

The National Forum for Environmental and Toxic Tort Issues

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PERCHLORATE: IS IT LURKING IN YOUR DRINKING WATER?

By: Linda Bondi Morrison, Esq.
Tressler, Soderstrom, Maloney & Priess
Costa Mesa, California 92626
714-429-2939
lmorrison@tsmp.com

Just when you thought it was safe to drink the water again . . . perchlorate emerges as the next "hot" constituent of concern. Thanks to technology and the development of more sensitive methods of testing, elevated levels of perchlorate have been detected in the ground or surface water in at least 30 states. Those states include California, Arizona, Texas, Nebraska, Iowa, New York, Maryland and Massachusetts. Major sources of drinking water, such as Lake Mead and the Colorado River, have also been found to be contaminated. A June 2004 report from the California Department of Health Services detected the presence of perchlorate in 350 drinking water sources. Although these sources were primar-

ily groundwater wells, perchlorate in wells containing water from the Colorado River was also detected.

Perchlorate is a very persistent chemical that is difficult to remediate once it is in the environment. It does not break down in soil easily, is extremely soluble, and moves quickly through water. It was first discovered in the groundwater in California and Nevada in the 1980s, but the extent of the problem was not fully realized until the mid-1990s, when technology made it possible to detect the presence of the chemical at lower concentrations.

Perchlorate is the primary ingredient in solid rocket propellant. It has been used in rocket fuel and munitions, including missiles, since the 1940s. Historically, this has been its primary use. Consequently, most perchlorate-contaminated sites are associated with rocket

(Continued, Page 2)

Inside:

**Perchlorate:
Is It Lurking
In Your
Drinking
Water?**

1

**Does the
Agricultural
Practice of
Open Burning
Produce Solid
Waste?**

2

**Colorado
Supreme
Court
Refuses to
Apply
Pollution
Exclusion**

5

**ALSO:
See Enclosed
2004
Conference
Insert**

FETTI's 11th Annual Conference

September 29-October 1, 2004
Schaumburg, Illinois

Embassy Suites, 1939 Meacham Road, Schaumburg, Illinois 60173

See Enclosed Agenda and Registration Form for More Details!



Embassy Suites, Schaumburg, IL

PERCHLORATE (Cont.)

manufacturing and testing facilities, and include disposal sites. Perchlorate salts have also been used in electronic tubes, car air bags, leather tanning and fireworks.

According to the U.S. Environmental Protection Agency (“USEPA”), perchlorate interferes

with the normal operation of the thyroid gland, which regulates metabolism. In children, the thyroid gland also plays a major part in development. Disruption of the thyroid function has also been reported to cause thyroid tumor formation.

At the legislative level, perchlorate has been a hot topic of discussion in recent months, in part because there is no federal drinking water standard which defines “safe” levels. After conducting a risk assessment, the USEPA set a recommended safe dose for drinking water.

However, the U.S. Department of Defense has disagreed with the USEPA over what should be considered a safe dose. A review of the USEPA’s risk assessment is presently being conducted. A “maximum contaminant level” is not expected to be set until, at the earliest, 2007.

In the meantime, both the USEPA and the U.S. Senate have urged the Department of Defense to continue cleaning up its sites which have been contaminated by perchlorate. As of June 2003, the USEPA had identified 27 Department of Defense sites with known perchlorate groundwater contamination, 14 of which were on the Superfund National Priorities List of the most contaminated sites in the country.

Recent studies by an organization called the Environmental Working Group have reportedly found perchlorate in 31 of 32 samples of milk purchased in grocery stores in Southern California. Previously, the group had reported the presence of perchlorate in lettuce grown in the same area.



DOES THE AGRICULTURAL PRACTICE OF OPEN BURNING PRODUCE SOLID WASTE?

Ninth Circuit Court of Appeal rules that grass residue does not constitute solid waste under the Resource Conservation and Recovery Act (“RCRA”)

By Cyndy Day-Wilson, Esq.
Best Best & Krieger LLP
San Diego, California 92101
619-525-1300
cyndy.day-wilson@bbkllaw.com

An interesting case that pitted a grassroots environmental group against grass farmers has helped to clarify aspects of the Resource Conservation and Recovery Act (“RCRA”) and what constitutes solid waste under RCRA. In an attempt to impose a ban on the open burning of grass fields by farmers, Safe Air for

Everyone (a grass-roots non-profit corporation formed by individuals from Northern Idaho, Washington, and Montana) filed a complaint and request for a preliminary injunction with the U.S. District Court for the District of Idaho in May 2002. Safe Air was formed in the fall of 2001 following publication of a letter signed by more than 85 percent of the physicians in Sandpoint, Idaho. The letter called for an immediate end to grass field burning because of the serious health effects caused by the practice. According to its website, the purpose of Safe Air is to “protect the health

OPEN BURNING (Cont.)

of area citizens by ending grass field burning in North Idaho.”

