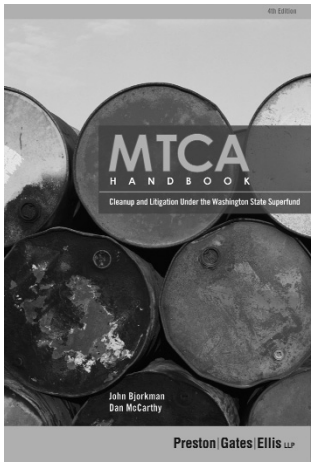
UPDATE

November 2003

MTCA Handbook: Cleanup and Litigation Under the Washington State Superfund

Preston Gates & Ellis is pleased to announce the publication of the 4th Edition of the MTCA Handbook: Cleanup and Litigation Under the Washington State Superfund. For over ten years, the MTCA Handbook has provided business, industry, and local governments with a helpful introduction to Washington State's toxic cleanup laws and regulations. The Handbook contains an overview of the law and its regulatory and liability schemes, along with a readable and non-technical summary of the entire cleanup process. New to this edition are a chapter on litigation, focusing on issues relevant to bringing and defending private cost recovery and contribution actions, and a helpful glossary of key terms. We have also updated the popular FAQ section. Please watch the ELUD *Update* for announcements of upcoming seminars in which attorneys from Preston Gates & Ellis LLP and leading toxic cleanup consultants from Floyd Snider McCarthy, Inc., will summarize current developments in the law and regulations using the Handbook as a resource. ■



Inside This Issue:

Tenth Circuit Ruling Limits Cost Recovery Actions Under CERCLA

By Alina A. McLauchlan

The Tenth Circuit recently held that the Comprehensive Environmental Response, Compensation and Liability Act's (CERCLA) statute of limitations for removal and remedial cost recovery actions applied to only one removal and one remedial action per site.

In *State of Colorado v. Sunoco, Inc. et al.,* 337 F.3d 1233 (10th Cir. 2003), the state of Colorado brought suit against A.O. Smith Corporation (Smith), ASARCO, Inc. (ASARCO), Bechtel Corporation (Bechtel) and Sunoco, Inc. (Sunoco) to recover the cost of cleanup at the Summitville Mine site in southern Colorado. The Summitville site contained gallons of contaminated wastewater, as the result of toxic chemicals used in the mining process. After the last operator of the mine filed for bankruptcy in December of 1992, Colorado took control of the site to prevent a "disastrous release" of this contaminated wastewater into the environment and began cleanup activities.

In 2001 Colorado filed an action pursuant to CERCLA sections 107 and 113 to recover response costs incurred and to be incurred at the site from Smith, ASARCO, Bechtel and Sunoco. Smith filed a summary judgment arguing Colorado filed its claims for recovery more than six years after it began the remedial action at the site and, thus, outside the statute of limitations for such cost recovery claims. The district court granted summary judgment for Smith and *sua sponte* granted summary judgment for the remaining defendants. It held that the government had started the physical construction of remedial actions on-site prior to January of 1995 (more than six years prior to filing the complaint). Colorado appealed this decision to the Tenth Circuit.

Colorado argued to the Tenth Circuit that the district court erred in interpreting the cost recovery statute of limitations because the court anticipated one removal and one remedial action per site. Colorado, however, contended multiple removal or remedial actions could be implemented at a single site and that the cost recovery statute of limitations applied separately to each individual removal or remedial action. Thus, cost recovery actions could be brought at any time until three years after the completion of all remedial and removal actions.

The Tenth Circuit rejected Colorado's argument because it was not supported by the text of 42 U.S.C. §9613(g)(2). The Court held that the statute's use of the definite article "the" to modify the phrase removal action and remedial action suggested there would be a single "removal action" and single "remediation action" per site. The Tenth Circuit reasoned if Congress had intended to allow multiple actions for separate components of recovery it would have used the indefinite article "a" rather than a definite article to modify the phrases "remedial action" and "removal action." Therefore, the Court ruled that the initiation of a remedial action started the statute of limitations period.

