

April 2003

# Environmental Law

The newsletter of the TENNESSEE BAR ASSOCIATION'S Environmental Law Section



## Meet Betsy L. Child

Interview conducted by J. Wayne Cropp



*Betsy L. Child, Commissioner, Tennessee Department of Environment and Conservation in the new Bredesen Administration, was interviewed in Nashville on March 4 by J. Wayne Cropp, of counsel to Grant, Konvalinka and Harrison PC in Chattanooga. The interview was edited due to length restrictions.*

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**P**rior to joining TDEC, Child was a senior vice president for Covenant Health. Before joining Covenant Health, she served as senior vice president of Economic Development for TVA, and held a number of other senior positions with TVA from 1993 to 1999.

From 1988 to 1993, she served as director of policy development and human services in the Knoxville mayor's office (Victor Ashe). She headed up alumni programs for the University of Tennessee from 1982 to 1988. She holds a bachelor's degree and masters degree in education from Middle Tennessee State University.

**Cropp:** Commissioner, why don't you start off with a little bit of your background and give me a synopsis of your career and what you have done in terms of environmental issues.

**Child:** OK. My work with the environment started with the City of Knoxville as director of policy development and human services. The development of Knoxville's

waterfront was a part of that, Ijams Nature Center at the time was also a part of the city. One of the mayor's campaign commitments was to focus on Knoxville's heritage, including being able to positively emphasize our founding at First Creek and the fact that the city's history is linked to the Tennessee River. And yet we had really gotten away from that. From the initial planning phase of the waterfront, it became very clear that we would never be able to maximize the potential of the waterfront unless we addressed the environmental issues. The city's regulatory responsibilities were minimal, but the perception in Knoxville about its water quality was much worse than the reality, even though the reality was that we had some problems. I thought we'll never be able to achieve the type of development we want if we don't address the environmental issues, so we started a Water Quality Forum. My office actually initiated the process where we asked anyone and everyone that had any regulatory responsibilities

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Steven Stout

## From the Chair

At this writing I am thinking ahead to the upcoming Solid/Hazardous Waste Conference in Gatlinburg (April 30-May 2), to a planned ABA CLE conference in Atlanta on May 14, and to the annual Tennessee Bar Association convention in Memphis on June 11-14. All of these events will provide CLE opportunities covering a variety of substantive areas for members of the section. There will also be an opportunity in Gatlinburg to meet new TDEC Commissioner Betsy Child, whom Wayne Cropp has interviewed in this newsletter. Please keep these events in mind as you plan your schedule for the next couple of months.

I am writing again about a short but important book titled *Breaking the Vicious Circle: Toward Effective Risk Regulation* by

Stephen Breyer, now an associate justice on the U.S. Supreme Court. Breyer identifies three major problems with the way that the government at all levels regulates environmental risks. These are:

- 1) Tunnel Vision (or the "last 10 percent");
- 2) Random Agenda Selection; and
- 3) Inconsistency.

I promised to cover the second two of these problems in this installment. Random agenda selection is illustrated by the difficulty government agencies have in approaching environmental regulation in a systematic and rational manner. Past experience has been to react to major risks that come to the public's attention; this is the opposite of a planned, systematic approach. It's the equivalent of putting out fires — the fires are the stuff in headlines. Aside from sensationalized media coverage that often exacerbates the situation, there are a couple of other problems leading to this random agenda selection.

First is the difference between public perception and reality. Breyer shows the difference between the public's ranking of a list of environmental problems based on perceived risk and compares this list to an expert ranking based on a better understanding of the risks and likelihood of exposure. The differences are remarkable. What grabs public attention are not necessarily the most serious problems. The first problem feeds the second. The second problem is that political institutions tend to accept inaccurate perceptions of risk and transform them into policy. While political institutions should be responsive to public opinion, this does not lead to accurately managing true risk

Government agencies' reaction to public outcry over an environmental problem based on emotion rather than facts leads to Breyer's third identified problem: inconsistency. Breyer notices the disparities in the cost of avoiding premature deaths among different federal programs. Some of Breyer's critics claim that he is biased against environmental regulations aimed primarily at preventing exposure to carcinogens compared to safety regulations. But there is a wide variation in the amounts of money spent to save a statistical life — even among different programs in EPA.

Cost/benefit analysis as a part of the regulatory process is controversial, because it is difficult to place value on human life. The problem is not just economic, but moral and spiritual. However, the lack of consistency among regulations diminishes the effectiveness of the overall regulatory system in meeting its purposes no matter what value one places on human life. In other words, the system now is less effective in terms of lives saved than it could be, because money is not being spent in areas where concentrated spending would produce better results.

