

CALIFORNIA ENVIRONMENTAL PROGRAMS

This section highlights the extensive and complex system of environmental controls imposed by the State of California. Each major California state environmental program is summarized with particular emphasis on the ways in which each varies significantly from the federal programs. County and municipal ordinances may impose additional controls. This year's features include an article on "Drinking Water Contamination – The Emerging Toxic Tort in California."

DRINKING WATER CONTAMINATION: THE EMERGING TOXIC TORT IN CALIFORNIA

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INTRODUCTION

Toxic tort litigation is not a new phenomenon in California, but in the post-Erin Brockovich era, the nature of the claims, the target contaminants, and the class of defendants continue to evolve and expand. Drinking water contamination is now a major focus of the plaintiffs' bar and has become the emerging toxic tort in California. This article briefly provides: (1) a summary of the factors influencing the recent surge in drinking water litigation, (2) a review of jurisdictional issues now pending before the California Supreme Court, (3) a summary of new target chemicals, (4) an overview of Proposition 65 as it relates to drinking water, and (5) some thoughts on how potential defendants can minimize the risk of costly litigation.

HOLLYWOOD AND SUPERFUND COMBINE TO INCREASE DRINKING WATER LITIGATION

Society as a whole has become increasingly informed about environmental risks through the media. The recent portrayal of communities plagued by drinking water contamination in popular movies such as *Erin Brockovich* and *A Civil Action* have fueled both interest and action in community groups (and plaintiffs' lawyers) across the nation. In California in particular, the recent deluge of publicity has served to heighten an already existing awareness of environmental issues. Indeed, the last three decades in California have

been marked by a profusion of environmental legislation and enforcement. Accompanying passage of each new regulatory scheme are pronouncements by enforcement agencies and politicians regarding their commitment to the environment. The comments in turn keep the public involved and informed regarding environmental matters. Moreover, much of the new environmental regulation in California requires industry to report chemical inventories, hazardous waste discharges, and compliance provisions. This information is readily accessible to the public and the plaintiffs' bar through governmental databases.

Recent litigation over Superfund sites in California has also contributed to the increase in drinking water contamination cases. Two of the largest Superfund projects consist of several sites located in the San Fernando and San Gabriel Valleys. The San Fernando Valley Superfund sites, located in the eastern portion of the San Fernando Valley between the San Gabriel and Santa Monica Mountains, overlay a significant source of drinking water for the Los Angeles metropolitan area, Glendale, Burbank, San Fernando, La Canada-Flintridge, and La Crescenta. The San Gabriel Valley contains multiple Superfund sites within a 170-square-mile area. The contamination of the San Gabriel Valley may in turn have contaminated over 30 square miles of groundwater.

The litigation surrounding the San Gabriel and San Fernando Valley Superfund sites in Southern California resulted in a plethora of documents and information detailing the chemicals and parties responsible for ground water

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contamination. Not surprisingly, this information has caused an increase in personal injury drinking water cases as well as cases brought under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65).

CALIFORNIA SUPREME COURT TO RULE SOON ON JURISDICTIONAL ISSUES

The California Supreme Court recently heard argument in *Hartwell v. Superior Court*, a series of water contamination personal injury cases addressing the issue of the jurisdiction between the California Courts and the California Public Utilities Commission (PUT).¹ The cases, filed by hundreds of plaintiffs, allege that industrial defendants contaminated drinking water and that both regulated and unregulated utilities delivered that contaminated water to the plaintiffs. In response to the lawsuits, the PUT ordered an investigation to determine whether the regulated utilities under its jurisdiction were complying with PUT water quality standards.

The various regulated and unregulated utility defendants demurred or moved for dismissal on the grounds that (1) the PUT has exclusive jurisdiction to decide whether regulated utilities are in compliance with water quality standards and (2) the PUT standards should similarly apply to unregulated utilities. Additionally, certain defendants moved to stay the cases until the PUT completed its investigation. The trial courts reached different outcomes. The Superior Courts in Los Angeles County, where three of the actions were pending, found that the PUT jurisdiction and investigation might overlap with the issues raised in the actions and stayed all of the proceedings and did not rule on the demurrers. In contrast, the Superior Court in Ventura County, handling a separate action, sustained the regulated water companies' demurrers without leave to amend but overruled the remaining defendants' demurrers and denied the motions to stay. The Court of Appeal

ultimately ruled that section 1759 of the California Public Utilities Code precludes private actions against regulated entities but does not bar suits against unregulated suppliers. The litigation was stayed pending appeal to the California Supreme Court. Oral argument took place in November, and a ruling is expected shortly.