The Tenth Circuit, however, also held its statutory reading did not foreclose cost recovery actions filed many years after the initial limitations period had run, because the statute distinguishes between an "initial action" to recover costs and "subsequent actions" to recover further response costs. As long as EPA or a state filed an initial action for costs within the statute of limitations, the statute allowed subsequent actions to be filed to recover any further response costs no later than three years after the date of completion of all response activity. Further, it defined removal action broadly so as to provide flexibility to parties seeking to recover costs. In fact, Colorado was able to successfully argue that several actions the state took at the site were removal actions, rather than remedial actions.

The implications of this ruling are unclear. The case appears to tighten the statute of limitations and put pressure on plaintiffs to identify all potentially liable parties early in the clean-up process, but the Court's broad definition of removal action arguably provides the parties with more flexibility in their efforts to recover costs. ■

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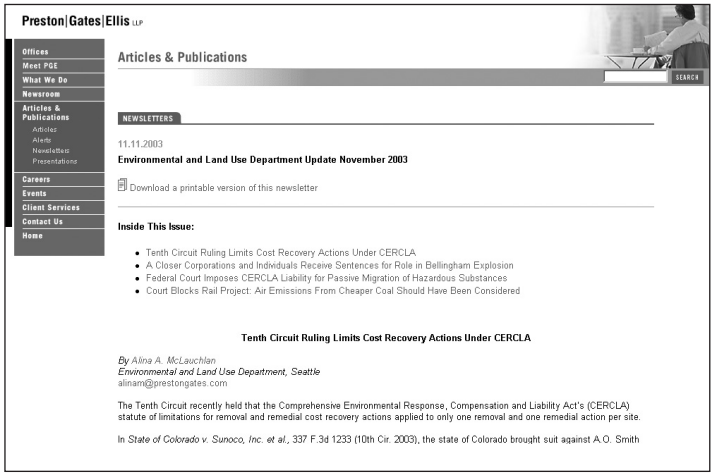
UPDATE Goes Electronic

Preston Gates Environmental and Land Use and Environmental Litigation Practices will now publish the UPDATE in an electronic format. Instead of printing on paper, this UPDATE will only be available via e-mail. In order to continue to receive UPDATEs, please e-mail to PGELLP@prestongates.com. In the subject line, please type "Subscribe ELUD Newsletters." You will begin receiving the e-mailed UPDATE in our year-in-review edition, January 2004.



Court Blocks Rail Project: Air Emissions From Cheaper Coal Should Have Been Considered

By Sally Brick and Holly Harris

According to a recent Eighth Circuit decision, where a project will increase the low-cost availability of "dirty fuels" the courts can require that environmental impact statements (EIS) consider air emissions from their downstream use. Moreover, the Eighth Circuit Court of Appeals indicated that courts can require an EIS to consider air pollutants that are not capped by statute, and this may include CO_2 emissions despite the Federal government's ongoing reluctance to regulate them.

Mid States Coalition for Progress v. Surface Transportation Board, 2003 WL 22251298 (8th Cir. Oct. 2, 2003) concerned a proposal by the Dakota, Minnesota & Eastern Railroad Corporation (the "Railroad") to construct and upgrade a rail line. The federal licensing agency for the project, the Surface Transportation Board (Board), was required to complete an EIS under the terms of the National Environmental Policy Act (NEPA). Environmental groups challenged the Board's approval of the project, arguing in part that the final EIS should have considered the fact that the Railroad project would result in a reduced-cost source of coal, which would in turn increase consumption at power plants and thereby increase air emissions, including CO_2.

NEPA requires federal agencies to consider "indirect" adverse environmental effects, which must be caused by the action, and must be reasonably foreseeable rather than speculative. The Railroad argued that the effects of increased coal generation were too speculative because coal-hauling contracts had not yet been finalized. The Court was not convinced, and vacated the Board's final decision so that its deficiencies could be corrected.