The bulk of health-based environmental regulations are aimed at reducing the incidence of cancer. I realize there are many different types of cancer. But I don't think there is a rational process to say, for example, that bladder cancer is worse than skin cancer, and, therefore, we as a society should spend more on regulations that are aimed at eliminating risks of bladder cancer. I do not think there is a system at all. So, our society has a system of risk regulation that is not truly based on evaluating and reducing risk. Now what if you were given the information (just for the purposes of illustration since I don't have actual data) that \$100,000 spent on a program to control emissions of a chemical linked to bladder cancer would save 10 lives but that the same \$100,000 spent to regulate another chemical

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# New EPA Guidance Document

## Summary and Analysis of Common Elements of Landowner Liability Protection, Small Business Liability Relief and Brownfields Revitalization Act (Brownfields Amendment)

By William L. Penny

The United States Environmental Protection Agency (EPA) issued Interim Guidance on March 6 to guide agency staff in making determinations of liability for the three categories of landowners that received some relief under the Brownfields Amendments. Those three categories are (1) Bona Fide Prospective Purchasers (BFPP), (2) Contiguous Property Owner, and (3) Innocent Landowner. While the Brownfields Amendments contain numerous requirements for these landowners, the guidance addresses only elements common to all three.

### Threshold Criteria

#### *All appropriate inquiry:*

Any person in any one of the three protected landowner groups must perform “all appropriate inquiry” into previous ownership and uses of property before acquisition of the property. The demonstration cannot be shown *after* purchase. Of course, a BFPP will acquire the property with knowledge of contamination. However, the contiguous property owner and the innocent property owner must demonstrate that they had no reason to know of any contamination to qualify for the defense. The requirements for determining all appropriate inquiry are in three phases:

- Pre May 31, 1997 • Take into account such things as commonly known information about the property, the value of the property if clean, the ability of the defendant to detect contamination, and other similar criteria.
- After May 31, 1997 • ASTM 1527-97 “Standard Practice for Environmental Site Assessments: Phase 1 Environmental Site Assessment Process” must be used.
- After January 1, 2004 • EPA criteria will be published, with elements of the current ASTM language included.

#### *Affiliation:*

Congress sought to prevent clever landowners from sham transactions that would allow contaminated property be held by close relatives or another related business entity to be subject to one of the defenses. As a result persons wanting to be a BFPP or a contiguous property owner cannot be potentially liable or affiliated with any other person who is potentially liable for response costs. The innocent landowner provision does not contain the “affiliation” language; however, such a requirement is probably unnecessary in that the pre-existing requirement for the innocent purchaser defense required that the person show the damages were not

caused by a third party with whom the person has an employment, agency, or contractual relationship.

### Continuing Obligations

Landowners must comply with certain continuing obligations to maintain the defenses and protections afforded by the Brownfields Amendments. They are:

- (1) complying with land use restrictions and institutional controls;
- (2) taking reasonable steps with respect to hazardous substances
- (3) providing full cooperation
- (4) complying with information requests
- (5) providing legally required notices.

#### *Land Use Restrictions and Institutional Controls:*

To maintain the defense all three landowner categories require:

- the person be in compliance with land use restrictions established or relied on in connection with the response action, and
- the person does not impede the effectiveness or integrity of any institutional control employed in connection with a response action.

EPA in its guidance believes the statute requires compliance even though these restrictions were not in place at the time they acquired their interest in the property. Institutional Controls are used to implement land use restrictions. However, EPA notes that land use restrictions must be complied with if relied upon regardless of an institutional control. So, where the institutional control is not implemented, where the property owner or others using the property impede the effectiveness of an institutional control or where a court finds the controls unenforceable, the landowner must still implement the land use restriction.

To take advantage of the liability protection, the party seeking the protection cannot impede the effectiveness or integrity of any institutional control. This does not mean just a physical disturbance or disruption of the land. For example if a landowner removed a notice of an institutional control from the register of deeds office or just refused to file one when required they would be impeding the institutional control. The owner can seek changes to the controls and restrictions, but cannot actually make a change unless

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# The RCRA Inspection

By Ed Callaway and Shelby Sheffield

**R**CRA Section 3007 and the Tennessee Hazardous Waste Management Act grant state and EPA inspectors broad authority to conduct inspections of hazardous waste-related facilities. While inspectors are granted a certain degree of authority and leeway in order to conduct thorough facility inspections, facilities/permittees have rights to protect themselves as well. This article highlights certain measures and precautions that facilities may follow during the course of a RCRA inspection. So what are the basics that a facility should know when an inspector appears?

## Should I Expect Notice?

Prior notification of an inspection is not required. In fact, in many circumstances (i.e., an unannounced Compliance Evaluation Inspection, or when a violation is suspected), notification will not be given. Regardless of whether prior notification has been given, upon arrival at a facility, an inspector should present proper identification. In some situations, the inspector will want to proceed immediately with the inspection itself. In others, however, the inspector may have an opening discussion with the permittee to outline what will be inspected and the underlying reason(s) leading to the inspection. The opening meeting is a good opportunity for the permittee to foster a cordial rapport with the inspector in addition to helping the inspector establish the order of the inspection, meeting schedules with key personnel, and arrangement for accompaniment by facility personnel.

