pertaining to punitive damages. While the court’s decision applies only to the MTBE plaintiffs in New York, the decisions applying other states’ laws in other MTBE multi-district cases will likely be strongly influenced by this decision.

**State Case Law Developments**

**Montana Supreme Court Recognizes Restoration Damages and Allows Additional Evidence for Punitives**

In *Sunburst School Dist. No. 2 v. Texaco, Inc.*, 338 Mont. 259 (Mont. 2007), the Montana Supreme Court reviewed the trial court’s rulings after a jury awarded $16 million in compensatory damages and $25 million in punitive damages to plaintiffs in the town of Sunburst, whose soil and groundwater were contaminated by benzene from a nearby Texaco refinery. Sunburst’s suit was based on common law claims, including nuisance, trespass, strict liability for abnormally dangerous product, and constructive fraud.

Sunburst asserted that it was entitled to “restoration damages” that exceeded the value of the property if it were clean. The Montana Supreme Court, in a new rule, held that Sunburst was entitled to restoration damages because personal use of the property gives it value beyond that of the sale price and because restoration damages may be necessary to make whole the owner of personal property. The Court found that the award was not an unreasonable windfall to plaintiffs because plaintiffs stated they would use the money to remedy the contamination and because the amount awarded was less than the cost of remediation shown by plaintiffs’ experts.

The Court also held that evidence that Texaco had been working with Montana regulators regarding the appropriate remediation for the site and otherwise had been complying with environmental regulations was irrelevant to its defense against common law claims for compensatory damages. The Court noted that plaintiffs’ claims related to contamination from operations that ended in 1961. Evidence showed that Texaco had
some knowledge of off-site contamination since at least 1955. Therefore, particularly considering that plaintiffs had claims for strict liability for the benzene contamination, evidence of Texaco’s work with regulators beginning in the 1980s could not be used to defend against compensatory damages. Texaco’s evidence, however, could be introduced to oppose demands for punitive damages. The Court remanded the case for a new trial on punitive damages so that Texaco could present evidence of its cooperation with regulators.

Texas Refinery Not Liable for "Use and Enjoyment" Property Damage for Public Nuisance

On August 30, 2007, the Texas Court of Appeals dismissed property damage claims against the multiple petroleum, chemical and energy companies who are defendants in the mass toxic tort suit arising out of contamination in Port Arthur, Texas. In re: Premcor Ref. Group, 2007 Tex. App. LEXIS 6962 (Tex. App. Aug. 30, 2007). Plaintiffs primarily are minor children who, in addition to bringing common law claims alleging personal injury, brought a claim in permanent nuisance. Under Texas law, the only person who may bring a claim for permanent nuisance arising from injury to land is the owner of the property at the time the injury first occurred. Here, almost none of the plaintiffs owned land and none owned land at the time the injury first occurred, more than fifty years ago.

To avoid the argument that as "new neighbors," they had no standing to bring a permanent nuisance claim, plaintiffs limited their claims to the "loss of use and enjoyment" of their homes, and did not allege that their homes, per se, were damaged. The court rejected this device, however, and found that claims for loss of use and enjoyment of real property is a property damage claim like any other nuisance claim. Therefore, because plaintiffs did not own the property at the time of the injury to it, plaintiffs lacked standing to bring a nuisance claim. The Court of Appeals ruled that the trial court had abused its discretion in refusing to grant the defendants’ motion to dismiss the "loss of use and enjoyment" claims.

New Jersey PRPs To Be Fined for Failure to Submit Required Reports

The New Jersey Department of Environmental Protection ("NJDEP") announced on September 24, 2007 that on October 1, 2007, it will begin bringing enforcement actions with fines of $8,000 per day against parties who are responsible for monitoring the effectiveness of remedial actions and who fail to submit the required biennial certification that engineering and institutional controls remain effective. Under New Jersey law, when a remedial action has been imposed on a site, including for leaking underground storage tanks, the owner and operator of the site must submit a biennial certification and monitoring reports with respect to remedies requiring engineering and institutional controls. Included among the affected owners and operators are those who hold a security interest in the property and either (a) negligently caused a discharge after foreclosure; or (b) actively participate in the site’s management.
NJDEP had found that site owner/operators had been ignoring their obligation to file these certifications and self-monitoring reports. In March 2007, NJDEP granted an amnesty period until September 18, 2007, and now plans to aggressively bring enforcement actions for parties’ failure to comply.

Foreclosing Lender Must Prove Coverage of Borrower’s Claim to Obtain Tank Insurance Proceeds

On July 17, 2007, the Court of Appeals of Washington held, in an unpublished opinion, that a foreclosing lender cannot obtain proceeds from the borrower’s insurer in a garnishment proceeding without first proving that the insurer was indebted to the policyholder (the borrower) and that the contamination was covered by the policy. *City Bank v. S&Hy*, 2007 Wash. App. LEXIS 2016 (Wash. Ct. App. Jul 17, 2007). City Bank, the lender, foreclosed on S&Hy’s gas station and sought to recover proceeds from S&Hy’s underground tank insurance for the bank’s costs of remediating a gasoline leak. Prior to the foreclosure, the insurer had contested S&Hy’s claim for coverage. To expedite recovery under the insurance policy, City Bank obtained a default judgment against S&Hy for the bank’s remediation costs. Then, the bank filed a garnishment action against Colonial, its insurer, to collect on that default judgment. The trial court in the garnishment proceeding entered summary judgment against Colonial, despite Colonial’s arguments that it did not have any liability for coverage to S&Hy. The Court of Appeals of Washington reversed, holding that Colonial’s documents contesting coverage were sufficient to establish a triable issue. As a result, the case was remanded so that the trial court could address the factual and legal issues of Colonial’s insurance obligations to S&Hy. Thus, City Bank was not able to avoid establishing S&Hy’s right to coverage by using the garnishment procedure.