

**NEW MEXICO ENVIRONMENTAL  
REGULATIONS FOR  
DESIGN PROFESSIONALS**

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## **I. OVERVIEW OF ENVIRONMENTAL REGULATION**

The regulatory climate for development has changed markedly in the past decade. In addition to zoning and subdivision issues, the astute developer must analyze a multitude of environmental issues prior to reducing the project to a blueprint. As recently as ten years ago, most development projects were shelved permanently if an initial investigation revealed existing environmental problems which potentially implicated liabilities under the far-reaching federal and state regulatory schemes. Financing for these projects could not be obtained, and no one, including the developer itself, was desirous of inheriting a project laden with potential environmental liabilities.

Times have changed at a pace that is remarkable in the regulatory field. The United States Environmental Protection Agency ("EPA") has itself recognized the impediment to development that the Superfund, or Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), has imposed on innocent parties. Congress has finally vested lenders with a true "safe harbor," and the advent of brownfields legislation and guidance documents have encouraged, rather than frustrated, the development of environmentally blighted properties. In fact, the regulatory agencies have shifted their focus from an "all-out" remedial effort to a "risk based" response designed to assist developers in placing the property to its highest and best use.

This paper will review a common sense approach to developing an environmental baseline, which segregates existing environmental conditions from those which may develop after the closing of the purchase of the property. After discussion of the environmental baseline, this paper will address the primary environmental permits necessary for a successful development, including air quality, hazardous waste, and wetlands issues. This presentation will then highlight the historical theories of liability and the limited defenses to environmental claims asserted under federal law, and compare that history to the recent judicial trend of expanding those defenses and thereby encouraging property development. Finally, the ability to "reuse" environmentally impaired properties will be discussed. The development of these impaired properties, commonly known as "brownfields," will be affected by the structure of the environmental baseline, the relief afforded to lenders providing the financing for the project, and by the recent judicial limitations on liability and the expansion of defenses available under federal law.

## **II. ACCOMMODATING NATURAL RESOURCE PROTECTION LAWS**

In virtually every business development transaction, potential environmental liability is a risk that must be appropriately assessed. As the discussion of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601 et. seq. (“CERCLA”) in part V below indicates, liability is frequently based not as much on fault as on ability to pay. Additionally, future laws may impose potential construction or operational restrictions which may deprive a proposed project of economic viability. The role of the environmental attorney is to ensure that these risks are managed to achieve maximum value.

Environmental risks in buying or selling real estate can be segregated into the following four categories: (i) existing contamination of purchased property, which is largely governed by CERCLA; (ii) third-party claims which may be asserted by neighboring land owners; (iii) operational restrictions, including obtaining necessary environmental permits and compliance with those permits; and (iv) enforcement actions, which may be instituted by an agency or an aggrieved citizen based on activities which preceded the purchase.

### **A. Due Diligence**

The EPA defines “brownfields” as “abandoned, idled, under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.”<sup>1</sup> Brownfields can be empty warehouses and factories or contaminated, junk-filled lots. While many factors have caused investors to shy away from brownfields properties, CERCLA created the essential risk associated with ownership of previously contaminated sites. As discussed in the prior section, CERCLA’s liability scheme imposed harsh liability for the costs of clean-ups on a number of “responsible parties,” including current owners and operators of a contaminated site who arguably had nothing to do with the contamination. Against this backdrop, the unattractiveness of an old industrial or commercial site is readily understandable.

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<sup>1</sup> See Brownfields Economic Redevelopment Initiative (September of 1995). The term “brownfield” is also defined by statute in Section 101 of the CERCLA, as “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.” See 42 U.S.C. § 9601(39) (also identifying nine specific types of properties that are excluded from this definitions).

The EPA has responded to CERCLA's significant impediment to the development of brownfield properties, which are often located in low income or other depressed areas. In 1995, the EPA began its Brownfields Program to change the way people think about contaminated properties. The Program was designed to be flexible so that communities could tailor approaches to meet their unique local needs. The heart of the EPA's Brownfields Program<sup>2</sup> is its investment in Brownfields Pilots, three types of programs that provide "seed" money to state and local entities for the assessment, cleanup, and redevelopment of brownfields. These programs include: (1) Brownfields Assessment Demonstration Pilots that fund environmental assessments of brownfields as well as local planning and community education regarding their clean up and redevelopment; (2) Brownfields Cleanup Revolving Loan Fund Pilots that provide state, local, and tribal governments with capital to make low or no interest loans to finance brownfields cleanups; and (3) Brownfields Job Training and Development Demonstration Pilots that train local residents for jobs related to brownfields cleanups.

The main focus of the EPA and of the states has been to encourage development without the risk of incurring unnecessary liability. The EPA has two primary mechanisms for the clarification and liquidation of potential liability, both of which are discussed below:

## **B. Comfort letters**

The purpose of comfort letters is to provide prospective purchasers and others with the best, most current information about the EPA's interest, or lack thereof, in a given site. These letters summarize data available to the EPA regarding a site and, importantly, summarize the federal government's past actions and future expectations with respect to response actions at the site. The EPA will not issue a comfort letter for any property unless there is a realistic perception or a probability of a prospective new owner incurring CERCLA liability. The EPA policy, which may be found on the EPA website, sets out four types of sample comfort/status letters:

a. A "no previous federal Superfund interest" letter which advises party that there is no evidence of past Superfund interest or involvement with the site (in other words, the site is not in the CERCLIS database).

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<sup>2</sup>Under the Brownfields Program, the EPA also partnered with states to develop Memoranda of Agreement that clarified the roles and responsibilities of agencies and encouraged the cleanup of contaminated properties. New Mexico is one of these states.

b. A “no current federal Superfund interest” which advises a prospective purchaser that this site has been deleted from CERCLIS or from the National Priorities List.

c. A “federal interest” letter which advises the prospective purchaser that the EPA is responding, or plans to respond, to contamination at a site.

d. A “State Action” letter which indicates that the State has primary responsibility for any activities at this site.

### **C. Prospective Purchaser Agreements (“PPAs”)**

In contrast to a comfort letter, a PPA provides actual resolution or liquidation of any legal liability that the prospective purchaser might incur. EPA issued its guidance on agreements with prospective purchasers of contaminated property on May 24, 1995, which states that PPAs are available only for sites where there has been, or where there realistically will be, a CERCLA response action. This standard is more restrictive than that which governs the issuance of comfort letters. The essence of a PPA is a covenant not to sue the new owner for pre-existing contamination, which is generally granted in exchange for appropriate consideration.

The covenant not to sue also qualifies, pursuant to section 113 (f) (2) of CERCLA, to protect the new owner from possible contribution actions by other PRPs. The EPA guidance states that in consideration of granting the covenant not to sue, the EPA should receive a substantial benefit either in the form of a cleanup, or an indirect public benefit in combination with a reduced direct benefit to EPA. Prior versions of the guidance restricted the consideration to direct benefits of cash or cleanup work. However, the current guidance recognizes the considerable indirect benefit that can be realized from brownfields redevelopment, including the creation or retention of jobs, the development of abandoned or blighted property, the creation of conservation or recreation areas, or the improvement of public transportation or infrastructure.

### **D. Brownfields Revitalization Act of 2002 and New Mexico Voluntary Remediation Act**

On January 11, 2002, President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act<sup>3</sup> to bring new clarity to brownfields regulation and provide government funding to assist in restoration efforts. Most significantly, the 2002 law authorizes up to \$250 million in funds annually for

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<sup>3</sup> The full text of the Act is available from the EPA’s website at [www.epa.gov/brownfields](http://www.epa.gov/brownfields)

Brownfields' grants. The grants are administered through the EPA to encourage businesses and localities to redevelop brownfields. Generally, grants of up to \$200,000 each are awarded to assess brownfields and identify creative and cost-effective means to clean-up contaminated property and restore them to productive use. In 2003, \$73.1 million in grants were awarded. In 2004, the EPA announced a record \$75.4 million grants to be distributed to 219 applicants, including 42 states, Puerto Rico, and 5 tribes.