## What is the Inspector's Authority?

Specifically, an inspector conducting a RCRA inspection has the authority to:

- 1) Enter any establishment where hazardous wastes are, or have been, generated, transported, stored, treated, or disposed;
- 2) Obtain samples for the inspection of any such wastes as well as samples of any containers or labeling for such wastes; and
- 3) Access and copy all records relating to such wastes.

## Facility Access

Prior to granting an inspector facility access, the owner or agent in charge of a facility at the time of the inspection must give consent to the inspector to inspect the premises. A permittee is only required to give facility access to a "duly designated" officer, employee or representative of EPA or TDEC. If an inspector is not wearing proper identification, a permittee should request to see

proof of identification.

All inspections must be conducted at a reasonable time, during normal working hours, and completed in a timely manner. In general, this means that inspections are conducted during the normal operating hours of a facility. Operators and managers of facilities running continuous operations should note, however, that if facility management leaves before operations stop, an inspector may continue an inspection using his/her own discretion, so long as the inspection is completed in a timely manner.

It may sometimes be proper for a permittee to deny access to an inspector or to withdraw consent during the course of an inspection. In these situations, the inspector must secure a warrant before beginning or completing the inspection. Access denial or withdrawn consent would be proper if an inspector did not have the proper safety equipment required by a facility in order to conduct the inspection, or if the inspector failed to follow proper OSHA regulations during the inspection process. A facility is not responsible for providing the inspector with such equipment, and should not allow an inspector to proceed with inspections involving site conditions for which the inspector is not prepared. Note however, that even without a permittee's consent, an inspector is still authorized to observe and report on things in plain view upon arrival at a facility and anything that a member of the public would be in a position to observe.

A facility operator is not required to modify its schedule of operations for a RCRA inspector. The inspector may not demand that equipment not in use be started, or that operating equipment be kept running longer than standard procedure would require.

If an inspection is conducted under a warrant, the procedures will vary from a typical inspection. First, the permittee should ensure that the inspection is conducted in strict accordance with the warrant. This includes any restrictions that the warrant may specify as to facility location and records. Second, the permittee has a right to demand that the inspector stay within the areas of the facility authorized by the for inspection according to the warrant.

## Information and Records

Once on facility premises, in addition to conducting a visual site inspection, an inspector will usually conduct a record review. As noted above, a facility may wish to claim certain records and/or samples as confidential. Statutory authorization gives inspectors access to confidential information. A permittee should assert a claim of

confidentiality upon first opportunity and should thereafter claim any information as confidential as soon as the inspector begins record review. This is imperative as records become public record upon the inspector photocopying them and making them a part of the inspection file (unless they are claimed confidential). It is much more difficult to assert a claim of confidentiality after records have been made public. A facility owner has the right to ask the inspector for receipts regarding documentation of what was copied or sampled during the inspection.

The facility operator generally has a reasonable time to comply with requests for documentation. If the request covers information that should be readily ascertainable (training records, manifests, or the like), then a facility is expected to produce them during the inspection. If the request involves compiled data, or voluminous records that must be culled from files, a facility may often provide those records after the fact, in a time frame commensurate with the request. The facility should be sure to discuss the time frame for any document production with the inspector.

### What about photographs or samples?

Inspectors may also photograph certain parts of the facility during an inspection. If a facility's processes are confidential or proprietary, the facility should note at the time that the photos taken should be considered confidential business information, and should follow up in writing. Although photographs are generally a readily-accepted means of documentation, and many inspectors consider them an indispensable part of the inspection documentation, site-specific considerations may arguably provide permittees a means to withdraw consent to photography in certain cases. Consider the use of flash photography in facilities using volatile, flammable solvents. Arguably, a permittee is justified in refusing to allow an inspector to take a flash photo during this situation. In addition, certain facilities may refuse photography because of national security concerns. In the alternative, the facility may consider providing a copy of a photo to the inspector at a later time. In such case, the facility should request that it be given a reasonable time to produce the document. TDEC is currently considering the circumstances under which a facility may refuse to allow photography, and impact of such a refusal on the completeness of an inspection.

If sampling is included in an inspection, the permittee has the right to retain and should request "splits" of the

samples obtained by the inspectors to ensure the validity of laboratory analysis conducted on the samples. The inspectors should also provide copies of "chain of custody" forms to the permittee to ensure the validity of the samples. Further, if any other property is taken from the premises, inspectors must provide receipts and maintain an inventory of all items removed from the premises.

