

# ENVIRONMENTAL ALERT

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## VOLUNTARY CLEANUP PROGRAMS SPUR REDEVELOPMENT

In the late 1980s the Highway 280 corridor, between Minneapolis and St. Paul, resembled a ghost town. Years of industrial operations (including a scrap yard, zinc coater and trucking depot) produced widespread contamination. With the passage of Superfund laws, the fear of environmental liability drove many businesses away.

Today the area has a new, revitalized look, including multi-use buildings and new businesses. What has changed?

In response to Superfund's onerous liability scheme, many states enacted voluntary cleanup laws. The Minnesota Pollution Control Agency (MPCA), in particular, worked with the U.S. Environmental Protection Agency (EPA) to establish lead agency status for its own Voluntary Investigation and Cleanup (VIC) program. The VIC program allows parties to obtain certain liability assurances by the voluntarily undertaking the cleanup of sites contaminated with hazardous substances or petroleum constituents. In addition, MPCA staff can provide technical or administrative oversight during site assessment and cleanup.

The VIC program offers private parties a range of liability assurances including:

- **Technical Assistance Approval Letters** — document MPCA staff review of investigation plans or reports.
- **No Action Letters** — assure that no further cleanup is needed.
- **Off-Site Determination Letters** — document that contamination is due to activities or an adjoining property and that MPCA will not take action against the VIC participant.



BEFORE REMEDIATION —  
A HIGHLY CONTAMINATED PROPERTY



AFTER SITE REMEDIATION — A BUSY OFFICE PARK  
SOURCE: REAL ESTATE RECYCLING

- **No Association Determinations** — document that a party had no connection to contamination when it acquired the property.
- **Certificates of Completion** — show that a party has implemented a comprehensive cleanup program.

Since its inception, 1,400 sites have been enrolled in the VIC program. The MPCA has issued nearly that number of assurances. Applicants include:

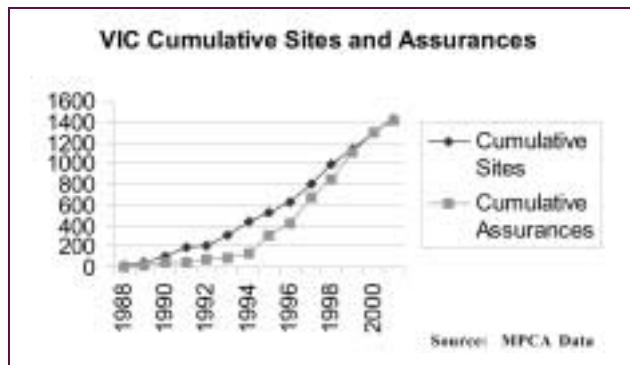
- Local redevelopment authorities such as the Saint Paul Port Authority or the Minneapolis Community Development Agency (MCDA),

*Continued on page 2*

Voluntary Cleanup article continued from front cover

“Persons who are not otherwise responsible for a contamination problem may be eligible for future liability protection when they voluntarily undertake an investigation and, if necessary, cleanup action approved by the MPCA through the VIC Program.”

– MPCA Guidance



It is standard practice to conduct a Phase I Environmental Site Assessment before property acquisitions or divestitures. In addition, most banks now insist on documentation of a site’s environmental conditions before approving real estate loans. The emergence of state voluntary cleanup programs has helped create new opportunities in urban, industrial areas. Now private parties can pursue creative solutions to reuse abandoned industrial sites. In Minnesota, contamination cleanup grants and loans are also available from the Department of Trade and Economic Development, the Metropolitan Council and some counties to stimulate Brownfield redevelopment.

- Land developers,
- Banks and lenders who want to minimize their risk on real estate financing loans,
- Environmental consultants and attorneys who want to reduce client liability and enhance project success, and
- Concerned individuals who own contaminated land.

## IF YOU SHIP IT, WILL THEY FINE?



Large civil penalties (ranging from \$50,000 to \$84,000), proposed

by the Federal Aviation Administration (FAA) against four companies signal increased toughness on hazardous material shipping violations. The alleged violations include:

- Starwest Pharmaceuticals, of Rancho Cordova, California, for improperly labeling a fiberboard box to ship twenty ounces of peppermint extract.
- Sears, Roebuck & Co., for shipping and incorrectly labeling ninety-six ounces of cologne in a fiberboard box.
- World Courier, Inc., of New York, for mislabeling an infectious substance and shipping it on a passenger flight.
- The French firm, Irrifrance Industries, for shipping two paint cans in an improperly labeled fiberboard box.

In addition to labeling violations, the FAA charged most of the companies with improper packaging and marking of hazardous materials, inadequate documentation and failure to provide sufficient emergency response information or training.

In three of the cases, shipping company or airline staff discovered the violations after the packages leaked or caught fire.

Hazardous materials regulations, found in 49 CFR, Parts 100–185, outline requirements for material classification and documentation, package marking, labeling, placarding, emergency response and training, although requirements vary by shipment method (rail, aircraft, vessel or highway).