The Brownfields Revitalization Act also established the Brownfields Cleanup Revolving Loan Fund (BCRLF).<sup>4</sup> The fund allows communities to provide funds to public and private entities for Brownfields clean up. Groups can apply for funds of up to \$1 million, provided that sixty percent of the award must be used to capitalize a revolving loan of funds used in clean-up efforts. The EPA administers this fund, and has already awarded well over \$100 million in grants. The loans contain escalation clauses that provide for the loan of additional cleanup funds if additional contamination is found during cleanup.

Similar to the purposes set forth in the Brownfields Law, the New Mexico Environment Department, pursuant to the New Mexico Voluntary Remediation Act<sup>5</sup> ("Remediation Act"), established a Voluntary Remediation Program to promote voluntary cleanup of contaminated sites. "The program is designed to facilitate redevelopment of contaminated sites by providing a streamlined, non-punitive remediation process."<sup>6</sup>

Any current or prospective landowner or operator can apply to participate in the program. Parties that successfully complete the program obtain a Certificate of Completion or a Conditional Certificate of Completion stating the contamination has been successfully mitigated. Parties can also receive a Covenant Not to Sue shielding the purchaser from liability. Finally, lenders are also protected from liability arising from any sites participating in the program.<sup>7</sup>

Cleanups conducted under the Brownfields Law or under the New Mexico

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<sup>4</sup> Information on borrower eligibility and loan fund conditions can be found at [www.epa.gov/brownfields/rlflst.htm](http://www.epa.gov/brownfields/rlflst.htm)

<sup>5</sup> 1978 N.M. STAT. ANN. 74-4G-1.

<sup>6</sup> New Mexico Environment Department, *Guidance for Prospective Applicants to the Voluntary Remediation Program 1* (2004-05), [http://www.nmenv.state.nm.us/gwb/New%20Pages/ROS\\_files/VRP\\_New/Statutes-Rules-Guidance/VRP\\_Prospect-App-Guide.pdf](http://www.nmenv.state.nm.us/gwb/New%20Pages/ROS_files/VRP_New/Statutes-Rules-Guidance/VRP_Prospect-App-Guide.pdf).

<sup>7</sup> *Id.*

Environment Department's Remediation Program limit the authority of the EPA at eligible response sites.<sup>8</sup> The Brownfields Law prohibits the EPA from bringing an action against a person conducting, or having completed, a response action.<sup>9</sup> This prohibition, however, extends on to actions as to the same releases addressed by the response action. Thus, the EPA may bring a separate action as to a different release. Furthermore, the prohibition applies only to the party that conducted, or is conducting, the cleanup.<sup>10</sup>

### **E. New "All Appropriate Inquiry" Requirements**

The new "All Appropriate Inquiry" rule implements the Brownfields Law. The Brownfields Law intended to clarify and add possible defenses to CERCLA's strict liability. CERCLA and the EPA had previously not defined the minimum requirements for an "all appropriate inquiry." Therefore, people relied on the practices of the American Society for Testing and Materials ("ASTM") as the standard for an "all appropriate inquiry." The new "All Appropriate Inquiry" makes significant changes to the long used ASTM E1527-00 standard, mainly by enhancing the scope of the due diligence activities. These new changes will increase the cost and time associated with performing an Environmental Site Assessment ("ESA").<sup>11</sup> Parties can try to minimize these expenses and additional time commitments by incorporating language into purchase agreements that would permit a purchaser, or the purchaser's environmental professional, access to the property and property records while the property is still within the seller's control.

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<sup>8</sup> Brownfields Law §231(b), Pub. L. No. 107-118, 115 stat. 2356, 2375-79 (codified at 42 U.S.C. § 9628) (2002). In order to effectively limit EPA authority, state programs must specifically govern response actions for the protection of public health and the environment. States must also maintain a public record of sites involved in remediation.

<sup>9</sup> Brownfields Law §128(b)(1).

<sup>10</sup> As the Committee Report commentary notes, there are four exemptions to this rule which include instances where the state requests assistance in a response action, when jurisdiction and cross-jurisdiction issues may arise, when an Administrator learns that information was not previously known by that state and further remediation is necessary to protect the environment or public health. See Report 107-2 to accompany S.350, Brownfields Revitalization and Environmental Restoration Act of 2001, 107th Cong. 1st Sess., Committee on Environment and Public Works, at 15-18 (Mar. 12, 2001).

<sup>11</sup> The EPA estimated that the cost increase will be between \$41 to \$48. This number, however, appears unrealistically low and does not account for environmental professionals' increase in time that will be invested into conducting a more comprehensive AAI, among other factors. See "Preamble" to AAI.

## 1. Objective of the “All Appropriate Inquiry” Site Assessment

The EPA’s new “Standards for Conducting All Appropriate Inquiry”<sup>12</sup> rule (“Rule” or “AAI”), which takes effect on November 1, 2006, establishes a regulatory standard for performing environmental due diligence in real property transactions. The new Rule supersedes the commonly used ASTM E1527-00 standard; when the rule takes effect, parties will have to comply with the AAI requirements or follow the new ASTM E1527-05 standards.<sup>13</sup> The AAI serves as a crucial component to three liability defenses available under CERCLA: innocent landowner defense,<sup>14</sup> *bona fide* purchaser (“BFP”) defense,<sup>15</sup> and contiguous property owner defense.<sup>16</sup> Parties receiving grants under the Brownfields Grant programs must also perform an AAI.<sup>17</sup>

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<sup>12</sup> 40 C.F.R. § 312.

<sup>13</sup> *Id.* § 312.11(a). The now superseded E1527-00 standard can still be purchased through ASTM International by visiting their website at [www.astm.org](http://www.astm.org). The active standard, E1527-05, can also be purchased through ASTM’s website.

<sup>14</sup> The innocent landowner defense applies to persons who purchase property and are unaware of, or have no reason to know of, contamination existing on the property at the time of purchase. The landowner may use this defense if: 1) the owner conducted an AAI before acquiring title, 2) no contractual relationship exists between the owner and the party responsible for the contamination, and 3) the owner exercised due care with respect to hazardous substances. 42 U.S.C. § 103(35) and § 107(b)(3).

<sup>15</sup> The BFP defense applies to purchasers with prior knowledge of contamination. The purchaser may assert this defense if: 1) the purchaser conducted an Inquiry prior to acquiring title, 2) disposal of all hazardous substances occurred prior to acquiring title, 3) the purchaser used “appropriate care” to prevent continued or future releases, 4) the purchaser limits or prevents exposure to the contamination. 42 U.S.C. § 101(40) and § 107(r).

<sup>16</sup> A purchaser of contiguous property must not know of, or have reason to know of, contamination existing on the property at the time of purchase. A landowner may assert this defense if: 1) the purchaser conducted an AAI prior to acquisition, 2) the contamination resulted from hazardous substances migrating from adjacent parcels, and 3) the purchaser took “reasonable steps” and used “proper care” to prevent future releases. 42 U.S.C. § 107(q).

<sup>17</sup> United States Environmental Protection Agency, *Comparison of the Final All Appropriate Inquiries Standard and the ASTM E1527-00 Environmental Site Assessment Standard* (Oct. 2005), at <http://www.epa.gov/brownfields/>.