The Court held that increased consumption of coal, and the associated air emissions, were reasonably foreseeable as a result of the Railroad's project. More specifically, the *nature* of the air quality effects of the Railroad's project was reasonably foreseeable, even though the *extent* of the effects was not. According to the Court: "The *nature* of the effect ... is far from speculative. ... [I]t is reasonably foreseeable - indeed, it is almost certainly true - that the proposed project will increase the long-term demand for coal and any adverse effects that result from burning coal." The Court noted that, during the NEPA review process, interested parties had identified computer models that are widely used in the electric power industry and that could be used to simulate the effects of coal consumption from the proposed rail line.[1]

Significantly, the Court implied that the EIS should have considered CO_2 emissions. The final EIS proceeded on the assumption that air emissions would be limited to the level mandated by law. The Sierra Club argued, however, that because certain pollutants - including CO_2 - are not subject to a regulatory cap, the EIS had erroneously disregarded them. Although the Court did not specifically list the uncapped pollutants, it appeared to accept the Sierra Club's argument: "[The Board's] 'assumption' may be true for those pollutants that the [Clean Air Act] amendments have capped ... but it tells the decision-maker nothing about how this project will affect pollutants not subject to the statutory cap." Thus, the Court concluded that, for the most part, the Board had completely ignored the effects of increased coal consumption.

The *Coalition for Progress* case has drawn attention from environmental groups and the media because of this novel suggestion that NEPA review should include reasonably foreseeable CO_2 emissions. Out of step with the majority of world opinion, the United States has refused to commit to binding CO_2 reductions by ratifying the Kyoto Protocol to the Climate Change Convention. The Bush Administration steadfastly opposes federal regulation of CO_2 emissions, instead asking industry leaders to make voluntary reductions in CO_2 emissions.[2] Persistent Congressional attempts to introduce CO_2 legislation face close scrutiny, and a White House veto threat. Thus, although some regulatory steps are being taken at the state and local level, federal environmental laws do not expressly impose CO_2-related obligations.[3] It is therefore significant that the courts may require project planners and federal agencies conducting NEPA reviews to take a broader view of the downstream effects of CO_2-emitting products. Under the current administration, the Federal government is unlikely to write any such requirement into regulation or statute, but judicial decisions may begin to fill the void. ■

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[1] The Court suggested that NEPA's regulations required the Board to do four things to address the issue of increased coal consumption. The Board should have acknowledged that the relevant information was currently unavailable or incomplete.The FEIS should have described the relevance of the information to evaluating the reasonably foreseeable significant adverse impacts. The FEIS should have summarized the scientific evidence relevant to those impacts. Finally, the Board should have used the research methods generally accepted by the scientific community to evaluate the impacts.

[2] *See*, Elizabeth Thomas, Sally Brick and Kristin Boraas, "The Temperature's Rising: Developments in Greenhouse Gas Regulation" WSBA Ent'l Land Use (April 2003) for a more detailed analysis of the regulation of CO_2 emissions internationally and in the United States.

[3] *See*, Thomas, et al., *supra*. For example, the Washington State Energy Facility Siting Council ("EFSEC") has been contemplating issuance of a rule that would require thermal generating facilities with a capacity of over 350 MW to mitigate for greenhouse gas emissions. EFSEC has recently promulgated a proposed draft rule, which may be viewed at www.efsec.wa.gov/standards/Draft463-NEW(CO2).pdf. In general terms, it would require mitigation of 20% of CO_2 emissions at the rate of 87 cents per ton. The Washington Department of Ecology has also just filed a Preproposal Statement of Inquiry, indicating its intention to engage in rulemaking that would impose CO_2 mitigation requirements on new power plants. Dept. of Ecology, A.O. 03-09 (October 16, 2003).