Safe Air’s lawsuit claimed that the practice of open burning created severe respiratory problems for residents in the areas immediately surrounding the fields where farmers conduct the open burns, especially those residents with cystic fibrosis, chronic heart disease or an inflammatory airway disease including asthma. The defendants included more than 75 grass farmers and corporations involved in Kentucky bluegrass-seed production.

Why Burn Grass?

The practice of grass burning is not new. Beginning in the 1940’s, farmers burned post-harvest straw residue as an easy and economical means of clearing the straw from fields and controlling diseases, insects and weeds.

According to witnesses for the defendants who testified at the hearing on the preliminary injunction, Kentucky bluegrass is typically planted in the spring and produces seed the following summer. To harvest the seed, the farmers first cut the crop close to the ground (the plants grow 15 - 36 inches tall) to prepare the crop for combining. A combine then separates the seed from the straw, leaving the straw on the field. Bluegrass farmers then burn these straw remnants, a practice referred to as “open burning.”

Farmers claim that the straw contains nutrients that are absorbed into the earth after the burning and help to revitalize the soil. In addition, the grass burning allegedly also kills fungus and pests without the use of chemicals and blackened soil increases sunlight absorption that improves the grass crops’ yield.

The impacts to air quality, however, caused by open burning eventually led to legislation in

some states that mandated limits on burning, beginning in the mid-1980s. Grass seed straw is no longer burned in Washington, while only about 10 percent of the grass-seed acres in Oregon are still burned.

The Basis of the Suit

Safe Air contended that the practice of open burning in Northern Idaho violated RCRA as the grass residue remaining after a Kentucky bluegrass harvest constitutes “solid waste.”

In response to the lawsuit, farmers growing and burning Kentucky bluegrass filed an opposition to the motion for preliminary injunction and a motion to dismiss the complaint on the basis of lack of subject matter jurisdiction. The District Court held a hearing on the motion for preliminary injunction at which 23 witnesses gave testimony over a two-day period. A week after the hearing, Judge Edward Lodge of the District Court dismissed the complaint, “concluding that it was without jurisdiction to resolve Safe Air’s RCRA claim because, inter alia, grass residue did not constitute “solid waste” under RCRA.” Safe Air appealed the decision.

On July 1, 2004 the U.S. Court of Appeals for the Ninth Circuit affirmed the lower court’s decision, *Safe Air for Everyone v. Meyer, et al.* 2004 DJDAR 8128, in a two-one decision. Judge Ronald Gould wrote the affirming decision for the court. Judge Richard Paez was the sole dissenter.

What the Appellate Court Said

The Court of Appeals first addressed the unusual procedural posture of the case. The lower court had dismissed Safe Air’s claim for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The Court of Appeals, however, found that the

(Continued, Page 4)

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Editors

Carey Cooper
Matthew Wiese
Klinedinst PC

Contributors

Linda Bondi Morrison
Tressler, Soderstrom,
Maloney & Priess

Cyndy Day-Wilson
Best Best & Krieger LLP

Wyman P. Berryessa
Tressler, Soderstrom,
Maloney & Priess

Website

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OPEN BURNING (Cont.)

District Court erred in characterizing its dismissal of Safe Air's complaint under Rule 12(b)(1) because the jurisdictional issue and substantive issues in this case were so intertwined that the question of jurisdiction was dependent on the resolution of factual issues going to the merits. The Court of Appeals went on to hold that the District Court's order of dismissal was really a grant of summary judgment on the merits in favor of the Bluegrass farmers.

The Court of Appeals' review of the case then focused on RCRA and its definition of "solid waste," interpretations of the statutory language in case law, and RCRA's legislative history to determine if Safe Air had demonstrated a genuine issue of material fact on the issue of whether grass residue is "solid waste" under RCRA.

In the decision, Judge Gould stated that "There is no genuine issue of material fact as to whether grass residue is 'discarded material.' It is not."

Why Grass Residue Isn't Solid Waste

RCRA defines "Solid Waste" as:

"any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous materials resulting from industrial, commercial, mining and agriculture

activities and from community activities but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act, . . . , or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954. . . ."

The statute thus potentially applies to any waste regardless of its physical form. "Solid Waste" is further defined by EPA regulations.

In making the determination that grass residue is not solid waste, the Court of Appeals focused on evidence presented by the defendant farmers that established: "(1) the grass residue is destined for beneficial reuse in a continuous process of growing and harvesting Kentucky bluegrass seeds, . . . ; (2) the Growers reuse grass residue, inter alia, to provide nutrients and to act as a fire accelerant for open burning, as opposed to being kept in storage for potential reuse, . . . ; and (3) the grass residue is being reused by farmers who are its original owners and not by a salvager or reclaimer."

The Court of Appeals thus concluded that there was no genuine issue of material fact as to whether grass residue is "discarded" as defined by RCRA. The Court of Appeals affirmed and concluded that RCRA did not prohibit the Bluegrass Farmers general practice of open burning.



Cotter Corporation v. American Empire Surplus Lines, et al.

