Garfunkel, Wild & Travis, P.C.

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Suzanne M. Avena, Esq., Managing Editor

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ARE GREEN HOSPITALS WORTH THE INVESTMENT?

By: Alicia M. Wilson, Esq.

The Leadership in Energy and Environmental Design (LEED) Green Building Rating System is a voluntary, consensus-based certification issued by the U.S. Green Building Council. In order to obtain a LEED certification, a building must meet standards in five key areas: sustainable site development, water savings, energy efficiency, materials selection, and indoor environmental quality.

The current zeitgeist of both energy independence and desire to save money makes the consideration of LEED certification of hospitals very appealing. LEED certified facilities use less energy, and thus decrease operating costs. Furthermore, there have been important studies suggesting that the improvement of indoor environmental quality as a result of implementing green building materials and technologies significantly decreases incidents of hospital-acquired infection, hence extra costs associated with these infections decrease.

Energy Savings

According to the Health Care Energy Project, an initiative by the American Society of Healthcare Engineers, health care facilities consume nearly twice the annual energy of an average commercial office building. In fact, a study by the United States Green Building Council claims that 91% of hospitals reported higher energy costs from 2005 to 2006, and more than 50% cited double-digit increases.

A 2003 report to California's Sustainable Building Task Force suggests that while LEED certification and green building will increase the initial cost of design and construction of a building by 2-3% of the overall cost of the project, it is likely that the extra expenditure will be recouped through energy savings of about ten times the original investment. While these estimates are for green buildings generally, there are several case studies specific to hospitals citing over 40% increases in energy efficiency compared to non-green buildings. One example is The Center For Discovery in Harris, New York, an independent living facility for the elderly and learning center for disabled children, completed in March of 2003. The energy model for the Center predicted that it would be 24% more efficient than a simply code-compliant building, and would realize an energy savings of $19,225 per year. In fact, as of now, according to publications, it is 28% more efficient than a simply code-compliant building. Another example is the Carrier Clinic, a 281-bed psychiatric hospital and detoxification clinic in Belle Mead, New Jersey, which recently signed a power purchase agreement with Enxco, a California renewable energy company, to build, own, and maintain a complex of solar panels to power the hospital. It is estimated that the solar panels will supply 50% of the health system's energy, cutting in half the electric bills that reach as high as $85,000 in the winter.

Health Benefits

Hospital-acquired infections lead to significant increases in expenses. According to a 2005 memorandum by then Assemblyman Pete Grannis (now the Commissioner of the New York State Department of Environmental Conservation) to Speaker Sheldon Silver, just "limiting" hospital-acquired infections would save "anywhere between $100 and $200 million in state and local Medicaid expenses per year." Moreover, the Center for Disease Control (CDC) has concluded that hospital-acquired infections result in nearly $5 billion in additional costs per year. Other estimates from GREENGUARD, an organization that certifies products and materials as "low-emitting" of volatile organic compounds, cite as much as $11 billion in additional costs per year. In addition, the CDC found that nearly two million patients annually contract an infection while in the hospital, and that nearly 88,000 die every year as a result.

The quality of indoor air in general is a tenet of LEED. The importance of air quality in a hospital, however, is of even greater concern due to the increased health risks potentially created in a hospital as a result of adverse air quality. The air in a hospital differs from that in other

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types of buildings for the following reasons: 1) the increased presence of microbes, viruses, and bacteria associated with illness; 2) the controlled ventilation environment, including temperature, humidity, and air change; 3) the volume and diversity of people entering and leaving—i.e., patients, visitors, staff. An article in the July 1998 issue of HPAC (heating, piping, and air conditioning) Engineering included a review of hospital mechanical systems. The study concluded that many respiratory pathogens have actually adapted to the conditions of the hospital and are transported throughout the building through airflow movement. According to the study, one third of the approximately 88,000 deaths per year is preventable.

The Green Building Council released a report showing that LEED buildings were healthier for occupants. Their review of more than 600 studies of the effects of hospital design on patient well-being found evidence of reduced infection to those being treated at facilities built with green construction. Specifically, green building enhances patient health by improving air quality through the use of high efficiency particulate air (HEPA) filters. In addition, the location of air supply diffusers, location of air intake, laminar (streamlined airflow in which the entire body of air within a designated space moves with uniform velocity in one direction along parallel flow lines) as compared with non-laminar air flow in rooms, and appropriate insulation of ventilation systems from construction activities, all have an impact on infection rates.