The resolution of the *Hartwell* decision and similar cases in other states will have far reaching implications and raise even more potentially troubling issues. For example, regulatory agencies may determine on the one hand that parties under its jurisdiction were in compliance and that the water quality and water quality standards were safe. On the other hand, courts or juries may determine that unregulated utilities delivering water from the same water source should be held liable and pay punitive damages for delivery of water that the jury or judge deems contaminated. Such inconsistent outcomes will continue to provoke claims of unfairness and more litigation.

THE EVER EXPANDING LIST OF CONTAMINANTS IN DRINKING WATER CASES

Three chemical contaminants are currently sharing the spotlight in California – chromium 6, MTBE, and perchlorate.

Chromium 6

Despite the limited availability of scientific evidence to show that drinking water containing low levels of chromium 6 is harmful, the tide of litigation surrounding the chemical has flooded the courts since Julia Roberts portrayed toxic investigator Erin Brockovich. The Brockovich drama reflects the real-life litigation between residents of the California city of Hinkle and Pacific Gas & Electric (PG&E) in which an arbitration panel awarded a group of citizens \$333 million for their personal injury claims against PG&E for contaminating the Hinkle drinking water supply with chromium 6. The Hinkle case and its

portrayal by Hollywood have resulted in a flood of cases involving chromium 6.

In fact, the Hinkle case has significantly contributed to the overall surge in toxic tort filings. Such cases had diminished somewhat after the California Supreme Court decision in *Potter v. Firestone Tire and Rubber Co.*²

In the *Potter* case, the Court held that a direct causal link between a toxic substance and a specific ailment needed to be established before a case could even proceed to trial.³ This proof requirement discouraged plaintiffs' lawyers and resulted in fewer toxic torts cases. The trend has now reversed, especially with regard to chromium 6 contamination. In addition to this litigation, public awareness and political pressure have produced an onslaught of new and proposed regulations on the federal and state levels.

Chromium 6 litigation has commenced despite the limited availability of scientific information regarding the chemical. There are various forms of chromium. Some are naturally occurring, including chromium 3 (trivalent chromium), often used as a dietary nutrient. Chromium 6 is a metal that naturally occurs in the soil. It is also, however, used as an anticorrosive in power plants and industrial coolant systems, and finds its way into the groundwater. Some scientists have found that chromium 6, when inhaled, is carcinogenic. Although many studies have investigated the effects of the ingestion of chromium 6 through contaminated drinking water, none has found it to be carcinogenic in this context.

Federal drinking water regulations set the level of allowable chromium at 100 parts per billion (ppb). In California there is currently no maximum enforceable containment level for chromium 6. Recent attempts to set a recommended level in California appear to be stalled. In setting standards, the Department of Health Services looks at recommendations from the California Office of Environmental Health and Hazard Assessment (OEHHA). Recently, however, OEHHA stated that it would not follow through on its prior pledge to set limits for the suspected

carcinogen chromium 6 in drinking water. While this may stave off some litigation for awhile, it is unlikely to stop a zealous plaintiffs' bar from continuing to lobby for additional regulations at the state level.

Methyl Tertiary-Butyl Ether (MTBE)

MTBE, made from methanol and a by-product of the oil refining process, is used as a gasoline additive. As an oxygenate, MTBE adds oxygen to gasoline in order to make it burn more cleanly and efficiently and produce less of the tailpipe pollutant carbon monoxide.