## 2. Standards and Practices of the “All Appropriate Inquiry” Site Assessment

An AAI requires an environmental professional to conduct an investigation of a property which includes: interviewing past and present owners, operators, and occupants; interviewing neighbors if the property is abandoned; reviewing historical sources of information; reviewing federal, state, tribal, and local government records; visually inspecting the facility and adjoining properties; reviewing commonly known or reasonably ascertainable information; and evaluating the degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect the contamination.<sup>18</sup> Although not necessarily performed by an environmental professional, an AAI must also include: searches for environmental cleanup liens; an assessment of the relationship of the purchase price to the fair market value of the property if the property was not contaminated; and an assessment of any specialized knowledge or experience of the prospective owner.<sup>19</sup>

The results of an AAI must be documented in a written report that includes: 1) “an opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases of hazardous substance...on, at, in, or to the subject property; 2) an identification of data gaps...that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances...on, at, in, or to the subject property and comments regarding the significance of such data gaps on the...professionals’ ability to provide an opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases; 3) the qualifications of the environmental professional;”<sup>20</sup> and 4) two signed declarations.<sup>21</sup>

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<sup>18</sup> 40 C.F.R. § 312.20.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* § 312.21(c).

<sup>21</sup> *Id.* § 312.21(d). The professional must include the following two statements: 1) “[I, We] declare that, to the best of [my, our] professional knowledge and belief, [I, we] meet the definition of Environmental Professional as defined in § 312.10 of this part” and 2) “[I, We] have the specific qualifications based on education, training, and experience to assess a property of the nature, history, and setting of the subject property. [I, We] have developed and performed the all appropriate inquires in conformance with the standards and practices set forth in 40 CFR Part 312.”

All AAIs must be conducted within one year of acquisition of a property. Certain components, however, must be updated within 180 days of acquisition.<sup>22</sup>

### **3. How Much Research is Enough?**

As mentioned, the AAI requires more research than ASTM E1527-00. In the event that a property is abandoned, for example, the AAI rule, unlike ASTM E1527-00, requires the environmental professional to interview neighbors or nearby property owners.<sup>23</sup>

Furthermore, all “[h]istorical documents and records must be reviewed for the purposes of achieving the objectives and performance factors.”<sup>24</sup> These documents, under the AAI, must “cover a period of time as far back in the history of the subject property as it can be shown that the property contained structures or from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes.”<sup>25</sup> This new requirement proves far more extensive than the ASTM E1527-00 standard of researching only obvious uses beginning when the property was first developed.

### **4. “Di Minimis” Contamination**

The Brownfields Law added a new liability exemption to CERCLA. The new exemption provides otherwise liable generators or transporters a qualified exemption from liability where the parties can demonstrate that, prior to April 1, 2002, the amount of hazardous substances they contributed to a CERCLA site listed on the National Priorities List [“NPL”] was less than 200 pounds of solid materials or less than 110 gallons of liquid material.<sup>26</sup> This exemption “is similar, but not identical, to the protection previously afforded by the” EPA and U.S. Department of Justice (“DOJ”) “regarding settlements with de minimis parties at Superfund sites.”<sup>27</sup>

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<sup>22</sup> *Id.* § 312.20.

<sup>23</sup> Compare 40 C.F.R. 312.23(d) with ASTM E1527-00.

<sup>24</sup> 40 C.F.R. § 312.24(a).

<sup>25</sup> *Id.* § 312.24(b).

<sup>26</sup> See CERCLA § 107(o).

<sup>27</sup> Memorandum from Barry Breen, Director, Office of Site Remediation Enforcement at EPA, and Bruce Gelber, Chief of Environmental Enforcement Section at DOJ, to EPA directors and regional counsel 2 (Nov. 6, 2002) available at

This exemption, however, does not apply in certain cases.<sup>28</sup>

A party may still enter *di minimis* waste contributor settlements under the EPA/DOJ policy. A party entering such settlements provides cleanup funds based on its share of the total waste contribution.<sup>29</sup> This share often includes a premium.<sup>30</sup> In exchange, a party may receive “a covenant not to sue and contribution protection from the United States.”<sup>31</sup>

## 5. Representations and Warranties

Common subjects for representations in connection with environmental matters include the following:

- a. Compliance with laws and regulations;
- b. Possession and effectiveness of required permits;
- c. Lack of pending or threatened enforcement action; and
- d. Lack of pending or threatened third-party claims.

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<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/wv-exmpt-dmicro-mem.pdf>. The codified exemption differs from the EPA/DOJ’s policy in two significant ways. First, the exemption applies only to NPL sites, while the EPA/DOJ policy applied to both NPL and non-NPL sites. Second, the exemption does not apply to disposal or transport occurring after April 1, 2001, while the EPA/DOJ policy did not have a date limitation. *Id.* at 4.

<sup>28</sup>The exemption does not apply when “the President determines that: 1) the person sent material that contributed or could contribute significantly...to the cost of the response action...; 2) the person has failed to comply with an information request or agency subpoena; 3) the person has impeded, through action or inaction, a response action...; or 4) the person has been convicted of a criminal violation for conduct related to the exemption.” *Id.* at 3.

<sup>29</sup>United States Environmental Protection Agency, *Superfund Enforcement FAQs* (Mar. 2006), <http://www.epa.gov/compliance/resources/faqs/cleanup/superfund/enf-faqs.html> [hereinafter “Superfund FAQs”]. In lieu of, or in addition to, providing funds, parties may undertake some of the cleanup work. *Id.*

<sup>30</sup>See, e.g., *United States v. Cannons Eng’g Corp.*, 899 F.2d 79 (1<sup>st</sup> Cir. 1990)(upholding premium).

<sup>31</sup>*Id.*

Additionally, a buyer should require representations of the seller concerning the absence of undisclosed liabilities and whether hazardous substances have been used or stored on the property.

From the seller's perspective, an "AS IS" clause may not be sufficient to prevent the buyer from seeking reimbursement for environmental costs, as these types of clauses are generally construed against the seller. **Southland Corp. v. Ashland Oil Inc., 696 F. Supp. 994 (D.N.J. 1988).**

## **6. "As Is"**

Buyer agrees that, except as expressly set forth in this agreement, no representations by or on behalf of Seller have been made to Buyer as to the condition of the property, any restrictions related to the development of the property, the applicability of any governmental requirements, including, but not limited to "environmental requirements" pertaining to the property, or the suitability of the property for any purpose whatsoever. Buyer represents to Seller that Buyer has made its own independent investigation of the property and is relying solely on such independent investigation. Buyer acknowledges that Seller has no expertise concerning "environmental requirements" and "hazardous materials" and that Buyer is not relying on any representation or the lack of same, with respect to "environmental requirements" or "hazardous materials" as they apply to conditions on the property.

Through the environmental due diligence procedure, the parties are able to segregate pre-closing from post-closing liabilities. This segregation, commonly called the "Environmental Baseline," serves to establish responsibilities for environmental response costs and liabilities which are liquidated after the closing of the purchase and sale.

The following are examples of allocation and baseline provisions:

## **7. Environmental Allocation**

Except as otherwise provided in this schedule, Seller shall be responsible for, and bear the costs of, such corrective action as may arise as a consequence of the ownership or operation of the property prior to the closing date, and Buyer shall be responsible for, and bear the cost of, such corrective action as may arise as a consequence of the ownership or operation of the property on or after the closing date. The presence or absence of hazardous substances in the soil or groundwater on the property as of the closing date, for purposes of determining the necessity of

corrective action, shall be conclusively determined by the baseline, as defined below.

## **8. Environmental Baseline**

Except as otherwise provided, or specifically agreed to in writing, the presence or absence as of the closing date of hazardous substances in the soil or groundwater on the property, or that have migrated or may migrate from the property as a consequence of activities on or related to the property (hereinafter called the "Environmental Baseline"), shall be determined referenced to data from the environmental assessments performed by ABC Company. The Environmental Baseline shall not include the presence of substance in such quantities as are consistent with the method of operation of the property, in process equipment, storage tanks, land farm, or non-earth containment devices or of such substances as may lawfully exist as a consequence of the operation of the property ("lawful substances"). Buyer agrees to be responsible for any corrective action arising from the use of lawful substances after the closing date, and any contamination caused by those lawful substances after the closing date or related corrective action after the closing date.