In 2003, The Centre for Health Design, a not-for-profit organization, conducted a study illustrating the link between the physical environment of a hospital and patient outcomes. Significantly, the study found the following:

1) Patient falls significantly declined;

2) Medication errors by staff fell 30% in two-patient rooms that allocated more space for their medication rooms;

3) The rate of hospital-acquired infections decreased by 11% in new patient pavilions due to the introduction of single-patient rooms.

Conclusion

Even though there is an increased initial investment required in green building of hospitals of approximately 6-7% of the total building cost for LEED certification (according to the United States Green Building Council), it seems that ultimately the investment will yield a valuable return by saving energy costs and contributing to the increased health of patients and reduction of infections acquired while in the hospital.

Port of Tacoma Case Broadens The Reach Of *Cooper Industries v. Aviall Services, Inc.*, By Limiting The Reach Of Parties Seeking CERCLA Contribution

By: Colleen M. Tarpey, Esq.

In a ruling issued on January 14, 2009, the United States District Court for the Western District of Washington dismissed, upon reconsideration, a third-party claim for contribution under CERCLA §113 as premature, further refining the Supreme Court's 2004 landmark decision in *Cooper Industries v. Aviall Services, Inc*. The District Court, in *Port of Tacoma v. Todd Shipyards Corp.*, dismissed Defendant Todd Shipyards Corp.'s ("TSC") contribution action against third-party defendant, the United States, because TSC had not been directly sued by any party under CERCLA §106 or §107.

The *Port of Tacoma* case falls in line with those cases since *Cooper* that have broadly construed the Supreme Court's holding in that case, and is a blow to CERCLA Defendants who, on a narrower reading of the *Cooper* holding, would have been entitled to sue for contribution under CERCLA §113 if any §106 or §107 action had been commenced involving the same site, even though they had not been a party to that action.

History of the Tacoma Superfund Site And Litigation

The *Port of Tacoma* case centers around the Mouth of the Hylebos Waterway of the Commencement Bay Nearshore/Tideflats Superfund Site (CB/NT Site), located in Tacoma, Washington. The CB/NT Site was used for naval shipbuilding activities during both WWI and WWII. In 1983, the United States Environmental Protection Agency (EPA) placed the CB/NT site on the National Priorities List and in 2005, the federal government filed a complaint at the request of the EPA against the Port of Tacoma and other defendants (the EPA suit), seeking recovery of response costs associated with the cleanup of the CB/NT Site under CERCLA §107. TSC was not named as a defendant in the EPA suit. On March 15, 2005, the Port and the other defendants in the EPA suit entered into a Consent Decree, whereby they agreed to incur response costs associated with the release of hazardous substances at the CB/NT Site.

Thereafter, on March 5, 2008, Port of Tacoma filed its suit for contribution under CERCLA §113 against TSC and other defendants, seeking to recover costs it incurred for investigative and remedial actions taken in connection with the Consent Decree. TSC thereafter filed a third-party complaint against the United States, seeking contribution from the United States pursuant to CERCLA §113 on the grounds that the United States was also

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an "owner/operator" and had controlled all shipbuilding operations at the CB/NT Site.

Judge Benjamin Settle initially declined to dismiss TSC's §113 claims against the U.S., but, upon reconsideration, issued his January 14, 2009 ruling, finding that the court had "erred in determining that [TSC's] contribution claim could proceed because [TSC's] potential liability 'stemmed' from the liability the Port incurred as a result of a suit brought pursuant to [CERCLA §107]."