Recently, Congress and many states have focused on MTBE due to concerns that MTBE contamination threatens the drinking water supplies of millions. Leaking underground storage tanks are the primary source of MTBE contamination. Contamination can also occur from the discharge of unburned fuel from water craft, gasoline spills at accident sites or pumps, and leaks from pipelines and aboveground storage tanks. The chemical qualities of MTBE make it highly soluble in water and thus amenable to transport through underground water supplies. Even in small concentrations, MTBE can give water a turpentine-like taste and odor. These qualities have prompted several states and the EPA to investigate and restrict the use of or completely ban MTBE

California was among the first states to pass legislation targeting MTBE. The action level set by the state is 13 ppb, and a secondary level of 5 ppb requires notification to consumers of contamination. In 1997, the California Legislature passed the MTBE Public Health and Environmental Protection Act of 1997⁴ requiring regulators to study MTBE and its potential health implications. The act also gave the governor authority to ban MTBE if it was deemed "significantly harmful." Acting pursuant to that authority, Governor Gray Davis ordered regulators to provide the framework to phase out the use of MTBE in gasoline by December 31, 2002.

Though the deadline is still nearly a year away, it is uncertain whether it can be met.

Ironically, the first debate that may squelch the deadline stems from the use of MTBE as an anti-pollutant. A lawsuit was brought in 2001 challenging the MTBE ban,⁵ claiming such a ban was preempted by the federal Clean Air Act,⁶ which mandates the use of oxygenates to make gasoline burn cleaner. United States District Court Judge David F. Levi rejected the lawsuit in September 2001, finding that the Clean Air Act exempted California because California regulated emissions from automobiles prior to Congress's entering the field and, consequently, that California could ban MTBE. The case will be appealed to the Ninth Circuit.

The second dynamic that may operate to extend the 2002 ban on MTBE is the ability of refineries to complete modifications that would allow them to produce gasoline that both meets clean air regulations and eliminates MTBE additives. Such construction could be delayed by a number of factors. One example in 2001 was a challenge by a labor union, Plumbers & Steamfitters Local 343, to rescind the issuance of a construction permit granted the Valero refinery until an environmental impact report could be conducted. The permit is still active, allowing construction to move forward; however, some anticipate the challenges will continue.

If even one refinery is unable to make the necessary modifications, the result would be a severe shortage of gasoline and the consequential increase in the price of gasoline. A delay in refinery modifications means that the Governor would have to choose between upholding the MTBE ban deadline and face a gasoline scarcity or extending the deadline and avoiding gasoline shortages. Many anticipate an extension.

Though oil and chemical companies may be unencumbered by the extended use of MTBE, no such relief is in sight in the litigation forum. A series of class action suits has been filed nationwide by private well owners. The plaintiffs assert various legal theories including strict liability for failure to warn, trespass, nuisance, negligence and fraud.

In addition to the ongoing litigation, several actions against oil companies have settled. In a landmark settlement negotiated between Exxon and the South Tahoe Utility District, Exxon agreed to pay \$12 million and admitted it was liable for selling a "defective product."⁷ Unlike other MTBE cases in which oil companies have been held liable for leaking underground storage tanks, Exxon conceded that gasoline containing MTBE is a faulty product that should not have been used.

Following the Exxon settlement, Chevron agreed to pay \$10 million to the South Tahoe Utility District in order to escape the District's suit against several oil companies for contamination of Lake Tahoe's water supply from gasoline leaks at local stations.

On a larger scale, five oil companies, Shell, Chevron, Texaco, Unocal and Equilon, signed an agreement in August 2001 to clean up MTBE contamination caused by gasoline spills in 700 sites across California.⁸ The suit, brought by the environmental group Communities for a Better Environment, rested on California's Unfair Competition Act and continues against Arco, Tosco, Exxon and Mobil, which have not settled.

Perchlorate

Another chemical in the spotlight is perchlorate. The dissolution of ammonium, potassium, magnesium, or sodium salts results in the contaminant perchlorate. Ammonium perchlorate is used in the production of the solid propellant of rockets, missiles, and fireworks. Industry uses perchlorate salts in a number of ways: as a constituent of air bag inflators, nuclear reactors and electronic tubes, additives in lubricating oils, a compound for tanning and finishing leather, a mordant for fabrics and dyes, and in electroplating, aluminum refining, rubber manufacturing, and the production of paints and enamels.

The chemical nature of perchlorate makes it highly soluble in water and thus exceedingly mobile in drinking water supplies. Due to concern that perchlorate may cause thyroid cancer, it has become a target of investigation.

Perchlorate has been detected in 58 California water systems, and most of the perchlorate contamination is linked to 12 facilities that have manufactured or tested solid rocket fuels for the Department of Defense or the National Aeronautics and Space Administration. The Department of Health Services plans additional sampling of California water systems, especially those associated with aerospace sites and landfills, through December 2003.