## **III. THE ENDANGERED SPECIES ACT**

### **A. An Overview**

Congress enacted the Endangered Species Act ("ESA")<sup>32</sup> in 1973, amid growing concern about the detrimental effects that land use and development have upon plants and wildlife. The ESA provides the means to identify species of plants and wildlife that are threatened by development and sets forth detailed guidelines for how those species will be protected to best ensure their continued survival. Although the ESA has nationwide application, it has special implications for each state in which endangered or threatened species are at risk. The ESA's impact on several New Mexico projects has been well documented because the state is home to such endangered or threatened species as the Mexican spotted owl, the black-footed ferret, the Rio Grande silvery minnow, and the bald eagle, among others. New Mexico is inhabited by 42 species officially listed as either endangered or threatened, 29 of which are animals, and 13 are plants.<sup>33</sup>

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<sup>32</sup> 16 U.S.C. §§ 1531-1544.

<sup>33</sup> FWS Threatened and Endangered Species System (TESS), *available at* [http://ecos.fws.gov/tess\\_public/TESSWebpageUsaLists?state=NM](http://ecos.fws.gov/tess_public/TESSWebpageUsaLists?state=NM).

## B. Administration

The Fish and Wildlife Service (“FWS”), in the U.S. Department of the Interior, and the National Oceanic and Atmospheric Administration (“NOAA”) Fisheries, in the U.S. Department of Commerce, share responsibility for administration of the ESA.<sup>34</sup> The FWS operates the Listing Program, to determine whether a species should be added to the federal lists of endangered and threatened wildlife and plants. A species can become listed through one of two methods: through the petition process<sup>35</sup> or through the candidate assessment process.<sup>36</sup> The petition process allows any interested person to petition the Secretary of the Interior to add a species to the list of endangered or threatened species. In the candidate assessment process, FWS itself identifies species for the list.

Once identified as a candidate, the FWS looks to a variety of factors<sup>37</sup> to determine if the species should be listed and if so, whether it should be listed as endangered<sup>38</sup> or threatened.<sup>39</sup> Once the decision to list is made, the species then receives the heightened protection provided by the ESA. If possible, the FWS should designate a critical habitat concurrently with the listing of a species.<sup>40</sup> A critical habitat includes the areas occupied by the species, at the time it is listed, and any areas that are deemed essential to the conservation of the species.<sup>41</sup> Although the FWS is required to designate critical habitat for endangered or threatened species, it has discretion to consider the economic impact of such a designation and any other

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<sup>34</sup>FWS Listing Program, *available at* <http://endangered.fws.gov/listing/index.html#listing>.

<sup>35</sup> 5 U.S.C. § 553(e)

<sup>36</sup> 16 U.S.C. § 1533.

<sup>37</sup> The factors include: the present or threatened destruction, modification, or curtailment of the species’ habitat or range; over utilization for commercial, recreational, scientific, or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; and other natural or manmade factors affecting the species’ continued existence. *See* The Endangered Species Listing Program, *available at* <http://endangered.fws.gov/ESB/99/11-12/6-9.pdf>.

<sup>38</sup> “Endangered” means any species which is in danger of extinction throughout all or a significant portion of its range. *See* 16 U.S.C. § 1532(6).

<sup>39</sup> “Threatened” means any species which is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. *See* 16 U.S.C. § 1532(20).

<sup>40</sup> *See* 16 U.S.C. §1533(a)(3).

<sup>41</sup> *See* 16 U.S.C. § 1533 (5)(A).

relevant impact that might be caused by the designation.<sup>42</sup>

### C. Enforcement

*TVA v. Hill*<sup>43</sup> provided the Supreme Court with its first opportunity to interpret the ESA. The Court considered whether an almost completed dam project should be halted because it would harm the snail darter fish, a newly listed endangered species. The Court declared that the language, history, and structure of the ESA clearly indicated that Congress intended the highest protection for endangered species, even over the primary missions of federal agencies. The Court found that the “plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost*.”<sup>44</sup> The Court further noted that the ESA’s “pointed omission of the type of qualifying language previously included in endangered species legislation reveal[ed] a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.”<sup>45</sup> Moreover, the Court found that the value of a species, any species, was “incalculable”<sup>46</sup> and therefore, the ESA prohibited the completion of the dam.

This strict interpretation of the ESA was, however, short lived. After the *TVA* decision, Congress amended the ESA to create an Endangered Species Committee consisting of the heads of various federal agencies as well as a resident of each affected state.<sup>47</sup> This Committee has the authority to exempt a project from the ESA’s critical habitat requirements if it finds that no reasonable or prudent alternative exists and that the project’s benefits clearly outweigh the benefits of any alternatives.<sup>48</sup> Consequently, the ESA now provides administrators limited authority to equitably weigh the competing demands of the endangered species

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<sup>42</sup> New Mexico also has laws to protect wildlife habitats. *See e.g.*, the Habitat Protection Act, § 17-6-1, et seq. NMSA 1978.

<sup>43</sup> 437 U.S. 153, 184-185 (1978)

<sup>44</sup> 437 U.S. at 184 (*emphasis added*)

<sup>45</sup> *Id.* at 185.

<sup>46</sup> *Id.* at 187.

<sup>47</sup> *See* 16 U.S.C. § 1536(e).

<sup>48</sup> This Committee is sometimes referred to as the “God Squad” because its decisions may ultimately decide whether an endangered species will survive.

against the needs of the proposed project and the affected community.

## **D. Central Provisions**

### **1. Federal Agency Projects**

One of the most important provisions of the ESA is Section 7.<sup>49</sup> This section prevents federal agencies from jeopardizing any listed species or destroying or altering any designated habitat. Section 7 requires all federal agencies to consult with the FWS or the NOAA (for marine animals) if a listed species or designated habitat may be present in the area of a proposed agency action. The federal agency must consult with the FWS for any project it initiates and any project for which it might issue a license or permit to a developer.<sup>50</sup> The ESA utilizes strong language in this section to assure compliance, prohibiting the consideration of economic or other factors when making critical decisions under Section 7, and requiring the use of only the best and most current data and procedures.

### **2. Unauthorized Takings by Private Parties**

Section 9<sup>51</sup> of the ESA applies to all persons within the United States' jurisdiction. Its significant prohibitions include: (1) the import and export of endangered species, and products made from them; (2) commerce within the United States in listed species, and products made from them, and (3) possession of unlawfully acquired endangered species. Section 9 also prohibits the "taking" of listed endangered wildlife. The definition of "taking" is quite broad because it includes any act that would "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct."<sup>52</sup> By statute, the "take" definition only applies to endangered species. However, the ESA grants the FWS the power to extend the "take" regulation to threatened species as well.<sup>53</sup> The FWS has used this discretionary provision to attach the "take" regulation to virtually

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<sup>49</sup> See 16 U.S.C. § 1536.

<sup>50</sup> See 16 U.S.C. § 1536(a). Therefore, any project authorized, funded, or carried out by the federal agency requires consultation with the FWS.

<sup>51</sup> See 16 U.S.C. § 1538.

<sup>52</sup> 16 U.S.C § 1532(19).

<sup>53</sup> 16 U.S.C. § 1533(d).

all threatened wildlife species.<sup>54</sup>

### 3. Incidental Takings and Habitat Conservation Plans<sup>55</sup>

Private landowners, corporations, state or local governments, or other non-federal landowners who want to conduct activities on land that might incidentally harm (*i.e.* “take”) an endangered or threatened species, must first obtain an incidental take permit from the FWS.<sup>56</sup> A taking is “incidental” if it is incidental to, and not for the purpose of, the carrying out of an otherwise lawful activity.<sup>57</sup> An application for an incidental take permit must be accompanied by a Habitat Conservation Plan or “HCP.”<sup>58</sup> HCPs are intended to ensure that projects adequately minimize and mitigate the effects of the authorized incidental take. Section 10 also allows for “No Surprises” assurances by the government to provide certainty to private landowners through the HCP process. “No Surprises” assurances promise the private landowner that even if unforeseen circumstances arise, the government will not require the landowner to commit additional land, water, or financial compensation, nor will the government place additional restrictions on the use of the land, water, or other natural resources beyond the level otherwise agreed to in the HCP. The government will honor these assurances so long as a permittee continues his good faith efforts to adhere to the terms and conditions of the HCP and the permit.