### Exit Discussion

Inspectors should hold a closing interview with the permittee to discuss the inspection findings. A permittee has the right to request such a meeting if one is not offered. During the closing interview, the permittee should keep in mind that all inspection findings are preliminary until reviewed by the inspector's supervisor. Nonetheless, the permittee should ask questions regarding any inspection findings that are revealed which are unclear and seek definitive follow-up to questions that the inspector may not readily be able to answer.

### Conclusion

RCRA and its state analog give EPA and TDEC inspectors considerable power in conducting inspections of operations covered by RCRA's jurisdiction. Facilities subject to inspection do, however, have certain rights, and knowing how to exercise them appropriately can help ensure a smooth, orderly, and balanced inspection. ■

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Shelby Sheffield

Meet Betsy L. Child, *continued from page 1*

related to water quality to come to Calhoun's on the River and we literally sat around the table and discussed everybody's respective areas of responsibility. Believe it or not, it was the first time this group had ever gotten together. Of course, many other groups and individuals contributed to this effort. As it ended up, as a part of the master plan, Ijams Park became, in essence, an independent arm of the city. They have been able to create their own master plan, and build their park. The Water Quality Forum still exists today as a part of the Ijams Nature Center, and that is where the cleanup of the river was generated. The Water Quality Forum really took on a life of its own, which it should have. It was that area that really got me excited about balancing development and environmental needs.

**Cropp:** OK. Anything else?

**Child:** As you know, at TVA, I was a senior vice president of economic development. I am proud to say that even when we were doing economic development, we tried to consider development's impact on the environment. For instance, we had a program of waste audits of small business and industry that we conducted on a volunteer basis through a grant provided by EPA. We tried to identify and correct different types of wasteful actions, whether it was an inefficient manufacturing operation or an energy efficiency issue that might have an affect on the environment. So really, I feel that I have a long history of balancing economic development and environmental needs.

**Cropp:** OK.

**Child:** And then, I have been a member of the Friends of the Great Smoky Mountains National Park for forever. How can you live in East Tennessee and not be. You know, I have a Friend of the Smokies license plate, I have for years. Now I guess I'm going to have to get a State Parks license plate too.

**Cropp:** As commissioner, are you going to live in Nashville or Knoxville?

**Child:** I built a house in Knoxville 4-1/2 years ago that is close to the river. I can walk down to the river from my house. I haven't emotionally detached from my house yet, and I am thinking, how do I ever replace this, but I will live here. I do live here (Nashville).

**Cropp:** What is your agenda for the agency? I heard you speak to the Tennessee Chamber of Commerce and Industry where you said that you want Tennessee to be the "benchmark" environmental program. What does that mean in your mind?

**Child:** I do want us to be the benchmark for the country as I said at the Chamber meeting. I don't really know exactly what that means yet, except it means I want people coming to us, asking us about how we do business, because I want us to be the best in the business. Now what is that? I am learning that. I am just enough of a competitor, that I believe if you're going to do it, why not go ahead and be the best, so that's where that comes from. It's such a diverse department, that I think it will mean different things by

division. We are flattening the management. [At this point Commissioner Child drew on paper an organizational structure having three primary departments — parks and conservation, a business services position and environment.] In parks and conservation Jim Fyke (former director of Nashville Parks) is coming on and we are thrilled to have him join. How do you get a better park professional? You don't, he is awesome and he's exciting and he's smart and fun and capable, anyway, so I'm just really thrilled that he is signing on. And then, there will be another piece that really is an infrastructure support for both environment and parks. This is going to be a business services position where we will house the infrastructure that should help make the two programmatic areas work better. There will not be a deputy commissioner's position. The only direct report positions will be communications, the general counsel, and internal audit. So, really, we are trying to reduce staff and in fact, we took just as much of a hit in our budget reductions in the commissioner's administrative positions as the other departments did. I did not ask any less of myself then I did of the departments.

**Cropp:** So tell me again, what are some of the groups that fit into the infrastructure piece?

**Child:** It will be finance, human resources, and information systems and so forth. You know it's all those business system pieces that should help the divisions work together.

**Cropp:** Do you know who or how you're going to fill the environmental position, is that an open position?

**Child:** It's open right now. By flattening the management structure, the division heads like Barry Stephens, Mike Apple or Paul Davis, have had a layer of management over them removed. They really are going to be held directly accountable, because the environmental position will end up being policy, you know, big picture oversight, helping with the strategy over the environmental piece and they are going to have to deliver on a day-to-day basis over their areas, and they already do that.

**Cropp:** Well, it seems that there was another level above the commissioner in the last administration. Is there going to be a policy position like that, that you report to, or are you a direct report to the governor?

**Child:** The governor has answered that question.

**Cropp:** Has he, ok.

**Child:** The commissioner's position is the position. Policy will be set here with the approval of the governor.

**Cropp:** Having been in office for just a few weeks now, what do you see as the hot button issues, what do you see as the priority issues right now for the department?