Enforceable standards regarding levels of perchlorate in drinking water supplies are not anticipated for a few years, but guidance levels have been set. The Department of Health Services initially established an action level of 18 ppb, but lowered it to 4 ppb in response to EPA guidance.

The U.S. EPA set a standard of 4 ppb for the cleanup of the much litigated Aerojet site outside Folsom, California. The low cleanup level was a result of the EWG study that concluded cleanup levels for perchlorate should not be higher than 4.3 ppb.

The lack of an enforceable standard has not prevented litigation from going forward. In addition to litigation surrounding the Aerojet site⁹, other California cases have commenced against water agencies in Santa Clarita and against Lockheed Martin in Redlands.

PROPOSITION 65 CASES

Enacted by voter initiative in 1986, The Safe Drinking Water and Toxic Enforcement Act (commonly referred to as Proposition 65) offers plaintiffs an additional, powerful weapon against drinking water contamination – either as a substitute for or a companion to toxic tort litigation. A Proposition 65 case in the drinking water context implicates the statute’s “discharge provision” that prohibits “knowingly [discharging] a chemical known to the state to cause cancer or reproductive toxicity [a “listed chemical”] into water or onto or into land where such chemical passes or probably will pass into any source of drinking water”¹⁰

This requirement is separate and apart from the statute’s more commonly known “warning provision” that prohibits “knowingly and intentionally” exposing a person to a listed chemical without first providing a clear and reasonable warning.¹¹

In order to allege a violation of Proposition 65 for drinking water contamination under the discharge provision, a release must: (1) occur in the course of doing business; (2) be into water or onto land where such chemical passes or will pass into a source of drinking water;¹² (3) take place at least 20 months after the chemical’s listing; and (4) occur in an amount which would cause any “significant risk” if people were exposed to it in drinking water, or that would not be “in conformity with all other laws, and with every applicable regulation, permit, requirement and order.”¹³

Proposition 65 is increasingly attractive to plaintiffs bringing drinking water contamination cases for several reasons. First, as a strict liability statute, it is not necessary to allege or prove that any person has in fact been exposed to or injured by the discharge or release of contaminants. Second, Proposition 65 absolutely prohibits the discharge of *any* amount of a listed chemical except where the defendant is able to prove both of the following criteria: (1) that the amount of the chemical released is not “significant” and (2) that any discharges and releases comply with all laws and every applicable regulation, permit, requirement, and order.

Although the number of drinking water contamination cases brought under the discharge provision of Proposition 65 is on the rise, the majority of Proposition 65 litigation involves the statute’s warning provision. There may be some relief in sight for industry – at least with respect to the warning cases. One of the most controversial provisions of Proposition 65 is that it allows successful plaintiffs suing under the statute to keep a portion of the civil penalties – contributing to the statute’s reputation as a “bounty hunter” statute. Recent legislation, however, may very well reduce the number of frivolous lawsuits filed by plaintiffs’

lawyers “out for a bounty hunter buck.” Most significantly, the amendments require the plaintiff to prove “up front” that a claim has scientific validity. This requirement forces plaintiffs to submit a “certificate of merit” demonstrating good cause for the action based on consultation with an appropriate expert. This “certificate of merit” must be attached to the 60-day notice served on the Attorney General and is subject to judicial scrutiny at the close of the lawsuit. The amendments also call for expanded reporting requirements including mandatory settlement disclosure.

In a “beat the clock” end-run to avoid the new certificate of merit requirements, numerous California “bounty hunter” citizens and environmental activist groups have launched thousands of new Proposition 65 actions. Through the service of 60-day notices to sue, the groups target a myriad of companies and industries for environmental, occupational and consumer product chemical exposures in alleged violation of California’s unique toxic warning statute. The targets include industrial facilities, asphaltting and roofing companies and contractors, the automotive dealer and segments of the transportation industry, and many others too numerous to mention. Using net-available emissions inventory data, these groups serve the notices, leaving it to the targeted defendants to shoulder the statutory burden of proof of showing, absent warnings, that any exposures are below regulatory risk standards, or be forced into expensive defense of litigation for penalties and attorneys’ fees. All companies should review their Proposition 65 compliance programs and risk assessments to be prepared for another onslaught of what are often pure nuisance lawsuits attempting to garner a quick settlement with little or no environmental benefit.