### 4. Sanctions

Those who violate provisions of the ESA are subject to the penalties provided for in Section 11.<sup>59</sup> This section authorizes the imposition of criminal sanctions, civil penalties, and injunctions for “takes” or other violations.<sup>60</sup> Civil penalties may not exceed \$25,000 if the violation is done “knowingly” and may not exceed \$500 if

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<sup>54</sup> 50 C.F.R. § 17.31(a).

<sup>55</sup> Please see the U.S. Fish & Wildlife Service’s web page for more information on these matters. The website is located at: <http://endangered.fws.gov/hcp>

<sup>56</sup> See 16 U.S.C. § 1539.

<sup>57</sup> See 16 U.S.C. § 1539(a)(1)(B).

<sup>58</sup> See 16 U.S.C. § 1539(a)(2)(A).

<sup>59</sup> See 16 U.S.C. § 1540.

<sup>60</sup> 16 U.S.C. § 1540.

it is done without knowledge. The maximum criminal penalties are set at \$100,000 for individuals and \$200,000 for corporations.<sup>61</sup> Typical of various environmental laws, the “knowing” component of criminal and civil charges has been interpreted strictly against the violator. Courts have construed “knowingly” to mean only that the accused knowingly performed the action, not that he had any knowledge that the action affected an endangered or threatened species.<sup>62</sup>

## **E. Recent Developments**

Within the past few years, the Department of the Interior has been exploring new ways to encourage private landowners to undertake voluntary conservation measures on their property to benefit threatened and endangered species.<sup>63</sup> These programs include the Safe Harbor and Candidate Conservation Agreement with Assurances (“CCAA”)<sup>64</sup> policies that enlist the cooperation of private landowners in return for certain assurances from the government. The Safe Harbor policies encourage private landowners to take actions on their property to benefit listed species, in return for assurances that their conservation measures will not lead to further restriction on the use of the land if they lead to an increase in the population of the species on the property. Recent updates to these regulations are designed to provide clearer definitions and greater assurances for those private landowners who choose to cooperate through a Safe Harbor or CCAA agreement.<sup>65</sup>

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<sup>61</sup> 18 U.S.C. § 3571.

<sup>62</sup> See *United States v. Nguyen*, 916 F.2d 1016 (5<sup>th</sup> Cir. 1991); *United States v. St. Onge*, 676 F.Supp. 1044 (D. Mont. 1988); *United States v. Billie*, 667 F. Supp. 1485 (S.D. Fla. 1987).

<sup>63</sup> Assistant Secretary Manson Announces Revised Regulations for Endangered Species Conservation Agreements on Private Lands, *available at* [http://endangered.fws.gov/candidates/news\\_release.pdf](http://endangered.fws.gov/candidates/news_release.pdf).

<sup>64</sup> CCAs are essentially the same as Safe Harbor agreements except that CCAs apply to species *proposed* for listing, while Safe Harbor agreements apply to species already listed. There are currently 23 Safe Harbor agreements and 7 CCAs in effect, covering 29 and 21 species respectively.

<sup>65</sup> Please visit the U.S. Fish & Wildlife Service web page for more information on these and other new developments. The website is located at: <http://endangered/fws/gov>

## **IV. WETLANDS – CONTROLLING USE AND ABUSE**

### **A. An Overview**

In New Mexico, there are numerous organizations that take an active interest in regulating and expanding our knowledge of local wetlands. The U.S. Army Corps of Engineers studies wetlands using the “HGM” Approach (Hydro-Geomorphology), designed to produce regional methods for assessing the physical, chemical, and biological functions of wetland areas needing protection. The U.S. Fish and Wildlife Service is responsible for wetlands classifications and research on affected, threatened, or endangered species. The New Mexico Natural Heritage Program (of the University of New Mexico Biology Department) has developed the Handbook of Wetland Communities of New Mexico to aid in the description, inventory, and assessment of New Mexico’s wetland resources. The handbook provides a survey work of all major basins of New Mexico. Other organizations with an interest in New Mexico wetlands include the U.S. Forest Service, the Bureau of Land Management, and private interest groups.

### **B. Regulation**

The primary statutory provision regulating development in Wetlands is section 404 of the Clean Water Act (“CWA”).<sup>66</sup> The Clean Water Act<sup>67</sup> prohibits the discharge of pollutants<sup>68</sup> from discrete point sources into waters of the United States.<sup>69</sup> However, Congress also authorized the Army Corp of Engineers to administer a separate program under Section 404 of the CWA to address discharges of dredged or fill material into the navigable waters of the United States. Because wetlands development often involves dredge and fill operations, Section 404 has evolved into the federal government’s primary tool to limit and regulate development in wetlands.

Discharges of dredged and fill material have been defined broadly so many development activities in wetlands will involve a regulated discharge. The courts

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<sup>66</sup> 33 U.S.C §1344.

<sup>67</sup> See 33 U.S.C. §§ 1251 through 1387.

<sup>68</sup> “Pollutant” is defined broadly and includes dredged spoil, solid waste, incinerator residue, biological materials, rock, and sand. See 33 U.S.C. § 1362(6).

<sup>69</sup> *Id.* at § 1311(a).

generally define “discharge of dredge material” as the addition of material excavated or dredged from waters of the United States, including run-off from a dredge material disposal area.<sup>70</sup> In response to the settlement of civil citizens’ suits which were critical of the Corp’s regulations, the Corp now adheres to a strict view of regulating dredging operations.

“Discharge of fill material” is likewise defined broadly, covering almost every activity that involves earth moving or the addition of any material into designated wetlands. Among the regulated activities are: placement of fill that is necessary for construction in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for construction; site development fills; causeway or road fills; and many other protection or transportation devices.<sup>71</sup> Even the temporary stockpiling of soil from the construction of a drainage ditch or similar excavation may be a regulated discharge.

### **C. Permit Process**

In light of the expansive definition of dredge and fill operations, every initial project assessment should determine whether the proposed development is in an area designated by the Corps as a wetland. Maps maintained by the Corps and by the Fish and Wildlife Service may be found on EPA’s Wetlands website: <http://www.epa.gov/owow/wetlands/>. Under the 1989 Interagency Federal Manual for Identifying and Delineating Jurisdictional Wetlands, three criteria must be present for an area to be considered a Jurisdiction Wetland: (1) wetland vegetation, (2) hydric soils, and (3) wetland hydrology. In certain circumstances, the presence of one of the criteria may be presumed from the presence of the other two. If the proposed development is in a designated wetland area, a section 404 permit must be obtained from the Corps of Engineers before any activity begins.

There are two types of section 404 permits - individual and general. The Corps issues individual permits for specific projects and general permits for categories of activities that involve only minimal environmental disruption. General permits may be issued on either a nationwide or on a regional basis. Consequently, if a developer is involved in multiple similar projects, he should investigate the potential applicability of general permits and, if appropriate, consider redesigning his projects so that they fall within the parameters of a general permit. If a general

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<sup>70</sup> 33 C.F.R. § 323.2(d)(1).

<sup>71</sup> 33 C.F.R. § 323.2(f)(1997).

permit is obtained, it will streamline the permitting process for all of the projects and result in fewer administrative obstacles for all involved parties.

#### **D. Enforcement**

The penalties for violating the Clean Water Act can be quite severe, ranging from civil monetary fines to imprisonment for criminal violations.<sup>72</sup> Criminal penalties are available for both negligent and knowing violations. It is not necessary that the violator know the conduct is criminal, or even that the discharge was illegal.