**Child:** Well, obviously, I have been spending a lot of time on the internal operational pieces.

**Cropp:** And I am not really looking at the parks division for the purpose of this question.

**Child:** I didn't figure you would be. Jim will be crushed. I am going to split this discussion into three categories, especially within the area of the environment. We've got to be a

department that is driven by balance. We have got to look at our statutory, regulatory, legal and ethical responsibility's and be sure that we are doing what we're suppose to be doing. That is what the state has asked us to do. And working with economic development, working with TDOT, working with tourism we have to make sure that we've got that balance of appropriately supporting our economy and doing what the department is suppose to do.

One thing I have asked for research on is the growth of the level of sophistication and the demands on the environmental department over the last few years. If you look at the evolution of what is expected of the environmental department of Tennessee, it has become more and more significant and complex each year. We will look for a balance. We will try to anticipate what our role will be in the future. How do we work with EPA? How do we work with environmental groups? How do we work with business and industry?

One of the biggest challenges we face is not implementation of regulations, but how do we obtain a mind-set where we are in a much more proactive position and changing attitudes about addressing environmental issues on the front-end and not the back-end. I hope the department can spend some time, energy and effort with the right partnerships on addressing the cultural issues. Air quality is an example. All of us are going to have to deal with the issue of our automobiles. That's a cultural issue.

And then the last piece of the three-part agenda is accountability, and that takes on all kinds of forms. There is the accountability of the department. Are we doing what we are suppose to be doing as efficiently and as effectively as we can do it? Are we as Joe and Sally Citizen being accountable for our actions? Are we as citizens being sensitive to the environment, in the way in which we get rid of our waste, how we handle agricultural issues, and recycling? Are we using the used-oil program and what are we doing with leftover paint? I mean those kinds of things, that again, people in our culture just aren't thinking about. **Cropp:** So, its balance, culture and accountability, is that it?

**Child:** Balance, culture and accountability, those are the three.

**Cropp:** How about interagency relationships in the new (state) administration? I know there was talk about the relationship issue, specifically with the department of transportation in the prior administration.

**Child:** Economic and community development, agriculture, tourism, transportation and TDEC, the five of us are communicating constantly. In fact, we are working on formalizing a structure especially related to TDOT in terms of how we do business. We want to try to stay on the front-end of these issues by communicating and not get ourselves caught in the back-end. The governor has made it very clear to both Commissioner Nicely and me about what the consequences would be if we sued each other. He

told us, he would throw us off the tallest building, and I'm not big on heights, so ... (laughing).

**Cropp:** Now, you have mentioned lawyers, so let's run down that rabbit trail a little ways. I hear there are changes coming for the department's lawyers. They are being consolidated back into the department building here, tell me about that.

**Child:** Yes, we will be saving overall \$150,000 a year by the lawyers moving back into the department building. Even if we didn't save a penny in appropriations, just in efficiency alone, it makes sense. I'm thrilled they are back April 1st.

**Cropp:** How did you come up with the \$150,000?

**Child:** Extra rent, that's just dollars and cents.

**Cropp:** That isn't shoe leather from walking back and forth.

**Child:** No shoe leather. Alan Leiserson is going to gain weight, I'm convinced.

**Cropp:** Tell me about your thoughts about relationships with U.S. EPA.

**Child:** We're going to work with EPA and obviously do work with EPA on a number of issues. However, I think we have some challenges ahead. I am a little uncomfortable going too far down that road because Barry Stephens (director, air pollution control division) and I just had a meeting this morning regarding the position the state will take on EPA's New Source Review regulations. I told Will Callaway (executive director, Tennessee Environmental Council) this morning, we're waiting to hear the details of the specifics before we take a position. We want to give EPA an opportunity to come in next week, we need to hear what they have to say, and then do an overlay of what we know the issues are for the state and then take our position. But, we are going to work with EPA, that's our responsibility.

**Cropp:** That's the big picture on the relations with EPA, but going a little deeper into specific issues. I know Quincy Styke is here obviously to help on discussions related to air quality issues.

**Child:** I'm not the technical expert.

**Cropp:** One of the specific issues is EPA's Early Action Compacts. What is Tennessee's position on Early Action Compacts?

**Child:** First of all, I am very thankful that we have the competency in the air pollution control division that we have. Recently we have gotten some letters on very tough situations, up in east Tennessee. They were highly complementary of the staff and again, we're not going to be perfect, none of us are, but I do feel like the knowledge base of the department is excellent. They provide service at it's best. The Early Action Compact Agreements are going to be driven by local decision makers, we are going to help in everyway we can and be as active as we can, but it's a local decision.

**Cropp:** OK.

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approved by the appropriate regulatory authority.

#### *Reasonable Steps*

Landowners claiming the liability protection must take reasonable steps with respect to hazardous substances to:

- Stop continuing releases
- Prevent threatened future releases, and,
- Prevent or limit human, environmental or natural resource exposure to earlier hazardous substance release.