Corporations and Individuals Receive Sentences for Role in Bellingham Explosion

By John C. Bjorkman

As reported in the *Environmental Litigation Update: 2002 in Review,* two companies and three individuals pled guilty in December 2002 to a combination of felony and misdemeanor charges stemming from the June 1999 rupture and explosion of a pipeline in Bellingham, Washington. Specifically, Olympic Pipeline Company (Olympic), Equilon Pipeline Company LLC (Equilon), Frank Hopf, Jr. (Hopf), Ronald Dean Brentson (Brentson), and Kevin Scott Dyvig (Dyvig) were charged with five felony violations of the Hazardous Liquid Pipeline Safety Act (HLPSA) and various misdemeanor violations of the Clean Water Act (CWA). This case was the first criminal prosecution of pipeline companies and executives under the HLPSA.

In April 2003, Judge Barbara Rothstein sentenced the defendants and imposed harsh penalties, including jail sentences and criminal and civil fines. Judge Rothstein ordered Olympic to pay a $6 million dollar criminal fine and placed the company on corporate probation for five years. Additionally, the Court ordered Olympic to pay a civil penalty of $5 million to resolve pending state and federal civil proceedings against it and ordered Olympic to undertake specific inspection and damage prevention measures on the company's 400 miles of petroleum pipeline. The inspection requirements are estimated to require over $15 million in new spending by Olympic.

The Court ordered Equilon to pay a criminal fine of $15 million dollars with an additional civil penalty of $10 million to resolve pending state and federal civil proceedings. Five million dollars of the criminal fine was suspended and diverted to community service projects for the benefit of the Bellingham community. The Court placed Equilon on corporate probation for five years. The Court also forced Equilon to enter into a pipeline integrity/spill mitigation program. This program requires Shell Pipeline Company (Shell), Equilon's successor in-interest, to undertake specific inspection and damage prevention measures on 2100-plus miles of Shell's pipelines. The estimated cost of the program is over $61 million dollars.

Hopf and Brentson received jail sentences for their roles in the pipeline rupture. Hopf was sentenced to six months in prison with three years of supervised release. In addition, he must pay a $1,000 fine and perform 200 hours of community service. Brentson received a sentence of 30 days in prison followed by 30 days of home detention and two years of supervised release as well as a $1,000 fine and 150 hours of community service. Dyvig did not receive any prison time, but was placed on probation for a year and was ordered to perform 100 hours of community service.

These sentences are arguably the most severe imposed under HLPSA. United States Attorney John McKay noted that the government was pleased with the sentences, indicating the Court sent a "strong message to operators of hazardous liquid pipelines throughout the United States that they must conduct the type of inspections, maintenance and training that were lacking at Olympic."

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Upcoming Conferences

Endangered Species Act (ESA) Conference

The Endangered Species Act (ESA) Conference is scheduled for November 17 at the World Trade Center Auditorium in Portland, Oregon. Arguably one of the most dynamic and far-reaching environmental laws on the books, the ESA has implications for individuals, organizations, businesses, industries and agencies in terms of both impact and implementation. The conference brings together the region's top experts on ESA and other environmental laws, policies, and technical strategies.

Mr. William Stelle, Partner in Preston Gates' Environmental and Land Use Department, will speak at the conference regarding ESA legal issues, including compliance and timely legal developments.

Northwest Environmental Conference

Preston Gates is pleased to sponsor the Northwest Environmental Conference, which is being held November 18-19 at the DoubleTree Hotel Jantzen Beach in Portland, Oregon. The NWEC is the largest, most comprehensive environmental conference and tradeshow in the Pacific Northwest. Comprised of four tracks, the conference offers 32 workshops in the following areas: Environment 101, Advanced Technical, Advanced Leadership and Management, as well as a Roundtable discussion format for the most compelling environmental topics of the day. Preston Gates' Environmental and Land Use attorneys Catherine Drews, William Stelle, Peter Scott on issues such as the regulatory environment, homeland security, and wetlands.