Criminal penalties, including jail time, may result from knowingly violating a hazardous material regulation. Civil penalties and fines, on the other hand, may stem from unknowing violations. Violation categories set the fine baselines, but agencies consider the violation severity, the violator’s history of compliance and their ability to pay before determining a final amount. Agency guidance documents provide insight into common violations and penalty calculations.

Hazardous materials shipping regulations place the compliance burden on the hazardous material provider. Any business that hires a third party to transport its hazardous materials bears the responsibility of understanding and complying with the appropriate U.S. Department of Transportation (DOT) regulations. Moss & Barnett has assisted clients in auditing their shipping practices to ensure that they are in compliance with the regulations.

### Basic Shipping Requirements:

- Properly package, mark, label, placard, classify and describe materials on accompanying shipping papers.
- Keep shipment size within hazard category limits.
- Include emergency information (e.g., contact information, health/safety precautions, spill/cleanup advice).
- Provide packagers and handlers with adequate information and training.

## REGULATORY UPDATE



### *No More Carbon Copies?*

The U.S. Environmental Protection Agency (EPA) is conducting a pilot project that may some day change the way businesses manifest hazardous waste shipments. The current system of manifesting waste involves numerous forms, copies, signatures and mailings. In addition, inconsistency between states' forms and programs causes confusion for generators and transporters operating in multiple states. EPA believes the paperwork burden could be eased with either internet submittals or a system based on electronic data interchange (EDI). EDI allows otherwise incompatible computer systems to communicate via a translator program.

If EPA's pilot program is successful, EDI could bring greater efficiency, economy and uniformity to the hazardous waste manifesting process.

### *Title V Permits — The Last Mile*

Applications for Title V Air Quality Operating Permits continue to make their way through the system toward final issuance by EPA. Every two months, U.S. EPA Region 5 summarizes their application processing statistics online. The March 2001 data indicates a 47 percent average issuance rate for the region. Individual states' data includes:

- Indiana – 67%
- Minnesota – 48%
- Wisconsin – 41%
- Ohio – 30%

### *SEC Reporting*

Most businesses understand their obligation to comply with environmental laws. Publicly held companies are aware of their obligation to file an annual Form 10-K under federal securities laws. These two requirements overlap however, when a company's current or future environmental liabilities could impact financial performance.

An environmental advocacy group and a mutual fund dedicated to socially responsible investing recently accused the Securities and Exchange Commission of not enforcing environmental disclosure regulations. The World Resources Institute and Calvert Funds charge that many companies do not disclose serious environmental issues in their annual reports. Without this information, the groups feel that investors cannot make informed decisions and are therefore subject to increased risk.

### *OSHA's New Recordkeeping Rule*

The Occupational Safety and Health Administration (OSHA) issued a revised recordkeeping rule on January 18, 2001. Employers are still required to track and report workplace deaths, injuries and illnesses, but OSHA hopes the new process will be simpler.

Businesses with ten or fewer employees are exempt from many recordkeeping requirements, as are certain low hazard industries.

Affected businesses must comply with the new rule by January 1, 2002, but should adhere to the original rule during the transition period.

## JOSEPH G. MATERNOWSKI ATTORNEY PROFILE



Joseph Maternowski is a shareholder at Moss & Barnett who serves as Chair of Moss & Barnett's Environmental Law Practice Group.

Mr. Maternowski's practice focuses on business and real estate transactions, including Phase I Environmental Site Assessment review and voluntary cleanup program participation.

He has experience:

- Helping clients resolve environmental compliance issues before federal and state administrative agencies,

- Serving as outside environmental counsel to Minnesota-based companies with operations across the country,
- Managing litigation relating to contaminated property, including insurance coverage, and
- Assisting clients in developing environmental and health and safety audit and management programs.

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Moss & Barnett, founded in 1896, is a full service law firm dedicated to providing its clients with quality legal services in a manner consistent with high ethical standards. The firm's attorneys work in a variety of areas including business, real estate, family, telecommunications, governmental relations, environmental, taxation, banking, trusts and estates, labor and employment, insurance defense, general litigation and alternative dispute resolution.

## ON THE WEB



<http://hazmat.dot.gov/>  
The Office of Hazardous Materials Safety, U.S. Department of Transportation. Go to "Rules and Regulations" for links to 49 CFR, Parts 100–185 (HazMat transport

regulations). This site also provides access to training modules on a variety of topics (in Adobe Acrobat format).

<http://www.epa.gov/region5/air/permits/oper/table.htm>  
EPA Region 5 — Summary of Title V Operating Permit applications received and permits issued to date (updated every two months).

<http://www.osha.gov/oshdocs/record/>

History and requirements of OSHA's new recordkeeping regulation. Also provides explanation of how the new regulation differs from the previous version.

<http://es.epa.gov/oeca/ore/enfalert/index.html>

Enforcement Alert Newsletter — published by EPA's Office of Enforcement and Compliance Assurance. The newsletter includes information on basic environmental enforcement trends, recent actions taken and where the regulated community can find help with compliance issues.

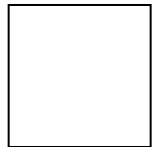
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