EPA believes that Congress did not intend to create response obligations for a CERCLA liable party. However, while the reasonable steps test applies to all three owners, there are some distinctions. A BFPP acquires the property with knowledge of the contamination. As such they have a much higher duty of care than a contiguous or innocent property owner who did not know about the contamination. Once they learn of contamination though, they must take reasonable steps related to their degree of knowledge. The required reasonable steps related only to responding to contamination for which the landowners are not responsible.

The reasonable step determination is site specific and a fact-based inquiry. Reasonable steps identified by EPA include notifying EPA or the state about contamination after purchasing property, site access restrictions, once it is learned that dumping is occurring, segregating leaking drums discovered after purchase, and repairing breaches in a containment system for an on-site waste pile. According to the guidance, EPA does not believe that, absent exceptional circumstances, a contiguous landowner will not be required to conduct ground water investigations or install ground water remediation systems. In addition, if a release of hazardous substances is discovered, EPA expects taking actions to stop the release but not remediation. In addition, the owner may have to take certain basic actions to assess the extent of contamination to determine how to stop the release.

EPA's "Policy on the Issuance of Comfort Letters Addressing Reasonable Steps" (1997 Comfort/Status Letter Policy), 62 Fed. Reg. 4,624 (1997) is a vehicle for gaining comfort that all reasonable steps have been taken. The comfort letter is not something issued like a termite letter, but is only issued where it facilitates the cleanup and redevelopment of Brownfields, where there is a realistic perception or probability of incurring Superfund liability and there is no other way to address the party's concerns. The March 6 guidance contains model comfort letters.

Other common requirements for landowners seeking protection of the Brownfields Amendments are

- Providing cooperation, assistance, and access to persons who are authorized to conduct the response action. This cooperation includes any such cooperation necessary

for installation, integrity, operation and maintenance of the response action.

■ Compliance with information requests and administrative subpoenas. A failure to timely, accurately or completely respond to 104(e) requests could jeopardize the defense. EPA in their guidance states that inconsequential errors could be overlooked. The example EPA provides in the guidance is fairly narrow: A letter addressed to the wrong EPA person causing the response to miss the deadline by a day is considered inconsequential.

■ Legally required notices. This applies only to BFPPs and contiguous landowners. Such notices include CERCLA release notification, notices required under federal, state and local laws.

The March 6 guidance will be of some benefit in trying to interpret the defenses created by Congress. Without much legislative history on the Act, however, it will be difficult to make very broad generalizations on interpretations. For example, does cooperation for a contiguous landowner also mean that they must permit access even if it creates business disruptions? If a prospective purchaser must agree to cooperate if subpoenas are issued, does the right to make legitimate objections to the scope of the subpoena cause the defense to be lost? What if a contiguous landowner filed a RCRA citizen's suit or a common law action for injunctive relief to require the adjacent landowner to clean up the release? Would that mean that "reasonable steps" were not taken since the owner did not physically take the action? It is likely that many of these questions will be the subject of controversy in the future, but it is at least some comfort to know that the reasonable steps will be evaluated on a site specific basis. EPA intends to issue additional guidance in the near future.

*William L. Penny is a member of Wyatt Tarrant & Combs LLP. He is in the firm's environmental practice group. His environmental practice covers a wide range of environmental law from wetlands law to superfund and hazardous waste management. He also practices in the area of health care concentrating primarily in state regulatory and licensure matters pertaining to health care facilities and health care providers in Tennessee. He is also a professor of environmental law at The Nashville School of Law. He received his bachelor's degree from the University of Tennessee and his law degree from the Nashville School of Law.*



**William Penny**

TennBarU and the TBA Environmental Law Section Present ...

## 32nd ANNUAL SOLID/HAZARDOUS WASTE CONFERENCE AND EXHIBITION

The premiere environmental event of the South will offer this year's attendees more than ever before: more workshops and topics from which to choose, more information on the newest developments in the industry, and more exhibitors displaying the latest in products and services to meet your needs! As always, the conference serves as a meeting ground for a diverse group of people with a shared interest. Participants include city, county, state and federal officials as well as regulators, the regulatory community, consultants, legal counsel, environmentalists and private sector representatives.