CONCLUSION AND SUMMARY OF CALIFORNIA CASES

The general consensus in the legal community is that drinking water contamination cases will be with us for years to come. Such cases join a growing list of high profile toxic tort and Proposition 65 cases that have been commenced in California within the last few years. These include:

- *Lockheed Litigation Cases*, Los Angeles County Superior Court, JCCP No. 2967. Numerous former Lockheed Martin employees sued manufacturers who supplied chemicals for use in Lockheed’s top-secret “Skunkworks” aircraft plant in Burbank, California, alleging personal injury due to the chemical companies’ failure to warn of dangers associated with the chemicals. One group of 29 plaintiffs was awarded \$760.6 million in punitive damages by a jury. The amount was later reduced by two-thirds.

- *Redlands Tort Litigation*, San Bernardino Superior Court, No. RCV 31496. In April 1992, this case was certified a class action lawsuit in which plaintiffs allege that several companies improperly disposed of rocket and jet propulsion fuel, as well as industrial solvents, thereby contaminating the groundwater. The certification order encompasses a class of up to 100,000 individuals who are seeking economic and punitive damages and medical monitoring funds.

- *Alveoli v. Unocal*, San Luis Obispo County Superior Court. Although regulators and plaintiffs disagree as to who is responsible for obtaining a landmark 1998 settlement, plaintiffs claim that a Proposition 65 discharge suit spurred Unocal Corporation to pay more than \$200 million in cleanup costs to virtually excavate the central

portion of the central coastal town of Alveoli Beach to remove petroleum distillate contamination. Subsequently, Unocal settled a Proposition 65 lawsuit filed by the Attorney General related to discharges at a nearby oil field for \$43.8 million. *People v. Alveoli*, San Luis Obispo County Superior Court.

■ *Communities for a Better Environment v. Tosco Corp.*, San Francisco Superior Court. Plaintiff alleges that 14 petroleum companies discharged listed chemicals to groundwater at nearly 3,500 gasoline service stations throughout California.

■ *People v. The Vans Companies, Inc.*, No. BC-190079; *Natural Resources Defense Council v. The Vans Companies, Inc.*, No. BC-190088, Los Angeles County Superior Court. The State of California and three environmental organizations sued several supermarket chains for allegedly exposing thousands of people living near grocery distribution centers to diesel engine exhaust (a listed chemical) and other toxins without providing fair and reasonable warning.

■ *LAST Coke Litigation*. LAST, the operator of a petroleum coke and bulk material loading and unloading operation, the Port of Los Angeles and the Port of Long Beach were recently served with Proposition 65 notices alleging that individuals working at or near the ports are being exposed to listed chemicals that are found in petroleum coke and other bulk materials.

ENDNOTES

1. *Hartwell v. Superior Court*, 74 Cal. App. 4th 837 (1999) (review granted).
2. 6 Cal. 4th 965 (1993).
3. *Id.* at 996.
4. California Code of Health & Safety § 25299.37.1.
5. *Oxygenated Fuels Ass'n, Inc. v. Davis*, 163 F. Supp. 2d 1182 (E.D. Cal. 2001).
6. 42 U.S.C. 7401 et seq.
7. *South Tahoe Public Utility District v. Atlantic Richfield Co.*, No. 999128 (Cal. Super. Ct.).

8. *Communities for a Better Environment v. Unocal*, No. 997013 (Cal. Super. Ct.).
9. *See e.g. CPC Int'l, Inc. v. Aerojet-General Corp.*, 731 F. Supp. 783 (W.D. Mich. 1989) and *Mangini v. Aerojet-General Corp.*, 227 Cal. App. 3d 1248 (Cal. App. 3d Dist. 1991) and their progeny.
10. Cal. Health & Safety Code § 25249.5.
11. Cal. Health & Safety Code § 25249.6.
12. A “source of drinking water” means either a present source of drinking water or water which is “identified or designated in a water quality control plan adopted by a regional board as being suitable for domestic or municipal uses.” Cal. Health & Safety Code § 25249.11(d).
13. Cal. Health & Safety Code § 25249.5.