Since the CERCLA §107 Action Failed to Resolve Liability, No CERCLA §113 Contribution Claims Are Available

Port of Tacoma is notable, as it is another in a line of cases interpreting the Supreme Court's 2004 seminal decision in *Cooper Industries v. Aviall Services, Inc.* In *Cooper*, Aviall Services was the sole contribution claim plaintiff and there had been no prior civil action whatsoever concerning the subject site. The Court summarized the issue before it as "whether a private party who has not been sued under [CERCLA] §106 or §107 may nevertheless obtain contribution under [CERCLA] §113(f)(1) from other liable parties." The Court concluded, "[w]e hold that it may not." Parsing the language of the statute, the Court stated that "[s]ection 113(f)(1) does not authorize Aviall's suit" because "contribution may only be sought subject to specified conditions, namely, '*during or following*' a specified civil action." (emphasis added)

The difficulty with *Cooper* is that, because Aviall was the only plaintiff and because there *had been no* prior civil action regarding the site at all, it left open for interpretation whether a contribution claim could stand where there had been a prior civil litigation regarding a site, but the party seeking contribution had not, itself, been involved in that litigation. While the *Cooper* court was clear that there had to have been a prior action under CERCLA §106 or §107, *Cooper* left it to other courts to determine whether the mere existence of a prior § 106 or §107 suit was sufficient to allow plaintiffs in future litigations regarding the same site to seek contribution from other potentially responsible parties, even though they themselves had not been directly sued. Such was precisely the circumstance in *Port of Tacoma*. In *Port of Tacoma*, there was not previously a CERCLA §106 or §107 defendant, even though there had been prior litigation under those sections concerning the CB/NT Site.

TSC's lawyers, in opposition to the United States' motion to dismiss, cited the case of *Boarhead Farm v. Advanced Environmental Technology*. In *Boarhead Farm*, the United States District Court for the Eastern District of Pennsylvania (Davis, J.) resolved the issue in favor of two plaintiffs who were not parties in the prior litigation regarding the site involved, and allowed them to seek contribution under CERCLA §113. The Boarhead Farm court relied specifically upon the language of §113 (f)(1), which states that "[a]ny person may seek contribution *during or following any civil action* under section 9606 of this title or under section 9607(a) of this title." (emphasis added) Distinguishing its holding from the holding in *Cooper*, the *Boarhead Farm* court noted the narrow grounds upon which *Cooper* was decided, relied upon the plain language of the statute, and asserted that the factual differences between the cases required a different result than in *Cooper*.

But other courts have disagreed. Indeed, the United States, in its motion for reconsideration, cited cases after *Cooper* in which the courts have construed the *Cooper* holding broadly, so as to prevent any plaintiff who has not previously been directly sued pursuant to CERCLA §106 or §107 from seeking contribution. For example, in the case of *United States v. Atlantic Research Corp.*, the Supreme Court recognized that a §113(f)(1) action brought "following" a §107 action is permitted if the §107 action "establish[ed] common liability." In *Port of Tacoma*, however, the EPA's §107 action against the Port did not quantify, resolve, or establish any liability whatsoever for TSC. The court, accordingly, held that a contribution claim was not available to it. On rehearing, Judge Settle accepted the United States' argument, finding that the court had "erred in determining that [TSC]'s contribution claim could proceed because [TSC]s potential liability 'stemmed' from the liability the Port incurred as a result of a suit brought pursuant to [§106].

Conclusion

Despite initially concluding that TSC's contribution action was authorized, Judge Settle's reconsideration and dismissal of TSC's contribution claim recognizes the power of the *Cooper* holding (followed by *Atlantic Research*) with regard to limiting claims for contribution by potentially responsible parties in CERCLA actions who have not, themselves, been previously sued under §106 or §107. Indeed, in order to proceed with a contribution claim, potentially responsible parties must first be sued under §106 or §107, and cannot rely merely on the possibility that they will, in future, potentially be subject to a claim.

About Garfunkel, Wild & Travis, P.C.

Garfunkel, Wild & Travis (GWT) was founded in 1980. The firm has since grown to more than 80 attorneys in its New York, New Jersey and Connecticut offices, serving the healthcare industry as well as universities, municipalities, developers, lenders and a diverse number of other clients with complex legal, regulatory and business environmental concerns.

If you have any questions regarding articles in the GWT Environmental Bulletin, or other environmental issues, please contact Environmental Practice Chair, Suzanne M. Avena, Esq., at (516) 393-2229 or savena@gwtlaw.com.

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New York Office: 111 Great Neck Road, Great Neck, NY 11021; (516) 393-2200
New Jersey Office: 411 Hackensack Avenue, Hackensack, NJ 07601; (201) 883-1030
Connecticut Office: 350 Bedford Street, Suite 406A, Stamford, CT 06901; (203) 316-0483

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