### THE BASICS

**Producer:** Steve Stout, Tennessee Dept. of Environment & Conservation, chair of Tennessee Bar Association Environmental Law Section

**CLE Credits:** 6.1 general hours & 3 dual

**Date & Locations:** April 30 – May 2, 2003      Gatlinburg Convention Center

### THE PROGRAM

*Wednesday, April 30*

- 1 – 1:50 p.m.      Geographical Information Systems: Presentation of Technical Data to the Public, Regulatory Decisionmakers, Judges and Juries/How to Make the Dry, Technical and Boring Potentially Interesting and Persuasive
- 2 – 2:50 p.m.      Geographical Information Systems: Practical Public and Community Relations Activities for Industrial Entities and Permittees/An Ounce of Prevention is Worth a Pound of Cure
- 3 – 3:50 p.m.      Legislative Update/Hot Cases

*Thursday, May 1*

- 8 – 8:50 a.m.      Risk Assessment: 2002 and Beyond (Panel Discussion)
- 9 – 9:50 a.m.      State Environmental Crimes (Panel Discussion)
- 10 – 11 a.m.      Federal Environmental Crimes (Panel Discussion)
- 11 – 12:30 p.m.      Luncheon
- 12:30 – 1:30 p.m.      Media and Ethics
- 1:40 – 3:40 p.m.      Update on New Ethics Rules

*Friday, May 2*

- 8 – 9:30 a.m.      Breakfast & Learn — What Private Attorneys Dealing with TDEC Should Know

### COURSE REGISTRATION

On-Site Registration (after April 11): \$250 + \$75 (for CLE Credit) = \$325

The fee includes admission to all conference sessions, continental breakfasts, lunches & refreshment breaks.

To register contact the Division of Solid Waste Management at 615-532-0798 or visit their website at [www.state.tn.us/environment/swm/conference](http://www.state.tn.us/environment/swm/conference)

#### Breakfast With the Commissioner at The Solid Waste Conference

There will be a sign up sheet at the registration desk  
for those section members who wish to attend  
the Friday, May 2, 2003  
breakfast with Commissioner Betsy Child.  
Don't forget to sign up, as space is limited!

# Mark Your Calendar

The deadline for submitting news, announcements, and articles for the next newsletter is Friday, July 11. The theme for the next newsletter is "air." Although we are attempting to have themes, please feel free to submit articles even if they are not within the theme if you feel the article is on a timely subject. Please e-mail me at [kstachowski@wallerlaw.com](mailto:kstachowski@wallerlaw.com).

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## REGION 4 PROGRAM

The ABA Section of Environment, Energy & Resources presents "Key Environmental Issues in U.S. EPA Region 4" Program on May 14, 2003, at the Sheraton Atlanta, Atlanta, Ga. For more information call 312-988-5724 or you may register online at: <http://www.abanet.org/environ/programs/environmentalissues/> ■

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## Transitions & News

**Karen Stachowski** left the Enforcement Division of the Attorney General's Office at the end of March and joined the law firm of Waller Lansden Dortch & Davis. She is working in the regulatory group with an emphasis on environmental law. Stachowski received a bachelor of science degree in biology at Mississippi University for Women and her law degree from the Cecil C. Humphreys School of Law at the University of Memphis. She is licensed to practice law in Tennessee. After graduating from law school, she worked at the Office of General Counsel with the Tennessee Department of Environment and Conservation.

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**Caroline Strickland** has joined the law firm of Waller Lansden Dortch & Davis. She is working in the regulatory group with an emphasis on environmental law and litigation. Strickland received her bachelor of arts degree in political science from the University of North Carolina, Chapel Hill, and her law degree from Washington & Lee University Law School. She is licensed to practice law in California. Her hometown is Southern Pines, NC. ■

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### From the Chair, *continued from page 2*

linked to skin cancer would not save even one life. This type of inconsistency is present in the current regulatory system, and this is just not rational.

Breyer characterizes the interaction of the three problems as a "vicious circle." Breyer says that the "vicious circle" can be characterized as "diminishing public trust in regulatory institutions and thereby inhibiting more rational regulation" (p. 33). He says the system has worked pretty well over the first 30-something years of environmental legislation on large serious risks. But as we now enter an area where smaller risks must be addressed, the "vicious circle" is more of an impediment to making progress.

The next and final installment will address the solutions Breyer proposes to "break" the vicious circle and perhaps have another set of alternatives. Critics may take

issue with the fact that one of Breyer's solutions is technocratic rather than democratic; he recommends the establishment of a scientific and technical body to establish a system of prioritization in risk regulation.

As always, I welcome your comments, and I look forward to seeing many of you at the upcoming events described in this newsletter. ■

*Steve Stout works in the Office of General Counsel in the Tennessee Department of Environment & Conservation in Nashville. He attended East Tennessee State University and the University of Tennessee College of Law. Steve is married and has two daughters.*

**Child:** It's going to be so tough anyway you look at it. You know, figuring out how to make this big department run better is one thing, I am real comfortable in that arena. But, air quality issues over the next year are going to be a learning experience for all of us, it's going to be tough, but again, you know, it's not like it's going to go away. We are going to step up, and do it, and we're going to do it with the localities. I'm going to go back to the cultural piece again, you know, we're not going to get to attainment until there is a cultural shift in the individual citizens of Tennessee. I mean, ultimately that's what it's going to take. We can address all the industrial issues and we're still not going to get to attainment levels. Common sense tells you, it's going to take more than what we currently have on the table and that last piece is going to be hard.