COLORADO SUPREME COURT REFUSES TO APPLY POLLUTION EXCLUSION

By Wyman P. Berryessa, Esq.
Tressler, Soderstrom, Maloney & Priess
3070 Bristol Street, Suite 450
Costa Mesa, CA 92626
(714) 429-2900
wberryessa@tsmp.com

In *Cotter Corporation v. American Empire Surplus Lines, et al.*, 02SC707 (Colo. June 7, 2004), the Colorado Supreme Court, reversed an appellate court's ruling regarding the application of the "qualified pollution exclusion." Cotter Corporation ("Cotter") was sued by several neighboring residents asserting bodily injury and property damage claims arising out of groundwater contamination caused by Cotter's uranium mill operations. Cotter tendered the claims to several of its primary and excess insurers. All of the insurers denied any duty to defend and indemnify Cotter for the claims based on the "qualified pollution exclusions" contained in their policies. The "qualified pollution exclusions" in the insurers' policies excluded coverage for liability arising out of the discharge, dispersal, seepage, etc. (hereinafter referred to collectively as "discharge") of pollutants. However, exceptions contained within the exclusions operated to restore coverage if such discharges were "sudden and accidental."

The source of groundwater contamination from Cotter's uranium mill operation allegedly arose from Cotter's practice of depositing radioactive byproducts known as tailings into unlined tailing ponds. The claims against Cotter asserted that the tailings migrated through the soil surrounding the tailing ponds and onto neighboring properties and

into the groundwater. Cotter argued that the "sudden and accidental" exceptions to the pollution exclusions applied under the following two circumstances: 1) when the insured did not expect or intend the alleged resultant harm caused by the tailings; and 2) when the insured did not expect or intend the migration of the tailings onto neighboring property and into the groundwater.

The insurers argued that the exceptions to the pollution exclusions did not apply because: 1) Cotter intentionally dumped the tailings into the unlined tailing ponds, knowing that the tailings would migrate into the surrounding soil; and 2) the fact that Cotter may not have expected or intended the resulting harm is irrelevant.

The appellate court affirmed the trial court's grant of summary judgment in favor of the insurers by finding that Cotter's lack of knowledge regarding the types of harm that were caused was irrelevant, but that Cotter expected and intended the tailings to migrate into the surrounding soil. Since Cotter expected and intended the migration of the tailings into the surrounding soil, the appellate court reasoned that the discharge could not have been sudden and accidental.

The Colorado Supreme Court first analyzed existing law interpreting similar "qualified pollution exclusions," which have held that "sudden & accidental" means "unexpected and unintended," *Hecla Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083 (Colo. 1991), and "sudden, unintended, and unexpected" means "unprepared for, unintended, and unexpected"

(Continued, Page 6)

EXCLUSION (Cont.)

Public Serv. Co. v. Wallis & Cos., 986 P.2d 924 (Colo. 1999). Next, relying heavily on *Compass Insurance Co. v. City of Littleton*, 984 P.2d 606 (Colo. 1999), the Colorado Supreme court found that the claims against Cotter may fall within the exceptions to the pollution exclusions. The Colorado Supreme Court therefore reversed the grant of summary judgment in favor of the primary insurers regarding their duty to defend and remanded the issue of whether the primary and excess insurers have a duty to indemnify Cotter based on questions of material fact.

The Compass case involved pollution claims arising out of the operations of an unlined landfill. The court in Compass found that the insured intended pollutants to migrate into the surrounding soil, but that the surrounding soil was intended to act as a filter to prevent pollutants from continued migration and resulting harm to third parties. The court found that the surrounding soil was intended to be part of a larger “containment area” than the landfill itself and that the migration of the pollutants from the landfill into the surrounding soil was not the relevant discharge. The court found that the relevant discharge was the migration of the pollutants beyond the surrounding soil within the “containment area” to areas that the insured did not expect or intend the pollutants to migrate.

In this case, the Colorado Supreme Court first found that the “sudden and accidental” exceptions to the pollution exclusions qualified the discharge of pollutants rather than

any resulting harm. The Colorado Supreme Court therefore agreed with the appellate court’s finding that whether Cotter expected or intended the resulting harm was irrelevant for the purpose of determining whether the exceptions applied. However, relying on its ruling in Compass, the court in this case found that the appellate court improperly focused on the migration of the pollutants from the tailing ponds into the surrounding soil as the relevant discharge. Cotter may have expected and intended the pollutants to migrate into the surrounding soil, but since the surrounding soil constituted part of the larger “containment area,” a discharge had not yet occurred.

After reviewing the relevant facts presented at trial, the Colorado Supreme Court found that the allegations in the complaints were sufficient to find that the claims may not have fallen within the exceptions to the pollution exclusions. It therefore reasoned that the primary insurers had a duty to defend Cotter. In regard to the primary and excess insurers’ duty to indemnify Cotter, the Colorado Supreme Court found that questions of material fact existed as to whether Cotter expected and intended the pollutants to migrate beyond the surrounding soil within the “containment area.” The Colorado Supreme Court expressly did not opine on exactly what physical point the pollutants would be deemed to have migrated beyond the “containment area.” However, at a minimum, the Colorado Supreme Court found that the migration of pollutants onto neighboring property or into the groundwater was beyond the “containment area.”