It is only necessary that the violator knew that the discharge occurred.<sup>73</sup> In light of such severe penalties, anyone seeking to develop or alter land that may be regulated by the Clean Water Act should take great care to determine whether his proposed activities are regulated and authorized by the Act. However, all is not lost if a landowner or developer discovers that he has violated the Clean Water Act. If he works in good faith with the Corps of Engineers to correct the damage, the Corps has discretion to decide that no further enforcement action is necessary.<sup>74</sup>

#### **E. Jurisdictional Wetlands – Recent Decisions**

In *Rapanos v. United States*, 126 S.Ct. 2208 (2006) (consolidated with *Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 304 (6<sup>th</sup> Cir. 2004)), the Supreme Court, by a 4:4:1 plurality, remanded to the Sixth Circuit the issue of whether the U.S. Army Corps of Engineers (the Corps) exceeded its statutory authority under the CWA by requiring property owners to acquire permits before dredging and filling certain wetlands. The case presented the Court with the opportunity to determine whether the wetlands at issue were subject to the United States' jurisdiction under the CWA. The Court's decision advanced conflicting tests for determining whether wetlands are protected by federal law. As explained in detail below, the Ninth and Seventh Circuits have held one test to be the controlling standard, while the First Circuit has held that if either of the two proposed tests is met, the federal government has jurisdiction over the wetland at issue.

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<sup>72</sup> See 33 U.S.C. § 1319.

<sup>73</sup> See *Weitzenhoff v. United States*, 35 F.3d 1275 (9<sup>th</sup> Cir. 1994).

<sup>74</sup> See 33 C.F.R. 326.3(d)(1).

Justice Scalia's 4:4:1 plurality decision in *Rapanos* took a narrow interpretation of "waters of the United States," and would remove many wetlands from the Corps' CWA jurisdiction by requiring a continuous surface water connection. Justice Scalia proposed a two-part test such that wetlands would be covered by the CWA where (1) "the adjacent channel contains a 'wate[r] of the United States,'" and (2) "the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* at 2227.

Justice Kennedy specifically rejected Scalia's test in his concurrence. Kennedy found the plurality's interpretation of "waters of the United States," as inconsistent with the language and purpose of the CWA, and advanced a test that would require a "significant nexus" between wetlands and navigable waters on a case-by-case basis. *Id.* at 2243 (Kennedy, J., concurring). Under this test:

Wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable."

The Supreme Court's decision in *Rapanos* both explicitly and implicitly left the door open for legislative and regulatory changes on this issue. In fact, Justice Breyer's dissent called on the Corps to "write new regulations, and speedily so." *Id.* at 2255 (Stevens, J., dissenting) (citations omitted).

The Ninth Circuit has interpreted Justice Kennedy's plurality opinion in *Rapanos* as the controlling law in this area. In *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9<sup>th</sup> Cir. 2006), the Ninth Circuit held that a city must obtain an NPDES permit to discharge sewage into a rock quarry pit filled with water from an aquifer adjacent to the Russian River. In doing so the court held, with limited analysis, that Justice Kennedy's "significant nexus" test is the standard by which to determine whether particular wetlands constitute "waters of the United States" subject to the CWA.

The Seventh Circuit followed suit in *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7<sup>th</sup> Cir. 2006) by holding that Justice Kennedy's concurrence in *Rapanos* provides the legal standard for CWA wetlands jurisdiction. The court

remanded the case to the district court with instructions to determine whether the Corps had jurisdiction over the wetland in question under Justice Kennedy's "significant nexus" test.

The First Circuit departed from the analysis of the Ninth and Seventh Circuits and has held that the federal government can establish CWA jurisdiction if it can meet either of the two standards set forth in the *Rapanos* decision. See *United States v. Johnson*, 467 F.3d 56 (1<sup>st</sup> Cir. 2006).

## **V. ACCOMMODATING EXISTING SITE CONTAMINATION IN DESIGN AND CONSTRUCTION**

### **A. Comfort letters**

The purpose of comfort letters is to provide prospective purchasers and others with the best, current information about the EPA's interest, or lack thereof, in a given site. These letters summarize data available to the EPA regarding a site and, importantly, summarize the federal government's past actions and future expectations with respect to response actions at the site. The EPA will not issue a comfort letter for any property unless there is a realistic perception or a probability of a prospective new owner incurring CERCLA liability. The EPA policy, which may be found on the EPA website, sets out four types of sample comfort/status letters:

a. A "no previous federal Superfund interest" letter advises party that there is no evidence of past Superfund interest or involvement with the site (in other words, the site is not in the CERCLIS database).

b. A "no current federal Superfund interest" may advise a prospective purchaser that this site has been deleted from CERCLIS or from the National Priorities List.

c. A "federal interest" letter advises the prospective purchaser that the EPA is responding, or plans to respond, to contamination at a site.

d. A "State Action" letter indicates that the State has primary responsibility for any activities at this site.

EPA's model comfort letter is attached to this paper as Exhibit A.

## **B. Prospective Purchaser Agreements (“PPAs”)**

In contrast to a comfort letter, a PPA provides actual resolution or liquidation of any legal liability that the prospective purchaser might incur. EPA issued its guidance on agreements with prospective purchasers of contaminated property on May 24, 1995, which states that PPAs are available only for sites where there has been, or where there realistically will be, a CERCLA response action. This standard is more restrictive than that which governs the issuance of comfort letters. The essence of a PPA is a covenant not to sue the new owner for pre-existing contamination, which is generally granted in exchange for appropriate consideration. The covenant not to sue also qualifies pursuant to section 113 (f) (2) of CERCLA, to protect the new owner from possible contribution actions by other PRPs.

The EPA guidance states that in consideration of granting the covenant not to sue, the EPA should receive a substantial benefit either in the form of a clean-up, or an indirect public benefit in combination with a reduced direct benefit to EPA. Prior versions of the guidance restricted the consideration to direct benefits of cash or clean-up work. However, the current guidance recognizes the considerable indirect benefit that can be realized from Brownfields redevelopment, including the creation or retention of jobs, the development of abandoned or blighted property, the creation of conservation or recreation areas, or the improvement of public transportation or infrastructure.

A draft PPA is attached to this paper as Exhibit B.

## **VI. STORMWATER MANAGEMENT<sup>75</sup>**

Stormwater<sup>76</sup> runoff is the most common cause of water pollution.<sup>77</sup>

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<sup>75</sup> The information in this section is compiled from the Construction Industry Compliance Assistance Center, funded by the U.S. Environmental Protection Agency. See the website at [cicacenter.org](http://cicacenter.org) for additional information.

<sup>76</sup> The official definition of ‘stormwater’ is “runoff, surface runoff, street wash waters related to street cleaning or maintenance, infiltration and drainage related to storm events or snow melt.” National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47990 (Nov. 16, 1990)(codified at 40 C.F.R. §§ 122-124).

<sup>77</sup> EPA, *Stormwater Outreach Materials and Reference Documents* (last updated Aug. 2006), <http://cfpub.epa.gov/npdes/stormwatermonth.cfm>. “Stormwater runoff occurs when precipitation from rain or snowmelt flows over the ground. Impervious surfaces...prevent stormwater from naturally soaking into the ground.” EPA, *AFTER THE STORM: A CITIZEN’S GUIDE TO UNDERSTANDING STORMWATER*, EPA pamphlet EPA 833-B-03-002 at CRS-1(Jan. 2003). The

Although many believe that stormwater is relatively clean, “discharge—from rainfall and snow melt—carries with it large amounts of organic and toxic pollutants that can harm water quality, including oil and grease, heavy metals, pesticides, soil, and sediment.”<sup>78</sup> The rain and snowmelt, traditionally nonpoint sources, carry these discharges either into storm sewer systems, which carry the discharge untreated into waterbodies, or directly into waterbodies.<sup>79</sup>

The EPA has recognized that “nonpoint source pollution continues to be, and is increasingly recognized as, the largest remaining threat to water quality and source of water quality impairments in the nation.”<sup>80</sup> Thus, as traditional sources of water pollution have become more regulated and better controlled, attention has shifted to other sources of pollution, such as stormwater, affecting water quality standards (WQSs). In fact, the EPA has placed stormwater regulation compliance on its “national enforcement priorities” list for water.<sup>81</sup> Since stormwater comprises a large source of pollution, Congress, through the Water Quality Act of 1987, directed the EPA “to implement a specific permit program for stormwater discharges from industrial sources and municipalities.”<sup>82</sup>