**Quincy Styke:** I think the Early Action Compact process does give local governments an opportunity to show the average citizen that they individually play a large part in how clean our air is. And as we grow in the Southeast, we have to start looking at lifestyle issues like the use of our cars, energy conservation at home, and at the office. It's much better to do it in a voluntary, proactive form, rather than lecture, waving the finger at somebody, so I think it will be real helpful if we continue those Early Action Compacts. But, again, the state is here to take the locals where they want to go in that.

**Cropp:** We've covered the EAC's probably as much as we need to, but we might just talk a little bit about New Source Review and the state's philosophy on that, and your philosophy on New Source Review issues.

**Child:** It is going to be a very difficult issue for this department to manage over the next few months. We do not have a hard and fast position. We are working on it.

**Quincy Styke:** I think you mentioned the board is going to have a meeting next week and figure out all points of view. You know, there are polarized views, some people are very much against it (EPA's New Source Review regulations) and some people are very much for it. We need to make sure that we have the pulse of Tennessee before we decide what position would be best to take on that. That's just part of government if you will, the pulse of the citizens, how do the masses feel about it?

**Child:** And to be able to compare that with what we have now, and to see what is the right thing for the state, from all different facets. It goes back to the balance piece again. What impact does that have on the attainment/non-attainment issue and so forth. We are working our way through it Wayne.

**Cropp:** What messages do you have related to the department's relationships externally with industry, with community organizations, with the public and so on.

**Child:** We want strong partnerships, and we would like to do as much as we can through those partnerships, again, in a proactive front-end way, because I think that will help support the cultural changes that we need to make. So the more we can prevent things on the front-end by working with contractors, road builders, The Home Builders Association, for instance, working with medical groups related to radiological health issues, and so on, the less the financial burden it is going to be on the state and the stronger our economy is going to be, and the stronger our environment is going to be. We can't do that without strong partnerships.

**Cropp:** Tell me a little bit about the budget and particularly how the state's budget problems relate to your interest in making this agency the benchmark, how do you balance those two issues?

**Child:** I think we can.

**Cropp:** But are you confident that you can achieve the benchmarking criteria that you want to set as a standard for the agency, even in the face of budget cuts? How do you do that?

**Child:** What we are doing is, we are starting at the top, the structure that I outlined for you fits with the philosophy of reducing the number of personnel but paying the people that you have. The other thing we are doing is we're going to transition this year to performance-based budgeting. We are one of three pilot agencies in Tennessee government to move to strategic budgeting and that will be a blessing and a curse. So we'll continue to try to collapse the management structure, have performance measures, and set standards of performance, those kinds of things.

**Cropp:** Ok, one last thing. What message do you want to convey that I haven't covered? Is there anything you want to say that I haven't given you an opportunity to say?

**Child:** We are interested in hearing from you and your members. If you know of areas that we can improve, we would like to hear from you. One of the things that we haven't done in the department in the past is to conduct a customer satisfaction survey. It would have to be crafted carefully because often times someone may not like the ultimate decision we have to make, but we need to know whether we are making timely decisions and that we are respectful. Any thoughts your organization has about how we can perform better or more efficiently, we would certainly like to hear, and that would be a big help.

**Cropp:** Good, alright, thank you very much commissioner. ■

*J. Wayne Cropp is of counsel to the law firm of Grant, Konvalinka, and Harrison PC. He is a graduate of Cumberland School of Law, Samford University, and Bryan College. Cropp is the former director of the Chattanooga-Hamilton County Air Pollution Control Bureau.*



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ASSOCIATION

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Environmental Law

# Playing soon in MEMPHIS

Plan now to attend the 122nd Annual  
TBA Convention \* June 11-14

**J**oin us at center stage for the hottest event of the summer — the 122nd Annual Tennessee Bar Association Convention in Memphis, June 11 – 14.

Compelling speakers, challenging programs and plenty of networking opportunities make this the one event Tennessee attorneys won't want to miss. It also promises fun for the entire family, with a trip to see the pandas at the Memphis Zoo and more planned for the four-day convention. Just take a look at all we have in store for you.

Don't miss our CLE program at convention, co-sponsored by the TBA's Environmental and Real Estate Sections:

#### WHAT IF YOUR NEW CONDO IS TOXIC?

Some of the state's top real estate and environmental lawyers lead a panel in dissecting hypothetical situations. They'll tackle some of the key considerations facing Tennessee attorneys as they deal with cases involving real estate and the environment.

Thursday, June 12,  
Memphis, The Peabody,  
1:45 - 5 p.m.,  
3 general CLE credits

To register for convention, go to  
<https://www.tba.org/conv2003>  
or call 800-899-6993