Federal Court Imposes CERCLA Liability for Passive Migration of Hazardous Substances

By Tisha Pagalilauan and Holly Harris

The United States District Court of Idaho recently issued an important ruling regarding Natural Resource Damages under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), which arose out of the Bunker Hill Superfund Site in Idaho. The court concluded that a party could be liable for passive water migration of hazardous substances that was unaided by human conduct. *Coeur d'Alene Tribe v. ASARCO Incorporated*, F. Supp.2d, 20003 WL 22092571 (D. Id. 2003). According to the court, "passive movement and migration of hazardous substances by mother nature (no human action assisting in the movement) is still a 'release' for purposes of CERCLA in this case." The issue was one of first impression. In a time when case law provides little guidance to natural resource damages defendants and trustees, Judge Lodge's decision is one of the most significant CERCLA rulings in recent times.

The United States, State of Idaho, and the Coeur d'Alene Tribe (collectively "Plaintiffs") brought suit against a number of mining companies for, among other things, response costs and natural resource damages under the CERCLA. Mining in Idaho's Coeur d'Alene Basin began in the 1880s. Until the late 1960s. Mining companies legally disposed of mining wastes, or tailings, by discharging them into nearby waters. The Plaintiffs alleged that the mining companies caused natural resource damages in the Basin when they disposed of tailings in the South Fork River.

One of the major issues facing the Court was whether the mining companies could be held liable for acts that occurred prior to the enactment of CERCLA. The statute expressly provides that a party cannot recover for natural resource damages when the hazardous substance release that caused those damages occurred before CERCLA's enactment.

Under CERCLA, the term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment. The mining companies argued that beginning in approximately 1968 they started impounding the mining tailings and, as a result, there were no "releases" after CERCLA's enactment. The Plaintiffs countered that there are post-enactment releases of hazardous substances into the Coeur d'Alene Basin through the leaching of the mining adits, tailings impoundments, and waste rock piles.

The Court quickly concluded that the pre-1968 dumping of mining tailings constituted a release, and that there had been minimal releases after 1968. The bulk of the Court's opinion on this issue, however, focused on the "re-release" of mining tailings.

The Court looked to a decision by the Ninth Circuit Court of Appeals to guide its analysis. In *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001), the Ninth Circuit held that passive soil migration of hazardous substances was not a "disposal" under CERCLA. "Disposal" under CERCLA is a subset of "release", meaning that not all releases are disposals, but all disposals are releases. The *Carson Harbor* court concluded that only the movement of hazardous substances that results from human conduct is a *disposal* under CERCLA. In the *Coeur d'Alene* case, no human conduct occurred after the mining tailings were dumped into the waterways. The hazardous substances moved naturally as a result of seepage, leaching, and migration due to flowing water.

Nevertheless, the Court concluded that passive migration caused by leaching is a post-enactment *release* based on the fact that "leaching" is included in CERCLA's definition of a release, but is not included in the definition of a disposal. The Court noted that the mining companies knowingly dumped hazardous substances into the waterways of the Coeur d'Alene Basin. According to the Court, they knew that "water runs downhill and that the hazardous substances dumped would not stay in the location they were dumped."

This opinion builds on earlier decisions regarding "re-releases". The Ninth Circuit concluded that wind-blown particles from an ore pile constituted a release in *A & W Smelter and Refiners, Inc. v. Clinton,* 146 F.3d 1107, 1110 (9th Cir. 1998). Similarly, a district court in California held that acid sludge seeping through a soil cover to the surface was a release. *United States v. Shell Oil Co.*, 841 F.Supp. 962 (C.D. Cal. 1993).

Natural resource damages trustees and defendants will continue to watch with interest any development in the Bunker Hill litigation. If Judge Lodge's decision is appealed, the Ninth Circuit will have the ability to determine whether it agrees with Judge Lodge in distinguishing the analysis in *Carson Harbor*. ■

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HOW TO REACH US

If you would like more information about these or other Environmental and Land Use issues, or have a suggestion for a future article, please contact the authors, *Update* editor Holly Harris at *hollyh@prestongates.com,* or Environmental and Land Use Department chair Konrad Liegel at *konradl@prestongates.com* or (206) 623-7580.

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