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problems associated with stormwater runoff are directly related to the development in urban and urbanizing areas, along with the pollutants attributable to humans. EPA, *Menu of BMP Background* (last updated June 2, 2006), [http://cfpub.epa.gov/npdes/stormwater/menuofbmps/bmp\\_background.cfm](http://cfpub.epa.gov/npdes/stormwater/menuofbmps/bmp_background.cfm)

<sup>78</sup> Claudia Copeland, *Stormwater Permits: Status of EPA’s Regulatory Program*, CRS REPORT FOR CONGRESS, 97-290 ENR (updated Aug. 25, 2005). Pollutants can: 1) destroy aquatic habitats; 2) remove oxygen from water which kill fish and aquatic organisms; 3) create health hazards and close beaches; 4) suffocate and choke animals; 5) affect drinking water; and 6) increase treatment expenses. AFTER THE STORM, *supra* note 53.

<sup>79</sup> AFTER THE STORM, *supra* note 53.

<sup>80</sup> Nonpoint Source Program and Grants Guidelines for States and Territories, 68 Fed. Reg. 60,656 (Oct. 23, 2003).

<sup>81</sup> EPA, *CWA National Enforcement Priorities* (last updated Mar. 23, 2006), <http://www.epa.gov/compliance/civil/caw/cwaenfpriority.html>.

<sup>82</sup> Copeland, *supra* note 54, at CRS-1-2; Water Quality Act of 1987 (“Water Quality Act”), Pub. L. No. 100-4, § 405, 101 Stat. 7 (1987).

The EPA sought to implement Congress' permit mandate<sup>83</sup> in two phases, announcing the rules and regulations for Phase I in 1990—21 months after the statutory deadline.<sup>84</sup> Phase I applied to large dischargers including: 1) industrial activities;<sup>85</sup> 2) municipal storm systems serving at least 100,000 people; and 3) construction projects disturbing more than five acres of land.<sup>86</sup> “123,000 industrial facilities (twice the number of industrial sources subject to the base NPDES program) and 220 municipalities and counties were covered by the” Phase I rules.<sup>87</sup> Phase II of the program, implemented in 1999, several years after Congress' mandate under the Water Quality Act,<sup>88</sup> applies to: 1) storm systems serving less than 100,000 people; 2) commercial operations; and 3) small construction projects disturbing one to five acres of land.<sup>89</sup> The EPA estimated that Phase II “would make approximately 3,000 more river miles safe for boating annually and protect up to 500,000 people a year from illness due to swimming in contaminated waters.”<sup>90</sup>

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<sup>83</sup> Permits are issued under the NPDES system. Thus, states generally issue the permits unless the state has not been authorized to do so by the EPA. See Proper NPDES Permitting, *infra* Part B, for further discussion of NPDES permits.

<sup>84</sup> See Water Quality Act, Pub. L. No. 100-4, § 405.

<sup>85</sup> In 1995, the EPA estimated “that about 100,000 facilities nationwide discharge storm water associated with industrial activity (not including oil and gas exportation and production operations) as described under phase I.” Final National Pollutant Discharge Elimination System Storm Water Multi-Sector General Permit for Industrial Activities, 60 Fed. Reg. 50,807 (Sept. 29, 1995)[hereinafter “Industrial Permits”].

<sup>86</sup> Copeland, *supra* note 54, at CRS-2.

<sup>87</sup> *Id.*

<sup>88</sup> The rules for Phase II should have been issued in 1992. The EPA, however, received a one-year extension under Pub. L. 102-580. Finally, a judicial order was issued requiring the EPA to develop the final rules for Phase II by March 1, 1999. *Natural Resources Defense Council, Inc. v. Browner and EPA*, Civ. No. 95-634 PLF (D.D.C. filed Apr. 7, 1995)

<sup>89</sup> See Copeland, *supra* note 54, at CRS-2, CRS-4.

<sup>90</sup> *Id.* at CRS-4. Waiver from Phase II coverage is available for both cities with a population of less than 10,000 persons and construction activities if the discharges will not cause water quality impairment. *Id.* Critics of the Phase II rules believe the cost for small cities and construction activities, estimated at \$297 million annually and \$505 million respectively, is too great. *Id.* at CRS-5.

Interestingly, a NPDES permit was not required under the Water Quality Act<sup>91</sup> for “storm water discharges from oil and gas exploration, production, processing, or treatment operation, or transmission facilities.”<sup>92</sup> This exception, the oil and gas industry noted, would still subject construction activities associated with oil and gas to permit requirements.<sup>93</sup> In response, the EPA deferred Phase II requirements for oil and gas construction activities. The EPA’s ongoing analysis of oil and gas construction activities became unnecessary following Congress’ passage of the Energy Policy Act of 2005.<sup>94</sup>

The Act added a new paragraph to the Clean Water Act<sup>95</sup> which “defined the term ‘oil and gas exploration, production, processing, or treatment, or transmission facilities’ to mean ‘all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, *including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.*’”<sup>96</sup> Thus, under the new definition, and as the EPA’s final rule states, any activities or operations associated with oil and gas exploration, production, processing, or treatment operation or transmission facilities are exempt from NPDES permit requirements.<sup>97</sup> The final rule does

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<sup>91</sup> Clean Water Act, § 402(l)(2).

<sup>92</sup> EPA, *Final Rule: Amendments to the Storm Water Regulations for Discharges Associated with Oil and Gas Construction Activities*, available at [http://www.ooga.org/PDFs/final\\_oil\\_gas\\_factsheet.pdf#search=%22%22changes%20to%20the%20NPDES%20regulations%20promulgated%20by%20this%20rule%22%22](http://www.ooga.org/PDFs/final_oil_gas_factsheet.pdf#search=%22%22changes%20to%20the%20NPDES%20regulations%20promulgated%20by%20this%20rule%22%22) (last visited Aug. 24, 2006) [hereinafter “Oil and Gas Amendments”]. Although a few limited circumstances associated with oil and gas will require a permit. Namely, when any activities that would “result in a discharge of reportable quantity release or that contribute pollutants...to a violation of a water quality standard are still subject to permit coverage.” *Id.*

<sup>93</sup> The Industry claimed this would have a “significant economic impact on the industry” because 30,000 sites annually would need to obtain a permit. *Id.*

<sup>94</sup> Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

<sup>95</sup> § 323 of the Energy Policy Act added ¶ 24 to § 502 of the Clean Water Act.

<sup>96</sup> Oil and Gas Amendments, *supra* note 68 (emphasis added).

<sup>97</sup> Amendments to the National Pollutant Discharge Elimination System (NPDES) Regulations for Storm Water Discharges Associated With Oil and Gas Exploration, Production, Processing, or Treatment Operations or Transmission Facilities, 71 Fed. Reg. 33,628 (June 12, 2006)(to be codified at 40 C.F.R. pt. 122). In the discussion behind the rule, the EPA supports the rule because “there could be administrative delays in the permitting process for oil and gas construction sites which could result in substantial economic impacts, particularly in the form of lost production

encourage “voluntary application of best management practices for oil and gas field activities and operations to minimize the discharge of pollutants in storm water runoff and protect water quality.”<sup>98</sup>

Those requiring a permit under Phase I or II must, under the terms of the permit, implement pollution prevention plans. Cities requiring permits must develop and enforce a stormwater management program that addresses issues “such as public education, eliminating illicit connections to storm sewers, good housekeeping of municipal operations, and control of erosion and sedimentation from construction sites.”<sup>99</sup> Industrial facilities covered under the permit plan must develop a stormwater pollution prevention plan. The prevention plans are intended to facilitate identification of pollution sources and to implement appropriate measures to control or prevent discharges in stormwater.<sup>100</sup> The EPA believes that such plans are the most cost-effective and environmentally sound way to control discharges in stormwater runoff.<sup>101</sup>

#### **A. Where Do You Get a Permit?**

If your construction project is located in one of the following states or territories, you must get a federal stormwater permit from EPA:

- Alaska
- American Samoa
- Guam
- Idaho
- New Mexico
- Northern Mariana Islands
- Puerto Rico
- Trust Territories

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revenues, that were not considered in the original economic analysis for the 1999 Phase II rulemaking.” *Id.* at 33,630.

<sup>98</sup> *Id.* at 33,628.

<sup>99</sup> Copeland, *supra* note 54, at CRS-3. Most cities use best management practices (BMPs) to manage stormwater which “include nonstructural measures to minimize contaminants getting into stormwater (e.g. street sweeping) and structural practices such as detention ponds to separate contaminants from stormwater.” *Id.* at CRS-5.

<sup>100</sup> Industrial Permits, 60 Fed. Reg. at 50,814. The development of a plan involves “four steps: 1) Formation of a team of qualified plant personnel who will be responsible for preparing the plan and assisting the plant manager in its implementation; 2) assessment of potential storm water pollution sources; 3) selection and implementation of appropriate management practices and controls; and 4) periodic evaluation of the effectiveness of the plan to prevent storm water contamination.” *Id.* at 50,814-15.

<sup>101</sup> *Id.* at 50,815.

- Massachusetts
- New Hampshire
- Tribal Lands (most but not all)
- Washington, D.C.

Additionally, there are several other instances where the CGP applies, including construction related to oil and gas activities in Texas; oil and gas and certain agricultural and silvicultural activities in Oklahoma; and construction of federal facilities in Colorado, Delaware, Vermont, and Washington. Refer to Attachment A of the stormwater checklist in Part II of the CICA guide for more details.

For coverage under the federal CGP, you can submit your NOI and NOT to <http://cfpub.epa.gov/npdes/stormwater/enoi.cfm> or to the following addresses:

Regular U.S. Mail Delivery  
 Stormwater Notice of Intent  
 U.S. EPA - Ariel Rios Building  
 Mail Code 4203M  
 U.S. EPA  
 1200 Pennsylvania Ave., NW  
 Washington, DC 20460

Overnight/Express Mail Delivery  
 Stormwater Notice of Intent  
 U.S. EPA - East Building, Room 7420  
 U.S. EPA  
 1201 Constitution Ave., NW  
 Washington, DC 20004

If your construction project is in one of the other 45 states or the U.S. Virgin Islands, you generally must get a stormwater permit from the state or territory (note that for certain activities in specific states, such as oil and gas construction activities in Texas, your project may require a federal permit). Construction projects in states authorized to administer the stormwater program may be subject to requirements that are different from the CGP requirements. **In all cases, check with your EPA region or state to determine the stormwater requirements that apply. You can find information on state-specific stormwater permit requirements and contact information for state environmental departments at the Construction Industry Compliance Assistance Center (<http://www.cicacenter.org>).**

## **B. What Questions DO you Need to Answer Before Starting Your Construction Project?**

You can use the questions in Section II of Part I of the CICA guide to start a discussion among all parties involved in the construction project and to assign tasks to ensure all environmental requirements are met. Each question has a space next to it to designate who will take the lead on each task. Note that designating a responsible party does not absolve you of your own obligation to meet environmental requirements or liability for failing to meet these requirements.

### C. Where Can You Get Additional Information?

Many tools are available to assist you with the stormwater permit requirements, including the following:

- The Stormwater Self-Audit Checklist in Part II of the CICA guide;
- The Construction Industry Compliance Assistance Center provides plain language explanations of environmental rules for the construction industry, including tools to identify state-specific requirements, permits, and contacts:  
<http://www.cicacenter.org/stormwater.html>;
- The National Environmental Compliance Assistance Clearinghouse contains a search engine to help you find compliance assistance tools, contacts, and EPA-sponsored programs: <http://www.epa.gov/clearinghouse/>;
- The Office of Wastewater Management, NPDES Stormwater Program provides information about the NPDES stormwater program: <http://www.epa.gov/npdes/stormwater>;
- The NPDES Construction Site Stormwater Runoff Control web page provides factsheets on a variety of stormwater best management practices (BMPs):  
[http://cfpub.epa.gov/npdes/stormwater/menuof-bmps/con\\_site.cfm](http://cfpub.epa.gov/npdes/stormwater/menuof-bmps/con_site.cfm);
- Does Your Construction Site Need a Stormwater Permit? A Construction Site Operator's Guide to EPA's Stormwater Permit Program is a brochure that provides construction companies with a brief overview of EPA's CGP and its requirements:  
[http://www.epa.gov/npdes/pubs/sw\\_cgp\\_brochure.pdf](http://www.epa.gov/npdes/pubs/sw_cgp_brochure.pdf);

- Resource List for Stormwater Management Programs lists resources to help stormwater program managers start developing or improve their stormwater programs: [http://www.epa.gov/npdes/pubs/sw\\_resource\\_list.pdf](http://www.epa.gov/npdes/pubs/sw_resource_list.pdf);
- The Stormwater Manager's Resource Center contains a series of factsheets for stormwater BMPs that include information on soil type, slope, and cost: <http://www.stormwatercenter.net/>; and
- EPA's "Where you live" page contains links to state environmental agencies: <http://www.epa.gov/epahome/whereyoulive.htm>.

### **LIST OF QUESTIONS FOR OWNERS AND CONTRACTORS**

This section contains a list of questions to help owners and contractors assign who is responsible for ensuring compliance with the applicable environmental regulations discussed in the CICA guide. You should make these assignments prior to beginning any construction activity. If you are unfamiliar with these environmental regulations, you should reference the corresponding detailed section (Sections III through XI of Part I) of the guide for more information. These sections contain detailed information and helpful resource links related to each regulation. Please note that this section does not include checklists for NEPA and NHPA. For more information on these regulations, go to

<http://ceq.eh.doe.gov/nepa/nepanet.htm> and <http://www.achp.gov>.

#### **Getting a Permit**

#### **Assigned To**

A.1. Who will determine if you need a stormwater permit? (A permit is generally required when at least one acre of land is disturbed.)

\_\_\_\_\_

A.2. Who will find out what agency issues the stormwater permit for your location (i.e., U.S. EPA, state, or local government) and get the permit? To determine your permitting authority, go to the following web site: <http://cfpub.epa.gov/npdes/stormwater/authorizationstatus.cfm>.

If your construction activity occurs in an area where the state issues permits, contact your state for further information about applicable requirements.

\_\_\_\_\_

The following questions specifically apply to the Federal Construction General Permit.

A.3. Who will submit the Notice of Intent (NOI) before the start of the construction project and submit the Notice of Termination (NOT) to EPA when the construction project is complete? \_\_\_\_\_

A.4. Who will comply with the Endangered Species Act requirements? \_\_\_\_\_

A.5. Who will determine if the receiving waters are covered under a Total Maximum Daily Load (TMDL) requirement? \_\_\_\_\_

A.6. Who will develop the stormwater pollution prevention plan (SWPPP) includes selection of appropriate BMPs? \_\_\_\_\_

**Meeting Permit Requirements**

A.7. Who will perform and document the inspections? \_\_\_\_\_

A.8. How often will inspections be performed? \_\_\_\_\_

A.9. Who will install and maintain Best Management Practices (BMPs) and stormwater controls? \_\_\_\_\_

A.10. Who will notify site personnel of the permit requirements (e.g., ensuring controls are in place and telling the recordkeeper of any site changes)? \_\_\_\_\_

A.11. Who will modify the SWPPP during the construction project (including updating records and documenting inspection results)? \_\_\_\_\_

A.12. Who will update the site map? \_\_\_\_\_

A.13. Who will be the recordkeeper? \_\_\_\_\_